Four Fragments on Doing Legal History, or Thinking with and against Willard Hurst

HENDRIK HARTOG

> *"legal history as a series of curiosities embedded in changing winds of historical practices"*
>
> Monica Huerta

What does it mean to know law—to understand legal sources—as existing in historical time? That is the question, or rather, my question. Not how to mine a legal archive to make social or cultural or political or economic generalizations about a historical moment or an era. Not how to find the origins of the legal present, the power or failure of a regulation, or any number of other questions that historians and others today pose about law. Here my concerns are epistemological and jurisprudential. When I as a historian identify something as law, and when I find myself seduced by a legal source—by a trial transcript, a lawyer's brief, a judicial opinion, a passage in a treatise, a letter or memoir of a litigant, a justification for a statute, or an interpretation of that statute—what is it that I am seduced by?

I have only glimmers of answers for the questions that consume me.

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But here are four fragments that will possibly play a part in a longer work: I begin with a sketch of what it is to do legal history today, in the wake of the enormous growth and development of the field of legal history in legal education, over the past 40 years. I continue with an extended examination of the answers that Willard Hurst, the founder of the modern discipline of legal history, gave more than 55 years ago to the question: What does legal history do? Finally, in the last two fragments, I spin off from Hurst to begin the work of suggesting an understanding of legal history less tied to legal thought and legal advocacy: How to practice a legal history that is something apart from legal scholarship.

The first three fragments were written to answer questions that had long bedeviled me. The immediate occasions for their production were first, as a talk about Hurst at the University of Wisconsin Law School, in celebration of the heterodox "law in action" tradition at Wisconsin, and second, as a presentation to the Davis Seminar of Princeton's History Department, at the conclusion of the first year of a theme in the Davis Seminar devoted to "Law and Legalities." The fourth fragment constitutes second (and third and fourth) thoughts that occurred a year later, in the midst of the pandemic of 2020.

I wrote these fragments primarily as an effort to situate legal history in tension with, and in conversation with American legal education, with academic law as taught in American law schools. They intersect with my curiosity about what it means that over the past 40 years legal history, particularly American legal history, has, on the one hand, become so thoroughly institutionalized within legal education. There is, on the other hand, an equally interesting question about the relationship of legal history to the growing presence of studies of legal texts (particularly trials and cases) in several sectors of academic history. That is a question to return to, but not one dealt with as explicitly here. And there is a third question. also to be confronted in the future, about the forms of dialogue and conversation (the breaching of the silos) emergent and incipient (and wished for) between academic law and professional history.

Fragment One

I have been a self-described legal historian for more than 45 years. That identity has been good for me. But what have I done, as a legal historian? That is harder to say. I have written books. I have educated undergraduates and law students about the field of legal history: I have introduced them to what legal historians do. I have trained a number of graduate students, who have themselves become legal historians, often in law schools, sometimes

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in history departments. I have been part of a community of legal historians that has grown and flourished for the past 40 plus years.

Along the way I have fallen in love with a number of primary sources—occasionally a whole archive—that I could explore and work with and write about. Being able to work with particular legal sources gave me immense and continuing pleasure. It is thrilling to find a source that does what I want it to do, that can be played with in the ways that I as a historian play with my sources. Even when the source is about subjects —sexual violence, murder, abuse, slavery, oppression, or any number of corrupt relationships—that anyone not a historian would find immeasurably painful to deal with.[1] Historians know that it is rare to find a lovable research text. Like almost every historian, I have turned an enormous number of excruciatingly boring pages. And sometimes I have been compelled by the logic of what I meant to write and argue to attend to those excruciatingly boring pages. And yet . . . There is a six volume set of published lower court records, from the courts of early nineteenth century New York City, that I have been using—or better—exploring and playing with, since I was a graduate student. I still get excited every time I find a reason to go online to view those records. Being able to read the testimony and the lawyers' arguments in any number of trials still feels like an undeserved treat. And there are other texts, including pamphlets and treatises and some canonical opinions and monuments of high legal thought, that give me a similar sensation. As Willard Hurst once admitted to me, although he said it in his clipped characteristically Midwestern way, "doing legal history can be a 'hedonistic' treat."[2]

In one or two instances, my scholarship has been cited in judicial opinions. Seeing my work in those opinions has its satisfactions. And yet, it would be fatuous for me to claim that it is because of my scholarship that same- sex marriage was declared constitutional. I know, as any sentient adult should know, that my scholarship was at most legitimation for a conclusion arrived at by other means. Without my scholarship, nothing would have changed.[3]

For the most part, my being as a legal historian has been indistinguishable from that of many historians, full stop. I wrote books that relatively

1. Thus, that characteristic conversation with other historians that usually begins: "What a cool source!"

2. Like other forms of love, it may have elements of compulsion and a sense of loss. See the recent novel, Jessie Greengrass, *Sight* (New York: Hogarth, 2018). I thank Tara Suri for the reference.

3. Dylan Penningroth usefully challenges my confidence in the relative insignificance of legal scholarship. This is a matter of great and long-standing debate within the academy, and a matter for future discussion.

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few people read. I worked to make them accessible and readable for an imagined audience of history readers, but for the most part they were read by other historians and by their students, if that. I taught students. I did the work that university faculty do to help manage and administer the institutions that we are a part of. I involved myself in a number of professional organizations that slightly widened the audience of those who might engage with me and with my work.

What does legal history do? Often that question becomes a question about why legal history should be taught and about how legal history has been taught. And that is a particularly complicated question, distinctively so, in the context of a law school.

When asked what was the good of the work that I did when I taught in a law school, I often mouthed familiar clichés about the humanistic goals of history, with legal history being nothing more than an instance of historical practice. I talked about learning about forgotten alternatives, about the widening of sympathy that history may offer, about the need to experience a wide range of normative moral and political judgments made in varying circumstances, and about learning both how different and how similar the lives and the choices made by "others" in "other" times were. Good history courses and books offer opportunities to imagine oneself confronting the dilemmas and choices and situations of those who lived in the past. And history, the study of the past or of many pasts, allows the reader/student/writer to explore and argue over what were the beginnings, the middles, and the endings of stories. It is in that sense unlike the study of the present, where endings are always unknowable. History involves many arguments about contingency and determinism. And more (of course there is much more): history involves a body of practices about record keeping and the construction and reconstruction and imagining of archives that become both the foundation for historical writing and, at the same time, a salient part of the record of human experience and the foundation for future historical writing. Such archives help challenge what might be found when one restricts one's view to what can be found in the law library.

Doing history is also centrally about critique and challenge: about the mobilization of reasons why prior interpretations were "wrong" or "right" or flawed, both in their times as well as in other times. And history is also a philosophical or epistemological discipline, in which the question of the knowability (yes or no, but also more or less) of facts or events or experiences or interpretations is integral to the practice of doing history. Doing history teaches a kind of normative modesty or restraint, one that counters the relentless claims making that is central to legal study and to political life. This insistence on modesty or restraint may be the most

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important contribution that history can make to legal understanding. At least, so it has often seemed to me.

Perhaps it may be enough to say that history introduces some elements of humanistic inquiry into the law school curriculum. The humanistic goods sketched in the last paragraphs ought to be intrinsic to the training of lawyers who need to see the forgotten alternatives that once shaped law, whose sympathies and empathy could use widening, who should experience the range of normative judgments made in past situations, and who also ought to confront the immediate and ultimate unknowability—or the limited knowability—of legal pasts. Doing legal history may affect a lawyer's consciousness and moral imagination; sometimes. Some will add that legal history has a core pedagogical mission, which is to socialize or assimilate students, who may soon become lawyers and judges and powerful legal actors, into the narrative of the law across long history. What is a lawyer, at least in the Anglo-American world, but a participant in that long multi-century legal culture? And further, in the modern United States there is or was the democratic promise of social legal history: about who made law beyond the urban and jurisprudential elite. What does it mean to reveal how the many, including the subaltern or oppressed, participated in making law? What were historians doing when they made those arguments and offered such portrayals? Were they opening up law for readers and students? Or were they reproducing a false consciousness that hid where power actually lay?

For a historian in a law school, and probably for many academic historians as well, to do legal history is usually to stand in a critical relationship to the law as it is taught and practiced. Not because one is bringing history to those who reject history (which may be closer to the stance of historians of science), but because there is already so much history in the law, although not the history practiced by professional or self-described historians. There is no escaping what might be called the conventional historicity within law: conventional narratives and spoken and unspoken historicized understandings about legal change, about temporal continuities and periodizations, about *durées longues* and short. All these are pervasive in legal decisions and in legal scholarship. Law in the Western world is always located within a variety of political and economic and social historical assumptions and conclusions, many of which will find expression in legal texts. Any common law case, any of the chestnuts of the first year law school casebook, when examined closely, will require accounting for a history that has been forgotten or skipped over or, more likely, been taken for granted, but that is implicit in the language of the case. To look at such a case historically, to free it from the bonds of the class casebook, as much superb recent legal historical scholarship does, will almost inevitably invite further historical thinking and critique.

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So, the legal history that we do often begins with a challenge to the conventional wisdoms, to the perspectives, often called lawyer's histories or law office histories, that shape and define American public and private doctrinal law, judicial opinions and treatise writing, law review articles, and statutory debates. In doing so, we may borrow from the exhaustive and essential portraits of our scholarly lives produced by Robert W. Gordon.[4] Gordon implicitly claims that to do legal history within a law school is to critique legal scholarship, to challenge the bad history characteristic of most legal writing, and to model how legal scholarship ought to be done. Or, to put it less confidently: if there is always history in law, does that mean that doing legal history is just a modality of doing law (probably with a critical edge)? I suspect that Gordon might say yes (reluctantly, and only if forced to do so).

If that is the case, though, if doing legal history is just doing law, but better, then what does it mean to "do" legal history, as such? What is it that we hope to accomplish when we exercise our legal historical imaginations and do the distinctive work that legal historians do? What does our scholarship do?

Or to return to my opening question: what do we think that legal historians do that, perhaps, goes beyond "doing" law?

Fragment Two

William Clune, a friend, a former colleague from Wisconsin Law School, and a distinguished student of legal implementation, once changed the legal landscape. Early in his career he coauthored a famous article about school finance reform that launched a generation of litigation and helped reformulate public education financing. His legal scholarship did something.[5] Today he is a member of a small community of legal scholars who are working to recreate a new movement in legal scholarship, one they have called "the new legal realism." In a recent essay, Clune identifies how the Wisconsin Law School from 1950 to 1970 was a site of pedagogical experimentation, for what came to be known as the "law in action." J. Willard Hurst's work was central to the creation of that site. Clune explores how Hurst taught legal history to generations of law students at Wisconsin, while producing

4. Robert Gordon, *Taming the Past* (New York: Cambridge University Press, 2018). However, Kunal M. Parker, among others, has complicated and developed Gordon's portrait. See Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism*, Cambridge Historical Studies in American Law and Society (New York: Cambridge University Press, 2011).

5. John E. Coons, William H. Clune, and Stephen D. Sugarman, *Private Wealth and Public Education* (Cambridge, MA: Harvard University Press, 1970).

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transformative scholarship that created our modern field. Like Clune after him, Hurst did something. But what did his scholarship do?[6]

Some historians will recognize Robert Darnton's advice: when you don't understand what someone was doing in the source you are reading, when some object, for example a joke or a practice or a text, makes no sense, that is the moment when historical work properly begins. "By picking a document where it is most opaque, we may be able to unravel an alien system of meaning." To offer historical understanding means to take on and to decipher texts, passages, jokes, actions, and images that seem, that are, just wrong or stupid. The goal is not to obliterate distance or time, to make the past accessible or to bring it closer to us. Instead, the goal is to distance or separate oneself, while allowing the reader some insight into the varieties of human experience, beyond the immediate and the close at hand.[7]

Here I treat one work by Willard Hurst, his 1964 book of lectures, *Justice Holmes on Legal History*, as both a book that elucidates what doing American legal history meant for him and, at the same time, as something of a great cat massacre.[8]

In the lectures that became *Justice Holmes on Legal History*, published shortly after he had completed his masterwork, *Law and Economic Growth*,[9] Hurst used quotations from Holmes's judicial opinions and his occasional writings. He did not engage with Holmes's earlier explicitly historical writing, writing that became the canonical but largely unreadable work, *The Common Law*.[10] Instead, he relied on Holmes's aphoristic quotations. These allowed Hurst to reflect on what legal history was as a useful practice. By practice (not a word either Holmes or Hurst used), I mean

6. William H. Clune, "Legal Realist Innovation in the Wisconsin Law School Curriculum 1950–1970: Four Influential Introductory Courses," University of Wisconsin Legal Studies Research Paper No. 1458 (January 10, 2019; last revised June 30, 2019).

7. Robert Darnton, *The Great Cat Massacre and Other Episodes in French Cultural History* (New York: Basic Books, 1984).

8. James Willard Hurst, *Justice Holmes on Legal* History (New York: Macmillan, 1964). It is important to add that I always thought of Hurst as a mentor. I would possibly not be a legal historian but for having come upon the work of Hurst when I was in law school. I knew him well during the years I taught at Wisconsin. He was an emeritus faculty member by then, but active and intellectually forceful. He and his wife Francis were very kind to Nancy and to me. He was, when I first met him, only a bit older than I am now. See Hendrik Hartog, "Snakes in Ireland: A Conversation with Willard Hurst," *Law and History Review* 12 (1994): 370–90.

9. James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge, MA: Belknap Press of Harvard University Press, 1964).

10. Oliver Wendell Holmes, Jr., *The Common Law* (Boston, 1881).

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Holmes's and Hurst's notion that thinking through what they understood to be American legal history allowed access to a broader and deeper understanding of both the nature of law in America and of American history, full stop. What Hurst sought was something like the philosophical understanding that Holmes, in the last two pages of his famous essay/lecture "The Path of the Law," declared just out of reach of those who merely practiced law.[11] Hurst was not interested in making legal history useful for legal practice, as such. Hurst meant to articulate the meaning of "American law." And for him, although perhaps not for Holmes, that came close to articulating the meaning of "America."

I don't mean to suggest that Holmes and Hurst thought alike. And they certainly didn't write alike. As Hurst regularly acknowledged throughout the text, Holmes was hostile to the "middle class culture" that lay at the heart of Hurst's work. Holmes also did not, according to Hurst, reflect hard about legislation. His attention always rested on the judiciary. And Holmes was bored by the social science of his day, even as he acknowledged the emerging power of science and economics. By contrast, Hurst identified with the social science of his time, and he was immersed in the functionalisms characteristic of postwar sociology. While Holmes emphasized the centrality of "will" and the "martial spirit," (Hurst was not entirely immune to that either), Hurst gave more weight to the inevitable fallibility and the failures that marked the lives and ambitions of willful men. He regularly pointed to the wastefulness that had long characterized American life, and this theme was the core of *Law and Economic Growth*.[12]

And yet, Hurst channeled Holmes for several purposes. He too focused on "will," although often translated into the language of "individualism." They shared much. Both were committed first, to understanding law as "experience," which provided something like the organizing understanding for Hurst's whole book; second, to legal positivism, that is, to understanding law as an expression of and an embodiment of the monopoly of legitimate violence in a society; and third, to what I might call a romantic anti-romanticism. Both reveled in being tough and hard headed.

Mostly, though, Hurst read Holmes for his own purposes, to make his own arguments. And one should not read *Justice Holmes on Legal History* for insight into the thought of Holmes. It is Hurst's book.

11. Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897): 457, 476–77.

12. This skepticism about human perfectability he would later claim he drew primarily from his reading of Reinhold Niebuhr. See Hartog, "Snakes in Ireland," 375.

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Hurst begins with two dyads. First his approach required the need to take seriously both "sequence" and "context," although he realized that they were often difficult to distinguish from one another. I'm going to write more about his sequencing than about his contextualizations, although for the moment, suffice it to say that his contexts are mostly cultural and economic generalizations, not legal categories. Second, the substance of his understanding of both the sequential and the contextual in American legal history relied on two categories: "middle class culture" and "constitutionalism," or the constitutional ideal. Together these two dyads, sequence and context and middle-classness and constitutionalism, produced and organized the continuing content of American law.

Two centuries of American nationhood was his relevant "sequence" for understanding American law. The law that concerned him was not part of a still longer tradition—Anglo-American, Western, or global, for instance. Nor was he interested in legal comparisons or transplants. It was always the United States law that concerned him, and his legal history was the contingent consequence of American democracy or majoritarianism, The contexts for his sequence were produced by white male nationals, by voters, by those he regarded as relevant American citizens.[13] Lawyers and other juridical actors were important to the sequence only insofar as they gave legal content to what "we" made of the law. He wrote constantly about what "we" made in and of the law. And his "we," which I will return to, always imagined a participatory community of American "men" who both made and were subject to the law that they had made. A striving individualistic and exploitative middle class culture produced the content of the legislative context, as it interacted with the conservatism of a constitutional (mostly judicial) culture that required law to serve "public" purposes.

The content of the sequence—the content of what remained continuous over the course of American history—was "the strong producer orientation and the weak consumer interest" in public policy. He believed this resulted from a preoccupation with "opening up a raw new continent." One will not be surprised to discover that Indians, native peoples, were absent from this distinctively Turnerian vision of Western expansion.[14] The content of the sequence also dictated what were the core texts of legal history for him; for example, the Declaration of Independence, the Federal Constitution, the Louisiana Purchase, and Lincoln's call for volunteers. These put "life" into a sequence that could not be stopped. And that is all or nearly all of what those documents "did." There is not a glimmer throughout the

13. He did not care about the long history of a juridical culture of elite lawyers. He was derisively dismissive of questions of legal origins.

14. Hurst, *Justice Holmes on Legal History*, 13.

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book about the ways that a constitution or phrases from constitutional documents might constitute aspirations or might challenge the dominant culture. Hurst pays little attention to the emergence of democratic values or the cultural significance of grand constitutional decisions. Instead, Hurst's sequence that becomes American legal history mostly relied on attention to what Holmes called "little decisions," to which Hurst would add the course of routine legislation voted on by majorities of white American men. It remains mysterious how those documents and decisions, big and small, became a sequence. At times he seems to be arguing that laws merely reproduced what existed elsewhere. For him, an archive of legal texts was no more than suggestive or reflective of the substantive content of American law.[15]

Hurst believed, as Holmes did, that a full understanding of the meanings of history—that which lay behind or beneath the law—was ultimately beyond our human capacities. Still, striving to do legal history "bends effort toward realizing the creative potential that resides in individuals and their society. . . . [S]uch explorations in time offers more than instrumental values; it feeds hungers which are part of our being." He then quoted Holmes in Holmes's most warlike voice, from a speech to Harvard undergraduates. While their scope for achievement was narrowing, Holmes hoped that they, the Harvard students, still had "the barbaric thirst for conquest, and there is still something left to conquer." To do legal history was a little like making war.[16]

Hurst did not disagree with Holmes on this, but his lectures moved in a different and a perhaps less violent direction, by identifying two "time-rooted" patterns of values and attitudes. One was the middle class point of view. The other was constitutionalism. For Hurst, constitutionalism was only understandable as constraint. Constitutionalism disciplined the middle class attitude by requiring the articulation of public reasons for actions by self-interested individuals (members of the middle class), who were the primary makers of [American] law. He acknowledged regretfully that constitutionalism sometimes became a "fighting faith," particularly when it emphasized "zeal" for group more than individual interests. Individualism became "blunted" because "men" worked to realize their aspirations more and more through group action: as farmers, or as urban voters, or as "white Southerners." He acknowledged the abolition of slavery as an exception, as an instance when the

15. Ibid., 22–24. Also important were Holmes's notions that law is the "witness and external deposit of our moral life" and that "Cumulative experience works its greatest effects on men's lives by (1) developing the content of their most deeply held, least questioned, values and attitudes and (2) developing the structure and processes of the large and durable patterns we call institutions."

16. Ibid., 17.

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constitutional ideal protected "individuality." But for the most part, mobilizations of the constitutional ideal expressed unattractive group interests.[17]

For Hurst, the "discrete and insular minorities" at the heart of *Caroline Products* famous footnote four did not rise to the importance of requiring intervention against the "middle class" inclinations of legislatures. He simply did not acknowledge or attend to the fact that many Americans could not participate as voters and legislators in his understanding of "we." For Hurst, *Lochner* was a persistent warning that constitutional claims could defeat reformist legislation. One might almost say that *Lochner* (as filtered through the New Deal constitutional transformation) remained constitutive of his framework. "[S]hrewd men could warp individualist symbols of the constitutional ideal to sanction unchecked organized power." Implicitly he was arguing, as Progressives had more than a generation earlier, that corporations had made constitutionalism into a tool that interfered with the legislative goals that "we" wanted and needed. As a result, "we delayed realistic handling of problems posed by the modern economy." "We" had to learn that the "individuality which the constitutional ideal exalted could have valuable substance only in a humane social context; this was the solid meaning in the growth of social legislation. So at least a man of historical perspective must see the matter." Here he referenced Holmes's dissent in *Lochner*, evidently without rereading it (for Holmes, unlike Hurst, made it clear that he had little faith in social legislation).[18]

For Hurst, it was the "middle class point of view" that predominated across the two centuries of American history. And articulating dimensions of the middle class point of view was one goal of the book.[19] What was the middle class point of view? He emphasized its moral ambiguity or multiplicity, even as he embraced it as an organizing understanding. "The legal historian needs the term . . . precisely because it connotes diverse qualities and defects . . ." What did it "connote"? "[I]ndependence of mind and will, and creative energy," as well as "capacity for waste and wrong." At its core was individualism and will(fulness). He quoted Holmes: "The joy of life is

17. Ibid., 38. I imagine that behind this, although mostly not articulated, also lay a Cold War understanding that constitutionalism, understood as the rule of law, distinguished United States history from that of authoritarian and totalitarian regimes. This anti-totalitarian perspective on constitutionalism played no explicit role in his argument.

18. Ibid., 39.

19. The "constitutional ideal" succeeded mostly as a force that occasionally moderated and shaped that point of view. But what Hurst meant by the constitutional ideal was not at all the liberatory or emancipatory impulses that others would draw out of the 13th and 14th amendments, as shaped by Lincoln's words and a reconfiguration of the Declaration of Independence. Ibid., 39, 95, 96, 110. For more on this theme, see Fragments Three and Four.

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to put out one's power in some natural and useful or harmless way. There is no other way. And the real misery is not to do this . . . More important to act than to vainly attempt to love one's neighbor as one's self . . . Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it is the one end that justifies itself."

That led Hurst to expound on what he had earlier called the release of creative energy (in the Holmes book more identified with Schumpeter's notion of "creative destruction"), and he tied that notion to scientific revolution, to "discovery," and to enlarging markets.[20]

Hurst's description of the middle class point of view then becomes a paean to who "we" are and were, as members of the middle classes. "We had faith in the creative potential of individual men and women," remarked Hurst, in one of the only sentences to mention women, "if they were given a chance to show what they could do." "[W]e appreciated that man"—and note that women have already disappeared— "was a self-centered and passionate creature who could not be trusted with unlimited scope for his will." So, how to deal with that?

> We extended the suffrage and generously endowed the legislative power (and, in the national government, the executive branch). On the other hand, we put government under constitutions, emphasized the separation of powers, created a federal rather than a unitary legal order, accepted the development of judicial review, and developed the informal checks and balances of party politics. So, too, in providing a legal framework for private activity we mingled encouragement and surveillance.[21]

As in his earlier book of lectures, *Law and the Conditions of Freedom*, Hurst emphasized the law of property and contract, of franchises. Delegations of power and dispersions of power were "natural to the individualism, the activist bias, and the rational skepticism of the middle-class view of life." Although there would be some movement toward public controls of private power, for the most part legislators used law to promote "expansion" rather than to limit "expressions of private energies of will." "We" depended on market processes, rather than politics, to shape political economy. In fact, party politics are remarkably absent from his litany of the features of middle-classness.[22] "We," he continued, "pursued our faith in manipulation and contrivance to increase yields from nature and from social relations." In other words, "we" exploited both the environment and one another (and other human beings). In particular that meant that "men"

20. Ibid., 27; and Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1956).

21. Hurst, *Justice Holmes on Legal History*, 41.

22. Ibid., 41–49.

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were free to "experiment with the structure and uses of the business corporation." Corporations and corporate law served him as a recurrent example.[23]

Yet, Hurst's "we" were not laissez-faire capitalists, because they envisioned a significant role for the state. Gradually, "[w]e became uneasily conscious" that such unrestrained experimentation left us dependent on large-scale private organizations. The twentieth century saw "a return to the realism of the founding fathers." That is, "we" came to the realization that "what the powerful want is more power." And that return to realism meant a renewed understanding that "law existed to serve men, and not men to serve law." Or, as he put it in what seems to me a core sentence,"So we fused our middle-class disposition to use law as a tool and our constitutional faith that law might properly and safely be used so, because it was our law and our government and its justification was in serving our life." And then he offered a variety of conventional illustrations of the fruits of that fusion, including the subsidization of public education and the building of road systems.

"Middle-class men were striving men," who directed their striving within the realm of "present experience."[24] Holmes, using the materialistic categories of the late nineteenth century, had evaluated "men" on "the total of human energy which they embody—counting everything, with due allowance for quality, from Nansen's power to digest blubber or to resist cold, up to his courage or to Wordsworth's power to express the unutterable, or to Kant's speculative reach." As always for Holmes, "The final test of this energy is battle in some form—actual war—the crush of Arctic ice—the fight for mastery in the market or the court." Hurst, by way of slight contrast, gave more weight to what he identified as the middle-class expectation that "will should be disciplined and moderated by reasoned calculation and by cautious sense of man's limitations." But more importantly, his middle-class culture was defined by the deeply individualistic and self-centered "we" that he mobilized. It was not a product of some kind of collective agreement.[25]

Hurst's "we," which has yearly been a subject of ridicule among my graduate students, was more than a rhetorical quirk. Obviously, his "we" excluded many, most, of the American population. "We" was white men, those he recognized as striving individuals and consumers of law,

23. Note that 5 years later, he published a book composed of lectures on the history of the corporation.

24. In our published 1994 interview/conversation, Hurst and I had argued about whether that focus on "present experience" meant necessarily selling out the future in the pursuit of short-term advantage, which is how I read his history of the clear cutting of the trees of northern Wisconsin. See "Snakes in Ireland," 386.

25. Hurst, *Justice Holmes on Legal History*, 28.

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and voters; no native peoples, no women, no one who could not participate fully in nineteenth or early twentieth century political society. It is hard to know if he would have included Catholics or those who worked with their hands, or those who did domestic work or care work.

For us, living in the twenty-first century, Hurst's "we" is defined by its absences. Missing are all the "others" who constituted America at any moment in its history. The consequences of those exclusions was a radically narrowed understanding of what the subjects of legal history are and were: corporate charters, but not the enforcement of the fugitive slave acts; settler colonists, not the expropriation of native lands; middle-class white men, not domestic violence laws; harnessers of corporate energy, not apprenticeships or indentured labor or peonage or Asian exclusion. Nothing about the legal construction of a carceral state. The household and the family he imagined for the most part, as a non-legal domain.

All this may seem obvious. But for me these absences are somewhat paradoxical, because of what "Hurst" and Wisconsin legal history stood for in the legal history community. For me, as well as for many others, "Hurstian" signified the widening of legal history to incorporate the whole of social experience. I appreciated it as a methodology to allow for imagining "everyone" in the law, and to uncover ways that "everyone" participated in the law. Did I, did legal historians of my generation, just misread him for all of these years?

What strikes me now, even more than the seeming exclusions, is how inconsistent and mysterious his "we" was. "We" were: voters and legislators or the makers of laws; the persons, including corporations, who elected legislators and agitated for policy; clients and consumers of laws; social scientists and historians. His "we" were not for the most part lawyers, certainly not creative lawyers, finding novel or integrative tools to represent the previously unrepresented. Lawyers perhaps reproduced or translated the individualistic wants of his collective "we," but not much else. Much of the time his "we" was or is a godlike presence that directed the society ("us") toward an expression of individual freedom.[26]

But I am more struck by the way that his "we" floats across generations and epochs. There is really no periodization within his sequencing. There is an implicit movement as the economy grows in scale (although global markets remain out of view), a gradual evolution from what Robert Wiebe once called "island communities" toward the nationalized economy that Hurst and others identified with modernity. But the "we" remains continuous and unchanged.[27] No parties, no race conflict, no populist crisis, no

26. Ibid., 60.

27. See Robert Wiebe, *The Search for Order* (New York: Hill and Wang, 1967).

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waves of immigrants, almost no Progressives, no labor movements. When he wrote about "sequence," his goal was to argue for an unchanging (or little changing) continuity across the whole of American history (from the American Revolution to the 1960s). Implicitly, he assumed an American exceptionalism that worked to find an American nature, sometimes called a "civilization," across the centuries.

Especially when I lived in Madison and worked at the University of Wisconsin law school, I once lived within the faith that Hurst and the Wisconsin law school in which he was a leading intellectual presence embodied a heroic heterodox alternative against the stultifying orthodoxies of postwar American legalism. It was a place unlike other law schools, where serious and critical inquiry about law was possible: a shining light marked by its difference, its distinctive identity, within the constellation of American law schools. Willard Hurst was a big reason why. And yet, it is now apparent that the Willard Hurst of *Justice Holmes on Legal History* was a man of his time, of a piece with other elite white law professors of his time. Unique as he seemed at the time, Hurst belonged to a generation of elite lawyers—legalists—who dominated postwar legal education.

What is striking, shocking even, about reading *Justice Holmes on Legal History* is that it has nothing to say about the history of race in America. Here is a book promising his mature understanding of legal history and of the meaning of law across American history. How was it possible that a book published in 1965, at the height of the civil rights movement, published by one of the most distinguished commercial presses, offered nothing about slavery? Nothing about the Thirteenth Amendment, nothing about freedom struggles, nothing about abolitionists and women's rights activists, nothing about native peoples or borderlands, and nothing about immigration restriction or exclusions (even as the Hart-Cellar Act would be enacted at exactly this same time). There is one bland mention of white Southerners as an organized interest group. The widely known and then ubiquitous challenges that *Brown v. Board of Education* raised for conventional constitutional thinking, do not appear. The only attention given to the 14th Amendment draws on Holmes's dyspeptic thoughts about its general insignificance.

Hurst was a sophisticated and cosmopolitan person who was well aware of all of these epochal historical events. In his politics he was a liberal, a racial liberal if that term had then existed. Yet in his scholarship he knew, and he excluded, intentionally, knowingly, one might even say, brutally. Just as one cannot read his brilliant evocation of the Pike's Creek settlers of the 1830s and their claims to constitutional rights (at the beginning of his 1956 *Law and the Conditions of Freedom*) without knowing that the

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rights they claimed were intended to mobilize the violence of the federal government to expropriate the native peoples on whose lands those settlers had settled illegally, so it must have been with civil rights in 1964 and1965.[28] His contexts bleached out conflicts that he must have known of, but that he chose not to discuss, conflicts that he regarded as irrelevant or parenthetical to the themes that concerned him. His writing tacitly condoned immeasurable violence. Race—struggles against Jim Crow, as well as the expropriation of Indian lands—messed up the analysis. If he had taken those seriously, he would have had to radically reconstruct his frame, his structure.[29]

A second point, smaller perhaps but equally shocking, bears on how Hurst worked to characterize the overarching policies that shaped law. He claimed that one could reduce law's "concerns" to three functional domains: natural resources, human nature, and society. With regard to the first of these, he introduced the history of the environment in the following way. He began in classic Turnerian fashion, as always, ignoring the presence and the agency of native peoples. Because "we" were "on a naturally rich, long underpopulated and unexploited continent," "we" learned to be concerned with what he called "the physical and biological bases." And that led to giving "land title" a prominent place in legal development. But it also led to a desire for population increase (for that European white population), which meant for him easy immigration, favoring the family farm, and supporting urban growth (a fairly banal and inexplicit list). But, he continued, "we" only pushed for activities that promised quick and easy gains. There was little attention to long run productivity (Here, one assumes he was waving at his just published book on the lumber industry and the destruction of the Wisconsin forests.). Eventually, he continued, "we" would learn to protect the environment. That was genuine progress from his perspective. And for him that included reforms that provided for the health, safety, and "self-respect of men and women" (a phrase that is not defined or described), and even "the genetic soundness of the human population." This passage then concluded with a footnote that blandly cited to Holmes's infamous opinion in *Buck v. Bell*, where

28. See Hurst, *Law and the Conditions of Freedom*, 1–10.

29. Farah Peterson, in reading an earlier draft, commented that my language still softens what was really "murder." For a suggestive and illuminating portrait of how early expropriation of native lands—using credit, mortgages, and foreclosures—was conducted while using private law, see the recent writings of K-Sue Park. K-Sue Park, "Money, Mortgages, and the Conquest of America," *Law and Social Inquiry* 41 (2016): 1006–35. One might add that Park, in her insistence on a long violent continuity between seventeenth-century foreclosures and the mortgage crisis of the twenty-first century, offers what seems to me to be something close to a Hurstian analysis of exactly what Hurst avoided.

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Holmes had defended eugenic sterilizations. This was, of course, the opinion that included the odious phrase, "three generations of idiots are enough."[30]

Sixty pages and one chapter/lecture later, Hurst returned to the theme. He agreed with Holmes that one could not do much to change "the lot of the mass of men by rearranging legal institutions of property." Holmes had called the notion that it was possible to use property law to produce "an economic paradise,"[31] "twaddle." For both of them, apparently, "the true sources of material improvement lay in more rational control of population increase, and in applying men's organizing genius to the means made available by science and technology." It would be a better legislative strategy, Hurst wrote, "to improve the quality than to increase the quantity of the population." Again, the passage concluded with a footnote to *Buck v. Bell*.[32]

I don't believe that Hurst was a racial eugenicist.[33] His implicit point was, rather, that *Buck v. Bell* was an ordinary police power decision, founded on plausible (rationally defensible) legislative grounds. Hurst did not have to like forced sterilization. He did not believe it was his business to challenge or critique, as long as (to use his frame of reference) legislation—here understood as the mobilization of the violence of the positive state—was founded on the overarching policies that properly shaped American law, any more than Holmes agreed with many of the legislative policies that he approved judicially, which he regarded as constitutional. In that sense, Hurst's thinking remained rooted in a typical legal Progressive mindset that saw constitutional rights as constraints (mostly the possession of corporations that used them to hold back reform legislation) and that placed hope for the future on an unleashed police power, on legislative freedom to innovate and institutionalize, freed from those constraints.[34]

30. Hurst, *Justice Holmes on Legal History*, 69.

31. Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," *American Historical Review* 75 (1970): 744–56.

32. Hurst, *Justice Holmes on Legal History*, 121–23.

33. Again, Farah Peterson suggests that I might be muting or avoiding a harsher reality.

34. For men like Hurst, an apparently close relationship existed between the environmentalism that did shape Hurst's understanding and that led to *Law and Economic Growth* (originally inspired by listening to Aldo Leopold as a young faculty member at the law school) and population control understandings. Garrett Hardin's "Tragedy of the Commons," one of the founding texts of modern environmentalism, published just 3 years after Hurst's book, began as an explanation by a population biologist of the inescapability and the tragic consequences of the "population bomb." One can read Hardin and Hurst as sharing something like a liberal eugenicist perspective. See Garrett Hardin, "The Tragedy of the Commons," *Science* 162 (1968): 1243–48

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It goes without saying that Hurst was very different from the legal process scholars who were the dominant intellectual forces in the mainstream American law schools in the 1950s and 1960s. He had little interest in formal processes, in the separation of powers. He did not obsess about administrative discretion in the post New Deal state, and he was not interested in the problem of the judicial role, the functions and place of "the least dangerous branch" in a democracy, or formulating the judiciary as a "counter- majoritarian" institution, as the legal process scholars were. It might be said that he continued the reformist "legal realist" project of the 1920s and 1930s, as it was being abandoned or qualified by legal process scholars. He fundamentally rejected the obsession of legal process scholars with fine-grained readings of Supreme Court opinions. He was ever the anti-doctrinalist.[35]

And yet, he remained marked, like the legal process scholars were marked, both by the inheritance of Progressive legal thought and, I would suspect, by the Cold War. How does one think about rights, when rights were understood fundamentally as the possession of alien corporate interests or as ways of constraining or limiting reform? More, how does one think about rights when the New Deal and World War II had transformed the relationship between rights and reform? All of them, legal process scholars and Hurst alike, continued to view those questions through a lens that posed constitutional rights as the enemy of democratic processes and majoritarianism. Unlike Hurst, legal process scholars could not escape worrying about *Brown*, about the introduction of a new and different way of imagining rights and the discourses of rights, and about judicial activism. But that was because they regarded the work of the Supreme Court as their core subject, unlike Hurst who wanted to write about "America."

Like most other elite lawyers of his generation, he didn't attend to the significance of race, and the Cold War was a continuing presence. The Cold War had shaped him, leaving him reluctant to embrace collective

35. One could characterize him as an odd combination of a legal realist and a 1950s functionalist sociologist. That is, he understood law, as Robert Lee Hale and Wesley Newcomb Hohfeld and Karl Llewellyn did, as fundamentally constitutive of relationships and structures in the society. That is the reason why studying law reveals (he would say, more modestly, law offers insight into) America. At the same time, he drew from the same cultural matrix that David Riesman and David Bell and Robert Merton and Talcott Parsons and others of his contemporary social scientists drew from (Tocqueville, first of all). He imagined American culture (by which he meant middle classness) in terms of "individualism." The state was mostly facilitative of individual freedom. His individualism, because of his legal acumen, was rooted in property and contract and the corporate form (both in its commercial and industrial variations and in its creation of voluntary associations), For him, individualism drew on the notions of bourgeois freedom that attached to legal rights and transactions and state-created institutions.

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solutions, anxious to mark himself as not a radical. He was afraid of or cool towards socialism or social reform, even as he supported many of the social reforms that were celebrated in a Progressive Wisconsin. He was not interested in the ways that rights would be marked and shaped by the language and the activities and the mobilizations of subordinated classes.[36] And I suspect that his unperiodized sequencing of America drew on many of the same understandings that made it possible for the legal process scholars and their contemporaries in the humanities and the social sciences, for the academic men of that generation, to look at America "as a civilization."

By 1965, that understanding was already under challenge. Not only by the civil rights movement, but also by black power (and soon, Indian power, and the women's movement), by the student-led free speech movement, by the New Left, and by the emergent practices of the discipline of history, particularly of social and later cultural history. Consensus history fragmented. The idea of America as a civilization became an archaic artifact. His understanding fell apart because of the fragility of its own premises, as well as by contemporary events.

One might conclude that by 1965 Hurst was already slightly out of date, particularly in his commitment to a Progressive vision of legislative power as well as his reconstruction of what we might call a "consensus" history. I imagine that his "we" must have already been heard as odd to his audience when he delivered the talks to the University of Iowa Law School faculty or lectured to Wisconsin law students. Or at least so I imagine.

Fragment Three

What is left of Hurst's legal history? Actually, a lot.

I want to hold on to his notion of the collective power of the middle class point of view. In the face of the apparent fracturing of notions of a hegemonic legal or political culture and in opposition to (or at least in dialogue with) the ubiquitous pluralisms of contemporary intellectual legal life, it seems important to work toward finding a method to describe the dimensions of a common culture (and the roles that law may have played in the construction of and the sustenance of that common culture).[37] Can it

36. One of the striking moments in my 1994 interview/conversation with him occurred early on, when I noted that in the 1960s and 1970s his course had become a mandatory one for the many "New Left" history graduate students who then populated the history department at the University of Wisconsin. He was dismissive of their interests and their interest in law. And he made it clear that their education was not a matter of much concern to him. "Snakes in Ireland," 385.

37. Daniel Rodgers, *The Age of Fracture* (Cambridge, MA: Harvard University Press, 2012).

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be done without the celebratory American exceptionalism that once accompanied it? I'm not so sure. But I hold to a faith in the effort to articulate what may or may not have been, at least some of the time, a common legal culture.

It is not so difficult to reframe Hurst's middle-class perspective as usefully describing the long-standing hegemonic power of a particular—lumpy, incompletely articulated—but clearly exclusive and powerful understanding of law, as it was experienced by a diverse and multitudinous range of Americans. That perspective is not that different from what Barbara Welke provided in her *Law and the Borders of Belonging.* There was, to slightly reframe what she would say, a powerful "we" that ruled American law. It did so, in large part, by knowingly excluding so. Law set the ground rules for who belonged and who did not belong in the society. It produced, coercively, a middle-class society dominated by white men, who were understood as producers (to use language common to both Hurst and Welke) and as the builders of a wealthy America, and who thereby became entitled to citizenship.[38]

One might add that a focus on the struggles of those excluded, of those who did not "belong," to find a kind of belonging, including citizenship and the capacity to mobilize rights, have come to define much of the recent constitutional historiography of post-Civil War America. The presence and power of a continuing culture is revealed in that literature. Those who did not immediately belong to the dominant class, those who did not belong to what might clumsily and inadequately be called the middle class, knew that they had to find ways to reveal or perform or produce identities both to challenge the white middle class, and to seek inclusion in this "middle class." There was no other way to gain access to the legal benefits or the legal rewards that America offered.

Since the 1960s, legal historians have produced wider and deeper portraits of how constitutional claims worked to challenge white middle class culture.[39] Any fair understanding of the coercive cultural power of

38. Barbara Welke, *Law and the Borders of Belonging* (New York: Cambridge University Press, 2010).

39. Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All'," *Journal of American History* 74 (1987): 1013–34. We might usefully borrow from a brilliant recent essay by Ken Mack, about the legal strategies of subordinated groups around university admissions: to serve their clients, lawyers for those groups learned that they needed to work in at least two registers. On the one hand, they had to convince courts and institutions that their clients wanted to become as if "at one" with middle classness, and often this came under the guise of "assimilation." But on the other hand, at the same time, they always retained, and sometimes articulated, a more critical aspiration (mostly hidden, but appearing suddenly at particular historical moments), which was to transform—sometimes to destroy—middle classness and the institutions to which they wanted access

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American law as a historical phenomenon would have to add much on the incompleteness of that hegemonic power: its susceptibility to challenges. The cracks and fissures in the legal culture, its inability to impose uniformity or clarity, are at least as important as its singularity as a continuing historical presence. And we (legal historians) have learned much from historical works that mobilized the Gramscian notion that law necessarily allowed even the subordinated and the relatively powerless a sense of "membership," if only a thin one.[40]

It is always a little bit of this and a little bit of the other. The glass is half full or half empty. I have argued elsewhere that reading legal texts in history ought to lead to a recognition of the muddle that history reveals in the law. Gay marriage as mostly, merely, reproducing heterosexual marriage, a paradigmatically middle-class institution. But transformations in adoption law and in custody law, halting movements toward approval (or an ending to sometimes criminalized disapproval) to polygamous and polyamorous relationships and of the ways of the queer and of the transgendered, plus the general removal of constraints on sexual behavior "outside" of marriage, all suggest that what is understood as the law that governs "private" households has changed, has moved far from the older and still coercive "middle class" point of view. Or, to take a second obvious example, consider the multiple and changing complexities of birthright citizenship and the uncertainties of who is a "person" entitled to the protections of the 14th Amendment. We have those complexities and uncertainties to thank for an occasional fracturing or undoing of executive and legislative efforts to mobilize middle class prejudices. The thin sense of constitutionalism that required law to serve public ends (as emphasized by Hurst), "that all public or private decision makers be accountable by some criteria outside of themselves," sometimes has become a momentarily stronger constraint, imagined by way of creative lawyering to require an undoing of established policies, certainly more so than Hurst ever imagined (or conceded) in 1965.

What strikes me as being of enduring significance in Hurst's portrayal of American law, what excited me when I came upon it in the early 1970s, and what excites me still, are three qualities.

First, I would mark his willingness to look at law as a human activity that takes its form across doctrinal silos. His work challenged the conventional wisdoms and the categories of doctrinal law teaching and of legal thought. I particularly liked his phrasing at one point in *Justice Holmes*

for their clients. Kenneth W. Mack, "Second Mode Inclusion Claims in the Law Schools," *Fordham Law Review* 87 (2018): 1005–31.

40. Many of us of a certain age received our introduction to Gramsci from our engagement with Eugene Genovese's *Roll Jordan Roll* (New York: Vintage, 1974).

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on Legal History, when he referenced what happened when nineteenth century statutes interfered with either the Commerce Clause or the Contracts Clause of the United States Constitution. All rights, he wrote, were "limited by the neighborhood of principles of policy which are other than those on which the particular right is founded." In some ways, he continued, the notion of the police power, as it was elaborated over the course of the long nineteenth century, was in its nature a challenge to doctrinal silos (or to singular constitutional mandates).[41]

Legal doctrine was probably more important to Hurst than he publicly acknowledged. He was such a good lawyer himself, so quick at conventional legal analysis, that he deprecated it as a skill and a frame for historical analysis.[42] But his willingness to imagine legal fields as united by common problems and by a shared culture and by a common context, stimulated a kind of work, a legal history that crossed and re-crossed and challenged the silos of legal doctrine.[43]

One might almost say that to do Hurstian legal history—or, rather, legal history as I want it to be—is to imagine the intersections of diverse doctrinal streams and legal cultural streams at particular historical moments, as they became manifested and helped produce and reproduce the formations and structures in our legal histories. Inevitably those intersections can be muddled by a certain chaotic or complex incoherence. But a conscientious historian—or rather, the historian I would like to be or become—ought to avoid resolving the muddle, by picking one theme out, because it is presumptively "important," for presentist or legally salient reasons, while the rest is noise, to be dismissed or diminished or ignored. Instead, the legal historian confronts a conceptual and jurisprudential problem: how to characterize and present the law that was there, in that situation, without trying to replicate the interpretive position of the judge; that is, how to tell

41. Hurst, *Justice Holmes on Legal History*, 67.

42. As a result, the emergence of a field of study and inquiry dedicated to the history of legal thought did not interest him in the slightest. I would add, as the late Elizabeth Clark once said, in a panel in the early 1990s on Hurst's scholarship, that Hurst was himself a historian of ideas, an intellectual historian. For examples of work that crosses doctrinal silos, see much of the recent literature on the law of slavery. Or Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (New York: Oxford University Press, 2016).

43. I am reminded of Sally Falk Moore's appreciative invocation in her canonical essay on "semi-autonomous social fields," of a line from Malinowski in which he asserted a desire to explore "all the rules" within a particular social field. Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law and Society Review* 7 (1973): 719–46. For myself, I would be content with an ambition to explore "more" of the rules.

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all of it, or at least as much of it as is necessary to produce a feel for the situation.

Second, Hurst's legal history avoided questions of origins. Hurst had little time for origin narratives that were and remain popular in legal history. Like the later Holmes, Hurst disdained the notion that a deeper past contained the germ of an answer to the legal problems that women and men confronted in their own present tense.[44] His legal history never situated a legal event or problem or situation within a singular long legal history, because he did not believe in the explanatory power of such singular legal histories. His best work always started in the middle of things and then explained strands of long-standing doctrinal understandings or long-term economic commitments.[45] He was not afraid to look back in time to understand contingencies of the laws that came into view, as they combined and interacted. But the multiple pasts that constituted the present moment or problem that he was exploring were understood only retrospectively. His selection of sequences was always reconstructed as part of the context—one might say, the present tense—of a legal problem or situation.

Many pasts and doctrinal and cultural streams played a part in what it was—the law, the relevant law—that needed to be explained and understood. How to arrange, how to describe or to characterize those contextual sequences or sequential contexts raised difficult writing issues, ones that helped produce some of the oddities and the awkwardnesses of Hurst's own writings. (As a writer, he was fundamentally a clunk, and he never resolved the writing problems that he confronted.) But his subject always remained "the law," by which he meant the whole of the law, as it was in its historical moment.

It is important to add that Hurst is of little help once one reaches the point of imagining a historically situated legal text or case or archive or problem as a contingent intersection of diverse doctrinal and historical and economic streams. I am struck by the absence of any awareness of periodization in Hurst's contextualizations, even as his work thrusts the reader into particularized historical moments. How could he continue to write as if the situations he was describing lived in an unperiodized "America"? How could he not have known that things happened at a particular time and not at any other, given his own work? How could he escape a notion of the distinctiveness and particularity of the past (of the past as a foreign country)? What was his signal accomplishment, his

44. The Holmes who authored *The Common Law* 20 years before "The Path of the Law," had a different orientation, a commitment to the search for origins.

45. In conversation, Daniel T. Rodgers suggests that he allowed sociological functionalism to do the work that historical periodizing should have done.

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20-year study of the legal destruction of the Wisconsin forests, his scholarly monument and still a chilling ecological classic, but a precise—and a precisely dated or periodized—historical portrait? All that law, all that legislation, all those many little decisions and continuing relationships, from varying doctrinal and legislative sources, mobilized across the middle years of the nineteenth century, to cut down all those trees in northern Wisconsin at the least cost. All that "law" could never have been mobilized earlier, during the late eighteenth and early nineteenth centuries. And most of us look with shock at the results, at the denuded landscape, today, as Progressives had done already by the early twentieth century. It could only have happened when it did, and not at another time. Yet not for Willard Hurst. It is something of a mystery to me how Hurst so deeply understood the power of contexts that cut across legal fields, while not understanding those contexts as knowable only historically—that is, by making their histories as specific and precise as possible—that is, by periodizing.

But third, I would celebrate—and work to emulate—his focus on contingency. "The life of the law represents no homeostatic, functionally self-adjusting process, but the product of the qualities and defects of men's will, imagination, and feeling." That meant for him that all law is and was fundamentally "legislative" in character. By this he meant that "the secret root from which the law draws all the juices of life . . . [is] considerations of what is expedient for the community concerned." (In that sense, one might say, as Hurst never would have, that it was all and always politics, just politics, all the way down.) And that led him to a critique of what he called "organic" metaphors, of evolutionary portraits of legal change. Middle-classness may have defined all or much of the law at many crucial moments in American history. But what those middle class manifestations of law were or would be depended on the contingent acts and decisions and relationships of many men and (women and) institutions, who differed and fought about many things. No reading of the Hurstian corpus can escape a sense of the constant and continual underlying presence of those struggles. And in that sense, his writings do prefigure the strongest features of what became critical legal studies (even if he wrote in a different, more Protestant or Unitarian and often functionalist, register). Implicit in his practices lay a kind of historicist faith that demonstrating the contingencies of the past may reveal the freedom to break with apparently fixed categorical or legal understandings.[46]

These qualities also lead the legal historian (this legal historian) toward a perhaps peculiar interest in exploring the legal (or jurisprudential) natures

46. Hurst, *Justice Holmes on Legal History*, 62. For the conventional understanding, one that I long shared, of Hurst as a contrast case to critical legal studies, see Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.

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of the historically situated events, texts, and problems that are our subjects. It is of course a feature of the present moment that historians today know legal sources and archives as interesting sites, as something more than merely a window on to the important things to study.[47] But historians and law professors alike continue to attend less to the jurisprudential status, to the formal and informal features, that make such sources and archives knowable as law. The lawness of the legal sources is perhaps taken for granted.

It is only lately that I have realized that some of my love for the sources that have long claimed my attention is also rooted in their identity as legal objects. They are not merely occasions for storytelling, although they are certainly that. They are trials or texts about trials produced to illuminate legal possibilities and conclusions. They are statutory commissions or constitutional conventions, produced by legal or constitutional mandates, whose language is constrained and empowered by those mandates. Our sources may be drawn from correspondence between lawyers and lawyers or between lawyers and clients (real or imagined), about debts or duties or obligations or risks seen on a variety of legal as well as commercial horizons. The legal objects that we care about may embody streams of lawmaking and law interpreting and legal relationships located in and across multiple and conflicting jurisdictions. Wherever they are found, however they are found, whatever they "are," such sources generate stories that are fundamentally "legal" stories. At least they do so for me.

Of course these texts and archives also evoke and express a culture and a political economy and ecologies and social norms and racisms and male rage and desires to exterminate or expropriate and imperial ambitions and greed and cosmopolitanism and impulses characterized by compassion and love and respect for human dignity. Almost always, at least among the objects I find myself most attracted to, there will be several such norms and streams of passions. Even if one didn't feel affinity for those sources as legal objects, even if one looked at them "merely" as embodying or evoking features of their times, as articulating forms of social life, or cultural forms, they would remain worth looking at.

Yet for me, and I suspect for other self-described legal historians, the jurisprudential issues also remain. What does it mean that some sets of documents are called "law"? What does it mean that documents are recognized as "legal"—sometimes as legally binding, as creating obligations? What does it mean that some people happily or unhappily, knowingly or unknowingly, violated these obligations? What do we mean when we apply the "legal" label? What does it mean when these documents—these archives—are understood as something more than the detritus of a

47. Why else is there a Davis Seminar devoted to "law and legalities"?

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political or cultural or commercial or imperial moment? As law? What significance should we give to our awareness of documents as embodying a legal temporality, one that necessarily implicates analytic questions about "law" and what might be called "juristic authority"? Debates about positivism and about the relationship of these objects to "politics" and political authority, and about the ways in which juristic work and practices become recognizable and reproducible as "legal" (or not) at and in a historical moment or situation, all become part of what we do as legal historians (what I do as a legal historian). Of course the law is not merely or solely state power. But to do legal history is also to do something that takes seriously the contingent and unsettled history of the instantiations of "law," as law, of the mobilizations of the expressions of the monopoly (or claimed monopoly) of legal violence, across cultures and regimes.[48]

To know law as "law" is not to deny that such sources are also composed of a muddle of themes and streams, legal and non-legal. Indeed, a serious effort to think "legally" about the legal objects that historians cherish (or at least that this legal historian cherishes) requires a recognition of the complexities and the contradictions and the multiplicities that those objects contain. That is, after all, where the fun begins. And it is also why these objects are worth attending to, why they may even justify our "love," at least for someone who wants to be a legal historian—or at least for this someone who claims to be a legal historian, as it was for Hurst as well.

Fragment Four (First Drafted 1 Year Later, during a Pandemic, as an Afterthought)

To begin: In 2020, I wondered whether and how the flu epidemic of 1918 affected Hurst (and his family). Did it leave him with a skepticism about the capacity of law to change things? Did it grant him an awareness, of the kind that has recently come to all of us, that forces or phenomena beyond merely human law can upend all expectations about normal life? In the past, I identified Hurst's downbeat skepticism about the power of law with his reading of Reinhold Niebuhr. But now I wonder if what he might have experienced when he was a child of 7 or 8 affected him, more deeply than he ever mentioned.[49]

48. Aldo Schiavone, *The Invention of Law in the West*, trans. Jeremy Carden and Antony Shugaar (Cambridge, MA: Belknap Press of Harvard University Press, 2012).

49. See the terrifying portrait, historically accurate, in Allan Gurganus, "The Wish for a Good Young Country Doctor," *The New Yorker*, May 4, 2020, https://www.newyorker.com/magazine/2020/05/04/the-wish-for-a-good-young-country-doctor (December 29, 2021). Hurst grew up in Rockford, Illinois, not far from the Iowa towns described in Gurganus's story.

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In any case, it seems to me that in 2019 I obscured some of what I wanted to suggest in the third "fragment." So, to return, one last time…

Legal history—the primarily American legal history that prominent legal historians have produced over the past generation and a half—seems to me today, even more than in 2019, to be defined by its institutional settings (and perhaps by the fact that the producers were until recently all privileged white men). Books and articles were written by legal academics who wrote for an imagined audience of other legal academics. Work was produced by historians in close conversation with legal academics. Legal academia has changed, at least modestly, because of those writings and conversations. And yet the institutional settings persisted.

In those institutional settings, it is and was taken for granted that law has a more or less clear inside and outside. Many years ago, in an early canonical article about Hurst, Bob Gordon fixed that image, using the metaphor of a box. His point then was to mark Hurst's originality within the world of legal scholarship. Most legal scholarship, he explained, occurred inside the box of the law. By contrast, Hurst found explanations for and perspectives on law outside the box.[50]

A recent essay by Charles Barzun points out that whether one works on the inside or the outside of the box, commitment to the existence of an inside and an outside conforms to a core and conventional understanding, one that is identified in modern Anglo-American jurisprudence with H.L. A. Hart's *Concept of Law*,[51] and one that is also ever present in the attention that historians today pay to law.

It occurs to me now that Hurst, at least in the lectures that became *Justice Holmes on Legal History*, was edging toward a somewhat different understanding of law, one that denied the salience of a clear inside and outside. In part, his alternative understanding emerged because he believed that legislation was the centerpiece of whatever law was in America. And he imagined legislation as a more or less direct expression of a democratic culture, although one modestly restrained by "constitutionalism." In any event, in those lectures he suggested a perspective that made the central problem to be solved how law (in whatever institutional form it appears) expresses culture. (Perhaps that put him closer to a position that Barzun identifies

50. Robert W. Gordon, "J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 9–44; and William Forbath, Hendrik Hartog, and Martha Minow, "Introduction: Legal Histories from Below," *Wisconsin Law Review* 1985 (1985): 759–66.

51. Charles Barzun, "The Tale of Two Harts; A Schlegelian Dialectic," University of Virginia Legal Theory, Public Law and Legal Theory Paper Series (Charlottesville, VA, 2020). Much of what is in these paragraphs comes out of conversations with David Sugarman, Risa Goluboff, and Farah Peterson.

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with Henry Hart, as opposed to H.L.A. Hart.) And I suspect that he would have (or, at least, should have) rejected an image of law as defined by a box.

If I had had the right words in 2019, I might have written something then about how the work of legal history may provide an alternative to the more conventional and singular notion of law that I then identified with Hurst. And that would have led me toward an understanding of legal history as "accompanying" plural and multiple understandings of law.[52] When understood as the subject matter of a legal history that stands apart both from academic law and from ordinary historical practices and impulses, the law we study may become portraits and evocations of localized and particularized and plural understandings and ways of being, explorations of spaces and practices that are apart from what lawyers or legislators will ordinarily recognize as "law." Here, I mean to pose a stronger challenge than in the first sections of this article, both to Hurst and to much recent legal historical writing (including much of my own work as a legal historian). In different ways, in so much of mainstream legal history, law is regarded as constitutive. And by "law," we mostly mean state law (or the phrases and language games that we identify with state law). For Gordon and those (like myself at times) who build from his "Critical Legal Histories," this means that law is everywhere and all the time. For Hurst, the point was that the particular or the local is worth exploring only because it embodies larger patterns, never as a distinctive or plural or separate understanding.[53]

Consider how Hurst used the story of the Pike's Creek settlers at the beginning of *Law and the Conditions of Freedom,* or the significance that he assigned to the clear cutting of trees in his study of the Wisconsin lumber industry. For him, one studies these temporally and geographically local and apparently particular episodes to find the general and the national and the continuing. And he did so without much actual interest in the local or the particular or the distinctively separate. In the Wisconsin

52. Staughton Lynd, *Accompanying: Pathways to Social Change* (Oakland, CA: PM Press, 2012); and Barbara Tomlinson and George Lipsitz, *Insubordinate Spaces: Improvisation and Accompaniment for Social Justice* (Philadelphia: Temple University Press, 2019). See also, Saidiya Hartman, *Wayward Lives*, *Beautiful Experiments*: *Intimate Histories* of *Riotous Black Girls*, *Troublesome Women*, and *Queer Radicals* (New York: Norton, 2019).

53. See, for a modest challenge, Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009). See also, Jessica Lowe, "A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era," *Law and Social Inquiry* 36 (2011): 788–817.

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lumber book, commercial lumbering stood in for the economic life and practices, the commerce, of the larger nation. It is, as a result, not at all surprising that *Law and Economic Growth* begins with a review of the history of the Commerce Clause, before diving into the minutia of Wisconsin decisions that helped to produce the denuding of the northern Wisconsin pine forest. It is the Commerce Clause that sets the scene and that makes the relevant features of the local possible.

I might note that a significant part of what once drew me and other historians to Hurst's work, back a generation and more ago, was the intuition that Hurst was providing something like a Braudelian *histoire totale* by way of law.[54] I think that this is what Harry Scheiber pointed to in an important essay that first brought Hurst to the attention of a larger community of historians.[55] Everything was "in" law. In this sense, as I suggested in my third fragment, Hurst prefigured critical legal studies; he offered a version of a constitutive theory of law. He offered a legal history in which everything connected together, in the law.

The end of that sense of a potentially totalizing and seamless history, an American legal *histoire totale*, is part of the history of history in the late twentieth and early twenty-first centuries. We live today in an "age of fracture," to invoke once again Dan Rodgers's wonderful phrase. I have played a small part in the coming of "fracture," I fear, at least for legal history. And I can only acknowledge my responsibility with, at best, ambivalence.

When in 1985, I published an essay, "Pigs and Positivism," about the possibility of a distinctive and alternative understanding of pig keeping in early nineteenth century New York City, Hurst wrote me a long memo about how I ought to expand the project suggested by the essay. He said that he liked what I had done. But he suggested that I use the story I had told to tell a broader one about judicial notice and the forms and the history of judicial notice. By judicial notice he meant the restricted practice by which judges are permitted to account for forms of (possibly

54. See Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (Berkeley: University of California Press, 1996). Hurst's disinterest in the local and particular is marked by the titles of these two books, neither of which tells one anything about what it is that he was actually studying. One suggests that his subject was American economic growth, and the other suggests that it was American freedom. (Indeed, all of Hurst's books had abstracted titles that claimed to cover large social or economic fields and that hid particularities.) Of course, Braudel's book could have been understood as an exhaustive study of the varieties of olive tree horticulture around the coast of the Mediterranean, rather than of the "world." How authors title their works is a theme to return to.

55. Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," *American Historical Review* 75 (1970): 744–56.

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distinctive) local knowledge, a practice that intersects with the nineteenth century evidentiary law of "presumptions."[56] This was an interesting idea but I didn't bite, in part because I did not understand why he wanted me to go in this direction. I think I finally understand. What he suggested was a way to make the story of my pigs part of a seamless (or a less particularized or localized) understanding of what it might mean that pig keepers had their own legal consciousness. He wanted me to situate New York's pig keepers in a national and recognizably legal story of how the law made space for local knowledge, while colonizing and partly incorporating that knowledge. And he wanted me to write it as if most of it happened inside formal state law (the space of judicial decisions and legislation). He was not interested in the ways that the pig keepers' lawyers (as well as members of the New York City Common Council) were using law as a kind of accompaniment that allowed a distinctive understanding of law and legal culture to continue to survive.[57]

There is obviously much more to say about the alternative portrait of law that some recent legal history poses, a theme I hope to return to. For the moment, in this fragmentary fragment, let me mark two features of legal accompaniment that some of the best new legal history implicitly attends to. First of all, I would focus on the ways that lawyering may accompany particularities, pluralities, and distinctive ways of legal being. Oddly, here Holmes's notion of the "bad man of the law" from his lecture/essay "The Path of the Law," becomes helpful.[58] Holmes had no interest in distinctive collective identities, or what we today would call legal pluralism. But his notion of how a lawyer acts on the basis of an understanding of a client as a "bad man," who cannot escape the coercion and the violence of state-centered law ("that which is more powerful than we are"), but who can rely on lawyers (who accompany and advise) to mitigate the effects of that power and, occasionally, to allow spaces where alternative or plural understandings or practices survived (for a time) or even flourished, reveals how lawyering becomes a kind of accompaniment. That is to say, lawyering or effective legal counsel, may make it possible for "bad men of the

56. See John D. Lawson, *The Law of Presumptive Evidence* (Littleton, CO: Rothman, 1982 [originally published 1886]).

57. To give his suggestion its due: I imagine that Hurst was concerned with the "who cares?" question: how to choose the right particularity or distinctive sensibility or practice, how to distinguish significant particularities from mere noise. One answer is that some particularities, like Hurst's Pike's Creek settlers or his lumber industry, embody the general or the national. But is it enough, in the alternative, to celebrate the particular or the strange or the different or the deviant? Sometimes, perhaps. But we all know that the aesthetic and moral burdens of justifying distinctiveness are great. And there is no handy shortcut.

58. Holmes, "The Path of the Law," 457–63.

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law" (which may be all of us) to live lives and life plans as they pleased, or less unhappily than they would do so otherwise, even though they don't care at all about the forms or the substance of "the law" (which is why they are "bad men."). Second, if Hurst had had a more generous view of constitutionalism, one less tied to early twentieth century understandings (call it the fear of *Lochner*), he might have understood constitutionalism as occasionally offering space for deviant rights consciousnesses. Constitutionalism, as we understand it today, necessarily incorporates the contradictions and multiple possibilities that lawyers have drawn out of the constitutional text. It allows notions of federalism and state sovereignty and personhood (under the Fourteenth Amendment) to be used for many purposes. It puts in question notions of apparently settled understandings, like the plenary power. It decriminalizes. It can even make space for protests, including those that harm some private properties.

I don't, on the other hand, want to go too far down the legal pluralism road. In the end, one task for legal history (for what legal history might "do") should be, I suspect, to find a balance between law as universalizing and hegemonic and law as a space for conflict and as an arena for disparate and distinctive worldviews and understandings. I don't want to deny the former while finding space for the latter. As the legal anthropologist Paul Dresch put it in a particularly helpful survey of a multitude of studies of legal systems in many times and places, textual and formal law offers something close to a general public morality. In studying particularities and contradictions and diversions, in emphasizing "legalities," one does not want to lose the capacity to explore the history of that (changing and contingent) general public morality that state law (written law) may occasionally and intermittently express. As well as the coercions and violence of state law.[59] As well as the ways that law offers a primary strategic field of action, a somewhat less violent alternative to the war of all against all.

So, I end with questions that I have raised, but certainly not answered, throughout these fragments: Should one understand "doing" legal history as something apart from academic law, as well as apart from many historical practices? What does it mean to "do" legal history, with passion and care and commitment, and with a sense of love for our sources? How should "we" (those who are or aspire to be legal historians), understand who we are and what we do? And what is the law that is our subject?

59. Paul Dresch, "Introduction. Legalism, Anthropology, and History: A View from Part of Anthropology," in *Legalism: Anthropology and History*, ed. Paul Dresch and Hannah Skoda (Oxford: Oxford University Press, 2012), 1–39, at 10.

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