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Snakes in Ireland: A Conversation with Willard Hurst

HENDRIK HARTOG

[January 29, 1994]

We were having lunch early in May, when I first broached the idea of a recorded conversation about his life as a legal historian. Willard looked doubtful. And I, no journalist, not even a twentieth-century historian, mired in print, afraid of tape, thought that he would quickly refuse. Then I could tell Michael Grossberg that I had tried but failed, and get on with other things.

I said, a bit desperately, maybe we could focus on the world of legal history that he had entered when he began work in the 1930s. Willard looked at me: "That would be a bit like studying snakes in Ireland, wouldn't it?" Then he continued: "But still, there might be something interesting in our talking about a world so different from the one legal historians today inhabit."

I relaxed. I had a title. And the rest, so to speak, would be history.

[Madison, Wisconsin, May 26, 1993]

Hartog: For most of us, doing legal history is such an odd mixture of collective and individual activity. You sit in a library, you read, you think, sometimes you write. All alone. But why do we do legal history? In part because of connections with others. And for many of us the initial connection came from reading somebody's work that made us think we wanted to do the same thing.

I was talking with Bob Gordon recently about how we each came to be a legal historian. Oddly, he and I had exactly the same beginning

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point, which was reading *Law and the Conditions of Freedom*.¹ In both our cases, it was an accident. It wasn't that it was assigned in a course. We both found it, I think, in a used book store, bought it, read it, and said (or thought), "Gee, this is something I'd like to do."

So, what started you, since there was no *Law and the Conditions of Freedom* when you began?

Hurst: Well, I think the thing that first got me really interested in trying to do some work in history, and particularly U.S. history, was reading Beveridge's life of John Marshall.² That was originally a four-volume work. The last two volumes, mainly dealing with Marshall on the court, are rather oddly enough the weakest part of the book. The first two volumes of the life have been sadly neglected. They're wonderful historical writings as they relate Marshall's early career to the life of the society in which he grew up. And particularly, I remember what struck me was the drama that Beveridge gives to Marshall's career as a practicing politician before he became a judge. His chapter on the Virginia ratifying convention on the federal constitution is a magnificent job of bringing history to life. You can see these people, and you can see them partly because Beveridge relates the conflicts of the ratifying convention to the tensions in the surrounding society. In fact that gave me a very lasting interest in the possibilities of history as a living sort of subject, not just a record.

And then at Williams College I had the good fortune to encounter a senior historian on the faculty, Theodore Clarke Smith, who sensed my early enthusiasm for Charles Beard, of whom T. C. Smith had a very low opinion. We had an honors program at college which allowed me to work on a one-to-one basis with a senior member of the faculty, and I hooked up with T.C. For the whole year, we took the then just-published Beard's *Rise of American Civilization*,³ and we would go through it and critique it step by step, with T.C. thinking the whole thing was pretty much phony and pretentious and me thinking with enthusiasm this was the whole new light of history. So we had a good year together.

Hartog: Odd about Beveridge. The Beveridge perspective on history is everything that I think you are not. I mean it is explicitly elitist and

1. J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, 1956).

2. Albert J. Beveridge, *Life of John Marshall*, 4 vols. (New York, 1916-19).

3. Charles A. Beard and Mary R. Beard, *Rise of American Civilization*, 4 vols. (New York, 1927-42).

anti-democratic. It is focused on an individual life; yet your legal history has always been antibiographical.

Hurst: In some ways, yes. But the telling of history could be exciting as a matter of ideas and the movement and drama of people. It wasn't dead stuff. And Beveridge himself was a practicing politician of no mean talents and maybe that explains partly why the first two volumes are so lively. I gather he could feel he was one with the young John Marshall as a rising young politico, because he had been there himself.

Hartog: I've always had a sense that for you legal history isn't about law as a distinct body of knowledge; it is about the practice of government, broadly conceived.

Hurst: And more broadly than that, the law *in* society. Lloyd Garrison and I put together some first-year-law teaching materials at Wisconsin. More or less by accident, we called the work "Law in Society," not "Law and Society."⁴ That is the kind of emphasis that's always interested me. The interweaving between the two.

Hartog: Back at the beginning, how did, when did the law come into the story? Did Harvard Law School give that or did Harvard Law School repress that?

Hurst: Well, I got some of it from T. C. Smith at Williams College. He was very interested in law.

None of it came from the first year at Harvard Law School, which was as abstractly doctrinal as it is possible to get. What a strange experience it was in retrospect to sit in Williston's contracts course at Harvard, in which contract law was treated like an exercise in Euclid's geometry. All the more strange because Williston himself was a sophisticated man of business. He knew how the business world ran, but we never heard anything about the business world in the course of contracts. And the same was true throughout most of the three years at Harvard Law, 1932 to '35. Another sample of that always stuck in my mind, although I didn't realize it at the time: I had a semester course in courts and mortgages. This was 1934 or early 1935. And the course never mentioned the idea of a mortgage moratorium, which was going on all over the United States and was moving toward the Supreme Court as a major constitutional issue.⁵

Hartog: Was legal realism mentioned at all?

Hurst: The only time I can remember it being mentioned was at a luncheon of a group of us with some of the senior faculty. I had got to reading Karl Llewellyn and some of the men at Yale, and I was incautious

4. Lloyd Garrison and Willard Hurst, *Law in Society* (Madison, 1941).

5. *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

enough at lunch to express some enthusiasm for this and met a very frosty reception from the senior faculty present.

The nearest exception to all this was Felix Frankfurter, who had a very keen sense of the historical relations of cases and statutes. His public utilities course very much undertook to relate public utility law, statutory law, and what the courts did with it to what was going on in the general economy of the country. It was in some ways a strange course. The students often called it the case of the month course, because it proceeded so slowly. But that in itself was instructive because Frankfurter would relate the case to the legislative process and to the state of the economy. He would just squeeze so much out of it. But the method usually bothered the students a lot since like law students today they figured they were getting their education according to the number of pages in the casebook they covered.

Hartog: Did you know yourself in law school as going on a different course than your classmates?

Hurst: I think I knew quite early on that I would like to be a legal academic, yes. I was interested primarily in trying to understand the processes of public policy making, which is what made the Frankfurter course the exception, because Felix was a process-minded person.

Hartog: You didn't see yourself as ever going into the New Deal?

Hurst: Well, I might have. Most of my classmates, or a great many of my classmates, promptly went into New Deal agencies, and I picked up a lot of New Deal gossip secondhand that way, but I knew by that time I wanted to do something either jurisprudential in nature or probably legal history. And Felix was chartered to give some lectures at the University of North Carolina I think it was, and he invited me to be his research assistant for a year following graduation. And so for a year I dug into the development of the Commerce Clause decisions under [chief justices] Marshall, Taney, and Waite.⁶

And he left me pretty much alone. What I did was, he invited me to write long memoranda, as I worked on this stuff, but we had very little interchange on it because he was always very busy with all sorts of things until about maybe late February, early March of that year following my graduation from law school. At that point I would go up to his house on Brattle Street, and we would sit down together. By that time he had these memoranda I had written, and I can type, so he would start to dictate his lectures to me inviting me to quarrel with them. So we would have a back and forth exchange on the shaping up

6. Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chapel Hill, 1937).

of the lecture, he using this memoranda I'd written to tear it apart and use parts of it or discard parts of it as he chose. That went on now for several weeks, not continuously, but I kept coming back to Brattle Street, pounding the typewriter according to his dictation. It was a very lively business because he was a lively person to be with, he always was.

And that of course further got me entrenched in the notion that I enjoyed doing this sort of thing.

Hartog: At that point did you know you were going to clerk for Brandeis the next year?

Hurst: Yes, the usual procedure was that anybody that was going to clerk for Brandeis spent the year following graduation with Felix. Most of the people that did that spent that year as candidates for the S.J.D. By that time I'd seen enough of graduate law at Harvard. So I didn't want any more of that. At that time post-graduate law at Harvard was conducted pretty much on sort of a missionary theory. They would bring in promising heathen from the outer lands of the United States and expose them to a year of Harvard. But it wasn't much of a graduate year I thought.

Hartog: Did you think of yourself as an egalitarian midwesterner at this relatively closed, elitist institution?

Hurst: Not a great deal, because even by 1932 the Harvard Law School student body was a pretty widely drawn body. It was unlike, say, Williams College, when I went there. Williams was very East Coast focused, very much so. Only a handful of people from the middle west, and the far west practically didn't exist as far as the college was concerned. But Harvard Law School was already a much more wide-reaching institution in 1932, becoming more so since.

Hartog: Did you have much contact with Roscoe Pound, who was, after all, in some ways one of the two or three leading legal historians of the time?

Hurst: Almost nobody had much contact with Roscoe Pound. He was a very isolated, rather arrogant figure and very dogmatic. I sat in, I audited his jurisprudence seminar the year after I graduated from law school, and it was by and large a rather fruitless enterprise, very didactic, very abstract. The only time it ever came to life that I can remember was one day in the seminar when some graduate student said, "But Dean Pound, what you said just now is different from what you wrote in such and such a book." And Pound slammed his fist on the table and said, "By god, I hope so." Which was a typical episode. I remember an old friend of mine, who was a student in his criminal law class two years before I got to law school telling of an occasion when Pound was running a class. He got the wrong seating chart and kept calling on

people who didn't answer. He got so mad he finally tore up the chart. There's another occasion when he thought he was getting not very bright answers to some of his questions, and he would throw erasers at the answering students. Pound was not a guy you got close to.

Hartog: Unlike Frankfurter.

Hurst: Yes.

Hartog: You worked for Brandeis for a year. Did Brandeis have much influence on your thinking about legal history?

Hurst: No, not a great deal. Working for Brandeis, I worked for Brandeis in the 1930s, I was 25, 26 years old, and I was working for a master of the craft who by that time was a little short of 80. There was not a great deal of buddy-buddy on that occasion. This was typical from what I learned from other Brandeis clerks. I don't mean to say he was in any way cold or unfriendly. That was not true. But he was himself very reserved, and he was husbanding his strength I think for his job, so we didn't have a great deal of exchange. And not focused very much on history.

There are little flashes I remember. I would always have a daily conference with him, see what he wanted me to do or to report on what I'd been doing, and occasionally that would diverge from the business of the day, and on one occasion we got on the subject of the Woodrow Wilson and his disastrous last period as president and the fight over the League of Nations, and Brandeis said he thought he'd always remember that as an historic example of the fact that a man shouldn't try to do too much, that there were limits to the human capacity to create and act.

Hartog: Well, that's clearly a theme in all of your writings. There's a constant sense of limits, of institutional as well as personal limits.

Hurst: I got that in large measure from Reinhold Niebuhr.

Hartog: It has a Protestant sound to it.

Hurst: Yes, but it is also part of Niebuhr's emphasis on what he always called the tragic element, not just in life but in human history, the sense of limitations of energy, courage, imagination, vitality that adhere in being a human being.⁷ I think this is something that modern CLS enthusiasts or enthusiasts for ideologically driven interpretations tend to overlook. People are limited. They don't have endless stocks of energy to spend on anything. This is part of history.

Hartog: At the same time, I have always been struck in everything I have read of yours that you retain a tension between that sense of

7. Reinhold Niebuhr, *Beyond Tragedy* (New York, 1938); *The Irony of American History* (New York, 1952).

limits and also a very strong aspirational vocabulary. Your story is never just about limits. The law in your telling is never just a reflection of power. There is also always a sense of failure of noble, perhaps even of utopian aspirations.

Hurst: Yes, I agree. Some of that I got from a very odd source. It probably is an illegitimate source, but many years ago—it must have been somewhere around mid-time in my college years—I browsed through Oswald Spengler's *Decline of the West*, and in the first place there's a sense of tragic limitation there.⁸ Spengler we'd write off today as a phony, and in some ways not an attractive person in his values, but he had a keen sense I think of this idea of limitations, and one aspect of reading Spengler that stayed with me was the notion that we all live within our own oxygen belt so to speak, that there are limits beyond which we can't live and limits beyond which indeed we can't think or imagine.

Hartog: Now, here's another impression from reading you: that part of your identification with American constitutionalism, as an embodiment of aspirations, is rooted in the Madisonian vision that, if men were angels there wouldn't be any need for government. The civic hope that you identify with America is rooted in the capacity of America's institutions to recognize human limitations.

Hurst: On our effort to cope with human limitations: some of that I got again from Felix Frankfurter. An aspect of his approach to understanding the Supreme Court particularly, and also the Congress in relation to the Court, was that the structure of legal institutions itself was a major factor in determining what they accomplished or what they could accomplish.

For example, in his Federal Jurisdiction seminar Felix always started with *Heyburn's case* and with the whole development of the notion of the case or controversy.⁹ And he did that not so much from doctrinal reasons as to develop the notion that there were practical and inescapable limitations to what courts could be called on to do. And you got into trouble if you unrealistically stretched beyond that.

Again, it comes back to Neibuhr's notion that human beings are finite creatures, that there are limits to what they can do and accomplish.

This again is one of the reasons I've felt something lacking in much CLS writing.

Hartog: So much of your work has focused on legislatures, which have, almost by definition since the middle of the nineteenth century,

8. Oswald Spengler, *The Decline of the West*, 2 vols. (New York, 1926–28).

9. *Heyburn's Case*, 2 Dallas 409 (U.S., 1792).

been institutions imagined as without limits, institutions to which people brought almost any want.

Hurst: Which brought all sorts of troubles too.

Hartog: So, what led you to focus on the roles of legislatures?¹⁰

Hurst: Well, partly I got increasingly impatient in my early interest in history with the excessive focus on the courts. It seemed to me that there was surely more to legal history than what came from the courts and particularly what came from the Supreme Court of the United States. The Supreme Court is a fascinating institution, and anybody who was exposed to Felix Frankfurter was bound to feel all that fascination, because, of course, it totally fascinated him. But somewhere along the line I decided I did want to do legal history, and I didn't want to wind up knowing nothing except all the gossip about the judges. This didn't seem to be that important. And a good deal of writing about the Supreme Court is not too far removed from Hollywood gossip sort of stuff.

My impatience led me almost, almost inevitably, to get interested in legislative process. And when I came to Wisconsin I wanted to see what I could do with teaching legislation. At that point there were about two casebooks on legislation, and they were very formalistic things, and there were almost no courses in legislation. The only course in legislation at Harvard Law School when I was a student was a graduate seminar. It was a good seminar; James Landis ran some of it. But it was striking that legislation was regarded as an esoteric frill, along with such courses as taxation.

And that reinforced my interest.

II

Hartog: It seems, as Marxists would say, no coincidence that you would end up at Wisconsin of all state law schools, if you were interested in legislation, given the progressive tradition, given the state Legislative Reference Bureau, given the enormous statutory resources of the State Historical Society Library, given John R. Commons and the Wisconsin Idea of the university. Did it happen accidentally? Or was there a master plan at work?

Hurst: No, no master plan. It was largely just a fortunate accident, from my point of view. I wanted to get on a law faculty, and the first school that ever approached me while I was clerking was the University

10. See, in particular, James Willard Hurst, *Dealing with Statutes* (New York, 1982).

of Buffalo, which developed into a very interesting school. David Reisman was the hiring fellow there; he was at Buffalo at that point. I seriously considered it. And I was also approached by Wiley Rutledge, who was then the dean at the University of Iowa Law School. Rutledge was a very appealing person.

But then, Brandeis's daughter, Elizabeth, was a lecturer in economics at this university, and she, of course, was in constant contact with her father.

I met her down there while I was clerking, and she suggested my name to Lloyd Garrison, who was then the dean. And it only took a couple of sessions with Lloyd to decide that I wanted to go where he was. He was a remarkable person.

And when I came here to work he gave me a couple of course assignments of course. As the much junior member you were expected to be given course assignments. But he also said, and this is typical of what kind of a man he was and kind of a dean he was, he said, "Look around and decide what we're not doing and think we ought to do and make a course."

Then he and I collaborated on this Law in Society course, which was an historically oriented course in which we undertook to trace the development of the law of industrial accidents from common law to the modern statutes and administrative regulations. So that deeply involved me in law teaching that amounted to teaching legal history and economically focused and institutionally focused legal history. We tried to depict the relative influence of the bar, the judges, and then the legislators and the lobbyists and then the administrators on what evolved, all very much of an institutional emphasis, but all coming back to an emphasis on the impact of these factors on the law's relation to something outside of the law.

Hartog: I remember meeting a lawyer here when we bought our house when we first arrived in 1982 or 1983. He had been your student in that course in the 1940s. He was the seller's attorney, and all he wanted to talk about was that course. "Do you know Willard Hurst?" he asked. I said, "Yes, I do," although I didn't know you well at the time. He said: "I got a 96 on that course" Nearly forty years had passed. But as he continued to talk it began to sound like that grade was still the most important thing that ever happened to him.

Hurst: There's an aspect to that I've always thought about in later years. Students didn't like the course. It wasn't a law course in their point of view, and yet in later years time and time again the students would come back to me and say, in law school I didn't know what the

devil that thing was all about, but now that they were out and into practice, they thought it was the best one they had in school.

Hartog: I take it you were happy here right from the start.

Hurst: Yes, I enjoyed it. The reason is partly Lloyd. Partly the fortunate accident of very attractive colleagues. Jake Buescher, particularly. And then the fact that it was apparent right from the very outset that this was a law school unlike most law schools, that did not exist in isolation from all the rest of the university. It was just taken for granted that we would have working contact with the economics department, with sociologists, only later with historians, because legal history was still regarded as not really history. But economics and sociology, it was taken for granted that people there were interested in the law school, and the law school was interested in them.

Hartog: At what point you know that you wanted to focus on the legal history of Wisconsin? Did that come immediately?

Hurst: Not entirely. I knew I wanted to try to develop some broad-reaching themes in legal history, and the invitation to give the Rosenthal lectures at Northwestern came along fairly early in the game and that gave me an opportunity to reach out deliberately for broader topics. At the same time, I was very impatient with the dangers of abstraction in doing legal history. I wanted my work tied down to some hard gritty background of what was actually going on and that led me to decide I wanted to do something that could exploit in great detail the raw materials of legal history. And that made it obvious that I should stay close to home, because I saw that the materials were readily available.

Hartog: What suggested focusing on the lumber industry?¹¹

Hurst: Here again, it was the law school reaching outside. I belonged to a small dining club here at the university whose custom was through the winter months to invite somebody to talk his own line of shop. And very early in the game, before World War II, it happened that one of the people we invited in was Aldo Leopold, and Aldo Leopold talked about the then-strange word ecology. It was the first time I guess I'd ever heard the word and the idea that there was a tremendous interrelation between the facts of botany and the facts of wild life and human beings and what they did with the earth. And he was very interested in what had happened to trees.¹²

That evening had a great influence on me. I was looking around for a case study, some specific subject to hold on to, and here was an

11. The result, of course, was Hurst's magnum opus, *Law and Economic Growth* (New York, 1964).

12. See Aldo Leopold, *A Sand Country Almanac* (New York, 1949).

industry that had gone through a complete life cycle in a rather short period: from almost nothing to become at one point the major factor in the economy of a society and then going into a total decline, almost total decline. You had an industry that was supplying the necessary timber to build up the Midwest. And then winds up as simply a source of Christmas trees.

Hartog: So, by the time you went off to war you already knew you were going to write about the rise and fall of the lumber industry in Wisconsin.

Hurst: I knew that was the most likely thing I would try. But then, after the war, somebody had sold the Social Science Research Council on the notion that there were a lot of young academics whose careers had been interrupted by service and that it would be useful to give them “demobilization grants,” funded by Rockefeller and other foundations. I got one of those, and it allowed me to come back to Wisconsin on a half-time teaching basis and to do work of my own devising in legal history.

And I decided a starting point ought to be a history of the lawmaking institutions, of lawmaking in a technical sense, of the formal institutions of law. The demobilization grant carried me for two years, and that allowed me to do the basic work for *The Growth of American Law: The Law Makers*. I did it deliberately, as a starting step for reaching outside the law, toward the lumber industry.¹³

Hartog: I never realized that the two books were connected, that you saw the one as a sort of first step to the second.

Hurst: Yes. I thought it made sense. And I really started with not knowing very much about how we got the legislatures we had and the courts we had and, for that matter, the bar that we had. I deliberately chose that as a starting point.

Hartog: It reads on its own. It still stands on its own.

Hurst: Well, I enjoyed doing it.

Hartog: The section of the book on the bar remains the best introduction to the history of the profession. Even today nothing—no general history of the bar—has replaced it.

Hurst: And it was a very inadequate beginning. When I did that, there was almost no literature on the bar. It’s difficult to exaggerate how little there was in print that was worth looking at on the history of lawyers in this society.

Hartog: I am struck by how inadequate the sociology and the history

13. James Willard Hurst, *The Growth of American Law: The Law Makers* (New York, 1950).

of the professions remains today. Much work still takes it as a given that the sole marker for professional identity is how wealthy the professionals become. By contrast, you focused on the work that lawyers did and do.

Hurst: There's another influence now that we mentioned it I can definitely answer to. I was interested in the work that lawyers do because of Karl Llewelyn. One of Llewelyn's favorite phrases was "law jobs," the word jobs was very important to him. He wanted to figure out what people were doing to what end.¹⁴

Hartog: I had exactly the same experience reading Llewelyn. He gave you a sense of how to describe the work of institutions and individuals, without using ahistorical categories. The jobs never stood outside of time; they were never naturally true. His functionalism was never like that of someone like Talcott Parsons.

Hurst: A great symbol of that to me is the law of sales. I had a course in sales at Harvard Law School, and like all typical courses at the time this was a course in the Euclidian geometry of sales. It was one of the toughest things I had to get through in law school; it was a real chore, it was so dry and abstract. And then you read Llewelyn's articles. Llewelyn makes articles on sales exciting. It's a little hard to know when you're all through why; part of it is his vocabulary. Llewelyn is just an exuberant person. But part of it also was his sense that this law of sales had something to do with the way an American economy worked and developed.¹⁵ And that was something Harvard's course had nothing to say about.

Hartog: The notion of jobs can be turned on the scholar as well: that the business, the job, of the observer is figuring what people are doing, why they are doing, how they went about doing it, and how those jobs changed over time.

Hurst: A colloquial expression of that same idea is the wholly impertinent question, so what. Why does it matter? What's it all about?

Hartog: You're writing this work on the lumber industry. You're writing this general institutional history. Who did you think you were writing for? There is, after all, no built-in audience for the social history of law in post-World War II America.

14. See, in particular, Karl Llewelyn, *Jurisprudence* (Chicago, 1962), particularly 231–396.

15. See, for example, Karl Llewelyn, "On Warranty of Quality, and Society," *Columbia Law Review* 36 (1936): 37; *ibid.*, 37 (1937): 341; *idem*, "Through Title to Contract and a Bit Beyond," *NYU Law Quarterly* 15 (1938): 159; *idem*, "Across Sales on Horseback," *Harvard Law Review* 52 (1939): 725; *idem*, "What Price Contract," *Yale Law Journal* 40 (1931): 704.

Hurst: I guess partly, and it's selfish, I'm just enjoying it. But partly also it was out of a sense of impatience with my legal education. I'm not sorry I went to Harvard Law School in 1932–1935, but it really wasn't a very good education in the law in many ways: very good in some ways, very inadequate in others.

Hartog: So you thought of yourself primarily as speaking to other lawyers. You didn't think in terms of an audience of historians.

Hurst: No, I think I was primarily responding to my own sense of the things that my own legal education had never given me. And it seemed to me that there was stuff here that ought to be available to serious students of law.

Hartog: Did you get responses from people as you wrote articles along the way?

Hurst: Not a great many. I always had a bias to get into hard covers, because I wanted a Library of Congress catalog card. I figured things get easily lost in the bound volumes of law journals. People may come upon you later, but it's an easy place in which to lose things. But if you have a Library of Congress card in the card catalog or in the modern computerized catalog, people are more likely to find you years later.

Hartog: So you had a sense that there would be an audience eventually, even if there wasn't yet?

Hurst: Yes. And there would be more of an audience for books, rather than for articles.

Hartog: What you probably didn't realize is that the audience would be as much non-lawyers as lawyers, right?

Hurst: No. At least that wasn't a prime motivation. I may have realized in the sense that I was deliberately trying to reach out beyond this tail-eating system of the law as a self-enclosed system.

Hartog: The Social Science Research Council funded you early on.

Hurst: For those first two years.

Hartog: And then the Rockefeller Foundation. . . .

Hurst: Those first two years I had to write reports to the Council about what I was doing. I guess they wanted to be sure their grantees were really doing something, and I used these reports to expound at some length about why I was doing legal history, and the way I was doing it. One of the people who read these was Dr. Joseph Willetts who was the head of what was then known as the social science side of the Rockefeller Foundation. My reports interested him, and I met him at some SSRC occasions, and I felt I was able to approach him. My two years of the demobilization money were running out, and I knew what I wanted to do by then on the lumber industry thing. I knew this would take time, so I approached Dr. Willetts and told him what I wanted to

do. Was there any chance that Rockefeller would be interested in supporting a program for some years in this field? And somehow I had the wisdom then, the practical wisdom, in knowing that in approaching somebody like Rockefeller it might be not the right approach to ask for too little, that they were not in the retail business but in the wholesale business. So I said, "How about funding a program at Wisconsin to develop an interest in legal history of a broad-reaching type among young legal academics. And give me the money to set up some scholarships here, give me half-time free, and each year I will bring you a young legal academic and try to get him interested and launched."

Hartog: You probably wouldn't get away with that today.

Hurst: Well, I don't know. Maybe not. I think the big foundations are still not in the retail business. In approaching them maybe you're more likely to get a response to something big than something little, and I can understand why. The overhead costs are real.

Anyway, this got me launched on six years, and that was in itself remarkable, that Rockefeller would give me six years of money for myself and for a young associate each year. And then they renewed it later. I think I eventually had that Rockefeller money for, I am not sure of the years, certainly eight years, maybe nine or ten. This was all thanks largely to Dr. Willetts who was a remarkable figure.

Hartog: He made a good investment.

Hurst: Well he was a remarkable man. He met me again, when we came together at some conference, and I'd been working for about five years on this basis. He asked me how it was going, and I said something self-deprecatingly about the fact that I hoped he wasn't too worried over the fact I had not yet produced a book. He said, "Look, if you worry about that you'll be defeating the purpose for which we gave you the grant." I don't know how many foundation people today you'd get that response from.

Hartog: They want their yield today.

Hurst: Well they need it for their own status. And Willetts apparently felt so secure at Rockefeller that he didn't need that sense of status.

And we actually produced for him: my own book, and a number of monographs by the students.

Hartog: So, who were the people who came under that program? What of the fellows?

Hurst: Well I had to do a selling job on most of them. Not on Lawrence Friedman. He responded immediately. But it was a strange idea to most of these young academics to envisage a possible career in legal history. I had to sell them on the notion that it would be a good idea, and it wasn't easy, but I got some good people. I drew some blanks too. I

always had good people, but some of them, a couple of them, just didn't work out. They couldn't catch the idea really.

Lawrence was I suppose the star in that group. He was probably the star of any group. But, well again there's a story. I dangled this opportunity before Lawrence. He was then on the faculty of St. Louis University, and his dean wouldn't give him leave of absence. Studying legal history wasn't a suitable thing to do. By that time I knew I'd like to have him as my fellow.

So we worked out a deal (I had complete flexibility under the Rockefeller grant). I would finance him for summers. He would come to Madison for summers and work at this thing. And that produced one of our published volumes.¹⁶ But it certainly is a telling story of the state of legal history in legal academia at that point that his dean wouldn't give him a year's leave of absence to try this.

Hartog: Throughout the 1950s, Rockefeller supported you, Northwestern asked you to give the Rosenthal lectures, and, a little later, Michigan asked you to give the Cooley lectures. So, you must have had some audience, some legal academics knew what you were doing and were interested in your project. Did you have a sense of people responding to your work?

Hurst: I suppose the thing that publicized interest in this sort of legal history most was the fact that the Rosenthal lectures carried a modest publication subsidy, and I brought that to the University of Wisconsin Press to be published in book form. And the little book, which we thought would be, I think the original edition was going to be one thousand or two thousand copies, and we figured that would be it. Both I and the Press figured that would be it, and that we'd probably sell out maybe over ten years.

But somehow something about the times was right. And the little book began to sell. I don't remember, I can't remember what the latest publication figures are, but it certainly sold well over ten thousand copies at the least and mostly, I suspect, to legal academics or academics in other fields interested in the law. That sort of spread the word.¹⁷

III

Hartog: Today, the map of legal history looks very different than it did thirty-five years ago.

16. Lawrence M. Friedman, *Contract Law in America: A Social and Economic Case Study* (Madison, 1965).

17. Hurst, *Law and the Conditions of Freedom*.

Hurst: I am very much encouraged by the extent to which legal history courses are being included in the standard curriculum of American law schools, to a degree that is almost unbelievable compared to where we started. It is literally true that say, as of about 1935, there were probably only three or four practicing legal historians in the United States.

Today, you only have to look at the catalogue of law teachers to see a rather astonishing list of names.

Hartog: You, yourself are part of the teaching story.

Hurst: Well, certainly, I am aware of the fact that the enrollments grew, because so did the load of blue books. Yet, I think that the reason why the course as I taught it became more and more attractive to more and more law students was that it sounded like a case-method course. Instead of assigning somebody's treatise, I assigned particular items from source books on American history: for example, Alexander Hamilton's argument for the constitutionality of the national bank, in contrast to Jefferson's argument in opposition to the bank. That would be a starting point for a day, and you could carry that out in various ways about early attitudes toward the corporate form, early attitudes toward the relations of law and the money supply and credit, and so forth.

Hartog: There is an odd aspect of this, which is that in the late 1960s, for a number of people who thought of themselves as student radicals, graduate students of history as well as law students, your course became an obligatory course. I think you were not in a great deal of sympathy with those radicals.

Hurst: No, I wasn't.

Hartog: Do you have any sense of why that happened?

Hurst: I think this was the case because I was typically trying to portray a real clash of selfish interests within the backdrop of much of this material. I was not claiming that the law was a neutral factor.

On the other hand, I was frequently irritated by my more radically minded students. When I said something had happened they thought I was glad it happened, that I was celebrating it. They didn't seem to be able to distinguish between recording the facts of what happened and putting a positive value on what had happened, which I thought was a rather sad commentary on the state of their liberal arts education.

Hartog: One of the interesting things in your work has been the tension it incorporates between visions of conflict and visions of consensus. I can see how student radicals would have been drawn to your perception of the law as the location of fundamental economic conflict in United States history. At the same time, it does strike me that all of your work speaks to the identification of broadly shared values, on the elaboration of a middle-class ethos that dominated American society.

Hurst: Yes, I think that's a matter of fact: that those shared values existed and affected how we used the law and what we used it for.

Hartog: In that sense, do you think that Avi Soifer was wrong when he argued that you were not a consensus historian?¹⁸

Hurst: I think that it goes back to a comment I made a moment ago. Some of the people who use the phrase "consensus historian" as a criticism assume that the historian thinks that consensus is desirable. I think it's just the facts.

Hartog: It is one way of understanding institutions like the law to see the degree of consensus, the support, that lies behind them.

Hurst: It also goes to a realistic appreciation of the practical limits at any time and place of what is likely to happen.

Hartog: A friend of mine once described your lumber book as being a story of how everybody got what they wanted and needed out of the legal process, except for future generations.

Hurst: I don't think that's an accurate reading of the book, because time and again in the book when somebody gets something, somebody else loses.

That's in the book.

Hartog: But no group, as you tell the story, was a systematic loser, except for future generations.

Hurst: I suppose that might be true.

The book has very little to say about the laboring force, and yet it doesn't ignore it. It's there. I think what it says is realistic and hard-boiled about the loggers in the woods. But there's really not much to say about them in a legal history, because these people just didn't enter the realm that the law dealt with. However, it is an important social fact, and I don't think the book is oblivious to it, but there isn't much to say about labor in that history, because labor was not at that point an active force in what was brought to law and what was done in law.

Hartog: That does raise a basic methodological problem. Today much work is done that focuses on the question who is in and who is out. Who participates in the process. Your work is consensus history in its focus on the ways a broad group of Americans committed themselves to a set of legal institutions, to a certain set of procedures, and to a set of substantive goals as well. It is also work that conflicts with modern assumptions that one ought to talk about the groups apparently excluded from those institutions.

18. Aviam Soifer, "Willard Hurst, Consensus History, and *The Growth of American Law*," *Reviews in American History* 20 (1) (March 1992), 124-44.

Hurst: It does not talk about environmentalists, but there were no environmentalists.

Hartog: You didn't talk about women either, and there were women.

Hurst: But the women were not in the woods. They just weren't there.

Hartog: But if they were there. . . .

The world of nineteenth-century American law, as you describe it, is a world of people who are making direct and explicit demands on the system of institutions. Presumably the law also affected other people who had little formal voice in the system. Particular clear-cutting rules, or rules about warehouse receipts, or rules about mechanics' liens, for example, would have affected workers in many ways. They just would not have been consulted. Their voices would not have been heard.

Hurst: I discuss that when talking about the liens on logs. The book explicitly asks the question, why did you get a rather large body of statutory law granting loggers liens on the logs they cut at a time when there was no organized labor movement? My suggestion is simply that the entrepreneurs had to get the workers into the woods. It was their initiative that brought the lien laws, because it wasn't labor who had pressure, because there were no labor unions. The reason why there were no labor unions at that point wasn't because of labor injunctions but because there wasn't much group conflict over labor.

Hartog: It's clear that the story is never simply one of exclusion or inclusion. Workers are present in the law, even if they're not there in organized forms. In this case, workers were present in their employers' visions and voices. Just as a Southern plantation owner had to think about what a restive slave force would mean for his work product.

Hurst: And so, the entrepreneurs had to think about how they were going to persuade workers to come into the woods to work.

What bothers the CLS line of thinking is that they don't find in a lumber book treatment of the history of oppression (I mean consciously delivered oppression). Here's where the idea of consensus comes into the picture. I think there was little history of oppression to tell because the shared values of the society were such that you didn't have any focal points about which organized activity could arise to express the interests of the oppressed.

The thing that is significant to me is that just dealing with the facts and the records shows the extent to which there was almost no question about the idea of economic progress, in the sense of increased output of goods and services, as a good in itself, regardless. There was almost no dissent to that attitude.

Hartog: There is always a question what are the boundaries and possible expressions within society at a particular time.

Hurst: That word boundaries bothers me a little. You have to distinguish between boundaries somebody deliberately sets and boundaries that are created by the limits of people's imaginations and efforts. Were there no conservation efforts in the 1870s because somebody was oppressing someone who wanted conservation? There wasn't anybody who wanted it.

Hartog: But it is also a historical question of what one ought to have recognized, that is what those living at the time could recognize as oppression. Boundaries change.

No one can describe everything, and no one can do it all. For me, much of the power of both the lumber book and of *Law and the Conditions of Freedom* is rooted in the focus on an articulated consensus.

Hurst: I come back to this because my students were so often irritated by my focus on an articulated consensus. The fact that I recognized the consensus doesn't mean that I approved or disapproved.

Hartog: A very broad group of Americans—but not everybody—came within your gaze. They shared, not just the idea of economic growth, but also a set of ways of achieving economic growth—which involved both a good deal of individual freedom and a surprising degree of governmental activity.

Hurst: Something that I discovered in the materials led me to emphasize the way in which thinking was done in terms of money. I think I used the term “monetized.”

Hartog: Perhaps one result of the power of those books has been an extension of monetization to legal history itself. Until very recently, it was assumed that legal history was fundamentally about economic relations. In part, that is because of your books.

Hurst: Maybe, it's partly because T. C. Smith had me read Beard.

Hartog: Of course your emphasis was not inconsistent with the assumptions of nineteenth-century Americans, including lawyers. For most of the makers of the American constitutional order, the economy was seen as the prime area of legal constitutional work. So, monetization is a defensible emphasis. But one could also say that the monetization of legal history was framed by the things that most interested you, by your own interests as a scholar. And it is also connected to legal education in the 1930s, which regarded family law and civil liberties and criminal law as the periphery around a core of economic relations.

Hurst: It's hard not to be an economic determinist. People have to find means to eat.

Hartog: I wonder, though, if there aren't two different issues that confront us here. The first is the ordinary historical problem of describing the shared values of people, their limited and blinkered ex-

pectations about what public institutions owed them. The second is a historiographical or methodological problem, which is the worry of being captured by the mindset of the people you are studying. So that the problems we regard as most important are drawn from those they thought most important.

Hurst: This brings me back to Reinhold Neibuhr and the tragic aspect of life, as Neibuhr would put it. We all live within our own limited oxygen belts. We can't breathe outside of a certain area.

Hartog: My sense is that you usually escaped being captured by the world view of the people you studied because you had such a critical and almost moralistic attitude about the shortsightedness of nineteenth-century public servants.

Hurst: At times it irritated me to view it as a modern-day taxpayer, when I think of what we lost of potential tax base north of Wausau in this state because of these shortsighted people.

Hartog: At the same time I sense that you liked most of the citizens you studied. You like your Pike County settlers with their claims club.¹⁹

Hurst: I sympathize with them. Again from Neibuhr's point of view. We are always fickle. We all are limited in vision.

Hartog: You hold public figures to higher standards, assume that they ought to have thought better. Including judges.

Hurst: They should have been far more sophisticated. They should not have accepted these taken-for-granted ideas.

Hartog: They shouldn't have been captured. The people who were asking for relief from whatever, they were operating out of their own particular needs. The legislators on the other hand ought to have had a longer view, a more broader vision.

Hurst: Again, I couldn't expect it of them. Anymore than I expect too much of Congress today.

Hartog: But in your writings I always sense that buried under a good deal of irony and distance and a very gentle tone are expectations that are not being met. Public officials always looked for short-term gains, for the immediate payoff. The phrase I remember is "bastard pragmatism."²⁰

Hurst: And they defined value by the kinds of definitions that could be expressed in dollars. As compared to a real pragmatism which understands what effects you are producing. What the effects really are. A bastard pragmatism interprets the effects wrong; it just doesn't seem

19. See Hurst, *Law and the Conditions of Freedom*, chap. 1.

20. See James Willard Hurst, *Law and Social Process in U.S. History* (New York, 1960).

to see the real effects. I should add, since you emphasize immediacy, that my criticism of a monetized calculus of values is that it ignores real satisfactions.

Hartog: Before we end, you wanted to express some dissatisfaction with the general body of recent work in legal history.

Hurst: A little disappointment in the lack of more published works dealing with specific case histories, in the relative absence of specific case studies of human interaction with the law. If general ideas and theories about what's going on in society are going to be anything other than moonshine, they have to be rooted in hard-bought knowledge of what in fact is happening in people's lives.

Part of the problem, that is the practical roots of this problem, is that it is extremely time costly and money costly to do things like the lumber book. I worked at that for about fifteen years. It takes money resources.

Who's going to support people over these long hauls?

Hartog: It's much easier to write doctrinal history than to write social history.

Hurst: It's not necessarily easier intellectually, but easier in terms of how long a period of time does somebody have to finance you.

My solution is to try to encourage the allocation of more gifts to universities to research endowments. I could carry on after the nearly ten years of Rockefeller money because I got a Vilas professorship [from the University of Wisconsin], which of course left me half-time free for research and writing. One solution is to encourage schools of higher education to invest more in academic time and less in bricks and mortar. If that idea could be sold, over a long period of time it would begin to have a major impact.

Hartog: But what gets people started in the field?

Hurst: My urging of research endowments isn't going to help that too much—because those endowments will probably go to people who have already gotten tenure.

Hartog: So what you need are people who have found some pleasure in doing what they are doing and so will keep on doing it.

To go back to the beginning of this interview then, there is no answer to the question why you started doing what you did, except that you liked what you were doing.

Hurst: I think I said in the beginning it was a hedonist approach. The trouble is that you have to have somebody willing to support you while you go about enjoying yourself.