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Commentaries

***197 WILLARD HURST AND THE ARCHIPELAGO OF AMERICAN LEGAL HISTORIOGRAPHY**

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Leading works published since the 1980s relating to law and the modern administrative state that privilege economy and politics--work by scholars like William Novak tracing the nineteenth-century common law roots of the modern regulatory state, Stephen Skowronek on the construction of a national administrative state, and Martin Sklar on the intersection of reform with the rise of corporate capitalism in reshaping the political economy of the American state--remain intensely engaged with the work of Willard Hurst. Leading works published in the same period relating to law and the modern administrative state that privilege gender--work by scholars like Kathryn Kish Sklar on Florence Kelley and women's political culture, Linda Gordon on the welfare state, and Leslie Reagan on abortion--do not cite Hurst in the footnotes or, for the most part, in their bibliographies. [FN1] For that matter, those from one sub-field do not cite the other and vice versa. There is a simple, innocuous explanation for these silences--we all have too much to read. Staying abreast of the most recent scholarship *198 in even one field encourages primary loyalties. Perhaps the greatest cost of the explosion in scholarship over the last few decades is the way it has encouraged intellectual balkanization as a survival strategy. There is also a second, obviously related, explanation: it is far easier to see the relevance of Hurst's work on law and the lumber industry or the modern corporation, for example, to those whose primary interests are economic than to those whose interests relate to gender. [FN2] But there is a more troubling structural explanation as well, relating to the academic world in which modern American legal history developed. This commentary addresses some of the implications of the context in which Willard Hurst worked for the reach of his vision of law in society and offers some preliminary thoughts on the possibilities for bridging the divisions in the archipelago of American legal historiography.

In his article in this issue, Dan Ernst highlights the ways in which Willard Hurst's education shaped his lifelong

intellectual elements of Hurst's education at Williams College, Harvard Law School, and in a year-long fellowship with Felix Frankfurter, followed by a year clerking on the U.S. Supreme Court for Louis D. Brandeis, all leading up to his acceptance in 1937 of a position at the University of Wisconsin Law School where he would remain for his entire career. In so doing, Ernst's article, like others in this issue, somewhat unself-consciously underlines that, like other academics of his time, Willard Hurst was trained and spent most of his active academic life in a world peopled by men. [FN3] *199 Harvard Law School did not begin admitting women until 1950, almost two decades after Hurst graduated, and women did not make up even ten percent of the class at Harvard and other law schools until the early 1970s. In the early 1930s Harvard was not exceptional--nationwide, women made up less than one-half of one percent of all law students, or put differently, men made up over ninety-nine and one-half percent of the law-student body. Law faculties were exclusively male. The legal academy, indeed the academy more generally, was a man's world. [FN4] Even the limited, but socially productive, interaction between a cohort of women social scientists and social activists and the male faculty in law and the social sciences at places like the University of Chicago at the turn of the century seemed part of the distant past by the 1930s. [FN5] A counter-reading of the articles in this issue casts a harsh light on the scholarly world of the 1930s through at least the mid-1960s, one in which letters and phone conversations from the right mentor opened career opportunities for bright young men. However bright the young *200 men whose careers were promoted, it is undeniable that this was a world of privilege defined by race, class, and gender. [FN6]

The generous, multi-year grant Hurst secured from the Rockefeller Foundation in the early 1950s, which enabled him both to pursue his own research and writing and also to direct student research, exemplifies the way this world functioned. In one letter, for example, Hurst urged the Rockefeller Foundation to fund cross-disciplinary training of "a small nucleus of promising young men" overseen by a planning committee made up of "four lawyers, and two men each" from various social science disciplines. The correspondence more generally related to the program is dotted with references to "law men," ""intellectually able men," "the law trained man." [FN7] The Rockefeller program, which provided critical funding for Hurst's Wisconsin school of legal studies, highlights a bygone era in which requests for foundation support for ""intellectually able men" and proposals to "man" committees could be completely unself-conscious of gender, reflecting as they did the structural reality of the academic world. Yet, at the same time, it suggests a world keenly conscious of gender, a self-acknowledged masculine world. As we know only too well today, the academy remained a man's domain by practices of outright exclusion, strict quotas, and, for the women who managed to complete advanced programs in law, the social sciences, and other fields despite the hurdles, closed doors in hiring. The invisibility of the barriers to all but the excluded was critical to the impression that the maleness of the academy reflected the natural state of affairs.

It would be a mistake to suggest that Hurst's inattention in his published work to issues of race, class, and gender was simply a byproduct of the lack of diversity that so marked the academic world in which he was trained, and in which in turn he trained others for most of his career. Hurst's career, after all, was marked by rebellion from the course defined for a young star from Harvard Law School in the 1930s. His move from the Northeast to the Midwest; his refusal, despite ample opportunity, to climb the ladder of the academic hierarchy; and, most importantly, his pursuit of a legal history that situated law in society were all elements of that rebellion. Its impact on both the legal academy and American history has been immense. His scholarship and the legacy he created through his students provided the foundation for the Law and Society movement. Just as important, his work played a key role in reconnecting American legal history to American historiography more generally. Yet, Hurst's rebellion, like all rebellions, had *201 boundaries. [FN8] When Hurst used the term "social history of law," he did not mean "social history" as historians would understand that term today, but rather a history of law in society. Hurst's abiding focus was the nation's economic growth in the nineteenth century, the role law had played in that process, and the emergence, at the end of the century, of the beginnings of the modern administrative state. Like other consensus scholars, Hurst did not question how women, African- and Native Americans, and even the

remained very much a man of his time. To the acknowledged ""environmental" factors that shaped Hurst's work--the economic turmoil and administrative experimentation that preoccupied the national agenda during his legal training and in which his mentors were deeply immersed, the Cold War context in which he produced most of his scholarship, and the fact that his professional academic home was in law rather than history--must be added another, equally important: the lack of diversity in academia generally and in law in particular, which both colored everyday intellectual exchange and limited what was out there to read.

That we can see the silences in Hurst's work so well is in part a credit to Hurst himself who opened up the study of "law in society." It is also, however, in critical part the product of the political and social revolutions of the 1960s, their impact on diversity in the academy, and the consequent flowering of whole new fields of study, such as social, women's and Native-American history, as well as the dramatic rewriting and mainstreaming of fields like labor and African-American history. Over the last three decades scholarship in these fields has transformed the historical picture of the nineteenth century on which most of Hurst's work focused and refuted the consensus tradition in which he wrote. As this scholarship has shown, a central condition of freedom for the few in the nineteenth century was varying levels of unfreedom for the majority of Americans. [FN10] Freedom was defined by a set of overlapping, binary oppositions--man/woman, *202 white/Native American, white/black--in which one side of the opposition enjoyed greater freedom by virtue of the other's relative unfreedom. For example, as the work of women's historians highlights, men's freedom, their very status as free citizens, depended on the legally constructed dependence of women. [FN11]

The serious engagement with gender and the legal order reflected in women's history scholarship has done more than simply shine a different light on the conditions of freedom in the nineteenth century; it has raised a series of fundamental challenges to the task of fully understanding law in society. I note four aspects of that challenge here. First, in writing legal history, we ignore individual identity--whether of race, class, gender, or sexuality-- at our peril. Second, in writing legal history we must be conscious of how law and gender, like law and race, have been mutually constitutive. Law has been as central in gender and racial formation as gender and race have been in shaping law. Third, dismissing "private" relationships like the family and marriage from broader discussions of public policy and state power ignores the process by which the law constructs such relationships as private in the first place and whose interests that construction serves. And finally, attempts to locate ""the state" must grapple with the ways in which the state has acted through private individuals, as well as with how the state constitutes itself through its lawmaking power. [FN12] In each respect, women's history, by moving beyond Hurst's focus on the formal agencies of legal process, has posed questions that go to the heart of law's role in American society. Women's history fundamentally challenges the assumption that simply by looking at legal records, even looking at all the legal records related to a given topic produced by the various agencies of law, one can see the broader interests at work. [FN13]

*203 But while the scholarship of the last thirty years demands a rethinking of the boundaries of legal history, it also unquestionably reaffirms what was at the heart of Hurst's work, that is, that law and legal process suffuse American life, that any understanding of American history must account for law. Put in terms of the scholarship of the last thirty years, law was as central in the nineteenth century to the creation of the unfreedoms that cleared the path and, indeed, formed the foundation underlying the economic dynamism Hurst traced, as it was to the "release of energy" itself.

This widespread engagement with law provides a foundation, a basis for bridging the gulfs that have left American history looking something like a chain of islands. The challenge is to reconnect the critical topics that so occupied Hurst, like technology and economy, with individual identity in the writing of an integrated American

that conort it might be productive to close with now I am grappling with these issues in my own work. Several years ago I published part of my current research in this journal, focusing for purposes of the article on cases leading up to the Supreme Court's 1896 decision in *Plessy v. Ferguson*. [FN14] As I noted there, understanding Jim Crow demands that we take account of gender. In the years following the Civil War and the end of slavery, the gendered structure of travel, with its implicit recognition of class in the form of "ladies' accommodations," led black women to predominate in legal challenges to railroad practices and regulations assigning all blacks, women as well as men, to smoking cars. These suits were fundamental in the construction of the common law requirement that separate accommodations be equal accommodations, constitutionalized in *Plessy v. Ferguson*. This argument depended on looking "beneath," if you will, constitutional law and appellate decisions to the actual trial records. These made clear the gender of those bringing suit, their assumptions relating to class, race, and gender, the assumptions of those who had denied them accommodations, and the physical structuring of accommodations in public transit. The argument also depended on moving outside the formal framework of law to study the physical structuring of space in American passenger transport, the social assumptions reflected in the organization of space and its implications for personal status, the economics of rail transport, and gender, race, and class norms of the nineteenth century.

But, as I have realized from further thought and research, even this argument was far from complete. Adding individual identity and rights consciousness to the political and legal narrative others had already constructed *204 still provides only part of the story of why Southern states resorted to statutorily mandated racial separation beginning in the late 1880s. A richer argument depends on incorporating the transformation of America's railroads in the key decade of the 1880s, the growing hostility to unregulated corporate power, and the broader regulatory movement at the state and federal level at the end of the century. In other words, an argument that adds a macro-economic perspective and couples separate coach laws with the broader regulatory push, restoring the South to the Union, if you will, is critical. Jim Crow was about far more than race, it was about corporate power, state regulatory power, federalism, and the relationship between the individual and the state in modern America. This understanding makes it clearer than ever why the railroad was at the center of Jim Crow. [FN15]

My work on Jim Crow has been fundamentally influenced by the work of Willard Hurst; it has also been fundamentally influenced by the thirty years of historiography relating to gender and race. This historiography owes a measure of its dynamism to the broader social and political revolution in which it was born and to the hostility it had to surmount within the academy itself. What seems clearer than ever today is that law provides an opportunity, a bridgework between the rich work being done in a whole array of subfields. Why live on an island when the bridge connecting it to others seems so clear?

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[FN1]. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982); Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, The Law, and Politics* (Cambridge: Cambridge University Press, 1988); Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830-1900* (New Haven: Yale University Press, 1995); Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (New York: Free Press, 1994); Linda Gordon, ed., *Women, the State, and Welfare* (Madison: University of Wisconsin Press, 1990); Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (Berkeley: University

clearer at the close of the essay, I have chosen to highlight works that have been central to my own current thinking on the emergence of the modern regulatory state.

[FN2]. J. Willard Hurst, *Law and Economic Growth: The Legal History of the Wisconsin Lumber Industry* (Cambridge: Harvard University Press, 1964); Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University of Virginia Press, 1970).

[FN3]. A striking legacy of this fact and its continued impact is that in the veritable cottage industry that has developed surveying Hurst's work and his impact on the field of legal history, every article and comment has been authored by a man. This is the third journal issue to be devoted to Hurst. For the earlier issues, see the 1975 special issue on Hurst in *Law and Society Review* and the 1980 festschrift in the *Wisconsin Law Review*. For an interview, articles, and commentary appearing outside the context of a special issue, see Hendrik Hartog, "Snakes in Ireland: A Conversation with Willard Hurst," *Law and History Review* 12 (1994):370-90; Aviam Soifer, "In Retrospect: Willard Hurst, Consensus History, and the Growth of American Law," *Reviews in American History* 20 (1992):124-44; Michael Grossberg, "Social History Update: 'Fighting Faiths' and The Challenge of Legal History," *Journal of Social History* 25 (Fall 1991): 191-201; Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57-125; Stephen Diamond, "Legal Realism and Historical Method: J. Willard Hurst and American Legal History," *Michigan Law Review* 77 (1979): 784- 94; Mark Tushnet, "Commentary: Lumber and the Legal Process," *Wisconsin Law Review* 1972: 114-32; Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," *American Historical Review* 75 (1970):744-56; Lawrence M. Friedman, "Some Problems and Possibilities of American Legal History," in *The State of American History*, ed. Herbert J. Bass (Chicago: Quadrangle Books, 1970), 3-21; David H. Flaherty, "An Approach to American History: Willard Hurst as Legal Historian," *American Journal of Legal History* 14 (1970): 222-34; Russell E. Brooks, "The Jurisprudence of Willard Hurst," *Journal of Legal Education* 18 (1966): 257-73; Earl F. Murphy, "The Jurisprudence of Legal History: Willard Hurst as a Legal Historian," *New York University Law Review* 39 (1964): 900-943. Although some of these authors have adopted a critical stance to Hurst, the complete lack of gender and racial diversity in authorship is both illuminating and troubling.

[FN4]. I am grateful here to Carol Chomsky for sharing data from her own research. See also Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* (Cambridge: Harvard University Press, 1998); Cynthia Fuchs Epstein, *Women in Law*, 2d ed. (Urbana: University of Illinois Press, 1993); Michael Grossberg, "Institutionalizing Masculinity: The Law as a Masculine Profession," in Mark C. Carnes and Clyde Griffin, eds., *Meanings for Manhood: Constructions of Masculinity in Victorian America* (Chicago: University of Chicago Press, 1990), 133-51; Jill Abramson and Barbara Franklin, *Where They Are Now: The Story of the Women of Harvard Law 1974* (Garden City, New York: Double-day, 1986). For an overview of discrimination in hiring in history departments, see Peter Novick, *That Noble Dream: The Objectivity Question and the American Historical Profession* (Cambridge: Cambridge University Press, 1988), 363-68, 469-521.

[FN5]. Ellen Fitzpatrick explores the training at the University of Chicago of Edith Abbott, Sophonisba Breckenridge, Katharine Bement Davis, and Frances Kellor in *Endless Crusade: Women Social Scientists and Progressive Reform* (Oxford: Oxford University Press, 1990). See also Sklar, *Florence Kelley and the Nation's Work*.

[FN6]. The articles in this issue by Dan Ernst, Bryant Garth, and Alfred Konefsky are most illuminating in this regard.

[FN7]. Bryant Garth, "James Willard Hurst as Entrepreneur for the Field of Law and Social Science," *Law and*

[FN8]. Scholars commenting on Hurst's work and career here and elsewhere have noted other limits to Hurst's rebellion. See in particular Garth, "James Willard Hurst as Entrepreneur," 37-58; Soifer, "Willard Hurst, Consensus History, and The Growth of American Law," 124-44; Grossberg, "Social History Update," 191-201; Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 51; Tushnet, "Lumber and the Legal Process," 114-32.

[FN9]. Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

[FN10]. See, e.g., Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998); Linda Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998); Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993).

[FN11]. On this topic see in particular Kerber, *No Constitutional Right to Be Ladies*; Stanley, *From Bondage to Contract*; Nancy Cott, "Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century," in Linda K. Kerber, Alice Kessler-Harris, Kathryn Kish Sklar, eds., *U.S. History as Women's History* (Chapel Hill: University of North Carolina Press, 1995), 107-21.

[FN12]. These points are most clearly made in Kerber, *No Constitutional Right to Be Ladies*; Reagan, *When Abortion Was a Crime*; Cott, "Marriage and the Public Order;" Stanley, *From Bondage to Contract*. In legal history, see Michael Grossberg, *Governing the Hearth: Law and Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985).

[FN13]. However laden with detail and fact, Hurst pointedly limited his inquiry to legal sources. See Hurst, *Law and Economic Growth*. This insight regarding an exclusive focus on the material of law is not unique to women's history. See in particular Tushnet, "Lumber and the Legal Process," 122, and "The American Law of Slavery, 1810-1860: A Study of the Persistence of Legal Autonomy," *Law and Society Review* 10 (1975): 119-86. The Critical Legal Studies movement offers a far more fundamental challenge to reliance on legal texts as sources for determining the actual motivations of actors. For an overview of Critical Legal Studies engagement with history, see Robert Gordon, "Critical Legal Histories."

[FN14]. Barbara Y. Welke, "When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855-1914," *Law and History Review* 13 (1995): 261-316.

[FN15]. Barbara Y. Welke, *Gendered Journeys: Railroads, Injury, and Law in the Making of Modern America, 1865-1920* (Cambridge University Press, forthcoming).

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