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Review Symposium: Retrospective on the Work of Hendrik Hartog

Response: A Muddle in the Middle

Hendrik Hartog

In this Essay, I offer two ruminations about the field of legal history, as reflected or refracted in the essays in this symposium on my work. First, the changing subjects and approaches that have characterized my work and that occasioned these essays reflect many of the changes in the field over the past forty years. Or better, they demonstrate the field's reconstruction over the past forty years. They sit between and draw on both the professional discourses of history and of academic law as each changed in the late twentieth and early twenty-first centuries. And second, those changing subjects and approaches are unified by a commitment to and an exploration of complexity and of middle spaces. That commitment represents a fundamental challenge to many of the core assumptions and practices of leading figures in legal history.

The generosity of the essays by Risa Goluboff, Roy Kreitner, Ely Aaronson and Arianne Barzilay, Galia Schneebaum, Shelly Kreiczer-Levy, and Eli Cook and Anat Rosenberg, leave me wondering how to respond.[1] I ran into Arianne Barzilay at the Law and Society Association meetings, and she gave me the right answer. Say "Thank you." And that should be enough.

So, I will. And I do. Thank you. I am inexpressibly moved by the thought and the care that went into these essays.

What more to write?

The substantive papers read my work for a dizzying array of purposes. Roy Kreitner responds to "Pigs and Positivism" both as a legal historian and as a critical legal theorist. Eli Cook and Anat Rosenberg brilliantly situate my new book on gradual emancipation in New Jersey within a core historians' debate about slavery and capitalism. Ely Aaronson and Arianne Barzilay take the framework developed in my essay on the "Constitution of Aspiration," and speculate how it might engage with a more recent historiography of African American history and of women's rights. On the other hand, Shelly Kreiczer-Levy and Galia Schneebaum regard my historical work on family law as

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I am grateful for the readings and criticisms of Nancy Hartog and Barbara Welke.

1. See (Goluboff 2019; Kreitner 2019; Aaronson 2019; Schneebaum 2019; Kreiczer-Levy 2019; and Cook 2019).

a useful tool to settle or to resolve contemporary legal and political debates that shape legal issues of our times. Risa Goluboff's introduction reimagines my writings (recreates them) as if they carried a heft and a significance that I only wish was the case. And better than ever I could, she recreates the goals and purposes that generated them.

Such a range of responses leaves me with a sense of anxiety.[2] How can mere "legal history," that is to say, my writings in legal history, occasion so much? I know I am not (entirely) responsible for how I am read. But I am curious, unsurprisingly, at what my work has stimulated. And how it might have done so.

More, I think these readings point to questions about legal history that I cannot answer here, but that I hope to return to in future writing. How to understand legal history as an epistemological practice, as something more than just what legal historians (both those credentialed professionally and those who do legal history without formal credentials) do? What is legal history good for? What does serious historical inquiry "do" in and for the law? What has brought legal academics engaged with the law as it is today to the belief that academic legal history is a useful practice or pastime? What is it about my writings that allows or encourages Shelly and Galia in particular to draw out and find contemporary legal meaning in historical portraits and narratives? Does legal history offer solutions to legal questions, both those that are perennial and those that are or appear to be new?

One reason such questions arise is because of the ascension of American legal history within the American (and, even more surprisingly, the Israeli) legal academy. No longer marginal. No longer known to be an arcane specialty that lived in the law schools only as a way for law schools to maintain a semblance of connection with humanistic scholarship and with the universities that housed them. Today there are law school deans who will say that legal history is one of a small number of standard "external" methodologies of legal scholarship and legal analysis. That is to say, or it has been said to me, that there is no formal limit to the number of legal historians one can hire to serve on a faculty.[3] I am not sure about the significance or the reality of such deanly assertions, and I am far from having worked out my own stance in relation to the "usefulness" of legal history. I may have some residual attachment to knowing myself as an adept in an arcane field. And marginality is not the worst of fates. But I am confident that I (and my students) have been the beneficiary of that ascension.

Again, I cannot offer here what I hope to figure out in the course of writing a future book on what I think of as "legal history as a pastime." But I can and will ruminate for a few pages about the field of legal history as a phenomenon reflected or refracted in the essays in this symposium and in my scholarship.

My ruminations build around two speculations: First, the changing subjects and approaches that characterize my work and that occasioned these essays reflect the changes in the field over the past forty years. Or better, they reflect the field's reconstruction over the past forty years. My work is emblematic (I am tempted to write "merely" emblematic.). It sits between and draws on both the professional discourses of history

2. Dean Goluboff thinks I should get over any sense of anxiety, that it is something of an indulgence on my part. She is undoubtedly correct.

3. So I have been told by more than one prominent law school dean. The other methodologies, so I was told, that had achieved such a status were law and economics, and normative political philosophy.

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and of academic law as each changed in the late twentieth and early twenty-first centuries. In particular, early on I fixated on a certain kind of source, the trial (and attendant and related texts), just as the field of legal history shifted toward cultural historical practices. That was a matter of lucky timing and, it reflected my semi-conscious attention to fashions emanating from early modern European history. The work that resulted embodied a kind of legal history that privileged storytelling and the reconstruction of mobile identities and individual lives, at the cost of the structural reconstructions of historically situated coercive jurisdictions, understood as embodiments of a state or of states or of an economy. In that sense, both generationally and personally and professionally and stylistically, my writings became distinguishable from those that characterized such esteemed predecessors as Morton Horwitz and Willard Hurst.

And second, my work expressed a commitment to and an exploration of complexity and of middle spaces. That commitment grew out of the effort (a lot of hard work!) to reproduce and to describe what I understood as "historical reality," or of realities as I found them in the texts and archives I worked with. I wrote to make sense of what I was exploring. But surely that commitment was also expressive of a psychological makeup, perhaps one that I shared with some others of my generation.[4] That commitment may also have left my writings available for a multiplicity of readings and uses, including some of those revealed in this symposium.

These two speculations lead me to think about who I am and about how I signify within the field of legal history. I have spent my life sitting between two fields—as a not quite good enough historian, and not quite clever enough lawyer. I have spent my life studying law historically, studying law as an arena of conflict between contending normative orders, as a site—or sites—where, with sufficient work, one might learn about some things that matter, at least if one believes that law and the effects of law matter. And I have probably also spent a good part of my life resisting much that has often been characterized as central to the history of law. Or, alternatively, I regularly discover that I am not particularly good at tasks that others would say are central to the study of the history of law, as it is usually or often practiced. In particular, I am less interested or less adept than I should be in doing deep dives into the history of legal doctrine, and I have been relatively oblivious to questions of origins. The history I resonate to and that I have produced always begins in the middle of things. *In media res*.

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There are books to be written about the conjoined transformations of legal education and of the understanding and treatment of "law" in historical writing.[5] The writings of Bob Gordon have offered an essential roadmap to the transformation in law school oriented legal history that occurred (Gordon 2018). But there is more to be done to explore the breakdown of a postwar orthodoxy in the legal academy, combined with the legitimation of the Ph.D. (in history and in a few other fields) as an

4. How to characterize that "makeup"? A start would be a sense of alienation from policymaking, a rejection of the notion that I ought to write in order to uncover better and worse public policy decisions or to clear space for better public policy decisions, in the present moment.

5. For conversational efforts to do some of this, see David Sugarman's conversation with Robert Gordon ("Robert W. Gordon in Conversation with David Sugarman" 2018) and mine with Barbara Welke (Welke 2009).

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oftentimes necessary credential for law teaching. Has that legitimation been a good thing for the training of lawyers? I leave the question for others. On the other side, within the discipline of history, in the training of professional (not necessarily law-trained) historians, there has not yet been a Gordon, and there remains much to be written about the ways that law—that is, thinking about law, researching legal archives, engaging with legal scholars—has advanced a reworking of the historical canon by some of the most gifted practitioners of the craft (Sugarman 2017).

I went to graduate school after law school, in part inspired by having read some of the writings of Willard Hurst and Frederick Maitland and in part because of the wonderful courses I had with John Reid at NYU School of Law. In my fantasies about what I would do or be as a legal historian, I carried two crude aspirations, neither of which I have succeeded at, I think. One was to demonstrate how law might offer access to the lives and thoughts of non-elites (non-professionals). The other was to reveal how law could sometimes change the world (I had not yet latched on to the word "constitute"[6]). The second aspiration drew on Hurst's exhaustive exploration of how law produced the total destruction of the northern forests of Wisconsin (Hurst 1964b). (It also surely grew from my reading in Marx and Weber and a variety of structuralist discourses about America and about capitalist forms of property holding.) The first was shaped both by the "new social history" regnant in the historical scholarship of the 1960s and 1970s and by a democratic fantasy (a characteristically liberal fantasy) that everyone (or at least a larger number of Americans than one might have expected) participated "in" the law, indeed produced or "made" the law. (I was blind to the possible conflict between those two aspirations.)

Meanwhile, like many other historians, I was also much shaped by the mantra (one that I at least drew from Maitland) that the goal of history was to lighten the weight of the past on the present (Maitland and Pollack 1968).[7] That mantra often led toward the view of the past as "a foreign country." If there was a political goal to doing history, it lay mostly in leaving present lawmakers and policymakers free or freer to innovate and to "reform." Well-done history would reveal that those lawmakers and policymakers were not constrained or bound by archaic past commitments or understandings or "laws." Or at least they were not as constrained or bound as conservative critics declared that they were. The political meaning or significance of legal history, as done professionally, as done right, was essentially critical: to challenge naive assumptions pervasive in law writing that "truth" would be found in the primordial or outdated (often racial or nationalistically established) past. It almost always led to a commitment to restraint and a challenge to the certainty that the past had a determinative meaning that could translate into contemporary knowledge and contemporary policies.[8]

6. See "Robert W. Gordon in Conversation with David Sugarman" 2018, note 5 above. I should add that John Reid's studies of law-mindedness among several different groups (those who became American revolutionaries, as well as travelers on the Oregon Trail, among others) have influenced my thinking enormously, but were almost entirely published in the years after I studied with him. For an example, see John Phillip Reid's *Law for the Elephant: Property and Social Behavior on the Overland Trail* (Reid 1980).

7. I notice that Hurst, once wrote something similar: "It is a prime service of history to free us from the servitude of uncritical acceptance of what is old or familiar" (Hurst 1964a, 10).

8. As the following "narrative" makes clear, my own barely masked presentism has meant that I have never had a clear-eyed understanding of the past as disconnected from present-day concerns. But I have also been "disciplined" to feel uncomfortable with the meanings that others might draw from the past, for the use of the present.

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Law—past or present—played almost no explicit role in graduate education in history at the time that I began my study. Both the "new social history" and "new left history" were at their apogee (Novick 1988). Neither left space for the study of law. Early on in graduate school, I was drawn into regular conversations with colleagues about whether and when law was "important." To my fellow students and to many whom I met in the course of graduate education, law seemed arcane and distant, merely technical. Or, to use the common left labels of the time, merely superstructural or at most a source of false consciousness. The assumption others made was that I had gone to graduate school as a rejection of my legal education, to escape the boredom of the law. And when I said that I was fascinated by law and even by aspects of legal doctrine, I was regularly asked: why would you want to spend your life studying something so boring?[9]

And yet, by the end of the 1970s, certainly by the early 1980s, everything had changed in the study of history. Studying law no longer needed justification. The labels of superstructure and "false consciousness" had disappeared, and they have never returned. Law became "important"—as the field on which other historical themes would be played out and as an important subject of study. And even more mysteriously, a few of the silos of the academy began to crack. Incrementally, not everywhere, but noticeably, conversations between law and history grew common—visible at academic meetings, and on some campuses.

I am the beneficiary and, I suppose, something of an embodiment of those new conversations. All of my writings reflect movements around and across the borders between the academic fields of law and history. Or to switch metaphors or clichés: I have been a passenger on the train of legal history. My work expresses the changes that the field of legal history has undergone over the past forty years.

My first book was written in the shadow of Morton Horwitz. I did not call it "the transformation of the American municipal corporation," and yet I did frame my argument around a conventional wisdom of much legal historical practice of the time: that there was one core discontinuity, and then it was all dyspeptic modernity thereafter, filled with conventional legal doctrinal categories. And though I was enough of a historian to challenge the simple doctrinal category of the municipal corporation (That is, that municipal corporations were merely agencies of the state, and therefore powerless.), I also wrote in a register that drew on the categories of the law school curriculum. I was writing to explain local government law as a subject and a field of study, as I knew it and as I was learning to teach it. Just as other legal historians of my generation were working to explain by historicizing other doctrinal categories, particularly those that found recognition in the law school curriculum.

Then, under the influence of cultural historians, I discovered trials and English and French writings about trials and customs. "Pigs and Positivism" is in many ways an homage to the work of E.P. Thompson and his students, as well as an effort to

9. There was an equivalent question that I confronted repeatedly when, a few years later, I went on to the law-teaching market. I proposed to teach a course called American Legal History. Again, one response came as friendly advice or as a kind of befuddlement: "You seem like a bright enough young fellow. Why would you commit yourself to something so deadly dull?" I should add that my informal survey suggests that the askers were often graduates of Columbia Law School, who had had to take the required "Development of Legal Institutions" course that Julius Goebel taught two generations of first-year students there.

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demonstrate that I belonged among the socio-legal scholars of Wisconsin, my new colleagues.

The constitutional rights essay came about because I was reading and digesting critical legal studies, at the same time that I was also reading much social history, particularly African American social history and the history of women's rights. It plasters a good deal of Unger on to constitutional and social history. It suffers, as Arianne and Ely suggest, from the defect of only looking at groups I liked (or had read something about). Like others, I assumed that rights consciousness meant, in its nature, the consciousness (the articulate consciousness) of the oppressed. Rights seemed at that moment to belong to the dispossessed. And it was written within a conventional wisdom of the historical profession that knew, without having to do much work, who were the dispossessed and the oppressed. It was written before I had read much in the subaltern studies literature. It also left unsettled who my subjects really were. It did not settle the question (or even really ask) whether the subaltern really speaks, in and through a constitutional register (Spivak 1988). The voices I mobilized in the essay were all highly articulate spokesmen and spokeswomen. (That said, I remain committed to the historical claim, found in the essay, that the text of the US Constitution became continuously open to a wide array of divergent aspirations and life plans and interpretive strategies. I still believe that claim challenged a constitutional law scholarship that was and is too much defined by originalism and by an over-focus on readings of a restricted range of rarified interpreters. I am, however, less confident than Ely and Arianne are that the kind of social historical work I called for then has been much forthcoming over the past three decades.)[10]

Meanwhile, I was falling in love with trials and trial transcripts, and with the possibilities for storytelling I found in them. Like others influenced by variants of post-modernism and post-structuralism, I moved away from large structural—mostly economic—narratives. Micro-histories became my overt *métier* (ignoring for the moment the many ways I continued to backdoor a variety of implicit structural narratives, including modernization narratives, into those narratives).

At the same time, all through the 1980s, while teaching at the University of Wisconsin Law School, I was privileged to participate in exciting and tension-filled conversations about feminist legal theory and women's history. Those conversations led me to think, both strategically and as a matter of historical redress, that I ought to write about the history of marriage. Family law was "cool" (for a very short moment), and it also offered a way to open up a new field. And doing so ratified my shift away from economic legal history toward the study of identifies and households. (It now seems to me that was less of a shift than I thought it was at the time.) Working on the history of marriage brought home to me the ubiquity of mobility and migration, and that led me toward the study of conflicts of laws and federalism and the challenge of a legal history in which jurisdictions were apparently less powerful. I came to understand jurisdictions more as sites than as agents, more acted on then actors. And I began to focus more on the advice that lawyers gave, and on the strategic behavior of litigants, rather than on the rulings and the opinions of judges.

10. See Goluboff's book, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, for a distinguished example (Goluboff 2016).

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The "old age" book began at Princeton University, with a memory of teaching property law in law schools, with a recollection of the pleasures (ironic but real) of getting students to talk about a case where someone about their age had devoted years to the care of a cranky older relative on the promise of the farm or the store. What happened, usually after the older relative's death, when it was discovered that the promise had not been fulfilled? How to understand a legal order that offered many reasons why the younger person should receive neither what was promised nor even ordinary monetary compensation? The discovery that cases regarding such problems were ubiquitous was entrancing and energizing. The project also drew on my own time of life, because middle-aged people like me were confronting the care of parents, as well as anxiety about the prospects for our own care. As the late Joyce Appleby said when I told her about the project I was working on (which I had imagined also as an extension into the nineteenth century of her work on the culture of early American capitalism): "You baby boomers just write about your own lives" (Appleby 2000).

My new book on Minna and gradual emancipation in New Jersey began as a spin-off of the study of care. But it was also in part inspired by my engagement with the works of friends and colleagues who were doing such interesting work on the global history of slavery. As Rosenberg and Cook note, writing about the care of the possibly enslaved Minna also took me back toward a problematic of economic legal history, now labelled as the history of capitalism, and it also led me to think anew about the roles states played in nineteenth century American economic or capitalist change.

What is obvious from this romp through the works that my gracious Israeli hosts so generously focused on is that originality is overrated and overemphasized. I am a prisoner of my times, even as I have worked hard to confront the past in its own terms.

In his essay on "Pigs and Positivism," Roy labels the trial that is my focus as epiphenomenal. It was little but a mere episode, he suggests, peripheral to the main forces that were changing city life in the early republic. He challenges my attention to the singular trial. The ambiguities and contradictions I drew out were both inevitable and properly countered by attention to the structural portrait of change that he finds better articulated in my earlier book on the corporation of the city of New York.

Likewise, in their piece on *The Trouble with Minna*, Eli and Anat can be read as arguing that I have been misled by focusing on the legal maneuvers that generated trials. Like many historians, I have overstated the significance of the documents in the archive I found. The flurries of contracts and contractual behavior that litter my sources led me to view slavery as of a piece with a contractualist and market driven world. But in doing so, they argue, I am missing a deeper—a foundational—legal structure that continued, even in gradually emancipating New Jersey. Slavery, in the end, rested on something more than market logic or market transactions. And they make a provocative and compelling case for a somewhat unfashionable perspective (one identified for many of us with the work of Eugene Genovese), one that situates the legal regime of slavery in conflict with capitalism, one that would give greater weight to the non-contractual hierarchical relationships, sometimes identified with paternalism, that continued to shape the institution (Genovese 1974). They insist that one should not be misled by the surface of contractual behavior—found in trials—that adjusted and responded to that slave regime.

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These gentle and somewhat buried criticisms challenge my focus on trials and on what might be called the cultural surface of legal behavior. What is legal history? What are the better sources or strategies for answering that question, for gaining insight into "law" in past times? Are the strategies I have used mistaken or misleading?

A serious answer to those questions is for a future day. For the moment, I want to acknowledge that my own thinking on the question of the meaningfulness of a focus on a case or a trial is incomplete and inadequately developed. I like working on trials, probably for reasons that have more to do with a desire to produce readable work than with consciously articulated theoretical or jurisprudential commitments. Like other historians, I have been seduced by a particular kind of source or set of sources.[11] I have a typical historian's desire to "do," that is to cover, an archive. But an archive of thousands of cases terrifies me. I have wanted a manageable archive, one that I could control (without an army of research assistants). And the stylistics of writing about a trial or a case or a small group of transcripts—being able to move out toward a wider field, showing my legal and historical chops by making appropriate historical and historiographical gestures, and then returning to the case or cases—appealed to me as a form of historical practice.[12]

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Several essays in this symposium notice the muddled or inbetween quality of my work. Eli and Anat call it my narratives of "blurred lines." All of them work, perhaps not entirely successfully, to make that fuzziness into a virtue.

Let me respond to their sympathetic but also gently critical responses in my own way, moving from the self-reflective to the momentarily hortatory. I see the inbetweenness in my writing as taking at least two forms. First of all, my subjects are both incompletely historicized and incompletely legalized. They sit in between. The law matters. But how much? Not as much as some think. The categories themselves are muddled. What I do is explore legal subjects that embody contradictions and multiple values. In almost all my work, there is never a singular or a driving value. I apparently am incapable of reducing what I see to a singular purpose.[13] Instead, I am a historian of the incomplete and the partial and the unresolved:

Of customs that do not quite find established form in the law;

11. I well remember the close to erotic joy I felt in discovering the published trial transcripts, dealing with divorce and seduction, housed in the New York University School of Law library.

12. When I was an undergraduate, I took a course where we read a great deal of Hegel. In the booming and buzzing confusion of Hegelian philosophy, as I experienced it, I held on to the notion of the "concrete universal," and I have held tight to it ever since. That is, I was early on entranced with the sense of the possibility of interpreting the world in a teacup, which became for me the world in a trial or in a case. The fact that such a version of the "concrete universal" gained respectability as a point of view for producing creative history, because of the work of a few cultural historians (Ginzburg and Davis are the obvious models), was a thrill. Their brilliance offered cover for what I was in any case inclined to do (Ginzburg 1980; Davis 1983).

13. For examples of singular purposes that recur in the literature: ensuring that legal elites can control capitalist development or sustaining patriarchy against the rising of women or maintaining or sustaining white power or creating a constitutional order that would be monopolized interpretively by a federal judiciary.

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Of constitutional rights that cannot be located in texts (or in established institutional readings of those texts);

Of constitutional claims that do not resolve or distinguish the "I want" from the "I have a right to";

Of marriages that are patriarchal, but also offer unexpected forms of escape and reconstruction;

Of marriages that are not, but might become, legalized;

Of contracts that were sometimes used to manage old age, within a family structure that was understood as apart from and hostile to contracting;

Of adult children and dependent parents;

Of a gradual emancipation that just kept going and going and going.

Secondly, I have tended toward periodizations that are both long and incomplete. On the one hand, in emphasizing long periodizations I did what legal history typically does, or what it has often done, since its first formation more than a century ago. Legal history has relied on longer periodizations than are common to political history. Many of us are not writing a history of events, indeed we reject the salience of "mere" events. When we take on or explore a case or a statute or what may even have been marked as a transformative occurrence, our impulse is ordinarily to situate that apparently singular occurrence within longer, sometimes multi-century, continuities. Even when we accept the transformative status of some case, statute, or event, time and energy will be devoted to the revelation of all of the continuities that helped constitute singularity, that produced an apparently singular event.

On the other hand, many legal historians rely on a different notion of periodization than I do. Their legal history describes how "we" get to a recognizable—often a reprehensible—modern legal world (here again, one can point to the recurrent trope of "the transformation" of . . .). Periodizations may be longer than in other fields of historical endeavor, but their goal is to get to an end point which is something close to a recognizable present.[14] At minimum, there is an expectation that legal history properly done will focus on the movement from a condition A (for example, a world before a market revolution or, for a second example, a world in which slaveholders were understood as engaged in a well understood system of vested property rights) to a condition B (the world of the market revolution and soulless capitalism, or the world of universal emancipation, as signaled by the Thirteenth Amendment). Most of the attention goes to the A and the B, not to the space between the two.

By contrast, I have tended to emphasize the space between A and B. I luxuriate in that temporal space, that periodization (to the point, perhaps, of exaggerating its

14. If not, the actual present, the understanding is that what remains "in the past," what will get the reader the rest of the way to "today," is either "merely" political history or something close to journalism.

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duration, its affective permanence). The absence of resolution was an explicit theme of the Minna book, where slavery never becomes emancipation (at least within the confines of the book). But both the marriage book and the old age book also sit within a largeish temporal space (I have sometimes called it "the very long nineteenth century") that almost never comes to an end. That space is also implicitly theorized as more or less frozen in its transition toward modernity, or wherever it is going. That is, I have drawn from Bourdieu's study of "practice," as well as from Hurst and others, a focus on how a particular body of practices (a *habitus)* will reproduce or sustain itself (Bourdieu 1990). The temporality, the long nineteenth century that I have explored, does not begin with the primordial premodern. But neither does it ever end in the new or the familiar. Indeed, I have given far more weight to the processes of reproduction than to endings or discontinuities. (In both of those books I wrote epilogues that sketched how different the recent modern world was. Those epilogues relied on a sharp contrast between my "space" and an imagined and discontinuous "now" that perhaps came into being in the late twentieth and early twenty-first centuries. But I offered little to explain how movement occurred from my space, my temporality or periodization, to that "now." I have never provided histories that carry out the legitimately wanted task of explaining the origins of the present. And I have sometimes been taken to task for the absence of such explanations (Case 2015).)

In any event, and here my continuing dependence on Hurst is further revealed, my primary goal has always been to show how some particular phenomenon or body of practices "worked." I am congenitally disinterested in beginnings and endings. I think questions of origins are unanswerable, or at least unanswerable with the tools at my disposal. (Was it continuities from the English Civil Wars, a market revolution, a need for global trade, or a global recession, the contingencies of particular actors with particular constitutional imaginations, who happened to be there at a particular time? Whatever.). Nor am I much engaged by the endings (let alone the transformations into the "new"). What interests me, what most excites me, is how bodies of practices, formed out of contradictory and conflicted constitutional, legal, and cultural norms, survived over long periods, even centuries, I want to understand how hierarchies and inequalities reproduced themselves, even as they were challenged and sometimes mitigated, how problems were solved in situations of both scarcity and excess, how longstanding habits of mind found articulation in legal institutions and legal practices. I am interested in what might be called the inevitable (better, the perennial or recurrent) problems of regimes or polities constructed on contradictory legal foundations. And to satisfy those interests I find myself thrust into the middle of things, not at the beginnings of periods and not at their endings. How older people secured the care of younger ones for their old age, in a market-driven world that lacked both traditional controls on the freedoms of the young and that also lacked the public and private support for the old that we today regard as our due; how lawyers and clients managed and negotiated separations, that is, how women and men who did not want to share their lives together, dealt with the legally constituted but weakly enforced permanence of the marriage bond; how slaveowners and their properties (or those who were perhaps properties, but perhaps employees) managed and negotiated over emancipations and labor.[15]

15. The model for such work, though not a model of writerly skill, remains Hurst's descriptions of all of the legislative and judicial decisions that together produced the obliteration of the hardwood forests of

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To put it another way, everything I have written, certainly all the essays and books that my interlocutors have focused on, has attempted to provide alternative readings of "law and the conditions of freedom in the nineteenth-century United States." Hurst's title, as much as the actual contents of his book, gave me something close to a scholarly mission. But the "conditions of freedom" that I picked up on have always been and remained unresolved and muddled. I fantasize that those blurred lines have allowed for a kind of clarity or insight about how lives are actually lived in the law, about the contradictions and confusions that all of us take as constituting everyday legal life (Hurst 1956).

The goal is not to resolve the muddle or the confusion of those longstanding situations, by revealing what they "really" were about. The legal history I am attaching myself to never unmasks a singular true nature. Nor does it trace or track a vector or a directionality that must inevitably get us to "our" world. Like Hurst (who drew his understanding from Dewey), I can imagine legal processes that "drift" as well as those that have "direction." Unlike Hurst, I do not think of the drift of the nineteenth century legal order as the core defect of that legal order (I would put much more weight on its many cruelties and its lack of compassion.). Nor would I find that drift optimistically or productively resolved into the directionality of the New Deal. I confess that I take pleasure in the weirdness and the odd juxtapositions that come into my field of view when I read trials and cases and statutes, without worrying overmuch about whether any particular trial or case or statute embodies drift or direction.[16]

To focus as I do on the legal practices that live on (and on and on) in the inbetween creates writing burdens that I suspect might be escaped if I focused more on directionality and on singular or dominant processes of legal change. The perspective I have adopted requires continual attention to particularities, a need to slow oneself down, a novelistic willingness to attend to the presence of multitudinous particularities, a consciousness that manages to take in the global and the local at the same time. Not a denial of changes. Indeed, I find I am constantly tracking numbers (but not innumerable) micro-narratives of change. But I do so usually without adding the pretense (or what seems to me to be the pretense) that any one of them is graced with the truth of a future directionality, of an emergent or overarching or imminent truth.

And the writing burden is magnified because of the reality that such a perspective inevitably frustrates the entirely reasonable and well-conditioned desire of readers of history for large resolutions, for endings, for solutions. Can a history that exemplifies the muddles and the complexities of our own lives, by revealing the different but similar muddles and complexities of legal lives in the past, be attractive or compelling or even accessible to present-day audiences? Is there a readership for legal histories that do not pretend to offer an answer (or at least a singular answer) to why we live as we do today? How to share with a reader my own sense of thrill in unpacking the complexities of an archaic (or somewhat archaic) legal order? Am I just engaging in a convoluted form of antiquarianism?

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northern Wisconsin (Hurst 1964b). A much more gracefully written model might be Barbara Welke's exploration of railroads and the accidents to which passengers were subjected (Welke 2001).

16. In conversation, Michael Grossberg noted that this formulation bears a close resemblance to the celebrations of complexity and multiplicity that mark the writings of the late Morton Keller, who, as it happened, was both Michael and my dissertation advisor (Keller 1994).

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So, what is it to be such a legal historian, as opposed to another sort? Why take as central to the practice of legal history the contradictory middle grounds that are what I found in legal situations? A defense of the middle ground as what some legal historians do (and perhaps what other historians ought to be doing) is for another day. But the brief version goes something like this:

Why is the exploration of middle grounds a proper approach to doing legal history? One answer might be that doing so is truer to most any archive of legal sources than any other approach. Anything else is a reification, a simplification, a repression of the contradictions and the muddle that one finds in law in the past (as in the present). By contrast, a historiography that is founded on finding or establishing the singular meanings of any law at any particular historical moment requires a denial of the reality—the historical truths—that should have been apparent (that are surely apparent) to serious students (those who explore) the legal records of the past.

(But it is also true that every research strategy involves selections and selectivity. We all have reasons why we do what we do. And there are a host of reasons why the elaboration of singular truths as imminent or emergent in law became the normal science of legal history as produced in the legal academy.)

A better answer, I believe, is that legal history is not simply a subset of argumentative policy-driven legal scholarship. Legal history ought to model a different approach to the legal record than reproducing an imitation of conventional legal scholarship. It ought to be something other than legal writing, with greater attention to past cases and statutes and treatises. Legal history is a genre of history, involves the full engagement of historical insight and imaginations. Properly done, legal history challenges the singularities that mainstream legal scholarship insist on as what it means to "do" or to think about "law." Legal history, as I imagine it, works against the isolation of a single position, the obliteration of alternatives, the rhetorical overkill that is intrinsic to legal rhetoric. It models and works at how to describe what is—so we all know—muddled legal experience.[17]

It might, but need not be, the goal of such legal history to embrace and to celebrate the muddle that is legal life. But, on the other hand, it is certainly a core responsibility of such legal history to find words that make muddle not just an incoherent mess, but comprehensible to the alien eyes of an audience (twenty-first-century readers) that has not experienced that particular muddle. That struggle for "clarity" in the midst of confusion and contradiction requires a sensitivity to the complex ways "the law" is experienced today, to our own muddles and the ways our muddles reproduce or resemble (as well as differ from) those that characterized legal life in the past. (Whether learning about the muddles that others in the past have experienced in and through the law is therapeutic for those living in our present day is a possibility, but one I leave aside for the moment.)[18]

17. On the other hand, it is surely a worthy goal of a field that might be labelled the history of legal historiography, to identify and to explore the singularities that have shaped the growth and emergence of legal history as a "discipline."

18. While it is not exactly my way of exploring and explaining the muddle, I think there is much to be gained from Hurst's identification of it with what he called "the middle-class point of view" (Hurst 1964a, 25ff).

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All that said, it remains the case that I have often felt my inbetweenness must represent a defect of character or imagination, expressive of a lack of political vision or of legal understanding. I have at times wanted to be someone different. Someone stronger, more able to articulate strong structured meanings and truths, which might mean becoming a better participant in present-day legal discourses. My own capacity to accept and to enjoy what I do as a legal historian, what I have done, is transitory and fleeting. I can tell myself that I have been absorbed in my historical sources. They are what led me toward the middle spaces. But obviously I chose the material—the archive—within which I was absorbed. And the reasons why I chose to work with that material will always remain slightly out of focus, ultimately inaccessible. I can never escape the fantasy that under other circumstances I might have been someone different, someone better, someone whose work might have made more of a difference in these terrible times.

But that is not who I am, I guess, in part because I am a legal historian. The time for apology is over. And in the end, I retain a (faint) faith that there is an audience for such (dare I label them humanistically inflected?) histories.

The essays in this symposium give me some confidence that I am not alone in my commitments and in my pleasures.

Thank you.

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