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The Origins of Modern American Legal  
History

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# The Origins of Modern American Legal History

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## **Abstract**

This essay was delivered at a conference at Harvard Law School honoring Morton Horwitz in September, 2008. It will be published by Harvard University Press in a volume of essays drawn from the conference. The essay identifies the origins of modern American legal history in the legal academy with a series of events that took place at Harvard Law school between 1967 and the mid 1970s.

## The Origins of Modern American Legal History

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### Abstract

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### I

On February 28, 1967, Mark DeWolfe Howe died. He was in his 61<sup>st</sup> year, and his death was unexpected. The preceding year he had been named the first Charles Warren Professor in the History of American Law at Harvard Law School. A 1965 bequest to Harvard University by the widow of Charles Warren, a Boston lawyer and Harvard graduate who had written several books in American legal history, had created four chaired professorships and the Charles Warren Center for Studies in American History. The professorships were in American history, American legal history, the history of American religion, and American legal history, and at the time of Howe's death only two had been filled.<sup>2</sup> Howe, whose work included two volumes of an authorized

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<sup>1</sup>David and Mary Distinguished Professor of Law and University Professor, University of Virginia School of Law. Thanks to Dean Elena Kagan of Harvard Law School for granting me access to minutes of law school faculty meetings, and to David Warrington for help with sources in the Harvard Law School and Harvard University Archives. Thanks also to Jerome Cohen and Andrew Kaufman for sharing their recollections of some of the events described below, and to William Nelson and Alfred Konefsky for reading a draft of this essay and correcting my account in places.

<sup>2</sup> Jack Davis, "The Unknown Charles Warren Center," *Harvard Crimson*, March 18, 1968. The other Warren chair that was filled promptly after the bequest was that in American history, given to Oscar Handlin. Id.

biography of Justice Oliver Wendell Holmes and a book on the legal status of religion in America,<sup>3</sup> had been an obvious candidate for the Warren chair in American legal history, being one of the few prominent legal historians in the country at the time. A year after Howe's death the *Harvard Crimson* reported that "finding a legal historian of Howe's stature" to fill the Warren Professorship in American legal history "will be difficult," especially since "there aren't many legal historians in the first place."<sup>4</sup>

The Harvard law school faculty, however, had no difficulties settling on a successor to Howe. On March 8, 1967, Dean Erwin Griswold announced at a faculty meeting that the Appointments Committee had recommended that James Willard Hurst, a professor on the Wisconsin law faculty, be appointed to the Warren chair. Hurst was 56 years old at the time. He had graduated first in his class from Harvard law school in 1935, spent an additional year doing research with Felix Frankfurter, and clerked for Justice Louis Brandeis in the 1936 Term. He had joined the Wisconsin faculty after his clerkship. Between 1950 and 1964 he had published four books, which ranged from an overview of the relationship of private law to economic development in the nineteenth century to a detailed application of his conception of that relationship to the Wisconsin lumber industry between 1835 and 1916.<sup>5</sup> Whereas Howe's scholarly interests had focused on intellectual history, jurisprudence, constitutional history, and

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<sup>3</sup> Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years* (1957); *Justice Oliver Wendell Holmes: The Proving Years* (1963); *The Garden and the Wilderness* (1965).

<sup>4</sup> Davis, *supra* note 1.

<sup>5</sup> James Willard Hurst, *The Growth of American Law: The Lawmakers* (1950); *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956); *Law and Social Process in U.S. History* (1960); and *Law and Economic Growth: The Legal History of the Wisconsin Lumber Industry, 1835-1916* (1964).

judicial biography, Hurst's were primarily centered on social and economic history, legislatures, and judicial decisions in private law cases.

The prospective appointment of Hurst seems to have been unanimously treated by the Harvard faculty as an opportunity to secure a legal historian of at least comparable stature to Howe. Griswold, in presenting the recommendation of Hurst, stated that Hurst was so well known that the Appointments Committee would not make a statement describing his work, and the faculty minutes record no discussion of Hurst's credentials. The only recorded comments on the appointment centered on whether Hurst might continue the Holmes biography (Griswold stated that the Appointments Committee had not discussed that issue) and whether, because Hurst was "at the intellectual center of an important group in the University of Wisconsin," his appointment to Harvard might be taken as a signal that either Harvard, or Hurst, were deprecating the worth of that group. One speaker felt that Hurst "was approaching the age when he would have to leave the group," and did not think he "would suffer any damage at all" as a result of the Harvard offer.<sup>6</sup>

The group in question may have been connected to a longstanding feature of faculty life at the University of Wisconsin, the "Wisconsin idea." That "idea," which had first been promulgated by Wisconsin's President Charles van Hise in 1904, urged that members of the university community partner with the elected branches of state government in drafting and implementing state-wide reformist legislation, such as the regulation of utilities, workmen's compensation, and tax reform.<sup>7</sup> In choosing to join the Wisconsin faculty after his clerkship with Brandeis, Hurst had demonstrated his ambition to fuse his academic interests with "progressive" reform at the

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<sup>6</sup> Harvard Law School Faculty Minutes, March 8, 1967.

<sup>7</sup> For more detail see Charles McCarthy, *The Wisconsin Idea* (1912).

state level. His work in legal history focused on the relationship of state courts and legislatures to changing social and economic conditions, particularly in the nineteenth century. It was scholarship designed not only to address historical topics, but to offer instructive episodes, both in a positive and negative sense, for reform-minded twentieth-century academics and legislators.

The comments by Harvard faculty members about Hurst's affiliation with an "important group" at Wisconsin may have been a way of indirectly raising the possibility that Hurst might not accept Harvard's offer. If so, that concern was justified. Hurst turned the offer down less than two weeks after it was tendered. In a March 21, 1967 letter to his friend Paul Freund on the Harvard faculty, who had also clerked for Brandeis, Hurst indicated that he written Griswold declining the offer, and advanced some of his reasons.<sup>8</sup>

"One basic factor," Hurst told Freund, was that "I just feel that this part of the country is home to me." He added that "the university here has given me working conditions entirely to my own specification," and that "I have strong ties to people here," and "find Madison...an exciting campus, in and out of the law school." Thus one of the concerns expressed at the March 8 Harvard faculty meeting was accurate. So was another: that even though Hurst might have achieved eminence at Wisconsin, and could search for new challenges, his leaving, given his importance in the Wisconsin community, might have not reflected well on him, or on Wisconsin. Hurst raised that concern with Freund, who had apparently suggested that it might be time for him to move on.

"You are right," Hurst wrote, "that there are respects in which perhaps I've done a job here, and

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<sup>8</sup> J. Willard Hurst to Paul A. Freund, March 21, 1967, Paul A. Freund Papers, Harvard Law School Library, Box 22, Folder 15.

should move to a new job.” But

at Wisconsin or at Harvard there is a new job every day in working at the vitality of the institution itself....I will say to you in confidence—I didn’t think it appropriate to specify so in my letter to Erwin—that for various reasons I think my leaving here might be quite damaging to the school at this juncture, and this would weigh on my conscience. For your sympathetic understanding of this feeling, let me appeal to LDB’s ideas about the things at stake in working at the job of maintaining diverse centers of quality in this dangerously big country.<sup>9</sup>

The remarkable speed with which Harvard had produced an offer to Hurst after Howe’s death, coupled with Griswold’s comments about Hurst’s scholarship, provide an index of Hurst’s prominence among American legal historians at the time. That fact, however, served to create difficulties for Harvard after Hurst declined the offer. Unlike most other major law schools in the 1960s, Harvard had an endowed chair in the history of American law and, suddenly, apparently no obvious candidate to fill it. In the years between the close of the Second World War and the mid 1960s, Hurst and Howe had not only been the most visible American legal historians on elite law faculties, they had been nearly the only ones.<sup>10</sup> An illustration of the depressed state of American legal and constitutional history in the legal academy during that period can be found in

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<sup>9</sup> Id. “LDB” were Brandeis’s initials. Hurst had previously turned down an offer from Yale Law School. See Charles E. Clark to Dean Acheson, January 28, 1938, indicating that Clark had offered Hurst a salary “considerably larger” than his stipend at Wisconsin, but that Hurst had declined. Quoted in Laura Kalman, *Legal Realism at Yale, 1927-1960* 276n 184 (1986).

<sup>10</sup> The only legal historians on elite law faculties of comparable seniority to Howe and Hurst in 1967 were Julius Goebel and Joseph Smith at Columbia and George Haskins at the University of Pennsylvania Law School, all of whose work in American sources was confined to colonial history. Lawrence Friedman, at Wisconsin, and John Philip Reid, at N.Y.U. Law School, were from a younger generation: they had become full professors at those institutions in 1965 and 1966 respectively. Wythe Holt had joined the Alabama law faculty in 1966, but was not specializing in American legal history at the time. No other elite law school had a member of its faculty whose scholarship was principally in American legal history.

the designation of authors for the Oliver Wendell Holmes Devise series of volumes on the history of the Supreme Court of the United States, a project that was launched in the mid 1950s. Of the eight Holmes Devise volumes initially conceived as encompassing the history of the Court from its beginnings through the tenure of Chief Justice Charles Evans Hughes, only two were assigned to members of law faculties whose principal scholarship had been in American legal history.<sup>11</sup>

On April 10, 1967, apparently in response to a request from Griswold to advise him on what Harvard might do next with respect to the Warren chair, Hurst wrote Griswold a three-page letter, sending a copy to Freund, with whom he had also discussed the question.<sup>12</sup> He took up possible nominees and “general policy.” He mentioned John Frank, then practicing law in Phoenix, Carl Auerbach at Minnesota, and Spencer Kimball at Michigan, but felt that Frank’s health “pretty well confines him to the southwestern kind of climate,” and that Auerbach and Kimball had not worked primarily in legal history. He endorsed John P. Dawson on the Harvard faculty “[i]f he were interested,” but Dawson had done almost no work in American legal history. Aside from those names, he had “canvassed appropriate headings in the law teachers’ directory, without

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<sup>11</sup> In chronological order, the Holmes Devise volumes were assigned to Julius Goebel at Columbia Law School, whose principal work had been in early modern English and colonial American legal history; Haskins; Gerald Gunther, a constitutional law scholar then at Columbia; Carl Swisher, in the political science department at Johns Hopkins University; Charles Fairman, an emeritus member of the Stanford and Harvard law faculties whose work had been primarily in constitutional history and judicial biography; and Philip Neal of the University of Chicago Law Faculty, Alexander Bickel of Yale Law School, and Paul Freund of Harvard Law School, all of whom were constitutional law scholars. Of those persons, only Swisher and Fairman had doctoral training in history.

<sup>12</sup> J. Willard Hurst to Erwin N. Griswold, April 10, 1967, Freund Papers, Harvard Law School Library. Further quotations in the next three paragraphs are from this letter.



fastening on a name I can advance with conviction.” He felt, in fact, that “the most obvious fact about American legal history as a field is the scarcity of able men devoted to it.”

That conclusion provided Hurst with an opportunity to turn to “general policy.” He suggested that “a case might be made...for treating the Warren chair for a number of years as a visiting chair with minimal formal classroom teaching duties,” so that it could be used “as a lever..to interest some first-rate men in legal history.” He felt that “we shall succeed in attracting to the field more talent...only by indirect...than by direct approach.” By an “indirect” approach he meant identifying people who were “actively interested” in one or another contemporary legal subjects (he gave “the modern corporation,” insurance, and venture capital as examples) and “talk[ing] [them] into spending some substantial time in looking at [their subjects] from the perspective of time.”

Hurst then sketched “some procedural specifics” accompanying his recommendation. A committee to provide “general oversight” for the Warren visitors would be established. A “subjectmatter field” for prospective visitors would be identified (Hurst gave “business organizations, the capital market, and antitrust” as examples), and potential nominees working in that field designated, with an emphasis “on finding younger, apparently ‘coming’ men.” A prospective nominee would be approached, and asked to consider making a two-year commitment to the visiting position, the first of which would be spent at his host institution “pursuing work in existing secondary sources, emphasizing insights to be gained by looking at his substantive area in its time dimension.” Harvard might “provide expense money to bring the nominee to Cambridge...perhaps once every three months” in that year “for continuing exploration of the subjectmatter area with the relevant Harvard Law School experts.” The next year the nominee

would commit to occupying the Warren chair at Harvard for ten months.

Hurst's comments to Griswold surely had the effect of confirming Harvard's dilemma: an endowed chair with a subject matter orientation and no apparent candidates to fill it. They also may have first planted the idea of using the chair in a different way, not so much as a base for someone already working in American legal history but as a device for recruiting younger legal scholars, currently working in what Hurst described as "a wide range of areas...involved with important substantive public policy," to investigate those areas "in the perspective of time."<sup>13</sup> As sketched, however, Hurst's proposal for the use of the chair had some difficulties. It presupposed that a committee of Harvard law faculty members could identify subject matter areas whose history might be profitably studied, and then, having done so, talk promising younger scholars working in those areas, none of whom likely had historical training, into become prospective historians of their fields. Hurst himself had been a historian of that stripe: he had no graduate training in history and, as noted, his historical research was intimately connected to his contemporary policy concerns. But virtually no one else in the legal academy, in 1967, seemed to be interested in studying the history of areas that had important contemporary policy implications. Why would promising younger scholars working in those areas want to engage in two years of historical research?

Harvard did not make use of the Warren chair in the manner Hurst proposed. But it did confront the difficulties raised by the state of American legal history in 1967 by altering its ambitions for the chair. Looking back, there was a certain logic, given the depressed market for American legal historians on law faculties, to the way in which Harvard responded once Hurst

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<sup>13</sup> Id.

declined its invitation. The precise response, however, could be described as something of a shot in the dark.

Among the relatively junior members of the Harvard faculty in 1967 was Jerome Cohen, then in his eighth year in the legal academy. Cohen had joined the Harvard faculty in 1964, specializing in Chinese and comparative law. In the spring of 1967 Cohen had attended a conference at the University of Chicago, where he had a conversation with Daniel Boorstin of the Chicago history department. Boorstin, who would eventually become the Librarian of Congress, was not a conventionally trained American historian. He was a graduate of Harvard law school who had subsequently acquired a doctorate of philosophy from Oxford, and his first work had been in legal history.<sup>14</sup>

Cohen had developed an interest in the state of legal history at Harvard because in the 1960s the Harvard faculty required a course entitled “Development of Law and Legal Institutions” for first-year students. The course was designed to introduce students to the historical dimensions of the development of common law doctrine. It was not so much a legal history course as one designed to show how current doctrine had evolved from ancient origins, and it was, on the whole, not a success with students. Cohen had become friends with Howe and Dawson, both of whom taught the “DLI” course. Cohen asked Boorstin, as a Harvard graduate who had found a career as an historian, how he might respond to the problems with DLI.

Boorstin told Cohen, in effect, that Harvard’s difficulties with DLI were just what he would have expected, given his own experiences as a law student interested in legal history at

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<sup>14</sup> Daniel Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone’s Commentaries* (1941).

Harvard in the early 1940s. Boorstin felt that law school faculties didn't appreciate historical scholarship or understand how it was done; they either thought of it as antiquarian trivia or as data that could be drawn upon for the purpose of contemporary advocacy. Boorstin said that his own historical interests had not been encouraged during his time as a law student, and the law faculty seemed to have no significant contacts with scholars in the Harvard history department. He suggested that the DLI course was implicitly conveying the messages that history was either trivial or fodder to be folded into contemporary arguments, and requiring the course only made those messages more painful for students.

Before the conversation with Boorstin, Cohen had come to the tentative conclusion that the DLI course should be abolished as a required first-year offering. After Howe's death, and Hurst's declination of the Warren chair, Cohen recognized that not only had Harvard failed to fill the Warren professorship, it would need another faculty member to teach the DLI course. Cohen decided that the vacancy in the Warren chair might provide a means for reconsidering the state of legal history at Harvard.

Griswold was to leave the deanship at Harvard to become Solicitor General of the United States in October, 1967. After Hurst declined the Warren chair and sent Griswold his recommendations for its use, it became apparent that Harvard would take no further action to fill the chair in the spring, 1967 semester. At that point Cohen made a suggestion to Griswold. He proposed that rather than recommencing a search for a senior legal historian, or a visitor, to occupy the Warren chair, funds designated for the Warren chairholder be used to create yearly Charles Warren Fellowships at the law school, which would be occupied by up to three junior scholars, and would give those persons the opportunity to pursue research in legal history. Cohen

also proposed investigating the possibility of the law school's creating a joint J.D./Ph.D. program in legal history with the Harvard history department, as part of a general effort, already underway at the law school, to relax the requirements for law students who wanted to cross-register in courses in other Harvard departments.

When Cohen approached Griswold in the spring or early summer of 1967, he already had in mind one potential Charles Warren Fellow. Morton Horwitz was a member of the Harvard law class of 1967, and prior to entering law school had received a Ph.D. from the Harvard government department, concentrating in American political theory. Horwitz had accepted a clerkship with Judge Spottswood Robinson of the U.S. Court of Appeals for the D.C. Circuit, beginning in the fall of 1967, and was contemplating an academic career. Cohen's contacts with Horwitz as a law student had given Cohen the impression that Horwitz might well be attracted to the prospect of doing research in American legal history.

Griswold, already aware of Hurst's recommendations, was receptive to Cohen's suggestion, and agreed to divert the Warren chair funds to legal history fellowships. He also agreed that the Charles Warren Fellowships could be part of what was later described as "an attractive program that will offer combined training in law and history," one that would be administered in cooperation with the history department and the Charles Warren Center and would be connected to the relaxation of cross-disciplinary registration and credit requirements for law students. Griswold formed a faculty committee, the Committee on Combined Work in Law and Related Disciplines, to initiate the law and history program. Cohen was a member of that committee. In the annual Harvard University Reports of Departments for the 1968 fiscal year, Acting Dean James Casner of the Law School stated that the Committee on Combined Work had

made formal proposals to the Faculty in March, 1968, recommending relaxation of the cross-disciplinary requirements and the establishment of the Fellowships. “Three fellows have been selected for the coming year,” Casner added, “one of whom will be supported jointly by the Law School and the History Department.”<sup>15</sup>

The selection of the initial Charles Warren Fellows had not been an elaborate process. At the time the Fellowships were created, the two principal members of the Harvard history department whose scholarship dovetailed with legal issues were Oscar Handlin and Bernard Bailyn. Bailyn, in particular, had immersed himself in the 1960s in the legal arguments about sovereignty and the political organization of republics that had been issued by pamphlet writers at the time of the American Revolution,<sup>16</sup> and had begun to work with graduate students who showed an interest in legal history. In the course of discussions about the details of a joint degree program in legal history, Handlin and Bailyn began to have regular contact with law school faculty members, including Cohen.<sup>17</sup>

As the formal creation of the Charles Warren Fellowships was moving forward in the 1967-68 academic year, Cohen asked Bailyn if there were any current graduate students in the Harvard history department who might be candidates for a Fellowship. Even though the

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<sup>15</sup> Harvard University Report of the President of Harvard College and Reports of Departments for 1967-1968 259 (1968).

<sup>16</sup> See Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); Bailyn, *The Origins of American Politics* (1968).

<sup>17</sup> The *Harvard Law Record* (law school newspaper) identified the faculty members working on the joint degree program in American legal history as, in addition to Bailyn and Handlin, Abram Chayes, Cohen, Dawson, Andrew Kaufman, and Detlev Vagts. *Harvard Law Record*, April 10, 1969, pp. 10-11.

Fellowships were to be administrated, and funded, by the law school, they would eventually be described as having been created for the purpose of training “able historians in law” as well as “able lawyers in history,” so graduate students in history were part of the candidate pool.<sup>18</sup>

Bailyn mentioned two history students, both of whom had law degrees, to Cohen. One was Kenneth Laurence, a 1962 graduate of Harvard Law School who had studied legal history in England for a year after his graduation, and between 1963 and 1967 had practiced law in New York. In the fall of 1967, Laurence had entered a Ph.D. program in the Harvard history department, and at the same time accepted a position as an editor with the papers of Daniel Webster.

The other graduate student was William E. Nelson. Nelson had received his LL.B. from N.Y.U. law school in 1965, and after a clerkship with federal district judge Edward Weinfeld, entered the Ph.D. program in the Harvard history department at the same time as Laurence. Unlike Laurence, who was in the early stages of making a transition from English to American legal history, Nelson had already resolved to write a dissertation that would be based on extensive archival research in the colonial- and Revolutionary-era Massachusetts courts. Both Laurence and Nelson seemed logical candidates for Warren Fellowships to Bailyn, and, after conversing with Cohen, he instructed them to get in touch with him.

Meanwhile Cohen had been in contact with Horwitz, and was encouraging him to accept a Fellowship beginning in the fall of 1968. After hearing Bailyn’s recommendations, Cohen sounded out Laurence and Nelson about the prospect of taking up Fellowships that fall as well. Both Laurence’s and Nelson’s financial arrangements, and other responsibilities, were less

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<sup>18</sup> Report of the President of Harvard College, *supra* note 13, at 259.

straightforward than those of Horwitz, who, having already completed a Ph.D., came with the expectation of pursuing full-time research in American legal history, and being paid wholly out of Charles Warren chair funds. Laurence and Nelson had Ph.D. oral exams to complete, and Laurence anticipated a continuing affiliation with the Webster Papers, while Nelson was in line for a graduate assistantship from the Harvard history department for the 1968-69 academic year. Eventually arrangements were made in which Nelson was designated a Teaching Fellow at the law school in addition to being a Charles Warren Fellow, and Laurence retained a reduced connection with the Webster Papers.

## II

With the appointments of Horwitz, Laurence, and Nelson, all of whom were reappointed as Fellows for the 1969-70 academic year, the sequence of events that had begun with Howe's death entered its second phase. For the next several years the Charles Warren Fellowship program at Harvard would serve as a loose sponsoring agency for research in American legal history by a group of persons who would subsequently acquire faculty positions at virtually all the major American law schools. The initial creators of the program very probably had not expected that it would have such wide-ranging effects. They were responding to the awkwardness of having a well endowed chair with no obvious candidates to fill it, and to curricular and other discomforts with the state of legal history at Harvard. What happened, however, was one of those defining moments in the history of an academic discipline.

Four related developments were connected to the emergence of that moment. First, a number of people who passed through Harvard law school in one capacity or another, between 1968 and the mid 1970s, were introduced to legal history under the expanding umbrella of the



Warren Fellowship program. Nearly all of those people were at least a generation younger than Howe and Hurst, and they received the collective message that doing scholarship in American legal history was a promising enterprise, all the more so because of the very small number of visible legal historians among Howe's and Hurst's age contemporaries. A new group of potential scholars had been implicitly presented with a new set of research opportunities.

Second, the persons in question were not in the same stages, in their careers, as those whom Hurst had prospectively identified as candidates for Warren chair visitors. They were either prospective entry-level candidates for the law teaching market who had not settled on a field of concentration, prospective candidates with some training or interest in history, or persons who had begun academic careers as historians and were considering developing legal history as a specialty. In participating in the Warren program they were not being asked to shift their scholarly orientation to become historians of a field in which they had hitherto done contemporarily-oriented work. They were asked to consider getting into American legal history on the ground floor.

Third, the Warren program provided an opportunity for a group of persons potentially attracted to legal history to talk with one another, and think about, the prospective future of the field. Out of those conversations, and ruminations, emerged the belief that American legal history might cease to be thought of as the province of antiquarians, and instead become perceived as a source of central and important contributions to legal scholarship. With that belief in place, discussions about the techniques of historical research, and the promise of various scholarly methodologies for legal historians, necessarily emerged. In those discussions participants in the Warren program began to develop their prospective scholarly identities.

Fourth, the Warren Fellowship program would eventually have the effect of expanding the market for legal historians in the American legal academy. By signaling that one of the nation's most visible law schools was encouraging junior prospective scholars to study legal history, the program was suggesting to the legal academy at large that having legal historians on law faculties would be desirable. The message was twofold. More entry-level candidates for law faculty positions be persons interested in doing scholarship in legal history, and thus accommodating the interests of such persons might be prudent. In addition, the sort of scholarship those persons could be expected to produce might be important, creating positive reputational effects for the institutions that hired them. That message was not immediately received by Harvard's peer institutions, but, as we will see, it was to have significant consequences.

By the second year of its existence the umbrella character of the Warren program was already evident. To the extent that the program had an institutional core, it was a faculty-student workshop group that met periodically to discuss projected papers, many of them in preliminary stages. The principal benefit of the workshop sessions was that they brought people together in a room to talk about legal history topics, and the conversation then spilled over into offices or hallways. Another benefit of the workshops was that they identified people as participants in a group whose "membership" was amorphous. Most of the people interested in legal history in the early years of the Warren program were not Charles Warren Fellows, and their backgrounds were quite diverse.

In November, 1969, the second year of the Warren program, the *Harvard Law Record* identified "a group of thirteen legal scholars" who "will work on American Legal History and related subjects this year." The "participants" identified by the *Record* were described as "three

Charles Warren Fellows, two Liberal Arts Fellows, two Senior Visiting Scholars, a Teaching Fellow, two graduate students, a Research Associate at the Warren Center, a first year law student and a third-year law student.”<sup>19</sup> It was clear, as another *Record* article had noted in April of that year, that “American legal history is rapidly expanding as an academic course of study at Harvard,” and that “more students and professors are engaging in an exploration and expansion of the field.”<sup>20</sup>

The identities of the “legal scholars” mentioned in the November *Record* article, and their precise affiliations with the law school, offer clues to the process by which the Warren program evolved from its initial connection to the vacancy in Howe’s chair to an umbrella operation for promoting the expansion of American legal history. Of the thirteen scholars identified, four were being funded, in whole or in part, by the law school: the three Warren Fellows, Horwitz, Laurence, and Nelson, and Morris Arnold, who had been hired as a Teaching Fellow.<sup>21</sup> Two others, Jerold Auerbach from the history faculty at Brandeis and Stanley Katz from the history faculty at Wisconsin, were Liberal Arts Fellows, appointed as part of a program that allowed outside scholars who had secured funding to come to the law school during their leave years.<sup>22</sup> The two Senior Visiting Fellows, Raoul Berger, a retired practitioner from the District of Columbia who

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<sup>19</sup> *Harvard Law Record*, November 14, 1969, pp. 3, 15.

<sup>20</sup> *Harvard Law Record*, April 10, 1969, p. 10.

<sup>21</sup> Teaching Fellows, at the time, were responsible for administering and evaluating the practice examinations and moot court participation required of first-year students.

<sup>22</sup> The Liberal Arts Fellowship program had been financed by the law school from 1966 to 1969, drawing on funds donated by the Carnegie Corporation. Beginning with the 1969-70 academic year, fellowships carried no stipend, and were made available to scholars who were able to acquire funding from other sources. *Harvard Law Record*, September 18, 1969, p. 15.

had once taught at the University of California at Berkeley, and Sado Koyama, an associate professor of law at Tohoku University in Japan, also had their own funding. Another participant, Kinvin Wroth, a faculty member of the University of Maine Law School, was spending the 1969-70 academic year as a Research Associate at the Charles Warren Center, working on the legal papers of John Adams.

As for the students, two, Maurice Holland and Jonathan Albert, had law degrees and were graduate students in the history department, and the other two, Thomas Green and “Edward G. White,” were currently enrolled in the law school and held or had completed the requirements for a Ph.D. in history.<sup>23</sup> The administrators of the Warren program, working from the original group of Fellows, had identified ten more persons who had were already in the Harvard community, or had asked to spend a year at Harvard with outside funding, and funneled them into an “informal discussion group.”<sup>24</sup> That group would also include, in the workshop sessions and in individually supervised research projects, faculty members Cohen, Dawson, Andrew Kaufman, Samuel Thorne, and Detlev Vagts.

The umbrella model for the Warren program would continue through 1977. In the years after 1970 two additional Warren Fellows, Wroth and Alfred Konefsky, would be appointed, both of whom would have affiliations with projects editing legal papers. Wroth would remain until 1974, and Konefsky until 1977. By 1971 the original Fellows were no longer holding those positions. Laurence had abandoned his ambitions to do graduate work in American legal history and joined a Boston law firm. Nelson had accepted a clerkship with Justice Byron White of the Supreme Court

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<sup>23</sup> *Harvard Law Record*, November 14, 1969, *supra* note 17, at 3, 15.

<sup>24</sup> *Harvard Law Record*, April 10, 1969, *supra* note 13, at 10.

of the United States for the 1970 Term. Horwitz had been given an appointment as Assistant Professor of Law at Harvard, beginning in the fall of 1970.

During the 1970s a cluster of law students at Harvard came under the umbrella of the program or became interested in legal history as part of their student experiences. When that cluster of students is combined with the first participants in the Warren program, a striking consequence of the program's creation can be observed. Between 1970 and 1978, fifteen persons who were either graduates of Harvard law school or participants in the Warren program became members of law faculties.<sup>25</sup> Of those persons, all have subsequently done some scholarship in legal history, and ten<sup>26</sup> have primarily concentrated on American legal history. In that same time period three other legal historians who were graduates of Harvard had already secured positions on law faculties, and a fourth in a history department.<sup>27</sup> In contrast, only four graduates of other law

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<sup>25</sup> In chronological order, the names of the persons, the dates they joined law faculties, and the institutions in question were Horwitz, Harvard, 1970; Robert W. Gordon, Buffalo, 1971; Katz, Chicago, 1971; John Langbein, Chicago, 1971; Nelson, University of Pennsylvania, 1971; Green, Michigan, 1972; Stephen A. Siegel, DePaul, 1972; White, Virginia, 1972; Stephen B. Presser, Rutgers-Camden, 1974; Daniel Coquillette, Boston University, 1975; Peter Read Teachout, Vermont, 1975; Wroth, return to Maine, 1975; Stephen C. Yeazell, U.C.L.A., 1975; Konefsky, Buffalo, 1977; John V. Orth, North Carolina, 1978.

Gordon is now at Yale, Nelson at N.Y.U, Presser at Northwestern, Langbein at Yale, and Coquillette at Boston College.

<sup>26</sup> Langbein, Wroth, and Yeazell have not concentrated on American legal history, and Coquillette's and Green's scholarship has been in English as well as American legal history.

<sup>27</sup> As noted, John Reid had joined the N.Y.U. faculty in 1962. James W. Ely, a 1962 graduate, had joined the Vanderbilt faculty in 1972, and Richard H. Helmholz, a 1965 graduate, had joined the Washington University faculty in 1972. Another graduate of the class of 1962, William C. Wiecek, had joined the history department faculty at the University of Missouri in 1968. Helmholz is now at Chicago and Wiecek on the Syracuse law faculty.

schools joined law faculties as legal historians between 1968 and 1978.<sup>28</sup>

The development just described needs some context. A number of persons not affiliated with Harvard law school, or the Warren program, had produced, and were continuing to produce, visible scholarship in American legal history in the decade after Howe's death and the creation of the Warren Fellowships. An anthology of essays in American legal and constitutional history, published in 1978, declared that "the last fifteen years have witnessed a vigorous resurgence of interest" in those fields.<sup>29</sup> It included, in its 34 essays, only four written by persons who had been at Harvard law school after the formation of the Warren program. But those figures were deceptive. Of the total number of essays in the anthology, only seven had been published later than 1970, the first year in which participants in the Warren program would have been able to produce scholarship as a result of that experience. Of those seven essays, three were written by participants in the program.<sup>30</sup>

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<sup>28</sup> In chronological order, those persons were Charles Donahue (LL.B., Yale), who joined Michigan in 1968; Barbara Black (LL.B., Columbia, Ph.D., Yale), who joined Yale in 1976; Bruce Mann (J.D., Ph.D., Yale), who joined Connecticut in 1977, and Hendrik Hartog (J.D., N.Y.U., Ph.D., Brandeis), who joined Indiana (Bloomington) in 1977. A fifth possibility, Aviam Soifer (J.D., Yale), who joined Connecticut in 1973, who has not specialized in legal history, may have entered the market as a legal historian. Donahue is now at Harvard, Black at Columbia, Hartog in the history department at Princeton, Mann at Harvard, and Soifer the Dean at Hawaii.

<sup>29</sup> Lawrence M. Friedman and Harry N. Scheiber, *American Law and the Constitutional Order: Historical Perspectives* vii (1978 ed.)

<sup>30</sup> The three essays written after 1970 by persons identified with the Warren program were Stanley N. Katz, "The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century," in *id.*, 46-52; Morton J. Horwitz, "The Transformation in the Conception of Property in American Law, 1780-1860," *id.*, 142-150; and Jerold S. Auerbach, "Lawyers and Clients in the Twentieth Century," *id.*, 353-358. The original publication dates on those essays were 1971, 1973, and 1974. A fourth essay by a participant in the program, William E. Nelson's "Emerging Notions of Modern Criminal Law in the Revolutionary Era," *id.*, 165-172, had originally appeared in the N.Y.U. law review in 1967.

### III

Scholarship in any field typically presupposes that the scholars are members of academic institutions, because a necessary first step to achieving some visibility for scholarly work, in most cases, is securing a faculty position that will support the work. In this vein, the signals that Harvard communicated to the law teaching market by the creation of the Warren program and its other efforts to promote American legal history took some time to be received. It may have been initially anticipated, when Fellows were hired and other persons encouraged to pursue legal history, that a year dedicated to research in the field would be sufficient to enable prospective legal historians who had good academic credentials to find positions in the law teaching market. If so, that expectation was overly sanguine. By the beginning of the spring, 1970 semester, no participant in the program who had the ambition of securing an entry-level position on a law faculty had reason for optimism. Only a very small number of law schools had shown an interest in hiring legal historians, and those with historians on their faculty seemed disinclined to add any more. Other law schools communicated the impression that having a goal of doing scholarship in legal history was not a positive element in a candidacy.

In addition, it was still the case, for most of the decade of the 1970s, that standard credentialing, which emphasized high grades in law school and prestigious clerkships, counted far more positively for entry-level candidates on the law teaching market than graduate training or even scholarly work in progress. This collective attitude created a dilemma for persons who wanted to go on the law teaching market as legal historians. On the one hand, it was apparent that modern research in legal history required some form of graduate training, or at least a deep familiarity with the ways in which professional historians approached and interpreted source

materials. People who began research in legal history with only a law school background often found the process of generating original scholarship daunting. Becoming a legal historian seemed to require a thorough immersion in the modes and techniques of historical research, and the Warren program, with its emphasis on identifying participants who either had both training in law and history or aspired after it, had implicitly encouraged that immersion. But it was not clear, as the decade of the 1970s opened, that graduate training in historical research was going to be valued on the law teaching market.<sup>31</sup>

That was why, in retrospect, Harvard's hiring of Horwitz in 1970 was something like a transformative event. To be sure, Horwitz had good law school grades and a clerkship, but he was hired primarily because he had successfully taught a course in legal history in the 1969-70 academic year, and because his emerging work on law and economic development in the early nineteenth century was seen as promising.<sup>32</sup> In addition, Horwitz had shown himself, in the two years since becoming a Warren Fellow, to be the sort of sparkling, penetrating conversationalist about a wide range of academic issues that law faculties cherish. With his hiring, Harvard's commitment to developing the field of American legal history became unambiguously tangible.<sup>33</sup>

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<sup>31</sup> None of the three legal historians hired at elite law schools in the 1960s, Reid at N.Y.U. Friedman at Wisconsin, and Donahue at Michigan, had Ph.Ds in history.

<sup>32</sup> That work would culminate in *The Transformation of American Law, 1780-1860* (1977), which won the American Historical Association's Bancroft Prize.

<sup>33</sup> This is not to say that the Warren program had a conscious goal of encouraging Harvard students to offer themselves as legal historians to other law schools. The idea of using the resources of Howe's chair to encourage junior scholars to study legal history at Harvard was animated by the prospect that one or more of those scholars might eventually be appointed to the Harvard faculty, as opposed to law faculties at large. Nonetheless the commitment of Harvard to an American legal history program, and the appointment of a junior scholar specializing in the field were, given Harvard's visibility, bound to be noticed by other law schools.



In the higher tiers of law schools in 1967, when Howe died, only Penn, Wisconsin, N.Y.U. and Virginia, in addition to Harvard, had legal historians on their faculties.<sup>34</sup> By the time of Horwitz's appointment only two more elite schools had added historians: Stanford an Americanist<sup>35</sup> and Michigan a prospective medievalist.<sup>36</sup> By 1980, with the appointment of Harry Scheiber to the Boalt faculty, every high-tiered school except Columbia had at least one American legal historian on its faculty, and Wisconsin arguably had three.<sup>37</sup> Allowing for some mobility, between 1971 and 1978 participants in the Warren program had secured positions on the Buffalo, Chicago, DePaul, Maine, Michigan, North Carolina, Northwestern, Pennsylvania, Rutgers-Camden, U.C.L.A., Vermont, Virginia, and Wisconsin faculties. The expansion and exploration of American legal history was now part of the experience of many American law schools.

#### IV

In 1981 Horwitz was appointed to the Charles Warren chair that had lain vacant since Howe's death. That same year Hurst retired from law teaching at Wisconsin. Those events, taken together with the striking expansion of American legal history in law schools throughout the 1970s, capped off the second phase of the events narrated here. There is a third phase to the story of legal history in American law schools in the late twentieth and twenty-first centuries, but it lies

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<sup>34</sup> Calvin Woodard, whose specialty was English legal history, joined the Virginia faculty in 1965.

<sup>35</sup> Lawrence Friedman moved from Wisconsin to Stanford in 1968.

<sup>36</sup> Donahue's first area of scholarship was property. His work in medieval ecclesiastical courts did not get underway until the 1970s.

<sup>37</sup> Hurst was a year away from retirement that year, Gordon would not leave for Stanford until 1982, and Mark Tushnet, who did not bill himself as a legal historian but has done a fair amount of scholarship in American legal and constitutional history, had joined the Wisconsin faculty in 1973.

largely outside the purview of this essay. I close by noting one feature of that phase, and then by turning back to Howe and Hurst.

Since the 1980s history has been a growth industry in the legal academy, fueled by a combination of factors that I have discussed elsewhere,<sup>38</sup> and will not belabor here. The result is that another generation of legal historians, many of them with doctoral degrees in history in addition to their legal training, have been added to law faculties. From the perspective of this article, the striking feature of this generation of legal historians is that their principal exposure to legal history did not come at Harvard law school. The primary places where they have received graduate training have been at Chicago, N.Y.U., Oxford, Princeton, Virginia, and Yale. Some have Ph.Ds from the Harvard history department, but those persons have not tended to be Harvard law school graduates. To the extent that something like the equivalent of the Warren program has existed for such persons, it has been the Golieb Fellowship program at N.Y.U., which presupposes that its participants have already selected legal history as a career choice, and could profit from advice as to how to successfully pursue that career. The Warren program was asking its participants to consider the choice in the first place.

The very success of the Warren program seems to have contributed to its current obsolescence. Initially conceived as a stop-gap response to an unfortunate sequence of events at Harvard in the spring of 1967, it became a way in which a particular age cohort of prospective legal scholars was recruited to a hitherto marginalized discipline, with the result that the discipline flourished and became integrated into American law schools. Once that occurred, and the

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<sup>38</sup> G. Edward White, "The Arrival of History in Constitutional Scholarship," 88 Va. L. Rev. 487, 570-608, 614-631 (2002).

participants in the Warren program not only entered law school faculties but began to write books and articles that extended the field of American legal history beyond the tolerably broad parameters that Howe and Hurst had set for it, there was no need for the sort of model the Warren program represented. By 1981, not only had the Warren chair been filled, American legal history was off to the races.

In a brief remembrance of Hurst on Wisconsin Law School's Institute for Legal Studies website, Hurst, who died at 87 in 1997, was described as "the father of modern American legal history." According to the description, Hurst "taught that law can not be understood as a system apart from the society that created it," and "brought the American legal experience into the mainstream of social and economic history."<sup>39</sup> The comment seems a fair characterization of Hurst's perspective and contributions as a legal historian. But if that perspective and contributions make him "the father of modern American legal history," what of Howe? Howe's concerns were not primarily with social and economic history, but with intellectual history, legal philosophy, and biography. He was highly interested in the translation of political issues into constitutional ones in America, whereas one of Hurst's goals as a legal historian was to move away from what he thought was too much of an emphasis on the decisions of appellate courts on matters of high politics.

It seems idle to debate which perspective might be more fruitful for an American legal historian, let alone which perspective could be more accurately described as "modern." And despite the great contributions of Howe and Hurst, their work did not in itself modernize the field of American legal history. Modern American legal history was born in a process, extending over a decade, in which a critical mass of persons who had been given opportunities to engage in historical

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<sup>39</sup> "More on J. Willard Hurst," *supra* note 9.

research found themselves in a position, because they were members of law faculties, to integrate that research into the core concerns of legal academics. As that integration took place, a community of modern American legal history scholars has been able to draw on the insights of their nonspecialist colleagues as well as the standards of professional historians. Howe and Hurst might be described as fathers of modern American legal history, but their fatherhood was inadvertent. A fair number of midwives also participated at the birth.