



Willard Hurst

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Oral History Interview

**Interviewed by: Laura Smail
Interviewed at: University of Wisconsin,
Madison Law School**



BACKGROUND, EDUCATION, TRAINING

SMAIL: I'll just say, to begin with, this is an interview with Willard Hurst, in his office in the Law School. Today is April 15, 1981, and I'm Laura Smail with the Oral History Project. Well, I'm going to ask you to begin with why you were born in Rockford, Illinois, and why you went to Williams and why you decided to go into law.

HURST: Well, as to why I was born in Rockford, Illinois, my parents lived there. I went to Williams because I—

SMAIL: Well why? That's part of the question. What were they doing?

HURST: Oh, my father was the superintendent of a very good piano factory in Rockford for years. It eventually closed under the impact of the Depression. But that was his central occupation and then he and his business associate got involved in local motion picture exhibition which turned out to be his main line of business. At one stage they ran most of the motion picture houses in Rockford. I grew up for a long span of years seeing every movie that- came to town.

SMAIL: So your future career had nothing to do with your upbringing?

HURST: No.

SMAIL: What about your mother?

HURST: She was a very quiet woman who stayed close to her home. So do you want to go to Williams?

SMAIL: All right.

HURST: I had a—I don't know quite where I got it, probably from some good teachers in high school, a rather romantic attachment to the idea of going to college in New England. We did a little touring one summer and were very much taken with Williamstown which is a beautiful place. It's up in the northwest corner of Massachusetts, a classic New England village, very broad main street, houses set back hundreds of feet from the street, a white spired Congregational church on a green and the college in the midst of all this—no local industry—and a rather small college at that point, 800 students. Today it's more than double that. It was also at that point an all-men's college, today its co-ed. But it was a very good college. I got exactly what I'd hoped to get out of it. It was a college with a great respect for learning and very good teaching in small classes with a good deal of emphasis on putting the students into the experience at the best level right off the bat. In my freshman year, for example, out of five courses that I had, all but one were taught by senior members of the faculty in small sections. I don't think I was ever in a section of more than thirty or forty people, at the most—usually smaller. It in some ways was a rather rough atmosphere to come into for a young fellow from a Midwest high school because Williams at that point was still much dominated by a student-body drawn from eastern prep schools who set the whole social tone and pretty much ran the politics in the place. But that was sort of a growing-up experience, too, to come into such a totally different cultural atmosphere—social strata atmosphere—as that was. I got very much involved in the college newspaper in addition to being very much engaged in the regular

curriculum—eventually I wound up as editor of the college paper. And then went on from there to Harvard Law School.

SMAIL: What did you major in?

HURST: Economics with almost as much in history. It was really sort of a mixed history-economics course that I took. By the time I was through college I had toyed seriously with the notion of going on to do graduate work in economics but I had also gotten very much interested in college in governmental processes. I decided I wanted to know more about the law from the standpoint of people who were technically competent in running legal operations. The logical place to go, especially for anybody who'd been four years in Williamstown, seemed to be the Harvard Law School which I had no trouble getting into. I had good academic standing to get into it but I wouldn't have had much trouble anyhow because this was—when I graduated from Williams it was 1932, this was the depths of the Depression. By that point seven out of nine banks in Rockford, Illinois had closed their doors, things were really bad.

SMAIL: But everybody was going to the movies I suppose.

HURST: Yes, still to some extent, so that kept the family afloat—only sort of barely. But from the standpoint of getting to Harvard Law School there was no trouble at that point because they were happy to take anybody who could pay the tuition, not like it has been in recent years.

SMAIL: So you didn't expect to become a lawyer then? You didn't—

HURST: No, I didn't, no. I went to law school to get a legal education, all right, but at that point I wasn't quite sure what use I expected to make of it except I did want to become a good lawyer. I did not go with this notion which so frequently is bandied about that three years of law school won't do anybody any harm because you can always use it in so many ways. I think that's a rather poor judgment to make. Three years of law school, at least if you take it at all seriously, is too big a thing to use up in that rather casual fashion.

HARVARD LAW SCHOOL

I found myself in a highly competitive atmosphere in the Harvard Law School. It was a very tense place then and it still is today, but in some ways a rather desirable testing place. You sort of figured that at the end of your first year at the Harvard Law School if you could survive and make it there you could probably survive and make it any place. It was that kind of an atmosphere—a very cold impersonal place—the faculty quite remote, a big student body even at the depths of the Depression, a sixteen hundred student-body.

SMAIL: At Harvard?

HURST: At Harvard Law.

SMAIL: At Harvard Law?

HURST: Yes.

SMAIL: My goodness.

HURST: Yes, it's always been a very big school, it's the biggest. I guess it still is the largest law school in enrollment in the country. I wound up at the end of the first year with grades which got me in the law review which was a very fortunate occurrence, because then, as now, at Harvard as at every place including the University of Wisconsin Law School, there's a tendency for law student morale to drop seriously after the first year. The first year is an exciting year, it's so new and the intellectual approach is so challenging, but the second and third years tend, even today when we've tried to introduce more variety, to be repetitious enough of the first so that students tend to lose interest, and that was emphatically true when I was in law school in the '30's. So that what really made the second and third years of law school alive for me was being on the law review which was like being in a very advanced seminar. The whole law review staff at that point was only about forty people. It's about doubled in today's Harvard Law School. We were doing research and writing jobs which were supposed to be of top flight quality and generally were, as indicated by the fact that Harvard Law Review student output is from time to time cited even by the United States Supreme Court.

SMAIL: So this- is it an honor to get on it?

HURST: Yes.

SMAIL: It's not like being on the Crimson, for Instance, which is to some extent—

HURST: —I think people have to earn their way on the Crimson—I just don't know— but getting into Harvard Law Review at that stage was entirely a matter of academic standing.

SMAIL: So somebody'd write to you and say you've been appointed—

HURST: Yes.

SMAIL: And the same thing is true here also?

HURST: No that has been changed at the University of Wisconsin. It used to be that way. That was the standard norm across the country for law reviews but there was a curious almost populist egalitarian strain to the student discontents of the 1960's which turned into an emotional crusade against anything that the students liked to call elitism, and they figured that naming people to the law review simply on the basis they were in the top 5 percent of their class was a form of elitism which they wouldn't stand. So over the years, at practically all American law schools, entering the law review has been opened up so that today, and this is true here, and it's true today at Harvard, true at most law schools I know anything about, the law review staff is selected only partly on the basis of academic standing and partly on the basis of a writing competition which is open to people who wouldn't fit the academic standing requirement.

When I got on, it was purely a matter of grades which in some ways was not too good for the law review because the fact that you wound up in the top 5 percent of the class did not necessarily mean at all, and this often proved out in experience, that you had the right attitude or temperament to be a good independent researcher and to be able to write the English language. So there were always a

certain number of people on the law review staff who turned out to be more or less duds because they had succeeded in accumulating high grade standings but didn't have what it took to put out good published work. However, the law review itself was a stimulating environment you had there a group of about forty who were engaged on, an enterprise they ran entirely themselves. It was a terribly time-taking enterprise. If you were on the law review the norm was that at most, in your second and third years, you went to classes, you tried if you could to read assigned material so you'd have some idea of what was being talked about in class, but you didn't settle down to do any work, any real work, to be able to stand an examination in the course, until the law review had run through its publishing season which ended approximately the early part of April every year. So law review members would start about the second week of April, with exams coming up at the end of May and the first part of June, to get on top of their courses, which up to that time they'd been merely sort of auditing. This was excellent training in many ways—really superb training and still is—and the law review is the best seminar any law school offers. Even if it's under rather indifferent direction. Because on the one hand you learn to be a completely independent worker researching and writing on your own, and you learn secondly to stand the rigors of a very tough editing process. The editing of the law review is done by the third-year students.

SMAIL: Oh, I see.

HURST: A number of the staff are selected as top editors, and the tradition of editing, on the Harvard Law Review in particular, is very rigorous so that again you learn if you can survive that you figure you'd probably survive about anything. In the third year I was elected one of the editors. I became note editor and the notes were the longest student contributions. They would be student printed essays that would run between ten and twenty printed pages liberally laced with footnotes so that I got the experience in the second year of working as an independent researcher-writer and surviving the process of merciless editing, and then the third year I became a merciless editor myself. I sort of turned around the experience. What this meant, working on the law review, was that one typically worked every day of the week including Sunday at least an eight-hour day on the law review, frequently a ten-hour day. When I was editing a note, for example, in my third year, I would typically be closeted with a member of the law review from right after lunch say starting around one or two p.m. and he and I would be together With only a break for dinner until ten or eleven at night. And to do this usual editing job took about a week, so the two of us would be hammering out his original draft together in those intensive sessions for a week. And once I dealt with him I had to turn to the next ones—

SMAIL: Did this start in September?

HURST: Yes.

SMAIL: My goodness.

HURST: It's a very high pressure operation so that anybody who lives through it learns to work under a great deal of pressure which is one reason why being on the law review staff has always been an almost sure point of entry into top level law office jobs. Law offices want people who have been through this apprenticeship. You learn how to economize your time very well. You learn how to combine high-pressure work with high-level accuracy because you're going to withstand an extremely critical editing process. So altogether it's an absolutely triple-A educational experience for

anybody who can live through it. It's pretty rigorous. We used to consider it wild abandon to take a Saturday night off and go down to the theater maybe occasionally in Boston—always felt a little guilty at doing it.

SMAIL: How many people are on the law review?

HURST: At that point about forty, between thirty-five and forty, sixteen from each class.

SMAIL: —that means from sixteen hundred—

HURST: Oh, out of sixteen hundred students there'd be thirty-five to forty on the law review, yes. This was a very select seminar.

YEAR WITH FELIX FRANKFURTER

Well, in the course of that third year I took two courses—no, took one course from Felix Frankfurter but I also had some connection with him growing out of my law review editor's work. The tradition was that while the editing was done by the student editors and they had the final word, there was always consultation with relevant faculty members on whatever the subject matter made appropriate and in the normal course in dealing with that I got to know various faculty members in a way I never would have just as another student at the school. Among these people was Felix Frankfurter and the upshot of all that was that when I graduated I went back here to the Midwest promptly in the summer of 1935 with an engagement to return to Harvard the next year as Frankfurter's research assistant with the more or less tacit understanding, and this followed regular practice, that a year following that I would go on to Washington to be law clerk to Louis Brandeis of the Supreme Court of the United States. That was how Brandeis got his law clerks, he got them through—filtered through Frankfurter's selection based almost invariably on the clerk having worked for a year for Frankfurter.

SMAIL: That's what you did, wasn't it?

HURST: That's what I did, yes. Anyway, I came back here in the summer of '35 and took the Illinois bar exam. I wanted to become a member of the bar as soon as possible somewhere. I didn't have any idea whether I'd eventually want to practice in Illinois but it seemed the logical place to take a bar exam. So I went through an intensive six-week cram course for that during the typical Chicago heat and finally took it over a course of about—I think it lasted four and one-half days at the end of July and to my relief I passed it finally. But after that summer was over I came back to Cambridge. Oh, I should say that, just to see what it would be like, during that summer I made the rounds of big Chicago law offices, behaving as if I were a normal job-seeking candidate. But the indications were I probably couldn't have gotten a job there. This was again the depths of the Depression. They weren't taking on too many people and the indication was that probably a starting salary might be on the order of \$200 or \$300 a month. Today starting salaries in those comparable offices are running—for people just out of law school and with law review experience—are running on the order of \$2,000 to \$2,500 a month—some measure of where the Depression years were and where we are now. So I went back for the year with Frankfurter. He had contracted to give three lectures at the University of North Carolina Law School the following spring on the Commerce Clause and what the Supreme Court of the United States had done with it in the course of United States history. So my chore for him for that year was to bury myself in all the material I could find about the Supreme Court dealing

with Commerce Clause issues from 1789 up to—he chose the period at the end of the 19th century—approximately 100 years, about 1789 to 1890 and I worked intensively on that, meanwhile auditing his two seminars in federal jurisdiction and administrative law. I was an auditor, not taking them for credit. I could have been doing a graduate year there with a degree in prospect but I'd been around the school for three years and seen that a graduate year at the Harvard Law School was not a satisfactory experience for the people that took it. I had gotten to know people taking a graduate year and it was really just a fourth year of law school. And I'd been through three years of law school. Because the attitude of the Harvard Law School then, as it pretty much still is today, was the rather supercilious one that they would offer a graduate year at the Harvard Law School with a master's degree in law in prospect and, at the end, possibly a doctorate in law, but essentially organized on the assumption that during the year in residence for the advanced degree anybody who hadn't had the advantage of a Harvard Law education would be polished. So they would take people who had the disadvantage of going to law school somewhere in the Mississippi Valley for example and let, them take what amounted to simply a year of Harvard Law School courses. If you were going to write an important dissertation you'd do it after you completed that year. Well, I'd seen enough of that so it was not for me. In contrast, I had complete freedom and was my own boss completely, doing this job for Felix Frankfurter, and I had the additional advantage of having him as a sort of one-man committee whom I could see whenever I needed to. And that was a very nice experience, particularly when we got to just about this time of the year, in early April—that would be in 1936. It came time for him to really get these three lectures of his onto paper, and I could type—I had prepared him lengthy memoranda, typed memoranda of my own on all the relevant background. He took those and digested them and then I went out to the house and instead of using a stenographer he and I in his study would proceed, and we proceeded this way for almost two weeks. He'd pace the floor and talk, and when he had what he thought was the right way to grab the thought he had in mind I'd knock it off on the typewriter. Then my job was to criticize it. So it was a very nice relation because it was a very real give-and-take criticism and I was supposed to criticize in the light of the year's work I had done as background on what he was putting together. If I thought he wasn't getting the proper emphasis or was not getting the proper material out of the case, I was supposed to barge in and argue with him. So we had sort of a one-man seminar there for two weeks out at his house on Brattle Street and that was very nice, I enjoyed that.

SMAIL: Did he—you hadn't put your ideas together in such a way that he would use them? He'd put himself into what he wrote?

HURST: He put himself into what he wrote. I had not written him a rough draft of three lectures. What I had done was to write him lengthy memoranda on successive phases of the court's development of the Commerce Clause.

SMAIL: Then could you get the material from Boston or did you have to go down to—

HURST: No it was—mostly it was drawn from the court's own opinions and from records and briefs so far as they've been preserved in the court, and the library resources at Harvard are immense. There might have been some things we could have picked up in Washington, but as a practical fact we had all we needed.

Law Clerk for Justice Brandeis

So at the end of that year—in September 1936—I reported to Justice Brandeis at his apartment on California Street which is right up as you mount the hill off Connecticut Avenue there in Washington. He had an apartment in an old-fashioned apartment house with a magnificent view from his own study over to the Washington Monument toward downtown Washington. California Street's up on quite a rise of ground there, so you see all of Washington spread out before you. He had a small—and I don't know what you call it—a kitchenette, utility type apartment on the floor below his apartment, just a place that would have been a small living room, bedroom and bath and a kitchenette which he rented regularly for his law clerk to work in—not to live in but to work in, and for himself occasionally to work in. So I did my daily work down there for the most part. Brandeis did not like the newly opened Supreme Court Building. He was a very austere person who did not like fanciness or show, and he thought the new Supreme Court Building was rather vulgar, with sort of the Roman imperial vulgarity that characterizes so much of the building that was done in Washington in the first part of the twentieth century. So that he never went to the court except for court days when he had to be down there because the court was sitting in argument or having conference. He made practically no use of his palatial offices down in the court except to hang his hat in them. And so we did all of our work out there on California Street except for when I would occasionally go down to the Supreme Court or the Library of Congress digging up research material. Meanwhile, I lived in a rented apartment across' the Connecticut Street Bridge opposite the Shoreham Hotel which was an easy walk from the apartment. The general routine there was that—for the most part my job was to assist in the final preparation of his opinions. At the start of the year, just to get me into the swing of things and keep me busy until the court began to hear argument and he began to get assigned opinions to write, he assigned me the job of writing him short memoranda on what are known as petitions for certiorari. The overwhelming bulk of cases that come to that court get there only with the court's permission. There's very little appeal as of right to that court. It couldn't function otherwise because it couldn't handle the volume of business that people try to bring it. So you get these preliminary briefs—they're rather limited briefs—filed by counsel on both sides of a case where one side wants to get the Supreme Court to review what's been done down below. On the basis of these preliminary briefs the court weeds out the cases the court thinks merit court attention. Some justices use their law clerks very extensively to write them preliminary memoranda on these preliminary briefs—

SMAIL: All the justices have to go through all of the—

HURST: Yes, all the justices go through all of these petitions. Brandeis clearly didn't need a youngster just out of law school to help him to do this. He'd been on the court as a master at the job now ever since 1916. So as I say he was keeping me busy essentially but also giving me some introduction to the flavor of the court. I would bring my memoranda to him and occasionally he would indicate to me what his reaction was as to whether they ought to take a case or not. It was usually much more strict than mine. I've never forgotten the occasion in which I got very exercised in what appeared to me to be gross injustice done to some poor Hindu by the Immigration Service out in San Francisco and I wrote a hot little piece. These memoranda were always very short, they were only a typewritten page or so, but I wrote a pretty strong memo that such obvious injustice had been done to this poor individual and that the court ought to take and rectify the injustice. The Justice apparently thought this was a proper occasion to give me a little instruction in the business of the Supreme Court because he took the trouble to explain to me why he wasn't going to vote to take the case. He said the court's job wasn't to see justice done, that was the business of the lower federal courts.

Their job, since they could only take 250 cases a year, was to take those cases where some important broad public policy of concern to other than the immediate individual was involved—in some ways a rather hard-boiled attitude but a necessary functional one for that court. When the opinions started to get assigned, the usual routine then was that at the end of a week of argument the court would have conference, and at the end of the conference the chief justice would assign opinions to members of the court to write. Brandeis would get an assignment of one or two or three opinions to write out of that conference. By the following weekend but certainly by Monday morning he'd have them, and he would set to work himself and write a draft opinion and then turn it over to me. My job was—in the first place, in so far as he had not cited authorities I was supposed to find appropriate authorities to cite where they were appropriate either in the body of the opinion or in footnotes. Also very important, the opinions would always tell the history of the lawsuit—what had happened that caused—that brought the lawsuit about, including the key relevant evidence of the court's ruling down below and a summary of what the lower courts had done. Brandeis would have set this all out in his opinion. My job was to check it carefully against the record of the case to be sure that every statement of fact that the justice made in his opinion could be verified—if necessary, if somebody challenged it—could be verified by a citable portion of the record of the case. So that I did an intensive annotation of his opinions. I would write him a memorandum in which, sentence-by-sentence in the opinion, I would indicate precisely where in the record of the case one could find supporting data to show that what he said was correct. Which again was very excellent training and very precise work in handling documentary evidence. And he invited—as with the year with Felix Frankfurter, it was a nice year because he treated it as a working partnership here between an aged master of the craft and a very young apprentice. The whole atmosphere was that I was there not of course to waste his time on just raising points of academic interest but I was there to argue with him wherever I found anything that I felt called for arguing. And particularly and above everything else if I thought he was doing anything incorrect either in statements of matter of fact or even most rashly of all, if I didn't think he was correctly stating the law on the basis of what was there on the statutes of the cases I was supposed to quarrel on that, and he made it very apparent very early that this was not a polite facade—that he really wanted me to do this.

SMAIL: Did you find it hard to do—were you timid to begin with?

HURST: No he—right from the start, the atmosphere was very encouraging, I felt completely free. I felt as free—as much as if I were back at the Harvard Law Review editing some piece of writing written by one of my classmates. It was a very nice working relation in that respect. There is the famous story which sort of gives the whole temper of the thing which. Dean Acheson tells in the first volume of his autobiography—Dean Acheson was I think about the third Brandeis law clerk way back—of the time when an opinion of which the Justice had written and Acheson had checked went through and only after it was in print was it discovered there was some sort of a mistake in a footnote. Brandeis left a note on Acheson's desk one morning pointing out the error and the accompanying little note simply said—and Brandeis' notes were always very succinct—said, "Dean Acheson; Your job is to correct my mistakes, not to add your own." There was in some ways a very stem atmosphere but a very responsible one.

It was an exciting year, of course, politically because I was there in the October term 1936, that is from the opening of the court in the fall of '36 through the end of that term of court in the following June of '37 that was the period of Franklin Roosevelt's court-packing bill. Needless to say the justice, who had very strict ideas about the confidentiality about everything that pertained to the court, did not sit down and just gossip with me about the- whole controversy But it was an exciting time to be

in Washington and to be involved with the court and I picked up various shreds of gossip about the controversy elsewhere. I just remember one occasion when—I can't remember precisely what I said to the justice—I saw every morning routinely about nine o'clock in the morning. I'd go up from my office to his study to see if he had anything to say about memoranda I'd left him. We fell into—the only time I can recall ever falling into conversation with him about the court—packing bill, and I can't remember just what came up but he ventured further than he would ordinarily venture in a comment and indicated he profoundly disapproved of what FDR had done and said he thought it betrayed a characteristic weakness of Mr. Roosevelt, that he had that defect which Yankees called being a "smart man" which they do not mean as a compliment. They mean smart as in a horse-trader's sense.

THE LAW SCHOOL

HURST: It was in the spring of 1937 when Lloyd Garrison who was then the Dean of the law school at the University of Wisconsin wrote me and said he understood that I had some interest in law teaching. He was going to be in Washington, would I meet him for breakfast at the Washington Hotel and we'd talk about it. The connection had been made essentially by the justice's daughter, Elizabeth Brandeis Raushenbush, who was on the faculty here at the University and whom I had met as she visited her parents from time to time in Washington. I think that's how Lloyd particularly got connection with me although he then had written the justice who had written a recommendation to him. The upshot of all that was that I accepted an invitation to come here on the faculty as against invitations I then at that time had from what was then a very lively beginning new law school at the University of Buffalo, and also from the law school of the University of Iowa. I talked to the deans of both places but I was struck right off the bat with the extraordinary quality of Lloyd Garrison, whom I had not heard of before, who was a man of tremendous warmth and excitement of personality, a very capable operating man and at the same time a man of ideas. He had an unusual combination of operational and intellectual capacity and he had very ambitious ideas about extending the intellectual range of legal education, particularly in the direction of involving it more with the social sciences and with knowledge about social structure and process. He brought me out here on a very open-ended assignment.

SMAIL: Could you wait a moment? Had you—you had thought of teaching then, he was right?

HURST: Yes.

SMAIL: Had you been aware and thinking in terms of the social sciences and wanting to—

HURST: I knew I didn't want to do just conventional law school teaching. I wasn't quite sure at that point what I meant myself by this.

SMAIL: Where did you get the idea from?

HURST: Well, I really don't know. I guess I got it partly out of my college major in economics and history where I had written a couple of papers, at college, on legal matters, but relating them to historical and economic currents. Maybe this was partly the beginning of it. Otherwise I just don't really know.

SMAIL: Is the work you did for Frankfurter—did that—because that was historical wasn't it?

HURST: That was historical, yes.

SMAIL: Was that related, was—

HURST: It was related because it was largely economic, most of what we talked about there—the Commerce Clause after all, is a central economic aspect of the Constitution. So that probably had some effect on it.

SMAIL: So when Garrison came to talk to you, you had a long conversation and you sounded him out and he explained what he was—

HURST: Yes.

SMAIL: —wanting to do?

HURST: Although I wouldn't want to exaggerate how much either he or I knew at that point, what directions we were going in. We just knew both of us shared an enthusiasm for doing some things which as of that time were rather unconventional.

SMAIL: So he hadn't started doing them yet here?

HURST: He hadn't started very much here although he'd made some beginning, particularly in the way—when I got here there already were functioning two or three joint seminars, with economics particularly, to some extent I think with sociology but particularly with economics, in which members of the economics faculty and the law faculty were joining and running joint seminars on anti-trust agricultural co-ops and collective bargaining.

SMAIL: This was realist law, is that right?

HURST: Well it's broader than realist law. The so-called realist movement was itself a break with the past but only a limited one. The realists were mainly interested only in courts, and in a more realistic understanding of what moves judges to decide the way they do. Whereas the general direction Garrison and I were interested in was much broader than simply fastening on the work of appellate courts and their opinions. We were interested in legislation, administrative process and~

SMAIL: But these seminars were accomplishing that broader—

HURST: They were moving in that direction, yes. Particularly because these—the typical joint seminar, that is, joint between the law school and some other faculty, almost invariably centered on law which was mainly statutory and administrative rather than conventional judge-made law.

THE COURSE ON LAW AND SOCIETY

Well I came here then in the fall of '37 with a very open-ended assignment from Dean Garrison, rather extraordinary—and again this shows that he was a rather extraordinary dean. Ordinarily when

a young person is recruited to join a law faculty it's just routinely expected that he will be given as many hours as he can possibly fill a day with in teaching already established conventional courses: contracts, property, that sort of thing. Instead, Lloyd told me he wanted to develop an introduction, an introductory course to be offered in the first semester of law school to introduce students to methods of legal analysis and thinking, and methods of thinking about public policy problems dealt with in law. Today this is a very conventional thing. Today there's almost no law school in the whole law school world which doesn't have some sort of legal orientation course of this type. When we put one together here we were one of two or three that were even trying this, and I think it's fair to say that Wisconsin's model is at least let's say one-third the influence that today has spawned a course like this in almost every law school in the country."

SMAIL: Did you frame the course?

HURST: Lloyd and I framed it together. What we did was to—and this melded into my early interest in history—we decided we wanted a course which would expose students to a much broader range of legal agencies than just courts. We wanted something that would involve the development of legislation and administrative law particularly. But we wanted to give them a sense of the processes of how public policy through law grows and develops, that it isn't all just there, that somehow it took time for it to be the way it is and it went through certain processes getting there. And therefore the course should be in a sense a history course, not in any antiquarian sense but a history course in the sense it would deal with the development of public policy in the dimension of time. We picked for our purposes the growth toward the workers' compensation acts because that gave you a very nice sequence which fit our desires, in which you started with a body of law about the possibilities such as they were of a worker who was hurt on the job trying to recover money damages from his employer for injuries suffered on the job. Under the law as this stood at common law, that is, law totally made by court decisions, the common law was very stringent on this. It was very difficult for an employee to find any relief in law, but there were some possibilities. But this was nice for our purposes because you moved promptly into, from about the 1870's on, into an increasing stream of legislation as the Wisconsin legislature—and this was all centered in Wisconsin—as the Wisconsin legislature began to pass specific statutes on factory safety and creating statutory" rights of employees to a safe place regarding unguarded machinery and that sort of thing.

SMAIL: This was pioneer legislation?

HURST: This was pretty much pioneer legislation in Wisconsin, although other states were beginning to have it too, we weren't unique. That gave us two of the phases we wanted. We started the students with a picture of how the law stood and how it had grown at the hands of judges. Then we moved from the 1870's on into the development of legislation. And then in 1911 with the first Workers Compensation Act we got our third phase we wanted, the administrative process, because of course Wisconsin created an industrial commission to administer the Workers Compensation Act. And we were able to interweave, throughout here, the courts, still, because we had—with our statutes, we had court cases construing the first statutes and then statutes which reacted to the way the courts construed the earlier statutes. And then we had court cases under the Workers Compensation Act, and then court cases dealing with-judicial review and administrative action under the Workers Compensation Act. So that we were able to present students with a picture of the making of public policy over a gamut of the major agencies involved, in the modern United States, in making policy, where it gave them an opportunity to compare the strength and weaknesses in making public

policy through litigation on the one hand, and through legislative process and lobbying on the other, and through administrative process finally. All of this—our intent had been to make this also sort of an elementary course in jurisprudence, legal philosophy. And therefore we interwove with the specific Wisconsin story extracts from treatises and law review articles on general problems of jurisprudence. We would, for example, take the first Wisconsin decisions which had followed the earliest employer-employee liability decisions laid down in Massachusetts and South Carolina where the first basic cases arose. We took then the first Wisconsin cases which established rights and duties of employer toward employee here largely on the basis of those east coast states' precedents. And having spent some time in the class on first the Massachusetts precedents and then what the Wisconsin courts did with them we then broke off, temporarily broke off, following the Wisconsin story and would present the students with an extract from an article on the problems of adherence to precedent in law and the way in which law grows by adherence to precedent. Later on when we started dealing with statutes we'd present them first with concrete statutes but then we'd break off and present them with a piece of writing on problems involved in the interpretation of statutes. So that we were constantly weaving back and forth between a very particularized concrete case history of the actual growth of a body of public policy doctrine and a body of general jurisprudential writing, the hope being that both sides of that would take on more meaning for the students by being interwoven that way. If they were exposed simply to jurisprudential writing without anything concrete to match it against it might seem abstract and not particularly significant to them. We hoped that in light of what they were seeing going on in this concrete experience the jurisprudential writing would seem richer and more meaningful. But on the other hand, the particular details of how the courts operated or the legislatures operated would take on more meaning for them in the light of the concurrent reading they were doing on general thinking about these processes. I think the course was a success so long as it was taught by its founding fathers. Lloyd and I had great enthusiasm for it—

SMAIL: Did he teach too?

HURST: He taught it too.

SMAIL: How—

HURST: Different sections.

SMAIL: It must have taken you a long time to get ready—to learn enough to do it?

HURST: Well, it was a very intensive job and I worked the way I had worked on the law review at that point. It helped that I wasn't married so I didn't have to think about that I owed something to a wife, to be home with her once in a while. The course continued on in later years in other hands. Some of my colleagues liked it as much as we did and I think it was a reasonably successful course. Later colleagues didn't share enthusiasm for the basic idea, and the course finally dropped by the wayside. The general idea didn't, however. We still offer general orientation-type materials to our students. That particular course, however, proved to be one which would work only if it was taught by people who were quite fired up with enthusiasm for it because basically it was in large part a course in legal history. I've discovered over the course of years in which my own interest had focused principally on legal history that you have to be rather odd to be an historian, apparently. Most people don't find the time dimension of things that intriguing. They want to deal with the current temper of things and they—I think most people are curiously short-sighted in not realizing

that there are important respects in which history is part of the present. In any case—

SMAIL: Was it mostly third-year students?

HURST: No, these were all first-year students.

SMAIL: Oh, first-year.

HURST: —In some ways we were up against a dilemma. We deliberately wanted this as a course for students in their first semester with the thought that it would enrich their understanding of everything else they took. On the other hand, time and again we had students who had more or less rebelled against the experience of the course when they were exposed to it in the first semester. Both Lloyd and I had this experience time and again of students who in their third year or after they graduated would come back to us and say, "You know, now that I've been through all of law school, or now that I'm out in practice I can see that the stuff you were giving us in that course" (we called it Law and Society) "was terribly important and very practical, but why didn't you offer it in the third year when we'd appreciate it?"

SMAIL: They're anxious to get into things the first year.

HURST: The trouble is though, that as I say, we may have been wrong pedagogically but our theory was that we would make all the rest of the law curriculum have more depth and be approached by the students with better perception if they were hit with this at the outset.

SMAIL: People have to want to know history before they're willing to learn it.

HURST: Something like that. It also demonstrates something that was once said to me by the man who was the senior member of the faculty when I first came here, William Herbert Page, who said everything ought to be taught last. And who also said on one occasion that education was the only commodity he knew of for which people did not want their money's worth.

SMAIL: Those are both very nice.

HURST: Yes. Well, I got into—I already was in legal history more or less with that course, putting that course together and running it, but I knew by the end of my first three years here, I'd say 1940 or so, that in the long run I wanted to make American legal history my central focus of interest and I wanted to treat it in a very broad way. I wanted to treat it in a social-scientist way—I wanted to be interested in legal history not as the purely internal institutional history of legal agencies but a history of law in relation to the surrounding society. In effect what I wanted to do was to try to do what Roscoe Pound had preached years ago. He preached what he called a sociological jurisprudence in which he preached the need of more legal research and writing which would relate the institution of law to the other key institutions of the society and how they interplayed with each other. Then the war came along, of course, and I went off, and that provided an interruption until I got back here in 1946 to resume this historical emphasis.

LLOYD GARRISON

SMAIL: O.K. Now I'll interrupt you because I have quite a few questions to ask you about Garrison and this seems like a good time to do it.

HURST: O.K.

SMAIL: So we'll sort of turn to him for a while. Do you happen to know who got him here?

HURST: I know very little about that but I do know he was one of the products of several dean searches conducted by the then president Glenn Frank who, judging by—I'm speaking now very much at secondhand—but my impression is that while Mr. Frank became an object of a good deal of criticism he was an extraordinarily good man at picking deans. He picked several deans around this place who were very creative and capable people and one of them was Lloyd Garrison whom he plucked out of a busy New York law practice at that point and brought here in the early 1930's.

SMAIL: So you attribute it largely to Frank?

HURST: Well that's my understanding—again this is secondhand—but I was always told* that Lloyd had been in large part Frank's recommendation. He came out—Lloyd came out, of course, and apparently made a considerable hit with the law faculty in sitting around talking with them and whatnot. He, in other words, came into a situation where he found colleagues—it was a small faculty then. When I joined it in 1937 I think I was the fifteenth member: today we have forty-six full time, I think. I was told that the law faculty was quite enthusiastic about Lloyd right from the start, in contrast to the bar. The Wisconsin Bar over the course of Lloyd's years here—I'm not quite sure what was his first year here, I think it was about 1934 or '35.

SMAIL: '32.

HURST: Was it '32—as early as that? The bar over the course of his some nine years then that he was actively on campus in large measure acquired a very great distrust of him as a wild-eyed radical. You didn't have to be very far left of center to be a wild-eyed radical in those years, at least in Wisconsin. And some of this attitude, I gather, made itself felt on the Board of Regents. I'm speaking now completely at third or fourth-hand. I have no firsthand knowledge of all this. Lloyd had gotten involved by past experience, and then when he was dean, with the beginning—the first beginnings of the law's protection of collective bargaining. He was drawn into this first in the period of the National Industrial Recovery Act, the famous Section 7A of the National Industrial Recovery Act which was sort of the very pale forerunner of the Wagner Act. And then the first body set up to try to do something under 7A. Lloyd got involved in, and he was off and on—without neglecting his work here, he nevertheless was off recurrently in Washington as one of the first people who got actively involved in the efforts to keep labor peace on the national front, and this I think did him in in the eyes of the conservative Wisconsin Bar at the time. I think the temper of the time is considerably changed today. I think today the Wisconsin Bar would pretty much take in stride a dean in the law school who was actively involved in the administration of modern labor law. In fact I think the sophisticated conservative bar, at least as represented, say, by the big law offices in this city and in Milwaukee, would regard it as essentially conservative for I don't mean it in a political sense as much as in a social sense—it's desirably conservative that a member of the law faculty be involved in trying to help the system of labor-peace work. But in the 1930's this was a very different temper of affairs and merely to be involved at all with the law's efforts to protect and promote collective

bargaining was regarded as radical. This stamped Lloyd in the eyes of many influential lawyers in Wisconsin, as, I gather—again as I say, second or third-hand—as a rather suspect character.

SMAIL: Now his effort to incorporate the Wisconsin Bar which—I don't ' understand what that means but I know it's something he tried to do. Would that—

HURST: He became very enthusiastic about the notion that the bar needed more internal discipline in order to assure that lawyers were rendering proper service to clients, being both efficient, conscientious, and honest, and that existing methods of disciplining the bar were inadequate to this. And secondly that the bar needed more policy leadership, and that the bar should be a leading opinion factor in the improvement of the legal order and he thought it was slack and largely indifferent and ineffective in that respect. And to all that end he thought there ought to be created a stronger bar organization which would not be a voluntary organization. The typical bar association of the past has always been a voluntary club—people joined it if they chose to and didn't join it if they didn't want to, Lloyd thought that all lawyers should automatically be a member of the bar association simply by being admitted to the bar and being required to stay in the bar association as a condition of practice. This is a way he hoped of elevating the efficiency and the conscientiousness and the basic honesty of the bar and of, as I said, increasing its sense of responsibility to play a creative role in public policymaking. He wasn't around here to see this idea come to fruition as it now has in the integrated bar, and I think in many respects he'd be quite disappointed by the fruition. There's been a good deal of discontent inside the bar today with various aspects of the leadership of the integrated bar,

SMAIL: It took a long time then?

HURST: Oh it took a long time. It didn't happen while he was here. It came after—sometime after the war.

SMAIL: Was that what made him unpopular with the bar?

HURST: That idea?

SMAIL: Yes.

HURST: I'm sure it would have made him unpopular with some but he didn't— that wasn't a principal thing that he was involved with while he was on campus here so I don't think it really figured significantly in the degree of distrust of him.

SMAIL: Maybe if he—some of the letters I've read suggested that he was very much concerned about it.

HURST: Oh he was. He was propagandizing for the idea.

SMAIL: But you mean he wasn't actually doing anything substantial, he was—

HURST: Well I can't testify from first hand. I think it was in the talk stage.

SMAIL: So that just happened recently?

HURST: Yes—yes. Lloyd was a terrific dean in many respects but in two in particular. He believed that the law school should be a place which would have a great ferment of ideas about legal order. And he encouraged his faculty to be idea people, and corollary to that he encouraged them to be research and publication-minded people. And on top of all that he was a man whose whole instinctive approach to life was positive. Some administrators, we fortunately have never had one of this type here—

SMAIL: Here in the law school?

HURST: In the law school. Some administrators seem by instinct to be negative. Their whole instinct if a member of the faculty brings them an idea is to find a reason why you can't do something about it. Some of them are passive and that has been more characteristic of our deans other than Lloyd Garrison. There's something to be said for passive deans providing they are willing when their faculty stirs them into action to be willing to jump in and give backing to their faculty. There is something to be said against more active deans. An active dean can be a very dangerous character on a faculty because if he is a dogmatic, doctrinaire kind of person, and on top of that is intellectually ambitious, and wants his school to become known as his school he is very likely to make it a bed of Procrustes and try to force all of his faculty members in their teaching, their research, and their publication to follow lines which fit his notion of what the school ought to be putting out, so that it's a very two-edged tool to go around looking for a dean of ideas and of positive thrust—very two-edged. The Yale Law School has had lots of troubles over all the years that I've know it, in large measure because they've always had ambitious deans whose ambition has usually led them to want to make their own personal stamp on the school. Lloyd was not that kind of a dean. He was ambitious in a very selfless way. He wanted his law school to be ambitious as a school. He wanted it to reach out to broader intellectual horizons and to be productive in scholarly research and publication and to be full of new ideas about how better to teach law, but all of this not because he wanted the Garrison idea to become known over the country. And all of this in turn flowered into the fact that particularly for younger members of his faculty he was a tremendous source of encouragement. If you had an idea about doing something different and you needed scope to do it, say by being allowed to teach an experimental seminar or to change course content, or if you were seeking for some form of released time in order to pursue a research line, you always knew with Lloyd that the first reaction was going to be—he would want to hear you out and then secondly his almost instinctive reaction was, "Now let's see how we can do this." You just never heard from him, "Well that might be a good idea but the budget won't allow it," or, "I don't think I could sell that on Bascom Hill," or what have you. It was always a positive approach of a very unselfish kind in which he was not trying to make himself the center point. The result was that he had a faculty which just crackled—it was a very alive place, naturally enough.

SMAIL: The older members took to him also.

HURST: The older members liked him on the whole. Some of them liked him in sort of a tolerant way. They thought he had some newfangled ideas that they didn't always go along with, but he was personally very popular with his faculty. I was never aware of any degree of serious personal friction between him and anybody on the faculty, which, with some men, of course, might mean that he was a cream puff or that he didn't amount to anything. It definitely did not mean that with Lloyd

Garrison, who was very much of a character.

SMAIL: You could tell from his letters. They're really just wonderful.

HURST: Yes.

SMAIL: He wrote a recommendation for the daughter of a friend who wanted to get into Brearley and he said her father had come up from the ranks and was a good man; her mother had had a nervous breakdown, and the last time he saw the girl she'd been a skinny young thing but he rather thought they ought to take her.

HURST: Lloyd is the best law dean—in my mind, is the best law dean that has been in the law deaning business in the whole United States in the years that I've been involved in this business. There are only two or three people I would remotely rank with him. One of them is Edward H. Levi who was dean at Chicago for some time—a very first rate dean; maybe Frank Strong of Ohio State. I'm probably leaving out one or two, but at the most the law school world has not been—I'd add Carl Auerbach up in Minnesota—the law school world as I've known it from 1937 up here to 1981 has not been characterized by any great quantity of intellectual leadership in its administrative ranks. It's true in good law schools generally as it's been true here that the intellectual leadership in the law school world has come out of individual faculty members and not out of administrative ranks. So that when I say Lloyd is—in one sense when I say he's the best law dean in the business and that he'd certainly rank in the best three or four I'm not giving him awfully high praise because I'm comparing him with a level which on the whole has been conscientious, devoted to duty and all that, but on the whole unimaginative.

SMAIL: That's interesting you should say that because in his letter to somebody who asked whether he'd be interested in the Harvard deanship in I guess 1934, he said, "It's nice of you to ask and I would be interested but you ought to get a much more intellectual—" I don't think he used that word but somebody who'd done a lot more publishing and was—maybe he did use that word.

HURST: Lloyd was still a little conventional himself at that point. He changed rapidly over the years between then and 1941.

SMAIL: Oh I see.

HURST: He himself grew immensely I think. He just took fire out at this place; he loved the Madison setting.

SMAIL: When he was the head of the National War Labor Board in 1934 they wanted him to stay and apparently he wanted very much to stay—he felt he was still needed—but Glenn Frank said he must come back and the regents did also. Do you—this was before you came—

HURST: Yes. I'm very glad they got him back as a matter of fact. I think he was-

SMAIL: Did he ever talk to you about it?

HURST: No, he never did. I just know he was always very deeply interested in the role of national

law in the labor relations field as he showed of course during World War II when he was deeply involved with it again. No, he never talked to me—

SMAIL: But they were right, then, you think?

HURST: I think they were right from the standpoint of legal education. I think he made a more unique contribution to legal education than he did to the labor relations field. There were other people around with his savvy and enthusiasm for that field but a great scarcity of people like him in legal education.

SMAIL: I would like you to—I saw a reference—and you know someone else reading these files would find this too—he's recommending several men for a position and he refers to Katz at Chicago whom he said is the outstanding person in his field and he goes on to say, "He is a Jew but he has a fine personality and is a gifted teacher and an outstanding scholar," and I was struck by the comment.

HURST: Well I think Lloyd had not a trace of anti-Semitism in himself. I think in the first place I'd have to know something about the person he's writing that letter to. He may well have figured he was writing someone to whom the Jewish factor would be a bother and that therefore he had to grapple with it.

SMAIL: Yes—that's very likely it. From what Phil Cohen said I can imagine that one would have to do that with many administrators.

HURST: Well, and Lloyd had come out of—just immediately out of the atmosphere of top level law practice in New York City which in the early 1930's was very anti-Semitic. He would be aware of the fact that you'd be likely to encounter anti-Semitic attitudes among many lawyers, particularly lawyers of influence of the sort you might be writing letters recommending somebody to. Again I say Lloyd had not a trace of anti-Semitism- in him, but he would be all too well aware that many of his confreres at the bar of that day would be anti-Semitic. In fact, in the early 1930's I think it was still true that it was almost impossible for an able Jewish law graduate of the Harvard Law School to get a job in one of the—any one of the top New York law offices. It's only in recent years that that factor has disappeared. If you were a Jew in the early 1930's and were ambitious to get into a big corporate law office in New York you'd better look to one which was known more or less as a Jewish firm.

SMAIL: I see, it's a—

HURST: That would all tinge this little episode.

SMAIL: Yes, it certainly would. In fact I'm glad I asked you because I did read it the other way and as soon as you say that I realize that, of course, would be the consideration. And he didn't actually get Nathan Feinsinger here—

HURST: No-Nate was already here.

SMAIL: Yes. But I gather that—

HURST: They became very close, personally very close.

SMAIL: —Feinsinger in effect, well—worshipped is too strong a word, but was very strongly-oh, Abner Brodie was telling me that, that he—

HURST: Well, they were very devoted to each other. They found themselves very much in tune, and I think Nate Feinsinger of course went on to become one of the country's outstanding experts in the field of modern labor law and collective bargaining. This I think can almost completely be attributed to the influence of Lloyd Garrison because Nate Feinsinger started here never having had the slightest connection with labor law. He taught commercial law fields and domestic relations and it was Lloyd's influence and interest which brought him into the labor field.

SMAIL: Actually I gathered it was chance in a way. Bill Rice left and Nate Feinsinger had to teach his course in labor law. Were there any other Jews on the faculty here in the 1930's—in the law school?

HURST: I don't believe so. I can't remember any Jewish colleague. Since then, of course, a number of the faculty have almost always been Jewish.

SMAIL: Phil Cohen's remarks on the medical school really—because he was accepted personally, they liked him, but he would get open reactions to himself. And they'd say, "You know, you're fine, you're alright—"

HURST: Yes.

SMAIL: Anyway, Let's see, then—I guess we won't comment on this Benton correspondence with La Follette that I told you about—Hans Kohn—

HURST: I wouldn't have anything firsthand, except I do know that Lloyd was very disturbed, extremely disturbed and finally broke his personal relations with Phil La Follette over Phil's formation of that screwy political party of his,

SMAIL: Really?

HURST: Yes.

SMAIL: What was it? The National Progressive Party?

HURST: Something of that sort. Yes. They had been quite close friends over the years prior to that here, and Phil La Follette—the break was Phil's more than Lloyd's. Lloyd was very distressed at the turn taken by that new party effort of Phil La Follette's but it simply wasn't in Lloyd's temperament for him to have thereby written Phil La Follette off his slate of friends. But that was the way Phil La Follette was. As soon as Lloyd fundamentally disagreed with him Lloyd was out in outer darkness as far as Phil was concerned. That was the kind of a person Phil La Follette was.

SMAIL: That's interesting. What about Frankfurter, because again Feinsinger said something—and

this had to do with support for the war and Abner Brodie thought that it couldn't have been Frankfurter, that it was one being against the war, against joining, and the other being—

HURST: Lloyd was very much against this country's becoming involved in the war. He thought it was a basic mistake, that we should have held ourselves out of it, I'm not quite sure. I never heard him spell out his full policy ideas as to just what he thought we should do, but he did not want us to become involved. He thought our involvement in World War I had been not for the good on the whole.

SMAIL: He wrote a long letter to a man in England saying that they—he'd like to know what their ideas for peace were and that they ought to begin to think of negotiating now and think of how they could get along with Hitler and the Nazis if they had to. It's 1938. Well, how much do you know—you must know about his final departure.

HURST: Not really a great deal. See when Pearl Harbor came—

SMAIL: Oh, excuse me, before we get on to that. The four-year curriculum, did he seriously push that?

HURST: No, we talked about it. And we were interested in the experiment which was run up at Minnesota along those lines but we never pressed hard for it.

SMAIL: O.K.

HURST: Lloyd's departure from here more or less took place all away from here that is the circumstances surrounding it. I was in wartime Washington at that point, he was too. And I heard little scraps from him over the course of the years from 1942 into 1945-6 indicating he was of uncertain mind whether he was coming back here or not. He and his wife, one must realize, are very bred-in-the-bone New Yorkers.

SMAIL: Yes.

HURST: New York is a place they love, life-long family ties there and long ties of friends. And in some ways it was quite an oddity that they ever came out here in the first place, although they made themselves very promptly very integral members of some circles of the Madison community. They were just that kind of people. They were just tremendously attractive people to a wide circle of people in Madison. At the Garrisons' you were likely to encounter, in a way that you rarely encounter in this town, mingled parties drawn equally from Shorewood Hills and from Maple Bluff. But they were basically New Yorkers. They had ties of aging parents to bring them back to New York anyhow. And now I'm speaking completely on second or third hand, but there had been a temper of distrust toward Lloyd's ideas, what some people in the regents felt was radicalism, so that he was aware that the regents—

SMAIL: Political radicalism or radicalism in regard to the law school?

HURST: No, political radicalism. Particularly he was involved in—as I say it seems a little foolish in 1981 but the mere fact that he was involved, in trying to bring about a condition of peace in labor

management relations in this country was viewed as subversive by many people in the 1930's. It seems almost irrational today but that was the temper of those times. He was aware of all that. And that's all I know about it. I just know we had a rather sad meeting at lunch one day down in the cafeteria of the Labor Building in Washington when he told me he was definitely not coming back. We were both quite disturbed by his decision, but that's really about all I know about it.

SMAIL: He expected to come back, from the correspondence. I mean, he was talking—he said "I would like to consider forming an industrial relations institute when I come back."

HURST: When did he write that?

SMAIL: That was at the end of 1940 the last year of Dykstra—I guess '44. There's a folder on Garrison in Dykstra's last file, but E. B. Fred's file has one memo from a judge in Wisconsin saying he thought ought to keep Garrison, he'd done wonders for the morale of the law faculty and he had gotten two good people here—Hurst and somebody else, and we ought to get the opinions of other people in Wisconsin. And that's the last thing that I could find about it, there was nothing in E. B. Fred's file so—

HURST: I really can't fill the gap and I can't quite think either who might. Have you talked to John Stedman?

SMAIL: No,

HURST: John might just possibly know something about this. You have talked to Nate and he was—

SMAIL: Yes, but he felt that the regents were—what he said was that they said he could come back but they'd have to reconsider whether he'd come, back as dean. And he didn't like that. So it seemed reasonable.

HURST: Uh-huh.

SMAIL: So you had nothing to do with any of this.

HURST: No.

SMAIL: Well that's—I guess that is about all the questions I have about Garrison, unless I think up some new ones.

DURING WORLD WAR II

HURST: Well I got back here after the war. I don't think there's any particular point in talking about the war years except they did enlarge considerably my knowledge of—well maybe there's this much to say I felt I learned a great deal about the process of government in the war years. I was for one year in the General Counsel's office of a newly formed civilian war agency, the Board of Economic Warfare and I had the very enlightening experience for a year there of seeing an agency grow from very small proportions to a very big agency with all of the internal turmoil, palace politics, pressure grouping and all the rest of it that goes with that process. So I learned a great deal about bureaucracy

in the course of that year in the B.E.W. Then I was taken into the Navy and was put on to doing lawyer-type stuff in the planning and control division of my bureau which was sort of the policy-leadership division of that bureau. And eventually there it became known I was both they already knew I was a lawyer they'd hired me because I was a lawyer, they wanted me for certain purposes for that, but they also learned I was an academic with some interest in history so when an executive order came down it must have been in 1944—from Franklin Roosevelt that he wanted all agencies of the national government to compile realistic histories of their experience in the war which could be salted away in the archives to provide lesson material for the future I found myself suddenly designated to run a policy-history unit in the Bureau of Naval Personnel. I was in charge of a little group of about—there were eight of us eventually with a supporting secretarial staff—and we were supposed to go through our bureau like a vacuum cleaner and tell the complete policy story of everything that happened in the rapid growth of the bureau from Pearl Harbor on up.

SMAIL: Eight people?

HURST: So there I got another unusual exposure for about an intensive eighteen months—that carried me up to the time I was discharged from the Navy pretty much—of doing what amounted to a public administration study. I learned something about administering a study because I was running this unit but I was also one of the active researchers and I learned a good deal about techniques of interview research, both diplomatic and scholarly, because it takes some diplomacy to conduct interview research, particularly if you're a lieutenant (j.g.) and you're talking to Annapolis 4-strippers about mistakes that were made in their division. That was useful experience, although as far as I know FDR's idea was a romantic one that anybody was ever going to make use of that—avoid having to relearn the lessons from the mistakes already made. All that stuff's salted away in the archives and I'll bet nobody ever takes a look at it.

SMAIL: Certainly—

HURST: I learned a lot from it. So I got back here in 1946 and at that stage—

SMAIL: That was when you got married, wasn't it?

HURST: No, I got married in 1941.

SMAIL: Oh, I thought it was '44.

HURST: '41.

SMAIL: Well somebody's got it wrong in one of your sheets then. All right.

HURST: They'd better have the date right because I would have one illegitimate child if—

RETURN TO UW

I had made contact and I can't remember—oh, I know now, the Social Science Research Council had published a bulletin which somehow fell into the hands of lots of academics who were in the services, announcing that they were providing, I think primarily with the help of Rockefeller money,

a series of what they called demobilization awards which would buy a limited amount of free time for academics who'd been in the services to try to retool and get relaunched on research and publication efforts right after the war. I got one of these from them which brought me half-time free—I came back here on a half-time teaching basis—for two years. In other words, in effect they gave me a free year but I divided it over two years and by this time I had taken an attitude which stayed with me pretty much all the way through—a rather hard-boiled attitude—that I would protect my research time against encroaching other commitments. I felt—

SMAIL: Why did you decide that?

HURST: Well I knew I wanted seriously to make research my major effort more than teaching, and I had become convinced just from being around the campus as long as I had already been around one that while everybody talks a good line in research very few people are willing to suffer any pain in order to see that there are resources made available to get research done. So I early came to the conclusion which has stayed with me right up until now that people who are seriously interested in research had better constitute themselves an absolutely ruthless lobby for it because if they don't, nobody else will. And I count in these nobody else's practically all university administrators, who always talk a good line in research but who typically are, at the best, inert or passive toward it. They have to be pushed, and at the worst always find urgent reasons and current university business why they've simply got to have you turn out a memorandum for 'em or sit on this or that committee to deal with something that's burning right on the doorstep. And the idea that maybe if you turn aside from your present work to do that, that five years from now the school will have less resources to stimulate students with, is one which a dean will agree to in the abstract but doesn't really believe in the concrete when he's got a job he wants done. So, the moral I draw from this is that a grant which I had from SSRC and the grant which about three years later I got from the Rockefeller Foundation for continuing work in legal history was invaluable to me not just because it did provide money to buy me half-time free for a long stretch of years for research, but because it gave me a good basis of moral legitimacy on which to fend off requests I do something else. The University was implicated in my taking SSRC money and then taking Rockefeller money and my argument always was that we owed good faith to these sources of funds, that they had in effect bought my time and that I was entitled, in fact I was morally obligated to protect that time so that University demands didn't edge over into that half of my time.

SMAIL: They didn't mind your taking half-time—

HURST: No.

SMAIL: Because there was a big influx of students at that time.

HURST: Yes, there was an influx but I had made it a condition of coming back here that I would be allowed to do this.

SMAIL: Had you considered going somewhere else?

HURST: I had offers to go other places. In fact in my last period in the Navy I was offered a job on the Columbia Law faculty. I had already decided at that point I wouldn't like to live in New York City—a point of view which has only grown on me over the years. But I had an offer from Columbia

and I knew that there were a couple of other places that were interested in me so that I was in a little bit of a bargaining position. You're right, though, that I came back to a school which was terribly crowded. It was also the most exciting—educationally exciting—period in the law school in my experience of it.

SMAIL: Because of the students?

HURST: Because of the students. They were all GI Bill of Rights students, all of whom came here with the feeling that through no fault of theirs they had had a good chunk of their lives subtracted for what at best was a needed government service and at worst was wasted. I think most people who've done much time in the armed services figure that a great deal of their time there was wasted whatever they felt about the basic merits of why you were doing what you were doing. So that you had a student body with an unusual motivation in that period from 1946 to 1949. It was a very nice atmosphere from that standpoint.

AMERICAN LEGAL ECONOMIC HISTORY

But right from the start when I came back I was on a half-time basis. And I was devoting myself to developing the field of American legal economic history. My center of focus has always been on relations of law to the development of the American economy—an alternative such as, say, the law in relation to the church or the family or what have you. About two years after the SSRC had gotten me launched I knew by then that I wanted if I could possibly do it to find the means to keep on a half-time basis for an indefinite future because it was clear to me that nothing less would allow me to get much done on the scale I wanted to do, particularly because what I wanted to do had almost no precedent. I wasn't—if you take a young fellow starting out let's say in American history today and wants to write on the Civil War he's got an embarrassment of already published riches and well-known documentary sources to go to. Somebody starting in 1946 wanting to do American legal economic history almost literally had nothing to work with—nothing, particularly in the law school world—

SMAIL: No secondary sources.

HURST: No, secondary sources and no prior experience as to how to work with the original sources—what to expect, what kind of juice to extract out of them. So I knew it was going to be a time-costly effort to try to do something with the field, and that I simply, if I was going to get any substantial accomplishment, I needed if I could possibly swing it to get myself on a permanent half-time teaching basis. On the other hand I didn't want to try to get on a "full-time research basis. I figured I was tough enough to fend off people who would encroach on this research time. I also figured, however, that I might get weary or bored or stale if I got into long extended periods of nothing but research. There's a good deal of reviving experience in regularly meeting classes and dealing-'-law students are pretty good students to deal with. They're apt to be rather cantankerous, argumentative people who don't just agree with what they hear, so that they're rather stimulating counterfoil. So I never seriously wanted to get myself on full-time research basis, I've advised younger colleagues since that they'd better take full-time research basis unless they feel they can behave in a very ungentlemanly fashion and protect their research time. It's very dangerous to take part-time research leave. Very dangerous—from the standpoint of protecting your research leave. About that time, accordingly, I wrote a letter to the Social Science Division, of the Rockefeller

Foundation and I was tremendously lucky, probably ordinarily I wouldn't have gotten anywhere, but Joe Willits was then the head of the Social Science Division of Rockefeller and it turned out I'd hit him at just the right time. For reasons that I don't know, he was prepared to be interested in the notion that Rockefeller should venture into the law as a new dimension of research in the social sciences they'd never gotten into. As of this point there was almost no precedent—very little precedent for any foundations to spend money in the law field. It was an area they just didn't think about. So I put to Willits the notion of my getting a grant which would put me on half-time to Rockefeller for eight years, which is a too common thing in itself, and Willits told me later that as far as he knew, in his time there, this was the first time they'd ever made a research commitment to anybody for so long a span of time, but they decided they'd take a chance, I guess partly on the basis of support I got—recommending support I got—out of the people at SSRC who had been pleased with my reports with what I was doing with their time. In fact, they were so pleased that to my surprise at the end of my two year demobilization award they invited me onto the Board of Directors of the SSRC.

SMAIL: Yes, I noticed you got that seat rather early in your career.

HURST: Well they had decided I had interested them enough, and I was writing them extended letters every year telling them what I was doing—^no, not every year. I think it was more often than that—I think they wanted letters either" every quarter or every six months. Anyway I'd been firing a number, of letters off to them describing the development of my legal history work and they apparently decided they'd just like to bring a law guy onto their board—they'd never had one, and as far—I think they've only had one since. I think Edward Levi was on after I was, at some point. Well they apparently decided we weren't worth that much because they've never regularly invited a law man on. That was a very interesting experience in itself. In any case, Willits responded positively and I got this long-term half-time grant, not only for myself but I'd been bold enough to ask—I think I started with a grant just for myself—my memory's a little hazy now but I think I started with asking them to extend the SSRC grant for two years. During the course of that two years I went back to Willits and said I'd gotten deep enough into the field to see some more things I thought ought to be done with more time and more people, and presented them a prospectus for an enlarged grant as a result of which I got an extension so it turned out to' be an eight-year grant with money not only to keep me on half-time but to allow me to bring here each year for about a string of eight years a research fellow for a full free-time year of research to do research in Wisconsin economic legal history under my direction. So that I got launched on that about 1948-49 somewhere in there. And over the course of the next few years most every year I— entirely on my initiative—there was no way to find people because nobody was working in legal economic history at this point. What I had to do was use the law school grapevine and the directory of law teachers, pick out a field where I thought something useful could be done, and then just sound around until I found a likely-looking prospect and then try to sell him on the notion of doing something that he'd never thought of doing before. I eventually got people here out of whom we got about, at the moment I'm not quite sure of the count, but I think we got about eight published monographs. As always in these projects you drew some blanks. I got about three people I brought here for about a year from whom I never got anything. About eight out of eleven that's about the total—that's a pretty good total. All of this centered on Wisconsin which is again rather unusual. Wisconsin, after all, is not one of the premiere states of the United States, but at this point it has more legal history written about it than the state of Massachusetts, I think, which in itself is something of a commentary of the state of interest in legal history at the Harvard Law School. They got interested in legal, history seriously

only about five or six years ago. Indeed when Erwin Griswold who was Dean of the Harvard Law School encountered me one December meeting of the Association of American Law Schools when I was about midway in my Rockefeller grant period, he said, "What are you doing out there?" I described the situation to him—I was on half-time working at this research and had these fellows coming in working with me, and he looked at me in stark disbelief--and this is the dean of the Harvard Law School—and he said, "You'd never get away with that at my place," and he was right, you wouldn't have. Then—when was it now?—about 19—somewhere—Just before Erwin retired as dean—and I felt this was quite amusing, he was still dean—he invited me to Join the Harvard Law faculty as its legal historian, and by that time I liked Wisconsin Just too much to leave it and I didn't like Cambridge that much, so I turned it down, but as a result of that the Harvard Law School acquired its first full-time legal historian, a very able younger man, Morton Horwitz, who is making a great name for himself down there. But it took them until then to get around to the notion there was something in legal history—American legal history.

SMAIL: What about Yale?

HURST: Yale has had a legal historian. He got caught in some of this intra-feuding down there and they let him go despite a good publication record. Yale's just not a place, as I've said, for a young man to go unless he goes there with tenure. It's a very chancy place.

SMAIL: You advise your students not to go unless they—

HURST: Unless they got tenure—unless they went with tenure—not trust to getting it once they're there.

RESEARCH AND WRITING

SMAIL: You know, at some point I'm going to ask you how you schedule your research and your teaching and how you go about doing it when you're writing. Now maybe this would be a good time to ask you that. Back then in the forties you were just starting and—

HURST: Yes, we might as well talk a bit about that if you want to.

SMAIL: What I mean is, do you mix it up with your teaching day, do you do some every day, do you write as you go along?

HURST: It's always been completely mixed. Perhaps I ought to start with this first thing—the very first piece of full-dress legal history I did, apart from joining with Lloyd and putting together that orientation course which as I say was essentially a legal history course—the job I did under the SSRC demobilization award I deliberately chose as not legal economic history. I decided that it made sense starting in the field first to immerse myself as deeply as I could in an Intensive two years of work and I allotted two years to it to studying the history of the development of the major legal history agencies themselves; the judicial branch of government, the legislative branch, the executive administrative arm.

SMAIL: In Wisconsin or—

HURST: No, in the United States. So, that was what I used the SSRC award for. For two years I read intensively. I started even in the last months- when the Navy had released my time down there, I started working in the Library of Congress on this but when I got back here, for an intensive two years I read deeply in secondary literature—this was no original research on the growth of the major legal agencies and came out with a manuscript which Little Brown published in 1950, a book called *The Growth of American Law and the Law Makers* which is essentially history of the major branches of government of the United States. As I say, I figured I knew as a long course I wanted to work in law and the economy and—as a real long course; I planned to stay with this for many years. It seemed to me to make sense, given the fact that at that point there was very, very little in print about American legal history at all, most of it about the colonial years and literally almost nothing in print about the history of law in this country for the nineteenth century and up into the twentieth it seemed to me to make a lot of sense to give myself a grounding, before I approached more specific topics, by doing sort of a general survey effort on what the legal order looked like. And that was how I began.

SMAIL: So you read these books. Did you read them at home or in the library or in your office?

HURST: I was reading them everywhere. Somewhat to my wife's dismay, I think. We were bringing up two very small kids at that point and I look back on those years with something of a guilty conscience. I probably should have been more help around the house but that was not the modern day when you expect—

SMAIL: You would have been helping now.

HURST: Yes, yes. This was back at a time when that kind of expectation was not so established.

SMAIL: And so you took notes on them?

HURST: Yes.

SMAIL: And you say you turned out a book but how long did it take you to write that and how did you write?

HURST: Well, I wrote it in segments. I knew for example I was going to do a book that would have a big segment on the growth of courts in this country. So first I concentrated reading on the courts for a matter of months, and when I'd read what I thought from what I could tell from the available bibliography were probably all the really good things that were around—I hadn't, by any means, covered the waterfront but I'd read all the—what looked like, promised to be, good things—I'd then sit down and write myself a piece on the courts, and then I'd start reading about the legislature and then repeat the process, so I wrote segments..

SMAIL: Did you write easily?

HURST: No. I wrote very painfully. In fact the first manuscript I wrote was rejected by Harper, and I've always wondered whether there was a story back of that rejection that was intended to reach me, because the manuscript came back accompanied by the usual polite rejection notice—very interested but this just—for one reason or another doesn't fit our policy. But interleaved with the manuscript

was an interoffice memo which some kind soul down there thought I ought to see which said there might be a lot of good in this stuff but the writing style's impossible. So at that point—

SMAIL: This after all your experience?

HURST: Yes, but I had never tried to write a treatise-scale job before, and I had never tried to write—really I had never given much thought to writing simply before I had enough invested in that manuscript so that I decided I simply wasn't going to give it up, but on the other hand I didn't think, in the light of the frank comments which I thought were probably just enough, that there would be much point in sending the same manuscript to another publisher. So I decided I had to sit down and rewrite the whole thing. But before I did that somebody had gotten me on—I can't remember who, maybe it was Lloyd, it would be very like him to have done it—to a little book by a man named Rudolf Flesch, a Hungarian of all things, who has been the prime teacher of teaching Americans how to write simple Americanese. He became a consultant to AP, UP and International News Service. He wrote a little book-called The Art Of Plain Talk which had been recommended to me and which appealed to me as having a lot of sense in it. It was full of very strict admonitions. He didn't just say write simply, he actually told you how to write simply. For example, he said— and he had certain survey techniques to demonstrate he was right on this— that for adequate communication no sentence should be more than seventeen words long, that you should avoid adjectives and adverbs and stick as far as you could to declarative sentences—subject, object and verb that if you had to use adjectives or adverbs you should use them sparingly, and then you should always stay away from words of Greek or Latin origin and try to write in Anglo-Saxon if you could. Flesch said the ideal sentences were to be found in the New Testament in the King James version and he said the best sentence of all was, "Jesus wept." That was the style of writing one should shoot for. I took Flesch—he had a number of actual written exercises in his book and I did his exercises and I did nothing except Flesch for a period of some weeks. I really gave myself an intensive course in Flesch. And then I sat down from scratch, rolled a clean paper in the typewriter and rewrote the manuscript. And I guess Flesch took— or something took in me—because the manuscript this time was accepted by Little Brown and they published it in 1950. That to my mind had been sort of the necessary background for what I viewed as the real, long-term work I wanted to do, which was getting into law and economy.

SMAIL: This writing was pretty much—you were summarizing—you weren't having to organize—

HURST: No, I had to organize a lot because the—I was working entirely from secondary sources but I was using those secondary sources for a frame of ideas that no one had ever put together before. I was really—I think it's fair to say that at that stage I was inventing the field of legal history, legal social history. Nobody had any articulated set of concepts as to what the subject matter of legal history ought to be. It had been sort of taken for granted that the natural subject matter of legal history was to tell the story of successive appellate court opinions, and explain how the judges rationalized what they did. When you did that with one opinion then you moved on to the next one and that was legal history. What I was trying to do, again following the Roscoe Pound idea of a sociological jurisprudence, was to try to organize the history of law in terms of social structure and process, how society hangs together and works and what is the place of legal process in making it hang together and work.

SMAIL: But in this first book also?

HURST: Yes. For example, I undertook—I'd have to show you the table of contents in detail, maybe, to show you the point, but I had a section in there for example on the bar. That was unconventional in itself; the idea that legal history should include a separate section on the history of lawyers, not of judges only, was something nobody had done. And in order to put that together I sat down and made myself a conceptual structure of what lawyers do—what is it that clients pay lawyer for doing for them—what are lawyers' jobs. This did come to a considerable extent out of the legal realist movement. People like Lloyd Garrison and Karl Llewellyn had been very much interested in the 1930's in exploring what it was lawyers did for clients. Well I simply took this in the time dimension, but when I went to read secondary sources I couldn't find anybody who had written about what lawyers did for clients. I had to read legal biographies, histories of bar associations and more or less do a lot of reading between the lines so that my book was entirely on secondary sources in one sense, in another, it was an original book in its frame of ideas and concepts.

SMAIL: Did you just roll the paper into the typewriter and write or did you have to have many drafts?

HURST: I had many drafts and I tore up a lot of stuff and I did an awful lot of scratch paper work deciding how I would put together the general outline of the terrain. But when I was done with that I figured I was ready to tackle what I really from the outset had been meaning to do and that was to focus principally on the relations of law to the development of the American economy. And for that I in effect went back again to the precedent that had been set in that original effort with Lloyd Garrison. We had picked there for our orientation materials a concrete story of development of a particular line of policy in Wisconsin. I decided that, given the fact that almost no American legal history work was in print on law and the economy, what was needed in my work was in effect to do in an historical or on a bigger scale, what Lloyd and I had done with that course. And I figured from the outset that I would weave back and forth over the years and try to write a very detailed history of some aspect of law in the Wisconsin economy in order to keep my feet firmly on the ground of an actual, very particular experience so I wouldn't dive off into a purely imaginary blue. But on the other hand I would continue to do a lot of work with secondary materials on the American economy and law and write along a parallel line a more generalized, if you will, more theoretical work, about relations of law to the growth of the American economy in total. So that over the years I pursued both of those things—interweaving them. First, on the Wisconsin business, I decided to pick a specific Wisconsin industry which had gone through a complete life cycle and the logical one for that purpose was lumber, which had started from scratch in the frontier days as just a minor little thing, had grown steadily from the 1870's on to the point where between about 1885 and 1905 it was the premiere industry of Wisconsin—it was the number one thing in the economy, and then had rapidly declined with exhaustion of the northern forest to the point where today we still have a northern forest but it no longer produces important amounts of lumber, it produces Christmas trees and wood pulp for making paper. So you had an industry there which had been of major significance in the economy of an American state and which had, within a manageable period of time, from roughly 1836 to 1915 gone through a complete life cycle. And I thought what I would undertake to do was, to the best of my ability, to locate all the relevant legal material I could from all sources—the courts, the legislature, administrators, local government, what have you, which bore on the affairs of the lumber industry and undertake to tell as complete a story as I could.

SMAIL: Would you find all of that in the law library?

HURST: No. Well, I never got out of Madison. I stayed with what I could work with in Madison because what was available to me in Madison, combining the law library here, the library at the Capitol and the State Historical Society, kept me intensively busy in this job for about fifteen years. In the course of that time, however, I was also doing this other interweaving job. The lumber thing could have been done faster except that I began to get invitations for lectures—attractive invitations because they carried publication, and my kind of publication has always required a subsidy, I'm not a commercially paying venture. So I got invitations, for example, to give lectures at Northwestern, publication carried, in 1956, out of which came a little book which the University of Wisconsin Press published with a subsidy from Northwestern. I think they expected to lose money on it, and to our joint surprise we benefitted from the accidents of the time. The book appeared right at the threshold of the time when for the very first time a number of American law schools and a number of American colleges were getting interested in legal history. This little book was called *Law and the Conditions of Freedom in the Nineteenth-Century United States* and related broadly to the economy and politics so that the little book—it's only about a 120, although rather densely packed, pages—lends itself readily to collateral reading assignments. It got picked up by a number of law schools and colleges and to everybody's amazement, not the least the Press I'm sure, up to date it's sold about 12 to 14,000 copies.

SMAIL: Really?

HURST: Yes. Anyway, I took time off from my lumber thing to get that written. That was 1956. In 1960 the University of Michigan Law School invited me to give a series over there called the Cooley lectures and I'd had in mind for some time that I wanted more deliberately to weave sociological theory into my frame of legal history. So I used the Cooley lectures to give a series over there which was more deliberately sociological. It undertook to lay out some hypotheses about the structure of American society as a society and tried to relate legal process to that. That gave me a published volume in 1960 called *Law and Social Process in United States History*. Then at a later point—let's see that's '60—I was invited to give the Holmes lectures—there's a series of lectures funded under the bequest Mr. Justice Holmes left to the United States, And in 1964 MacMillin published a volume subsidized by the Holmes bequest—and again even when I'm published by a commercial publisher I'm subsidized—in which I was able to do some things about—using Holmes as my jumping off point—about the history of legislative in relation to judicial process in this country. Then the University of Nebraska invited me to give a series of lectures with publication and out of that I published a volume in 1973, By that time I knew that I ought, as a general coverage of law and the economy, to try to tell the history of relations of money and credit supply of the country to the law, so the Nebraska lectures are on the subject of the legal history of money in the United States, meaning by money not just coinage but the whole flow of currency and credit from the crudest early days up to the modern federal reserve system. I jumped over a step there—in 1969-70 the University of Virginia asked me to lecture and by that time I had decided that a major theme which ought to be included in American legal and economic history was the rise of the business corporation, particularly the modern big business corporation, the Fortune 500 biggest. So I tackled the general theme of what makes private corporate business power, the practical power wielded by business corporations, socially acceptable in this society so far as it's been socially acceptable. And I gave a series of lectures in Virginia on that, which emerged in their press as a little book entitled *The Legitimacy of the Business Corporation In the Law of the United States*, a book which eventually got me involved considerably with the American Bar Association and the American Law Institute

when they got into the field of corporate governance. I found myself invited to talk to a meeting of theirs on the historical background of current concerns over what legitimizes the power of big business in this country. Meanwhile I'd been working all this time at the lumber book and I finally sent the manuscript off with it—and it turned out to be a very big manuscript—and I was very much afraid almost any press would turn it down because of its sheer size. But it had turned out to be a big story and I regarded it as properly a big story because while I was simply talking about a Wisconsin industry from 1836 to 1915, I was deliberately trying to make this a model for the relation of law to the growth of the conduct of business, of private business, in this society in a very broad sense. And in the course of that I had to do a lot of jobs. For example, the book includes a chapter, which I think it's fair to say is still the only comprehensive job done by a legal historian as distinct from an economic historian, on the public land policies of the United States, because a large part of the lumber industry turned on public land disposition and Uncle Sam was the biggest single landowner in this state in the critical periods. Well, that book the Harvard Press accepted—again, I'm a subsidized character—they have a special endowment down there for books that they think they ought to publish that they're absolutely sure will lose money. It's called the Belknap Press of the Harvard University Press. If you ever see that imprint it means this is sure money-loser. So the Belknap Press of the Harvard University Press published that book which I called—gave it a general title to indicate it was supposed to be more than a parochial book—it's called Law and Economic Growth. The subtitle is The Legal History of the Wisconsin Lumber Industry, 1836-1915. That came out in 1964. So there's a pattern there.

SMAIL: Did they lose money on it?

HURST: Well, no, they—I don't think they ever had a remainder of it; on the other hand they were cautious, they only printed about—I think the printing was 3,000. It's been out of print now for some years and I would like to see it back in print because in some ways it was ahead of its time. It came in 1964. By about the time it was out of print, so that would be 1970 or so--just in this last decade, approximately, American legal history, in particular legal economic, has become a growth field in the American law school world, and in the American history field even, to some extent. There would be a market, I think, to sell another installment of those volumes but it's too expensive a book for Harvard to reprint, and a couple of reprint publishers whom I've talked to about it have said the same thing. So it'll probably not get out again. I just wish in some ways that the accidents had brought it to publication about five years later. I think it would have reached a broader public. I still like it very much. It's my favorite book as I did more in it of what I'd hoped to accomplish than in anything else I've published even though I've never accomplished what I'd like to accomplish in anything I've published. I think you always have that feeling. You wish you could do it better. But I'm more satisfied with that job than I am with anything else.

SMAIL: You did all the research yourself.

HURST: Well, pretty much, although all through this time I was having these people here under my direction turning out monographs on the basis of an intensive research year they spent here. I closely edited all those things and was deeply involved in all the research. One of them did a monograph on railroads in Wisconsin in the law and another one on the history of the development of water pollution controls in this state in the law; one on the development of the insurance industry in law. Inevitably in the course of this—let's say we eventually wound up with about eight or nine of these, can't remember the exact number now--In the course of shepherding these through—and I followed

them all very intensively both through the original research stages and through editing the manuscripts—I was, in effect, the prime editor of all these manuscripts, although they had to survive normal editing in university presses— I learned an awful lot from these which broadened my knowledge of what to look at. But there was a general pattern that I had laid earlier that I was fortunate enough to be able to carry through pretty well over a sizeable span of years. In some ways, as I say, it was a certain coherence—what I did after the war pretty much parallels what Lloyd and I did with that original course of weaving general material with more particular material and moving back and forth between them. The most recent series of lectures that has come out of all this is the one I just gave a week or so ago, the Curti lectures, which again will be in print and which is related to comparisons of law and the private market as processes of adjusting interests. I haven't confined myself exclusively to legal history. Last October I gave what are called the Carpenter lectures at Columbia in which I in effect tried to get into print—this will be a small book too—I tried to distill in print a good deal of stuff which I can't find elsewhere in print to refer my students to that I've been teaching. This is one point where my publication stems out of my non- historical teaching. All these years I've been teaching one semester a course in American legal history and the other semester a course in problems of lawyers handling statutory materials in court; the interpretation of statutes, issues of their constitutionality, particularly. These Columbia lectures more or less tried to distill some key material out of what I've been trying to teach for thirty years in that legislation course. Apart from that one deviation, all the publication has been of an historical character.

SMAIL: Did you write at home or in your office?

HURST: Mostly at the office. Although I always took a good deal of work home and did things at night and over weekends.

SMAIL: Did you know Paul Conkin very well?

HURST: Oh yes, not very well but I knew him more than casually.

SMAIL: He spoke of—you're treating writing very lightly compared to other people I've talked to, and I'm—

HURST: Well it's painful to me, I don't treat it lightly when I do it. I find it hard to write but I enjoy it too.

SMAIL: He spoke of the necessity of writing something every day which would include presumably lectures, and of having to write as you were doing your research and not thinking that you were finished, that you'd done anything when you—

HURST: Well, I've usually worked that way. I have usually written interim things as I go along on a project and then gone back and to some extent redone them. But most of the time I work rather slowly and carefully at what I do so that I don't feel I have to keep turning out successive drafts. I'm pretty painstaking at it in my first approach to it.

SMAIL: You must have developed a very intricate system of note-keeping.

HURST: It has varied a good deal over the years, I've never found a completely satisfactory system.

I usually have just taken notes on the typewriter, not on 3x5 cards sort of thing but just on standard size typing paper. If I was reading steadily in a given theme, like when I was reading, say, about legislatures, I'd just keep pounding off my notes in the typewriter, but I'd make an index of those notes.

SMAIL: And would you have an index of all your notes or just of sets of notes?

HURST: Just of sets of notes—for a particular job usually. But I always kept that stuff, so occasionally I've been able to go back to it and make some use of it for another project. I've never liked the card file system. It seems to me it takes an inordinate amount of time for somebody who can type. I type fairly facilely. Also it would seem to me that taking notes on standard-sized typing paper while I'm reading a book makes my note taking much more flexible. I can sort of talk to myself on the typewriter while I take notes. I don't worry that I'm running off the end of the card or what not. And it seems to me it has made it a much more flexible system of reacting to what I'm reading.

SMAIL: What do you find the hardest to do of the various stages of writing—of research and writing?

HURST: Oh I suppose hardest but also enjoyable, I've always enjoyed it, is the conceptualizing business. I've viewed my job—from the time I first started deciding I would principally commit my time to American legal and economic history, I viewed my job in large measure as that of an architect to the field rather than just the producer of specific historical work. I felt that when I came into it it was a field completely unmapped—there were no starting ideas, as I say, as to what the subject matter of legal history ought to be. Somebody had to reach a definition of it. Well, in most of what I've written it has been a combination of trying to tell as well as I could some specific legal history—that certain things did happen, certain lines of policy emerged, but I've also very much had in mind, all throughout, that in each of my books I was trying to create a model. I don't mean in the superlative sense but in the sense in which social scientists use that term, a pattern or a template or what have you to suggest what the character or the organization or subject of legal history might be. People subsequently—as in the last ten to twelve years more and more people have gotten into this field and we're getting more and more published stuff, a fair amount of it disagrees rather sharply with my ideas of what it ought to be. My colleague Mark Tushnet, for example, who has something of a Marxist bent, doesn't think too much of my notions of what are central subjects. So that there's plenty of room for developing other concepts of what the field ought to be about. But at the time I began, in 1946 essentially, it was almost literally true that nobody had any idea what the subject matter of this field was except in the narrowest most conventional terms, that you told seriatim that courts did this one year and they did this the next. That was about the sum total of it. And in particular, there was no idea to start with of defining the subject in ways which related it to some theories of social structure and practice—social structure and process. That was why my work, I found, originally had considerable interest to a man with whom I never had much contact but it was flattering to know he was interested, and that was Talcott Parsons who I suppose was one of the leading theoreticians of sociology in this post-war generation.

SMAIL: He found out about you?

HURST: He found out about it and—as far as I knew he read all the stuff I published. I never saw in

his own writings as far as I could understand him, he's a pretty hard man to understand, that he made any direct use of it. But he apparently was very much intrigued by it as a sociologist because he saw that I was trying to write legal history about some kind of a theory, however from his point of view crude it may have been, about what makes American society a society and what made it hang together. This was quite an altogether new—

SMAIL: It's really extraordinary isn't it, the fact that—I mean you must have felt—you mean there was nobody you could talk to about this when you went to legal meetings?

HURST: No. No. It's been in some ways rather lonesome.

SMAIL: Did you feel, "By God, I'm going to make them understand why this is important"?

HURST: Well, that's one reason why I was very eager to accept these various lecture invitations that carried publication because I was deliberately—I had somewhat of a missionary thought in mind. I wanted to try to get out to a wider academic public, at least, some altogether new notions that this was a field which had exciting subject matter possibilities. And I hoped that if the subject matter excitement could be conveyed I might succeed in recruiting some more people to go to work in the field. Almost nobody was working in it.

SMAIL: Why would there be such a lag on it? I suppose it would be—it's because people think of law the way they think of medicine as something that has to happen right now.

HURST: Partly that, and partly because law is very closely related to the narrowly pragmatic character of this society. This society as a whole, I don't think, thinks much of history. Take the typical high school. Who teaches the history course? It's the football coach. You need a job for your athletic director.

SMAIL: Or the math teacher. Only the assistant coach teaches the history course.

HURST: Yes. I think over the years, generally, history at the secondary school level, which is where most people first encounter it, has been regarded with a great deal of condescension. It was something that you had to make a gesture to but it wasn't that important and I think in general American affairs people are very impatient of paying much attention to the time-dimension of affairs. They want to deal with the immediate present. And law—on top of all this, law itself tends to be a highly pragmatic field. We're training—after all, our prime business in law school is to train people to go out and rapidly acquire the skill, I don't purport to say the law schools train people how to serve clients, we train them essentially to go out and learn quickly how to serve clients once they're out there. But we are training them essentially to do immediate operational jobs for clients. And the whole temper of the field is that of the ringing telephone which says it's 10 o'clock in the morning and I need an answer by 4 this afternoon. That's the normal temper of a law office,

SMAIL: Yes, but as far as I can tell history of law has much more practical value to lawyers than the history of medicine would have to doctors.

HURST: Well it has potentially more use. I wouldn't say it has realized that use. But I think public policy does tend to build by accretion in a fashion which is particularly true of public policy and

maybe less true of medicine, where the medicine of ten years ago is now so outdated by current knowledge that there's not any particular reason for current practitioners to pay any attention to it unless they pay attention to it to some degree to know there's some things they shouldn't do, that their predecessors once did.

SMAIL: I suppose really you'd expect the history of law to be of extreme interest to historians, but that apparently wasn't the case either.

HURST: It wasn't up until now. I think historians have gotten more interested in history of law since more history of law is being written which relates law to something other than law.

SMAIL: Did you talk to people, let's say in the 1940's in the history department» about this?

HURST: Not very much that I can recall. There wasn't anybody over there much interested.

SMAIL: Was Curti—

HURST: Merle Curti was the nearest approach. Of course today Stan Kutler over there is very actively interested in American legal history.

SMAIL: Yes, I know that, and Stan Katz presumably was, too.

HURST: He was, yes, I should have mentioned him. But there—historians by and large regarded law, I think—legal history—as a field which in so far as they had any interest in it at all could almost all be summed up in constitutional history. But the idea that they might be interested in, that economic historians might be interested—for example, the ways in which law affected the function of the economy was something that until very recently economic historians were not concerned with. It's really quite a new field, and that has been part of the pleasure of working in it. It has its own special interest and I suppose to some degree it's a special sop to one's own ego to feel that you're in a territory where you're drawing some first maps, where other people haven't been before. And that's—

SMAIL: Did you ever have any doubts about yourself back in the forties when you were starting?

HURST: No, I always knew—I always felt convinced that there were good reasons, intellectual and also practical operational reasons, why it was important to understand the past to public policymaking. It did—it was, however, rather lonesome and you begin—sometimes you'd wonder whether there was anybody out there who was ever going to listen.

SMAIL: Who on the law faculty before you got some colleagues of your own was interested in what you were doing?

HURST: Not very many. There are not very many of them interested today. Our law faculty today is a very social science-oriented law faculty, but their orientations lead them on the whole to focus their interests on the contemporary scene, what's going on right now. So that I don't regularly have a string of colleagues dropping in to ask me how was it in 1890.

[At the beginning of the next session. Professor Hurst looked through the tape index of the first session. His first statement is a correction of wording of the index.]

HURST: Going back a moment to Lloyd Garrison, I would not want to characterize him as even an isolationist let alone a determined or dogmatic isolationist. It was rather that, specifically in the particular context with which World War II emerged, he distrusted very much the motives and ends of the warring parties and was skeptical that the net result would be positive, and therefore he was, I think, much opposed to the United States military involvement in the world situation. This is not to say at all that he was not concerned about the relation of the United States to the rest of the world because he very much was.

SOCIAL SCIENCE FUNDING

SMAIL: Okay. Well, I'd like to start off today with the remark you made in our preliminary interview when I asked you what you particularly would like to say about your career and about the University and you said the thing you'd most like to get across is your feeling that the administration hadn't done well by the law school, with a few exceptions you specified for me. And the questions I have to ask today can more or less—I mean that can perhaps be the theme of them. I am mostly going to be talking about the law school but there is the social science committee and you were a member of that. Can you remember the circumstances? I mean, was it at any of your requests or did—

HURST: No. I think Bill Sewell was probably the principal spark plug, and the external impetus came from the first round of Ford Foundation grants. The Ford Foundation was in a very elementary stage of development at this stage. It was under pressure from the United States Treasury or the Internal Revenue Service that it must start disbursing more of its funds or else suffer some tax penalties, and since they had to get a lot of money out in a hurry they began by tendering very sizable grants to a small number of universities, essentially open-ended grants; they were not project grants. And Wisconsin was not among those to whom they made this offer and that considerably disturbed us, around here, because we thought on the merits, we should have been in the circle of institutions they approached. Therefore some of us interested in the social sciences put some pressure on Mr. Fred and his administration that we should make a positive approach to Ford and see if we couldn't join this circle of first grantees, and it was to that end that a committee primarily of social science faculty was formed and a top representative of the Ford Foundation was gotten out here to talk about the matter—without the positive results we had hoped for largely because Mr. Fred just really wasn't interested.

SMAIL: Were you at the meeting?

HURST: Yes. It was a discouraging kind of meeting because the primary intent of it had been to try to press Mr. Fred into indicating to the Ford people that the top management of the University was enthusiastically and solidly behind the expansion of social science at the University. And instead of doing that Mr. Fred maintained quite a passive role and I remember much to the irritation of both myself and Bill Sewell he showed himself very willing to respond to what was obviously not at all an emergency interruption of a phone call and just disappeared from the meeting for about a critical half hour of it. So he wasn't even there. And the whole point of the meeting had been to get him and the Ford man together.

SMAIL: Did you ask him about it afterwards?

HURST: Well, Mr. Fred was not a man you could press on this. He had many virtues and many skills in administration. He did the University a lot of good with the legislature. But his skills also included an immense capacity to evade issues if he didn't want to discuss them. It was just about impossible to bring him to a focus on something that he either wasn't very much interested in or didn't care to press.

SMAIL: I don't think he discusses this in his interview at all. That is, he's—

HURST: You mean Fred?

SMAIL: Yes. So there is no way of asking him, but it seems—why on earth, since he wasn't going to be responsible for the grant and wasn't going to have to do any work in connection with it—did you get any sense—he certainly—did he have anything against the social sciences?

HURST: I don't think he was hostile to them, but I don't think he thought they amounted to much. There was a story, it may be a legendary story but the very fact of its circulating tells something about the atmosphere, that the then chairman of sociology came to Mr. Fred to complain about lack of adequate resources for the Department of Sociology and that Mr. Fred's response to him was, "Well, it can't be so bad because all you fellows need is a desk to put your feet on."

SMAIL: So that was the end of that wasn't it, that Ford Foundation grant?

HURST: It was the end of trying to get in on that particular one. Subsequently, of course, the social sciences here did get money from Ford but they didn't get them as a result of any positive help from Bascom Hall. We got some Ford money, a rather substantial amount, in the law school here, but we got it entirely on our own efforts. Ford, of course, insisted that at some critical stage of the game there must be a piece of paper signed by the president of the University on behalf of the regents that the University was prepared to accept this money and see to its proper administration and we got that all right.

SMAIL: That was from E. B. Fred.

HURST: That was from Fred.

SMAIL: I guess he was a little worried about these big foundations, wasn't he? There had been something back in the 20's and I think he was harking back to that.

HURST: Well I don't know. I wasn't aware of that as a prominent motive. There is another one of the stories floating around on which I have no firsthand information but it's part of the atmosphere of the place, that Wisconsin was once tendered a sizable Rockefeller grant many years ago for a medical school and turned it down on the ground that Rockefeller money was so tainted that the pure state of Wisconsin couldn't accept any.

SMAIL: I think that's the story I am referring to. I think that happened—

HURST: I believe the money went to Iowa.

SMAIL: I think that there was still a feeling that Wisconsin shouldn't take Foundation money.

HURST: Well, I was never aware of that at least as a rationale that Mr. Fred expressed to any of us. I had rather the feeling that he just had very little if any interest in the social sciences, and did not have any great confidence that they either amounted to much or that they actually needed much in order to do what little they could do. In many respects, Mr. Fred, I think, would have felt very comfortable with the expressed attitude, what I gather is the expressed attitude of the current Reagan administration and the drastic cuts they are making in the monies in the National Science Foundation for the behavioral sciences, on the ground that the behavioral sciences aren't worth much.

THE DEANSHIP

SMAIL: Yes. Well, we can go back to the law school then. The way in which the administration shows its concern for any of the colleges is how much money it gives it and how much effort it puts into selecting its dean. Are those the two—

HURST: Those are certainly key elements, yes. Otherwise I think it's a lively school. It's just as happy to be left alone by the central administration.

SMAIL: But those two were—

HURST: Those two things are important and over the years I have been here, with one exception of the brief period in which Bob Fleming was a chief executive officer of the Madison campus, I have never felt that there was an administration in Bascom Hall, and I say this without exception for any administration from Mr. Fred up to date, which felt that the law school was a place into which the top administration should take affirmative, positive action to push resources on the ground that it would be to the general advantage and stature of the University to do this. Anything we have gotten we have always gotten by laborious pushing, and the pushing was so laborious that in the recent past we very clearly lost two very good deans because they became so frustrated with their efforts to extract more help from the central administration.

SMAIL: Well, let's go back to when Rundell became dean after Garrison left and then Ritchie. I saw a reference later on to that point, the fact that E. B. Fred and the regents very much wanted an outsider as the dean when Ritchie was appointed.

HURST: I think that's true, yes.

SMAIL: The law school, it was said, wanted an insider,

HURST: We would have liked to have Jake Beuscher. At least I say we, I shouldn't say that. A good many of us and certainly all those of us who were primarily concerned with the research side of the law school and its development as an energetic source of ideas in the law school world, thought that our dean should be Jake Beuscher.

SMAIL: Incidentally, where were you? You must have been thought of as a dean.

HURST: Not that I am aware of at any point. Nor would I have wanted to be thought of as a dean.

SMAIL: It isn't that people came to you and you said absolutely flatly, "I won't do it."

HURST: No.

SMAIL: I've seen your name on the lists—. Anyway, go on.

HURST: Well, the word came through the grapevine and I cannot tell you specifically where because I don't know. But we were informed that we could not have Jake Beuscher as dean. The regents wouldn't accept him.

SMAIL: The statement I read—again, I guess it was in a later memo by Fleming—was that Fred thought Beuscher would be a disaster as a dean.

HURST: Well, if that's true it just shows how little comprehension Mr. Fred had of the kind of sources of vitality that were in the school and the directions in which they were capable of going.

SMAIL: So he presumably wanted an outsider because the law school more or less solidly wanted Beuscher and he didn't. Do you think that would be the reason?

HURST: No, I don't think it was that. I would bring it back again to the fact that he sensed in Jake Beuscher a man who would press energetically for a social science emphasis in the law school and Mr. Fred simply wasn't convinced that this would be productive or be worth substantial resources and he didn't want to be bothered with a dean who would always be pressing him along those lines. That would be my estimate.

SMAIL: But why would he want Ritchie, for instance. I don't know anything about Ritchie. Was he a good dean?

HURST: Well, Jack Ritchie was by far in a way, I think, the outstanding outsider candidate among those the faculty was aware of as being looked at. He was primarily desirable because he was a very affable, congenial, Virginia gentleman.

SMAIL: Oh.

HURST: Yes, he was a Virginia gentleman. That was of interest to Mr. Fred. And we were quite sure that he would maintain a harmonious relation inside the place, which he did. On the other hand he did not prove to be a forceful man of ideas and like many deans of his generation, and this is not just true of him but it was characteristic of the law school world in the period roughly in the '50s and '60s generally, that almost all deans who regarded themselves as leaders—and energetic leaders—conceived of their job exclusively in terms of real estate. Now, we did need a building, there was no question about it. We were operating with an abominably poor physical plant in the old law building. We simply had to have better quarters and Jack Ritchie was very important in getting us the impetus for that. He deserves high credit for that, although the building we eventually wound up with is not a

long shot what he envisaged, and at one stage in the bargaining to get the money for a new law building, he bargained out a compromise which was very unpopular within the law faculty by which the building would have been shared with one of the social sciences, sociology, which we didn't think would have been a very workable proposition just in plain functional terms, and it never came to pass. But after giving all due credit, and considerably credit is due Jack Ritchie for getting us a new building, and we desperately needed a new building, that was about where his creativity stopped, and in that respect I don't single him out because as I say if you look at the law school world in the last generation generally, you will find almost anywhere where there is praise for a dean as having been a good strong dean and you ask what he accomplished, his accomplishments were brick and mortar.

SMAIL: I think that's true here too. While we're just on that subject of buildings, one of the, I think it was Leo Jacobson who was the campus planner—

HURST: Yes, he was.

SMAIL: He thought the law school should have been put south of University Avenue or Johnson—

HURST: Johnson Street—

SMAIL: —because it would make it more accessible. There could be parking around it and because of traffic between the capitol and the law school it would be much easier. Do you remember that?

HURST: We were strongly opposed to that in the law faculty. I say again I shouldn't say "we" so casually. I really mean that part of the law faculty that was actively interested in involving the University Law School with the social sciences and with the state government both, but particularly involvement with the rest of the University, we thought had been, over the years, considerably advantaged by our physical location right here in the center part of the campus. And we feared that if we were moved a matter of three or four blocks off that center, that simply that physical distance would be a substantial detriment to the school's tradition of close working relations.

SMAIL: It sounded like a good idea from the way he described it. But when you talk about the necessity of working with economics and sociology I can see it wasn't. Well, why did Ritchie leave, then?

HURST: He got a very attractive offer in terms of salary from Northwestern and I think he thought in terms of prestige that being dean of Northwestern Law School is a more prestigious job than this, in which I think he was just plain wrong. Northwestern's law school has always been an able professional school but I think it has never established a leading role intellectually in the law school world and with all due immodesty I will say this school has in the past achieved a recognized status as one of the few outstanding centers of ideas in the law school world. But I think Ritchie saw it differently and besides I think they offered him a much better salary than we could pay, and so he went down there.

SMAIL: So that left the field open and I have seen quite a bit of what E. B. Fred did at that point in his search for a replacement for Ritchie. He interviewed all the law school faculty members including you. Now I would like to hear what, and there was a chart, I don't know whether you are

aware of that, each faculty member according to his—was he enthusiastic for Young? Would he accept him? So he had all these marked down. Did you know about that?

HURST: No, I didn't. I'm not surprised though. That is a very sensible thing for him to do.

SMAIL: Well, your position was, you wanted Beuscher.

HURST: Yes. But we knew we couldn't get him and largely I think we were told because of the regents in the background. But I suspect if Mr. Fred had really wanted Beuscher he probably could have gotten him because I think Mr. Fred was very capable of getting things from the regents. So I think the veto on Beuscher must be shared almost certainly between Fred and the regents. Those of us who, on the faculty, pretty well unanimously accepted George Young as dean accepted him frankly as a sort of a caretaker dean. We knew George to be fair minded, equable-tempered, a very nice person, he is a very nice person, and we were desirous of keeping a harmonious relation within the faculty. I keep coming back to a fact that I mentioned before. Some leading schools, in particular Yale and Harvard, have been so conspicuously marked, over all these recent years, by the most virulent sort of factional feuding within their faculties that this, I think, has always powerfully influenced those of us here in the faculty who knew something about the inside history of those places.

SMAIL: I wondered about that.

HURST: So that we put a high premium on maintaining a faculty that wasn't given to such feuding, and George Young promised to be a man who would keep the boat from rocking too violently in that way. None of us had any illusions that George would be a powerful leading dean and he never was. And that is the principle reason, I think, why we eventually, some of us eventually came to feel that we must make some positive moves toward the top administration to replace George, because dissatisfaction was growing. Although we had gotten the absence of feuding which was a purely negative value for which we were anxious to have George come in, we became more and more conscious over the years of his deanship that the law school was marking time in terms of budget, that we were constrained for means to try to realize some of the ambitions we had for the place and this was now beginning to generate rather strong feeling inside the faculty so that there were signs that there would be strong emerging factionalism within the faculty over dissatisfaction at George Young's relative passivity. I should in immediate qualification, in what is fairly due to George, say George was always prepared fully to support what his faculty wanted to do. He was not a vetoing or negative kind of dean. If you had a project and needed help that he might be able to give he was always willing to sign his name to the papers and to speak a word for it, but he simply wasn't an energetic and effective salesman for the law school's ideas.

SMAIL: To the administration.

HURST: To the administration.

SMAIL: Just a point. You at one point said that it would be better to wait for Mueller. Do you remember he was a candidate? You thought that if maybe you waited a year he would consent to come. Do you remember?

HURST: I remember we had that flirtation with him and he might have been a very good person for us but he came over here and interviewed the administration people and he didn't make the right sort of an impression.

SMAIL: Oh, I see.

HURST: Similarly Willard Pedrick of Northwestern's faculty came up here and several of us felt that Pedrick might be the man we wanted as an energetic man of ideas. But Pedrick was a slight, rather small man, not physically impressive, and I think the people in Bascom Hall and the regents he met just didn't think he was much of a person. They were mistaken, I think. He was quite a person. But there we lost another possible chance. All of this experience simply underlines what an unusual person Lloyd Garrison was. There are around the law school world, and all the years I have known it, there has been a very great scarcity of deaning talent everywhere.

SMAIL: Yes. So you said last time. Feinsinger too was a candidate and Fred was opposed to him.

HURST: I believe so, although I don't know that at first hand.

SMAIL: That correspondence I referred to said that there was a faculty vote and the law school faculty wanted Beuscher, 18, Young, 3. So Fred was really going very much against the wishes of the law school.

HURST: Yes. And that was a serious adverse decision because I think Jake Beuscher would probably have proved to be a dean of the same creativity as Garrison and probably would have stood out, I think, relatively speaking, over the country, if he had been in the deanship for a long enough period of years to make a mark, would have probably emerged as one of the three or four leading law deans in the country in the general estimation of the law school world. I think there was a serious miscalculation in Bascom Hall there.

VILAS PROFESSORSHIP

SMAIL: I'm more or less proceeding chronologically. Your Vilas professorship came in 1962. Was that in response to an offer somewhere else?

HURST: Yes. I had, been getting offers other places and I didn't want to go somewhere else. I've always liked Madison very much. But it was quite obvious by this time that I could have the kind of a situation that I wanted which would spell sizable time free for research and writing at any one of three or four good places and I was more and more seriously torn by the notion of why should I let my affection for the Madison situation keep me here if it meant I couldn't do the kind of work I wanted to do. So, I frankly used some of these outside bargaining offers as some bargaining pressure.

SMAIL: You presumably told Young about this.

HURST: I told the dean, yes. And I think he must have been the intermediary.

SMAIL: Let's see that was Elvehjem just into Harrington wasn't it? I am interested by your omission

of Harrington as somebody who was in favor of or would have helped the law school.

FRED HARRINGTON

HURST: Well I don't recall that Fred ever showed any such positive signs. It's curious because Fred was on the social science side of things. He was a vigorous, energetic man and very ambitious that the University raise its intellectual sights and its intellectual reputation around the country, and I would have thought he would have seen the law school as a good place in which to plow some investment capital. But we never got that kind of initiative out of him.

SMAIL: You wrote him a letter at the beginning of his administration. Do you remember saying you hoped that he would give some support to social science, and apparently he did independently, without Young's knowing, raise your salary.

HURST: No. I didn't know that, no.

SMAIL: Yes. Young wrote to Harrington and said that, "Unbeknownst to me you raised Willard Hurst's salary way above everybody else's." I guess it was Feinsinger's salary that was the actual issue.

HURST: No.

SMAIL: You didn't know that was Harrington?

HURST: I knew at one point my salary went up, somewhat to my embarrassment, above Nate's. It shouldn't have then because he was the senior man.

SMAIL: Oh I see, seniority was the issue, I see.

HURST: Yes.

SMAIL: Well Harrington, this is in the files, it's rather amusing. What Young said was I think we should change it so that Feinsinger's is higher than Hurst's and Harrington wrote back and said, "I want Hurst's higher than Feinsinger's" in about two lines.

HURST: That may have been still a lingering trace of that same policy factor that figured about Lloyd Garrison. Nate Feinsinger, of course, was even more sharply identified with the field of labor and collective bargaining than Garrison had been, and for many years, accordingly, Feinsinger was regarded as a suspect character by conservative elements at the Wisconsin Bar and in the regents. I am sure that would be a major factor in keeping him from being seriously considered for the deanship in the past. But I think it also may have been a factor in this disinclination to recognize Nate's senior faculty status by always keeping him a notch above anybody else. As I say, in 1981 it's a little hard to step back into the curious atmosphere because today, I think, anybody you could call solidly conservative in this state, as distinguished from just a fanatical conservative, will be favor of legal steps to try to keep the peace in labor relations.

SMAIL: Yes. It's a big change. Harrington—there is one surprising thing that happened in about

1963, I guess. Phil Curtin wanted to get a man named Bohannon here.

HURST: Yes. I remember that.

SMAIL: You remember that. Well, your name isn't mentioned in the correspondence and you weren't sent a copy of the letter inviting Bohannon to come and that seems surprising to me. It may have been that that was just that you were in on the discussions. Were you?

HURST: I was in on discussions and my memory is very vague as to just what part I played. But I was well aware of the effort and I tried to help in some ways which I now can't remember.

SMAIL: Because he would have been on the law faculty or would have been—

HURST: Yes.

SMAIL: Alright, so you were. I thought maybe this was the history department people busy doing something and not bothering to notify you.

HURST: No. I remember I was involved there and I think I lent some sort of assistance to the project but I just can't remember what it was.

SMAIL: This would be during Young's time.

LAW SCHOOL SALARIES

SMAIL: Who instituted the equal salary raises for the law school? Did that go back a long time?

HURST: By equal you mean keeping it on a parity with other departments of the University?

SMAIL: No. No. The law school had an unusual policy of—what?—the same percentage raise for every faculty?

HURST: Oh. We didn't like these so-called merit raises.

SMAIL: Yes, that's right.

HURST: That was a long-standing policy feeling within the law faculty. I think it was a very pragmatic judgment. We just felt that the amount of money available for merit increases was so small anyhow that it wasn't worth the potential for stirring up ill feeling among the brethren by these rather minor differences which had little significance in money terms because the dollars were so few, and therefore might take on undue symbolic significance, and we thought it was better, so long as there really wasn't much money to go around and the dollars weren't big enough to make a substantial difference to an individual's standard of living or security, it was better to divvy it up on a more or less equal basis and avoid any personal recriminations about, what might seem like symbolic rankings of quality. I still think that's pretty wise pragmatic judgment unless you've got enough money so that you can give merit increases that really make a substantial difference to the recipient's economic position. If you are talking about differences, as we typically were, of two,

three, four hundred dollars, I have grave question whether it's worth the possible costs in internal feeling within the faculty group to draw such differentiations.

SMAIL: Did you have less money than other departments? That seems a very low amount, especially in the '60's.

HURST: Well, I can't testify on that. My general impression is that the reason that attitude prevailed in the law faculty was our sense that the money wasn't big enough to allow really material merit increases to be made. And it therefore would be better to just equalize it.

A SECOND LAW SCHOOL

SMAIL: Now, there are two other things that were happening. Let's see, well the expansion of the law school. That's being talked about in 1966— whether a new law school or this one expanded and I don't know whether you have much to say about that.

HURST: We were always very much divided in our own minds about what was wise, both as a matter of principle and as a matter of tactics on the idea of creating a second public law school in the state, and I think our net judgment was that we would be ill-advised to dig in our heels and be adamantly opposed to a second law school. On the other hand, we were not happy at the notion of a really large expansion of this law school because we thought a school of 1,200 to 1,600 students, which was sometimes talked of, would lose advantages that go with the smaller situation of faculty-student contact. And then, finally, coming back to the second law school idea, we were very much afraid of this on the ground that we'd probably wind up with the legislature unwilling to provide enough funds to allow anything except heading two mediocre schools instead of one good one. The legislature, I think, simply would not have supported or would not support two first rank law schools in this state so I am afraid that having two, having a school here and one at Milwaukee or Kenosha or some other place would simply mean essentially the same amount of resources would be spent in two places and you would wind up with two mediocrities.

SMAIL: Like the University.

HURST: Yes.

LAW SCHOOL STANDING

SMAIL: Another thing that was happening was the rating by Clark Kerr which was showing up the law school for some of its policies like admitting second-rate students. Do you remember that?

HURST: I don't remember that. Just so vaguely I don't think I have anything useful to say about it.

SMAIL: I guess it was the beginning of the awareness of the dissatisfaction with Young, with George Young.

HURST: Well that went back, in some ways, to the days of Oliver Rundell. Oliver Rundell had a very strongly felt, sort of almost a populist kind of conviction, that we should put relatively little emphasis on academic standing as a criterion for admission to law school. His general idea was that

in his lifetime he had seen so many individuals of mediocre academic record prove to be useful and successful lawyers in serving clients, that he thought we ought to hold the doors very widely open, and there was quite a long-standing difference between many of us on the faculty, in fact I would say most of the faculty and Oliver Rundell on this point. Oliver had his way on it so long as he was dean and we didn't really move toward substantial raising of standards until we came onto this tremendous push for enrollment in relatively recent years.

SMAIL: Yes. Apparently Wisconsin had the reputation around the country that people who couldn't get into the other law schools then came to Wisconsin,

HURST: It was fairly easy to get into, yes.

SMAIL: It was talked about down in Illinois, and Fleming refers to it.

YOUNG'S RESIGNATION

So they began to get disturbed, Harrington and Fleming. There was this—Clodius, Harrington, and Fleming have a very lively correspondence about the law school, and were you among the faculty who went and spoke to Harrington about George Young?

HURST: Yes I was.

SMAIL: Do you remember how that came about?

HURST: Well, it was a very difficult situation because all of us liked George as a person, as we still do. But as I said he is a very nice person and he was always gentle and fair and always open to talk to everybody and as I said when he was asked for such support as he was capable of giving, he gave it. He was not a negative or vetoing dean. But more and more of us came to feel that the school simply needed to have a stronger leadership after a good many years adrift. And so it was really very painful and with a great deal of reluctance that we spoke in favor of removing George and getting somebody else in but we felt we had to do it.

SMAIL: Who initiated it?

HURST: Well, it was shared among several people. Bill Foster was one who felt very strongly about the need for a change I remember. I felt very strongly despite my great personal reluctance to have to voice these criticisms of George. There were two or three others of us. I can't just at the moment remember. There were about four or five of us who were—I suppose if you viewed it unsympathetically we could have been called a cabal to get a change in the deanship. There were about four or five of us very actively involved.

SMAIL: You called up Harrington and asked to have lunch with him.

HURST: I think we had separate interviews with him. I think he talked to us one on one.

SMAIL: He may have done that but he also had lunch at some point; he speaks of it.

HURST: Well, I just don't remember that but I don't deny it.

SMAIL: And what happened then?

HURST: Well, the top administration I think became convinced that we had to search for a new dean and that we'd better, since we couldn't have Beuscher, we'd better look outside again.

SMAIL: But then there was the question of getting Young to leave.

HURST: Well, I don't know how that was managed. I don't recall that I was directly involved in that. Except at one point I do remember I spoke face-to-face with George about it and told him that I had reluctantly come to the conclusion that it was time the law school had a switch of deans. All of this occurred—I think it hurt George badly, but at the same time it's a tribute to him, all of this happened without becoming a storm center of very deep and bad feeling in the place.

SMAIL: Yes, I can imagine, because some of the deanship appointments have been rather bitter, haven't they? There's the pharmacy school and certainly the medical school—. Yes, I guess it was suggested to him that he resign and he said that, one of the letters says he said, "Why didn't the faculty come to me and tell me? Why did they go to you?" I guess that bothered him. And then Harrington started getting letters from all over the state. People were very angry. There was an effort to have him withdraw his resignation.

HURST: The bar, as I said in some other connection I think before, the bar usually is actually very ill-informed about legal education and what's actually going on inside the law school. They form impressions of a very casual and essentially superficial sort from rather fleeting contacts at bar association meetings and that sort of thing. I am not surprised that there was a flareback from the bar but I would have been surprised if Harrington had taken it very seriously because he was a very realistically minded person. I think he was quite capable of judging that it was a rather superficial reaction.

SMAIL: Someone called it one of Harrington's hatchet jobs. Harrington said he knew he'd made some mistakes but he didn't feel that way in this particular case. And then the students got involved too, didn't they? They were against his leaving.

HURST: Oh, well, that doesn't surprise me either because George has always been popular with students.

SMAIL: But you were among those who wanted him to withdraw his resignation.

HURST: No. No, I thought he must leave. In fact I went to him and told him I thought he ought to leave in one final stage.

SMAIL: Somebody made a chart, again, and it has little stars. "Wants him to resign," "Doesn't want him to resign," or "Wants him to withdraw his resignation," and you were one of those who—

HURST: Well that was a mistake, whoever did that, because I was one who thought very strongly that the interest of the school required George leave the deanship.

SMAIL: Yes, I would imagine so.

HURST: I can't imagine how somebody got that impression.

SMAIL: The prose was rather odd on this table so maybe somebody just got mixed up.

ROBBEN FLEMING AND WILLIAM SEWELL

SMAIL: Well, were you—what about Fred Harrington, end in that period Clodius, Fleming, Sewell. The law school faculty's salaries were extremely low and I guess you were having trouble keeping people. And you feel that they just didn't do enough, except for Fleming."

HURST: Yes. Yes. Except for Fleming and Fleming would have done more. He told me once that he found it embarrassing when he was here as the chief executive of the Madison campus. I guess his title then was provost, not chancellor. He found it embarrassing because he himself, of course, was a lawyer. He was in fact a member of the law faculty when he was provost. He had come here on the stipulation that he wouldn't take the administrative job unless he also could be a member of the law faculty. So he felt somewhat inhibited, in his position, to take a very aggressive attitude himself to pump more resources into the law school budget and he felt frustrated because he confronted the law dean in George Young who wouldn't press him.

SMAIL: So he could have done something if somebody—

HURST: I think Fleming could have made quite a difference here if we'd had Jake Beuscher as dean, let alone Lloyd Garrison. I think the period in which Fleming was here could have been quite a turning point, not due to any particular personal bias of Fleming although of course he was a graduate of our school and very close friends with several of us down here, but simply because I think Bob Fleming appreciated that there was a kind of vigor of ideas and enthusiasm in the law faculty which could make it a very major University asset if it were given a little more to work with.

SMAIL: What about Bill Sewell?

HURST: Well, Bill was in as a top executive too short an interval and of course almost as soon as he was embroiled in the disturbances of the Vietnam War protests so that Bill Sewell never had a chance, I think, to show what I am sure he would have shown in calmer times. I think Bill would have been a very sympathetic Madison chancellor to advance the interest of the law school. I think Sewell, by his own interests and his involvement with some of us down here, would have been a chancellor to whom we could have made approaches which would have gotten a very sympathetic and understanding response, but as I say he was in the job quite briefly and at a time when his attention was almost completely preempted by just the matter of trying to keep the place open.

EDWIN YOUNG, IRVING SHAIN

SMAIL: And then Young followed him.

HURST: Ed Young, I guess he did, didn't he?

SMAIL: Well, Bry Kearn was there briefly as acting-chancellor.

HURST: Ed Young, to me, was a puzzle in his position as chancellor and vis—a—vis the law school because several of us have always over a good many years been on very close relations with Ed Young. I think that's still true. And as chancellor he on various occasions made considerable drafts on law school faculty for counsel, advice, services of one sort or another, so that it's pretty plain I think that he had put a substantial value on some individual members of the law faculty, but I never and I don't think anybody down here ever got the feeling that he put any great weight on the law school as a total component of the University which again, as I keep coming back to, would have been a good place into which to press some Investment capital. And I just have to say that and then pretty well stop because I am baffled to understand it because I would have thought that Ed Young would be a chief executive who would be quite positive toward the school and positively desirous to give it more resources,

SMAIL: I guess the dean would be very important there, wouldn't he. I mean if a dean goes up there—

HURST: Well, now you see, I'm not quite sure of my chronology here but surely Spence Kimball's and George Bunn's deanships must have come in the chancellorship of Ed Young.

SMAIL: Yes, that's right. A change occurred in '67.

HURST: There were two deans who very vigorously pushed in a way that nobody had pushed in the deanship for some time on matters of faculty salary and more money in the law school budget to expand our teaching resources and free faculty time for research and the like, And they met such a completely negative or at least tepid response, time after time there, that both of them left the deanship sooner than I would have expected either one of them to leave it because I think they were basically totally frustrated. And not for lack of trying, because they were very energetically pushing for more resources for the place,

SMAIL: So this is something to ask Ed Young, isn't it, and Fred Harrington.

HURST: I think so.

SMAIL: —what was this attitude up there.

HURST: I guess they probably will say, and maybe this just comes down to matters of personal judgment that one cannot quarrel with except just to disagree with them, that they simply lacked confidence in the leadership or the general personnel of the law school to that extent. But if so, I think they didn't understand it.

SMAIL: But at the same time they say it is one of the outstanding law schools in terms of its ideas.

HURST: I think it is. I think it has been and I do not think that that judgment was shared up in Bascom Hall. I just am puzzled as to why it wasn't.

SMAIL: Maybe they wanted something—they thought that the law school should have been something different from what it was, and yet you'd have thought they would have been glad.

HURST: I don't think they ever spelled out what that desirable difference would be.

SMAIL: While we're on chancellors, Irving Shain apparently was saying that the law school was getting money from other parts of the, from other departments. Usually it's the other way around, isn't it, that the law school gives money to other departments? But that this had been reversed.

HURST: Yes. I think Shain is more, my impression is and again I am not close enough to the month-in, month-out affairs of our budget to be sure about this, my impression is that Shain has been more positive in his response to law school budget requests than his predecessors.

SMAIL: Do you know how the law school would compare, say, to the history department? Have you any idea?

HURST: No, I really don't.

SMAIL: Are there some issues that I—there's the degree, we didn't put that on tape.

J.D. VS. LL.B.

HURST: Oh the J.D. degree? I think that's a tempest in a teapot business, this transition from the LL.B. to the J.D. I think it's a rather superficial change. The good law degree representing three years of pretty good solid hard work, much of it I hope of a rather intellectual character, to me is always symbolized by the old fashioned degree, Bachelor of Laws. I think I said to you before, I feel that strongly enough so I have never moved to change my LL.B. to a J.D. I regard the J.D. as kind of a cosmetic change.

SMAIL: You equated it to calling a janitor a—

HURST: —a building superintendent, yes. It seems to me it's just an effort to fancy something up. My retired colleague John Conway told me once he was up in a bar meeting in the northern part of the state and found an older lawyer up there who shared John's ill-disguised contempt for the switch to the J.D. and said he agreed entirely with it, and the old lawyer said, "The first fellow that slaps me on the back and calls me Doc is going to get a punch in the snoot."

THE STUDENT-PROTEST ERA

SMAIL: The student protest is going on at about this period of 1965, '67, '68.

HURST: Yes. You asked about whether the University faculty as a faculty should have put itself on record in opposition of the Vietnam War, and I guess I would say no. I did not feel at that time that it should. I think there are some issues of moral principle on which a university faculty as a university faculty should be prepared to put itself on record. Those-particularly touching issues of free speech, free press, free assembly and the like. On the intrinsic merits of any particular substantive public policy, it seems to me that as a faculty, the University faculty is too diverse and represents too great

a variety of specialties to give it any clear title to speak as a total group. I think that the University as a collection of specialists in its special categories may have moral obligations to respond to some substantive public policy issues. I know for example Rachel Carson's book on the use of insecticides, pesticides and the damage it was doing to the natural environment, that sort of thing seems to me quite properly to elicit responses, whether pro or con, and I know there were pro and con responses on Rachel Carson. But I think it quite within the sphere of university scientists when posed with a question of political morality about what public policy should be toward endangering the natural environment or whether there is danger to the natural environment, that they should make themselves heard because that's within their immediate professional specialty. There are, I think, very few subjects other than those of the broad subject of freedom of the mind on which a university faculty with all of its variety of specialties should try to speak as a single voice. And by and large, I think faculty members should be very careful to preserve their own—should be very careful to hold themselves to their own proper roles of competence and should not, because they are faculty members, go around acting as community oracles on whatever subject somebody wants them to speak about. In that capacity I think they should very carefully disassociate themselves from their faculty role and speak as citizens. Just like any other citizen they should be able to write their congressman or rise in public meeting and criticize the president. But when you do this on a university letterhead or hitch a title of professor to your name--. I have always felt very strongly that individuals should speak only when they can conscientiously feel they're speaking out of their immediate professional competence as academic people. I have been very critical over the years of many of my colleagues in the University generally who it seems to me have used their university titles much too carelessly on issues for which they were not academically competent to speak. They're perfectly entitled to speak as citizens but not as professor.

SMAIL: And it is much more persuasive if you speak as a professor.

HURST: Well, that's on the one side and the other side of the picture is that the more you speak as professor on things in which you don't profess the more you depreciate the title.

SMAIL: So, the anti-war movement—you said you had many memories of a very bad time.

HURST: It was a bad time. The student protest mounted rapidly in intensity so that what had begun as a legitimate moral revulsion against what people regarded as an immoral war very soon turned into sort of a crusade of self-righteousness on the part of many people. If you didn't agree with them you were automatically a child of Satan. It's a very old, familiar phenomenon through the centuries. These were people, I think, who, or a lot of them, were at one stage of the game quite at one with forerunners who would cheerfully bum people at the stake for the sake of their souls. And also, of course, there was the degeneration, I would call it a degeneration of moral protest, into violent mob protests. , It's one thing to carry picket signs urging people to do this or that, another thing to muster pickets in mass picketing so that you made it impossible without physical combat for people who wanted to enter an academic building for an academic purpose to do so. There were two separate sets of occasions, I remember, when I would walk into my classroom to meet students who elected to come to the class behind ranks of national guardsmen. That's a very unpleasant experience. There seemed to be no thought on the part of many of the more aroused protesters that they had no particular title, because of their protest, to violate the civil liberties of their fellow students who elected to want to come to class. I felt as a faculty member, and here again speaking very specifically on what I see as the role of faculty member as faculty member, as distinguished from being a citizen

or what have you, that as part of the University I had a moral obligation to be there to meet people who elected to exercise their right to come and be students.

SMAIL: Did you talk to your students, or did they insist upon your talking about—

HURST: Yes, there were various occasions and I found, usually, the talk very unproductive because as I said the atmosphere rapidly mounted into one of self-righteous intolerance.

SMAIL: Students in your class.

HURST: Yes. The atmosphere just crackled with hostility. It was a strange atmosphere. I have been in the business now since 1937 and never before had—there's always some tension between faculty and students, there's bound to be in the nature of the job, but it's a tension usually within well-marked limits. The tension of this Vietnam protest period knew almost no limits. It was just naked hostility.

SMAIL: This is in the law school and did you all feel this or was there something about your particular field?

HURST: No, I think it was felt very commonly through the school.

SMAIL: I was just wondering whether you, who would be thought of as more of an intellectual I suppose, than some of the—

HURST: Well, I think I felt this hostility a good deal more perhaps because I do teach a course in the history of modern American law, the growth of public policy through law, and therefore I am talking about the development of the legal order as it has in fact existed and that very quickly translated in the minds of many of our students of that period into the proposition that since I was depicting a legal order which in fact had existed and continued to exist I was therefore its apologist and everything I said, anything I expressed as a matter of fact, they immediately would translate into a matter of value. If I said that in fact our public policy had been so and so, their immediate translation was that I believed that was the way it always ought to be and it was almost impossible, in that atmosphere, to get many of our students to see any distinction between recognizing what in fact had happened in the American experience and passing value judgments on what had happened in the American experience.

SMAIL: And you must have said to them, you must have at the time said, "There is a difference."

HURST: Oh I preached that constantly. But, usually I felt I was preaching to deaf ears.

SMAIL: Your students were third-year students?

HURST: Yes, mostly. Second, anyway. I wasn't dealing with first-year ones at all.

SMAIL: It must have been rather disillusioning for you, that they couldn't see that—

HURST: I wasn't particularly disillusioned in the sense that I was well aware as an historian that the

country has gone through these kind of periods on other things before, but it certainly was very upsetting to encounter not in the pages of books but in the matter of living experience. I remember once in that period I was asked to give a talk to the West Side Rotary Club and I came to talk to them out of one of these days of high tension down here and I opened my remarks by telling them how pleasant it was to be able to move from the University into the retreat of the businessman's ivory tower.

SMAIL: What about the TA strike period. As a lawyer and legal historian did you have any views on that, for instance Ed Young's recognition of the TAA?

HURST: I just don't know anything about that to be able to appraise it. I know some people think it was a bad mistake of judgment on his part.

SMAIL: But you yourself were not involved.

HURST: I was not involved, no. I have never been involved in any of the TA things except simply to have my reactions to it as a member of the faculty and involved as any member of the faculty, and I must say that starting as one who grew up from the 1930's period, with a strong bias in favor of rights of collective bargaining, and while I believe in the right of the TAs to organize and bargain collectively, I have as a faculty member been outraged by their specific demands and the way they have pressed them. There has been a wing of the TAA, I think, which has been just as bad in its self-righteousness as the worst of the blindness of the Vietnam protest years.

UNITED FACULTY

SMAIL: Are you on United Faculty, by the way?

HURST: No.

SMAIL: How do you feel about United Faculty?

HURST: I am largely opposed to it, for rather practical reasons I guess. I belonged to a faculty union when I first came here. A chapter of the AF of L teachers union was organized here and I joined it. A number of us on the law faculty belonged to it and I guess one of the reasons I have less than enthusiasm, in these later years, for joining a faculty union is my recollection of the many weary hours I spent sitting on hard chairs in meeting rooms of the Memorial Union building in those years before 1940, simply out sitting the communist sympathizers in the union. It was a well-known tactic of the commies or the commie sympathizers in the union to prolong meetings; they thought that all the liberals would be soft enough to wear out and want to go home and go to bed at some point and at that point the hard nucleus left would commit the union to their policies, so we had to outstay them.

WAYS OF TEACHING LAW

SMAIL: Let's get on to your feeling—you said that over the last ten years the law faculty has been split up over the issue of clinical training for lawyers.

HURST: Split not on the abstract desirability of it. I think almost everyone on the law faculty would agree that since the function of the law school is to provide young people with a background which will equip them rapidly to learn how to be effective client caretakers and counselors it would be ideally desirable if during the three years of law school, under careful supervision, they could get their first introduction to some of the problems of dealing with the concrete problems of clients. The problem is, I think, entirely one of means and competition for limited means.

We have had enough experience, by now, with forms of clinical instruction in which we place our students in situations where they are actually responsible for counseling live people in trouble, as in legal aid clinics or our inmate program in which we have law students rendering legal service to people at Waupun prison, for example, to know on the one hand that this can be invaluable experience as part of the training of a future lawyer, but on the other hand to learn really quite an obvious lesson—but still like so many obvious lessons it really has to be learned by experience—that clinical instruction isn't worth any more than the quality of the supervision: that it requires very close and detailed supervision by experienced talented people. That means fulltime faculty, typically, because part-time lawyers, busy lawyers, if they are the kind of quality of lawyers you'd like to use as preceptors they just don't have that kind of time away from their practice. So that you are talking about devoting really substantial times of experienced faculty to what must be relatively few students per faculty. That's where the close supervision comes in, and this is terribly expensive.

And the alternative is that you may create something that is called clinical but is actually very superficial, too little supervision, which carries a danger of doing disservice to the people you're purporting to serve and, more fundamentally still, probably allowing students to fall into bad habits, of careless and loose handling of people's affairs. Yet the costs are so high, that the harder you press the extension of clinical so that more and more students can have the advantage of it, if you maintain it at good quality, this is bound to drain resources from competing needs of the school, and I have felt this particularly because my own personal bias and interest has always been on the research side, which means the need to have resources to buy free time, for faculty to venture into their own lines of inquiry, and research is time costly, it doesn't always pan out. You spend many hours on things that never show up in print because they just didn't work out the way you hoped they might. So that there is bound to be a competition for limited resources there in proportion as you press clinical or research, either one.

All of these, of course, in competition with the more conventional classroom. There again, ideally, it would be desirable if most of our students, most of the time, in just standard classroom situations, were in classes no bigger than twenty or at the most thirty students. The classic so-called case method, so-called Socratic method of legal instruction envisages a constant give and take of an analytical argument between a skilled preceptor and students, and you simply can't carry on that kind of exchange in a very large group effectively. In a big group what purports to be case method or Socratic-type instruction soon becomes a facade of its own. It becomes sort of a disguised form of lecture.

So there is bound to be sharp competition because all of this is expensive in time costs, and the money costs that go into the time costs, between standard classroom instruction, which ought to be in small classes, research, and clinical. This in turn produces tensions in faculty recruitment because experience amply demonstrates that there are real differences in temperament. Some people are temperamentally basic research people, laboratory people; some people are basically by

temperament good classroom performers in a conventional classroom setting, stimulating people to better motivation toward the learning enterprise; some people are by temperament ideal clinicians, they deal best with the concrete situation and all of its complexity. And it's rare to find these qualities all combined in a single possible person to hire for the law faculty, so that the competition of these three fields tends to come to a sharp focus when we have limited resources to hire a faculty replacement or a faculty addition and the clinicians want to get somebody who looks to them like a good clinician, the classroom people want to get somebody who will run good, lively basic classes in contract, torts, or property, and the research people want people of ideas who will publish research and publish the sort of stuff that may be setting the pace in law school instruction ten years hence, and this does make for some rather tense exchanges in faculty recruitment. I think the nearest this faculty has come, in my experience of it, to really sharp disagreements verging sometimes close to fallings-out of personalities, has been over this competition for different types of persons to be hired on the law faculty out of very limited resources, simply because the realities are you just can't expect to find many individuals who will give you a combination of two let alone all three of these qualities—the classroom, the lab, and the clinical.

SMAIL: And you have to agree about this do you pretty much. It isn't— the history department can divide itself, into caucuses and say, well, this caucus is entitled to one person this year, and this—

HURST: Well, to some extent our practice works out somewhat like that but not at all formally. We have a two-thirds rule on the faculty. We will not vote to hire anybody who is voted down by a third of the faculty. If there is that much disagreement we won't take somebody. And that's a vote which is open to the entire faculty if they choose to attend a hiring meeting, and our hiring meetings are usually the ones that attract the bulk of the faculty. There is some indication that this is a real point of high tension in the operation of the school just in the attendance at faculty meetings. At the standard faculty meeting on most subjects most times, out of a faculty now of about forty-five or forty-six people, you count that you had a pretty good attendance if you had eighteen or twenty, something a little less than half.

SMAIL: How often—are they regular—

HURST: No they are not regularly scheduled. The dean calls them and our present dean hasn't been inclined to call them very often which has been all right with us because most of the time in the last couple of years we haven't had occasion for them. But in contrast, say, to an average attendance of between a third and 40 percent of the faculty at faculty meetings, a personnel hiring session will bring out close to 85 to 90 percent of the faculty, which shows something about the way in which hiring issues are evaluated for their long-run impact on the school.

SMAIL: And if you had your way, would there be no clinical work for law students?

HURST: No. I think we ought to have some because—in some measure I do think we ought to have some simply because I am a research minded person. I think we ought to have people actively trying to learn how to do better in clinical-type instruction as part of the research function of the law school because we might learn techniques which would make it possible for fewer faculty to do more with more students.

SMAIL: Sort of a sampling.

HURST: Yes. On the other hand I am opposed—out of the high primacy I give to research for the long-run vitality of the place, I am opposed to allowing the clinical enthusiasm to make very heavy claims on our limited hiring resources, simply because the claims are substantially boundless.

SMAIL: I can see that. I mean there are hundreds of people who need legal aid out in the state and—

HURST: Well, not only that but we have a student body of 850 and if we tried to see to it that each one of our students before graduating got a really substantial clinical exposure this could well occupy the full of, well, at least half of the faculty if not more, with what's left over for standard classroom instruction, and what's still left over, very miniscule by that time, for free research time.

SMAIL: I am sure the students like to do the—

HURST: Students like clinicals, yes. My answer to that, part of my research bias, is always to say that there is always the danger that you will respond to your present students at the inevitable long-run expense to the students who will be here ten or fifteen years hence, whose education ought to be enriched and fed and made very different from what it is today, largely as the product of research and writing efforts.

SMAIL: Well, how on earth do you balance it then?

HURST: Well, we balance it largely by, it's a very practical, pragmatic sort of balancing process such as goes on in Congress. You just bargain.

SMAIL: But the thing is that you can get—the weight goes up as you get another clinician and then the weight of the people in favor of clinical faculty goes up and then—

HURST: Then it goes down a bit after some point if the clinicians have gotten their innings. It tilts a little bit and you begin to feel it's time for the research people to get some innings, and vice versa.

SMAIL: The dean must be very important here.

HURST: He can be, although Orrin Helstad is a relatively passive dean in these matters. The dean can be very important in hiring although that is one of the dangers of having an active dean. And I think I mentioned before that having an activist dean is a two-edged sword.

SMAIL: But I mean which position he took I should think would have some effect on it.

HURST: Yes and particularly Orrin Helstad, our present dean, has been very important in this process because he essentially determines the extent to which we press Bascom Hall for personnel budget money. And we pretty well have to take what he says as to the limits of how far he thinks he can afford to press. And if he says, I think as he indicated to us most recently, that he thought that he could effectively press for only enough money to allow us to hire one person instead of hiring two or three as we had hoped, that inevitably—without his doing anything else than that, that inevitably profoundly affects the balance bargaining in the faculty as a whole and who will be selected, because if you had two or three positions open, there is obviously more room for people of diverse

enthusiasms to strike a deal. We've got three spots, here's a clear cut clinical choice, here's a clear cut research choice, here's a clear cut good general property utility teacher choice. We'll take those three people. But if you only have one opening, that makes the competition much more acute and always carries the danger of much more acute personal divisions within the faculty.

SMAIL: Are they getting somebody to replace you?

HURST: Not in any direct sense, no.

SMAIL: Really?

HURST: Well, we've got younger members of the faculty. We've got two of them particularly. Maybe you should count it as three, but at least, no, three, well really primarily two younger members of the faculty who share my interest in legal history as a research and writing field. So they are already here.

SMAIL: And they're good are they.

HURST: Yes. But—

SMAIL: So you don't feel that your niche is going to be lost?

HURST: No. I think there will still be somebody in the faculty actively interested in legal history. On the other hand, I more or less interpreted or maybe misinterpreted your query to mean were they going out actively recruiting—

SMAIL: I meant were they specifically going to replace your position.

HURST: Oh. No, not in that sense. But in a sense they already have done it.

THE ACADEMIC LIFE AND MARRIAGE

SMAIL: I wanted to ask you what role your wife has played in your career.

HURST: Well, by being very understanding by being willing to put up with a husband who, I am sure over many times and many of the years, has been much more fixated on his professional interest than he should have been at the expense of the household. I have something of a guilty conscience now, stirred up. I suppose by the general change in currents of ideas in the last ten or fifteen years, about the extent to which I did not, I think, share to the degree I should have in the critical early years of bringing up our kids.

SMAIL: Well, did she mind that?

HURST: I think she probably minded it. I know she felt herself under a great deal of the kind of stress and strain that I think all young mothers do when they are coping with the ages around two to six particularly. And that was a period when I was particularly engrossed in getting deep into this research area I had gotten into. I don't mean to say that I was working nights or not home weekends

or what not, but I was putting in very long working weeks and frequently my working weeks were—and I probably shouldn't have been doing this when the children were small—my working weeks frequently included the forenoon of Saturday. I would just sort of take it for granted I'd work a five-and-a-half-day week. I probably shouldn't have been doing that. I probably, as a husband and father, should have been at least home all weekend. Then there is the further fact that I am an inveterate taker of work home. When I am home I usually spend a couple of hours, say out of seven nights of the week, four or five of those nights I probably am spending a couple of hours on professional reading of one sort or another. So, I think I am something less than the ideal husband.

SMAIL: I guess all members of the faculty are that. But beyond that; would you—somebody said that she had been wonderful as a hostess and~

HURST: Oh, she always has been, and Frances is very much interested herself in the, I don't know, it's hard to say this in ways that don't sound stilted, in the academic life or in the world of the University.

SMAIL: That's fair enough. Wives, I think, tend to be. Well, that's really what I am after. It seems to me unfair to leave women so unacknowledged in careers, because they often can be very important.

HURST: Remember that dedication that somebody wrote some years ago of his book to his wife "without whom this work would have been completed much sooner."

SMAIL: Yes. Your career probably would have suffered if she had worked.

HURST: I am sure it would have. I think it's quite a problem for many of my younger colleagues who have wives in the newer tradition. Of course, not the least of those problems we feel very acutely these days in faculty hiring is when you have a two-profession household and the problem is of trying to find suitable, satisfactory jobs for both husband and wife in the same place. We've experienced that problem in a couple of instances now in the law faculty here and I know it's not an uncommon problem everywhere these days.

SMAIL: Yes.

HURST: When I was in law school it was extremely exceptional for any law student to be married. At the Harvard Law School out of a law class of nearly five hundred students, it just became common knowledge, and you would point out three or four individuals as oddities, because they had wives. There were no women in law school; that was just taken for granted at that point. In that atmosphere, of course, law students were not misogynists, they had dates, but it's a different thing to have a wife and have a date. And in that atmosphere, as I look back on and compare it with what I sense about life in our modern law school body, here at least, the difference is really quite fantastic. For at least two out of three years at the Harvard Law School in the 1930's (the third-year people tended to drift away a bit because they got increasingly bored with the routine of the instruction) but in the first two years you literally lived and breathed law. Law students ate together at places where law students congregated and they talked shop at meals, they formed informal discussion groups, and they talked shop in their rooming houses in the evening hours endlessly. You really just lived with and through the law as law students then completely. And I have sensed, particularly since World War II, a situation where now it is more and more the rule than the exception that law

students are married, that the quite natural demands of being part of a working partnership in a marriage relation means that students just don't give that kind of undivided attention to their professional study as they did once. And that, I think, has made a substantial diminution in the intensity of the law school experience. I am not saying that the result of this is the law students should be forbidden to marry, I don't think they should be celibate, but it's just a fact of life. It's a cultural change which has, I think, profoundly changed the atmosphere of the law student world from what I knew in the 1930 and what it is or has been at any time in about the last twenty years.

SMAIL: Is it possible to be aware of an effect? I mean the effect should be that people are not as thoroughly conversant in the law.

HURST: That's true. I think our students tend to get less out of law school than I wish they would get by just professional interchange among themselves. I felt myself, in my law school years, that I got at least half of my legal education out of my fellow students and probably more. I don't think that is true today.

SMAIL: Of course that would be true of any of the other intellectual disciplines.

HURST: Yes.

SMAIL: I don't think it would be true of medicine but certainly historians or economists.

HURST: Yes, and that's a very serious change.

SMAIL: Of course it's true of faculty too, isn't it, that they don't—although that isn't from being married, but just from not having a chance to be together as much.

HURST: Yes. I am not quite sure what has led to that. When I was here in the early years of my stay on the faculty, the faculty had a good deal more social contact with each other than they do now, but then that may be partly just a phenomenon of size. When I joined the faculty in 1937 I think I was the fifteenth or sixteenth member and it was very easy for the whole faculty to be gathered together on social occasions in one house. As I said, we now have a faculty of forty-five or forty-six. Apart from their numbers they live much more dispersed in the Madison area than they used to.

SMAIL: But the cars drive faster—

HURST: Well, yes. And then the larger faculty has tended, I think, also inherently to mean that there is a more pronounced generation gap in the faculty than there was. As a young faculty member I saw more of and felt closer to the older members of the faculty in a faculty of fifteen or sixteen people than I think our younger people feel now in the faculty of forty-five. These are, I think, just structural factors in the situation that changes.

SMAIL: Well, all right, thank you very much.