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### Willard Hurst's Unpublished Manuscript on Law, Technology, and Regulation

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## FOREWORD

### WILLARD HURST'S UNPUBLISHED MANUSCRIPT ON LAW, TECHNOLOGY, AND REGULATION

BJ ARD\* & WILLIAM J. NOVAK\*\*

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#### INTRODUCTION

It is with a great deal of excitement (and with thanks to so many contributing colleagues and collaborators over the years<sup>1</sup>) that we are able to present to the public for the first time a newly published work by one of the great originators of modern legal history and law and society scholarship—James Willard Hurst. Hurst published his last two books, *Law and Markets in United States History* and *Dealing with Statutes*, in 1982.<sup>2</sup> And, fittingly, he published his last substantive article—a very short comment on “The Use of Case Histories”—in the *Wisconsin Law Review* in 1992. In the latter, Hurst took one final parting shot at traditional legal scholarship focused on “tales of conspicuous political or constitutional controversies” as well as conventional legal histories that “tell only of great events and star actors.”<sup>3</sup> As a pioneer of both the “Wisconsin school” of law and society and the Wisconsin monographic

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1. The authors would especially like to thank the following individuals and institutions: Thomas Hurst and Deborah Hurst Senter for their permission and encouragement to share their father's work; Dan Ernst for his long-term and ongoing help understanding the origins of this manuscript; Sara Seo for inspiring us again to get this document published; John Lavanga for his heroic transcription efforts; Kyle Clark and his colleagues on the *Wisconsin Law Review* for their assistance preparing this important but nonstandard piece for print; and the extraordinary staff of the Michigan Law Library—especially Sandy Zeff—for securing a reliable scan of the original manuscript.

2. JAMES WILLARD HURST, *LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS* (1982); JAMES WILLARD HURST, *DEALING WITH STATUTES* (1982) [hereinafter HURST, *DEALING WITH STATUTES*].

3. James Willard Hurst, *The Use of Case Histories*, 1992 WIS. L. REV. 875, 875.

tradition in legal history research, Hurst's interests were different.<sup>4</sup> He aimed instead at the larger questions and the deeper causation reflected in the analytical categories that pervaded his mature work: sequence and context, particularity and generality, structures and functions, values and interests, and drift and direction.<sup>5</sup>

That complex and comprehensive approach to the study of law in society is already apparent in the manuscript published here for the first time: "Technology and the Law: The Automobile." In a document that we believe is among Hurst's earliest substantive histories (and now over seventy years old), we can see the very beginnings of the distinctive approach to legal studies that would shape legal history and law and society for generations to come. With slight stylistic and typographical changes, we present the manuscript as we found it—as a complete and carefully hand-edited final document with endnotes in the bibliographic style that Hurst utilized early in his career. This manuscript was clearly intended and finalized by Hurst for ultimate publication, and it has been our goal to make good on that original promise. Though we could have simply archived or digitized the document at several points along the way, we were determined to see it through to publication so a new generation of students and scholars might be freshly exposed to the power of Hurst's uniquely ambitious scholarly project in the law. After first saying a bit about the original discovery of this particular document, we close this foreword with some observations about what we see as its continued

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4. On the "Wisconsin school," see *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* (Stewart Macaulay, Lawrence M. Friedman & John Stookey eds., 1995) and *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* (Lawrence M. Friedman & Harry N. Scheiber eds., Harvard Univ. Press enlarged ed. 1988). Beyond Hurst's own magisterial (and only monographic) work, *JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964), the major Wisconsin monographs produced by Hurst's students and colleagues include ROBERT S. HUNT, *LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD ON WISCONSIN LAW IN THE NINETEENTH CENTURY* (1958); GEORGE J. KUEHNL, *THE WISCONSIN BUSINESS CORPORATION* (1959); SPENCER L. KIMBALL, *INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS, 1835-1959* (1960); EARL FINBAR MURPHY, *WATER PURITY: A STUDY IN LEGAL CONTROL OF NATURAL RESOURCES* (1961); JAMES A. LAKE, *LAW AND MINERAL WEALTH: THE LEGAL PROFILE OF THE WISCONSIN MINING INDUSTRY* (1962); SAMUEL MERMIN, *JURISPRUDENCE AND STATECRAFT: THE WISCONSIN DEVELOPMENT AUTHORITY AND ITS IMPLICATIONS* (1963); LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965); and SAMUEL MERMIN, *THE FOX-WISCONSIN IMPROVEMENT: AN HISTORICAL STUDY IN LEGAL INSTITUTIONS AND POLITICAL ECONOMY* (1968). For an excellent introduction to the Wisconsin monographs, see Richard N. Current, *Willard Hurst as a Wisconsin Historian*, 1980 *Wis. L. Rev.* 1215.

5. For a comprehensive examination of Hurst's historical sociology of law along these lines, see William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 *LAW & HIST. REV.* 97 (2000).

relevance today. But, for the most part, we are simply eager to have Hurst's words speak for themselves again after all these years.

*Image 1. Hurst's Introduction to His Unpublished Manuscript*

Chapter Eight

Technology and the Law: The Automobile

1. The Multiplying Effects of an Invention

In this chapter we are going to talk about some of the <sup>automobile</sup> effects that the ~~law~~ has had upon the law, and some of the effects that the law has had upon the automobile. We could ~~do this in a number of ways~~ ~~and~~ undoubtedly open up some ~~new~~ worthwhile lines of thought, if we talked about the automobile in relation to certain broader problems of which it is a part: for example, the effects of the internal combustion engine, or <sup>the growth</sup> of all ~~the~~ types of communication. But we shall have enough on our hands if we stick to the automobile, and even so in the limits of this chapter we can discuss at any length only the relation of the law and the passenger <sup>car.</sup> ~~car.~~ This is not merely an arbitrary limitation, however. Of the 32 million registered motor vehicles in the United States in 1940, substantially over 27 million were passenger cars, and a little under four and ~~one~~ one-half million were motor trucks. Until the middle 1920's the proportion of trucks to passenger cars was much lower than this. Not only was the passenger <sup>car</sup> ~~car~~ the ~~center~~ center of the auto problem as a matter of gross figures; it was likewise the main aspect of the problem that men saw and reacted to. ~~We~~ We may properly focus on it when we try to <sup>retrace</sup> ~~retrace~~ the unplanned paths of the law's responses to ~~the automobile~~ <sup>the motor vehicle.</sup>

I. THE JOURNEY OF A LOST MANUSCRIPT

Bill Novak first came into possession of this unpublished manuscript during the 1990–1991 academic year while serving as a Legal History Fellow and Student Administrator at the Institute for Legal Studies at Wisconsin Law School. Those years were especially heady times for sociolegal studies at the University of Wisconsin, which hosted innumerable law and society speakers, the first Critical Race Theory workshop, a celebration of the Civil Rights Act of 1964, and a symposium honoring the fortieth anniversary of Willard Hurst's *The Growth of American Law* (as well as Hurst's eightieth birthday).<sup>6</sup> Hurst himself was

6. The original Critical Race Theory workshop took place in Madison on July 8, 1989. Linda S. Greene, *Critical Race Theory: Origins, Permutations, and Current*

still very much a dominating intellectual presence in Madison, but he commuted into the Law Building itself less and less. Indeed, the standard method of receiving an enviable audience with Hurst was to pick him up at his home and drive him for an extended lunchtime discussion of legal history at a local Madison deli.<sup>7</sup>

It was around this time that Hurst made the fateful decision (amid a space crunch at the Law School) to actually vacate the library stacks office where he had amassed a lifetime collection of books, articles, papers, and correspondence on modern American law, society, and political economy. As meticulous as Hurst was in building his scholarly archive, the final disposition of his office material was another matter. Though Hurst had already donated teaching materials and correspondence to the library, and with many valued books and papers safely ensconced at home, Hurst disposed of his remaining office books and papers by inviting a series of colleagues to enter his Law School office and to take whatever they might find valuable or useful. As a mere doctoral student, Bill Novak was the last to receive Hurst's permission to enter the inner sanctum. By that time, Hurst's law books were substantially picked over—with many finding their way to the de-acquisition sale at the Wisconsin Historical Society and on to Madison's impressive array of used bookstores. When Novak arrived at Hurst's office, a plastic dumpster parked in the hall spurred a frantic nighttime call to Hurst at home since so much of value seemed to still remain (including signed photographs of Supreme Court Justices from Hurst's clerkship year). But Hurst was characteristically stoic about such papers and memorabilia. He had already said publicly everything he wanted to say in a half-century publication record of original research and writing still unrivaled in the fields of American legal history and law and society. Or so we thought.

Upon entering Hurst's office in its final days, Novak's first thought was to preserve intact a couple hundred or so volumes that might be of interest to future scholars. And the Institute for Legal Studies quickly absorbed those volumes into a nascent sociolegal studies library. In clearing the final bookshelves, however, Novak's archival interest was piqued by a remaining stack of faded manila envelopes wedged onto a bottom corner shelf. The contents of the envelopes and folders were as strangely random as they were decidedly aged—classroom lecture notes, hand-cut file-card notes for subsequently published projects, stray

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*Queries*, 2021 WIS. L. REV. 259, 262. The Civil Rights conference took place the following November. See RACE IN AMERICA: THE STRUGGLE FOR EQUALITY, at ix (Herbert Hill & James E. Jones, Jr. eds., 1993). The Hurst celebrations began in October 1990. See Aviam Soifer, *Reflections on the 40th Anniversary of Hurst's Growth of American Law*, 17 LAW & SOC. INQUIRY 167 (1992).

7. For some of the unique range and flavor of these conversations, see the wonderful pastiche assembled in Earl Finbar Murphy, *The Jurisprudence of Legal History: Willard Hurst as a Legal Historian*, 39 N.Y.U. L. REV. 900 (1964) (book review).

correspondence that eluded file cabinets, and old newspaper clipping files on subjects ranging from “morals” to “corporations.” But the two folders that especially captured Novak’s attention contained what seemed to be wholly complete and carefully hand-edited manuscript chapters: “Chapter Eight—Technology and the Law: The Automobile” (74 pages plus notes)<sup>8</sup> and “Chapter Eleven—Law and the Balance of Power: The Federal Anti-Trust Laws” (220 pages plus bibliography).<sup>9</sup> The Wisconsin Law School community had just spent almost two years studying and discussing Hurst’s work and legacy. We had assembled a comprehensive bibliography, and Hurst’s own books currently occupied two displays in the lobby of the Law Building. But nowhere did we find or discuss Hurst’s important scholarly contributions on either the Automobile or Antitrust. What exactly were these mysterious manuscript chapters “Eight” and “Eleven”?

After rescuing these manuscripts from a potentially disturbing fate, Novak largely forgot about them for the next decade or so as he moved to the University of Chicago. The question of the manuscripts next resurfaced in the context of a special symposium issue of the 2000 *Law and History Review* devoted entirely to the subject of Hurst’s prodigious scholarship.<sup>10</sup> In excavating a historical-sociological vision of Hurst’s academic project that escaped the close confines of “American legal history” per se, Novak dug out the manuscripts in search of fresh perspective. In particular, Hurst’s capacious rendering of the 119 “Derivative Effects of the Auto upon the Law”<sup>11</sup> coupled with his listing of an additional 148 new penal offenses emanating from the automobile in Illinois law<sup>12</sup> seemed to capture something of the distinctive scale and scope of Hurst’s scholarly imaginary.<sup>13</sup> Daniel Ernst’s contribution to the same symposium included a characteristic deep dive into the Felix Frankfurter Papers at the Library of Congress, precipitating a long and constructive dialogue about the

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8. James Willard Hurst, *Chapter Eight—Technology and the Law: The Automobile*, 2022 WIS. L. REV. 463. Star pages indicate the pagination of the original manuscript, which began with page 714. The original manuscript is available through the University of Wisconsin Law School Library at <https://repository.law.wisc.edu/s/uwlaw/item/305812>.

9. James Willard Hurst, *Chapter Eleven—Law and the Balance of Power: The Federal Anti-Trust Laws* (1949) (unpublished manuscript) (on file with author).

10. Symposium, *Engaging Willard Hurst: A Symposium*, 18 LAW & HIST. REV. 1 (2000). Over the next decade, Novak would explore multiple possibilities for the ultimate publication of Hurst’s unpublished manuscripts with several colleagues, editors, and publications, but alas, the manuscripts returned to cold storage when he relocated again from the University of Chicago to the University of Michigan Law School in 2009.

11. Hurst, *supra* note 8, at \*720–30.

12. *Id.* at \*731–35.

13. See Novak, *supra* note 5, at 109–11.

provenance of Hurst's unpublished chapters.<sup>14</sup> By January 1949, Ernst found, Hurst had already sent to Frankfurter "two bulky volumes"<sup>15</sup>—the raw material for what would eventually become *The Growth of American Law: The Law Makers* (1950).<sup>16</sup> Hurst mentioned to Frankfurter that his editors at Little, Brown liked the manuscript "even in its present, unreconstructed version," but from a marketing viewpoint, they were "still trying to decide whether to risk it."<sup>17</sup> More significant for deciphering the original nature of chapters eight and eleven, Hurst also discussed with Frankfurter an "additional volume" in his lifelong quest to forge a "modern, functionally-conceived legal history in the law schools."<sup>18</sup> Hurst was convinced that extant legal research was not "grounded in ideas adequate to the intellectual challenge which the phenomena of legal order present."<sup>19</sup> And he was determined to move legal education toward a broader conceptualization focused on "the living interplay of law and social growth."<sup>20</sup> Hurst launched that project with Lloyd Garrison as early as 1940 with *Law in Society*, and he now looked forward to advancing it with *The Growth of American Law*.<sup>21</sup> But, even as he put the finishing touches on *Growth*, he began to envision additional chapters, indeed, additional volumes.

The "two bulky volumes"—six chapters and 726 pages—that Hurst sent to Frankfurter in 1949 were originally entitled "A History of the Principal Agencies of Law in the United States, Parts I & II."<sup>22</sup> They were designed first as course materials. But while Hurst's left hand was busy turning "Principal Agencies" into *The Growth of American Law*, his right hand, as he conveyed to Frankfurter, was simultaneously hard at work on the next iteration—"an additional volume" that would expand "Principal

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14. Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 *LAW & HIST. REV.* 1 (2000); see also Daniel R. Ernst, *The Ideal and the Actual in the State: Willard Hurst at the Board of Economic Warfare, in TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 149 (Daniel R. Ernst & Victor Jew eds., 2002) [hereinafter Ernst, *The Ideal and the Actual in the State*].

15. Letter from James Willard Hurst to Felix Frankfurter (Jan. 12, 1949) (on file with the Felix Frankfurter Collection, Library of Congress, Reel 42).

16. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950).

17. Letter from James Willard Hurst to Felix Frankfurter, *supra* note 15.

18. *Id.*

19. Willard Hurst, *The Law in United States History*, 104 *PROC. AM. PHIL. SOC'Y* 518, 521 (1960).

20. Willard Hurst, *Perspectives upon Research into Legal Order*, 1961 *WIS. L. REV.* 356, 361.

21. LLOYD K. GARRISON & WILLARD HURST, *LAW IN SOCIETY: VOL. I, AN INTRODUCTION TO THE STUDY OF LAW; VOL. II, DEVELOPMENTS IN THE LAW OF INDUSTRIAL ACCIDENT* (1941).

22. WILLARD HURST, *A HISTORY OF THE PRINCIPAL AGENCIES OF LAW IN THE UNITED STATES, PARTS I & II* (1948–1949).

Agencies” into a full three-credit course.<sup>23</sup> Hurst’s plan for that volume (covering fully the second half of the proposed expanded class) was just as ambitious as the original material being revised for *Growth*. Indeed, Hurst proposed seven additional substantive chapters. The first would deal with something that Hurst called “peculiarly formative influences in our society” (i.e., “[t]he relation between the law and science and technology”).<sup>24</sup> To make these points “more concrete,” the following chapter would trace the legal effects of scientific and technical thought and practice by studying the “various effects which the automobile has had on the law, and the law on the automobile.”<sup>25</sup> By the time he wrote Frankfurter, Hurst had a “first draft” of the starting chapters in hand.<sup>26</sup> Hurst then proposed two chapters on a theme that preoccupied him throughout his career—the relationship between law and the “balance of power in the community.”<sup>27</sup> Here, Hurst planned both a chapter on the law of voluntary associations and a chapter on the “history of anti-trust law sanctions.”<sup>28</sup> Next, he anticipated adding a chapter on the rise of civil liberties in American law, as well as a chapter on the law of communications and interferences with “the flow of information and ideas.”<sup>29</sup> He then envisioned closing with a final chapter dealing with law itself as a social determinant through a focus on taxation as a rising technology of modern legal regulation.<sup>30</sup> Technology, voluntary associations, antitrust, civil liberties, communications, and regulatory taxation—here were substantive areas of expansive legal change in the early twentieth century that could perfectly supplement *Growth*’s structural and institutional focus on the legislature, the courts, constitutional conventions, the bar, and the executive branch.

It was January 1949. In classic Hurstian fashion, Will (as he was not infrequently referred to in correspondence from that period) proposed completing this entire second volume by September or “a year from now”<sup>31</sup>—the tight schedule perhaps dictated by the generous, multiyear grant Hurst had just received from the Rockefeller Foundation to support original legal-economic history research into “the interplay of the law and the lumber industry in Wisconsin.”<sup>32</sup> As “a year from now” came and went, Hurst successfully published *The Growth of American Law* to much

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23. Letter from James Willard Hurst to Felix Frankfurter, *supra* note 15.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

acclaim.<sup>33</sup> But even as Rockefeller and the Wisconsin monographs beckoned, Hurst remained committed to his plan for an additional volume. By September 1950, Little, Brown's Charlie Woodard and Rod Robertson both prodded Hurst about the progress he was still making on "the second volume of *The Growth of American Law*."<sup>34</sup> They were no doubt still awaiting the substantive chapters on automobiles, voluntary associations, antitrust, civil liberties, communications, and taxation—of which only the chapters on automobiles (Chapter Eight) and antitrust (Chapter Eleven) seem to have survived, and those only in manuscript form. What happened to the rest of the proposed "second volume" of "Principal Agencies" and *Growth*?

By 1952, we get closer to a credible hypothesis. In response to his editors, Hurst submitted a staggeringly ambitious and detailed four-page, single-spaced, ten-year plan for research and writing in U.S. legal history.<sup>35</sup> Here we see for the first time that Hurst's plan for a second volume of *Growth* had swollen to *three* additional volumes. "The Balance of Power" volume was now but the first planned supplement, including chapters on "the role of law in relation to social change," as well as a long case history of "anti-trust policy and enforcement" (the latter of which Hurst estimated to be half of the volume).<sup>36</sup> Hurst reported that sixty percent of this manuscript was "in my files in rough draft"—arguably automobiles and antitrust.<sup>37</sup> Hurst proposed completing "Balance of

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33. *Id.* In 1952 Felix Frankfurter captured the moment in recommending *Growth* to Douglas Logan of the University of London:

Wil Hurst is at the University of Wisconsin. He is undoubtedly one of the most esteemed law teachers of his generation. Several law schools, including our old shop, have been trying to seduce him, but Wil has dug into Wisconsin and both personally and professionally is very happy. I think he is wise in pursuing his chief preoccupation—the history of legal institutions—on that [M]idwest soil. He has written an important book which you should know about. It is 'The Growth of American Law,' which I am sure is in the law library of your University. If not it should be.

Letter from Felix Frankfurter to Douglas Logan (Oct. 30, 1952), available at *The J. Willard Hurst Collection: Series VII Correspondence*, UNIV. OF WIS. L. LIBR., <https://web.archive.org/web/20150906192548/http://library.law.wisc.edu/hurst/correspondence.html> (last visited Apr. 13, 2022).

34. Letter from Rod Robertson to Willard Hurst (Aug. 28, 1950), available at *The J. Willard Hurst Collection*, *supra* note 33; Letter from Charles F. Woodard to Willard Hurst (Sept. 20, 1950), available at *The J. Willard Hurst Collection*, *supra* note 33; Letter from Charles F. Woodard to Willard Hurst (Oct. 10, 1950), available at *The J. Willard Hurst Collection*, *supra* note 33. The October 10, 1950, letter acknowledges receipt of a "copy of the manuscript which you sent me." *Id.*

35. Letter from Willard Hurst to Charles Woodard (June 5, 1952), available at *The J. Willard Hurst Collection*, *supra* note 33.

36. *Id.*

37. *Id.* The year 1952 thus establishes the latest possible date of authorship for the surviving manuscripts. Recall that the first draft of the chapter on automobiles had been completed by 1949. See *supra* note 26 and accompanying text. The chapter on antitrust

Power” with new essays on “church and state, economic interest groups, the military, [and] private and public bureaucracy.”<sup>38</sup> But Hurst also now envisioned two additional volumes on “The Sense of Community” and “Morals and Morality,” completing what he started with *Growth* as a full-blown tetralogy canvassing a vast swath of modern American law, economy, and society.<sup>39</sup> All that was but one-third of Hurst’s ten-year plan. His monograph on law and the lumber industry in Wisconsin would remain his primary research and writing priority—to which he dedicated his so-called “regular workday hours.”<sup>40</sup> After that was completed, Hurst contemplated a “general Wisconsin study” that would synthesize and build upon all of the Rockefeller monograph material under the rubric of “Law and the Growth of an American State.”<sup>41</sup> Amid all of this demanding “regular hours” work, how would he simultaneously complete the tetralogy? Hurst proposed continuing as he had for the last three years—using his “spare time,” outside regular hours: “evenings, weekends, and school vacations and the summer recess.”<sup>42</sup> Hurst planned completion of “Balance of Power” by the end of summer 1953 and all the rest by 1963 (while giving himself the whole of 1964 as a hedge for “failing to meet the steps of the time-table as outlined”).<sup>43</sup>

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may also have been completed as planned by September 1949, *see supra* note 31 and accompanying text; alternatively, it may have been written in 1950 in time for inclusion in the “manuscript” referenced in Hurst’s correspondence with his editors at Little, Brown, *see supra* note 34.

38. Letter from Willard Hurst to Charles Woodard, *supra* note 35.

39. Hurst described “The Sense of Community” volume as exploring aspects of problems of “social integration,” “community,” and “belonging-ness” through topics like “urbanization,” “the mass media of communication,” “the bureaucratization of industry,” and “civil liberties.” *Id.* He described the more tentative “Morals and Morality” volume as including essays on “classic efforts to . . . enforce moral codes in law,” especially with respect to liquor, gambling, and prostitution. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

*Image 2. Excerpts from Hurst's 10-Year Timetable*

A rough time-table might look like this:

1952

- Regular workday hours: lumber study
- Sparetime (especially summer): "The Balance of Power"

1954

- Regular hours: lumber study
- Sparetime: "The Sense of Community"

1958

- Regular hours: general Wisconsin study ("Law and the Growth of an American State").
- Sparetime: "Morals and Morality"

Felix Frankfurter was enamored of Hurst's vast scholarly project: "I hasten to tell you what considerable excitement the summary of your three-fold program arouses in me."<sup>44</sup> Frankfurter counseled that it was "important to have direction in life and to take measures, so far as possible, for pursuing one's direction."<sup>45</sup> But he also warned, "The longer I live the more convinced I am of the dominant, too often too dominant, factor of contingency in life."<sup>46</sup> And contingency within such best-laid plans perhaps best explains the ultimate fate of Hurst's manuscript chapters "Eight" and "Eleven." By 1964, Hurst would use his "regular hours" to complete his magnum opus *Law and Economic Growth: The Legal History of the Wisconsin Lumber Industry*. He also enthusiastically embraced a new approach to book production based on the publication of invited law school lectureships (a process he was introduced to as early as 1936, when he was the principal researcher and "stenographer" for Felix Frankfurter's University of North Carolina Law Lectures, *The Commerce Clause Under Marshall, Taney, and Waite*<sup>47</sup>). Consequently, by 1964, Hurst would also deliver the Rosenthal Lectures at Northwestern Law School, the Cooley Lectures at Michigan Law School, and the Holmes Lectures at Harvard Law School, resulting in three more significant volumes: *Law and the Conditions of Freedom in the Nineteenth-Century United States*, *Law and Social Process in United States History*, and *Justice Holmes on Legal History*.<sup>48</sup>

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44. Letter from Felix Frankfurter to Willard Hurst (Jan. 18, 1954), available at *The J. Willard Hurst Collection*, *supra* note 33.

45. *Id.*

46. *Id.*

47. FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* (1937).

48. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956) [hereinafter HURST, *LAW AND THE*

Few would quibble with such a decade of spectacular and original scholarly productivity.<sup>49</sup> However, with Hurst turning his attention back to the nineteenth century—to law, to lumber, to Wisconsin's Pike Creek and the “conditions of freedom” and the “release of energy”—posterity did lose valuable substance from Hurst's original keen interest in twentieth-century law, technology, regulation, and the “Growth of an American State.” Indeed, one cannot help but wonder about the worlds we have lost in chapters from Hurst on church and state, interest groups, the military, public bureaucracy, urbanization, mass media, the bureaucratization of industry, civil liberties, criminal justice, and the modern policing of morals and morality. But that fact only increases our satisfaction in finally being able to provide but a glimpse into those unrealized possibilities and potentialities through the publication of Hurst's previously unpublished manuscript on law, technology, and the automobile.

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CONDITIONS OF FREEDOM]; JAMES WILLARD HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY: FIVE LECTURES DELIVERED AT THE UNIVERSITY OF MICHIGAN*, NOVEMBER 9, 10, 11, 12, AND 13, 1959 (1960); JAMES WILLARD HURST, *JUSTICE HOLMES ON LEGAL HISTORY* (1964) [hereinafter HURST, *JUSTICE HOLMES ON LEGAL HISTORY*]. As Hurst explained his reason for accepting “these various lecture invitations”:

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.

Interview by Laura Smail with Willard Hurst in Madison, Wis. (Apr. 15, 1981), <https://repository.law.wisc.edu/s/uwlaw/media/302252>. For the rest of his publishing career, after the production of his singular monograph on lumber, Hurst's books would be the result of invited law lectureships. See, e.g., JAMES WILLARD HURST, *LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS* (1982) (University of Wisconsin Curti Lectures); HURST, *DEALING WITH STATUTES*, *supra* note 2; JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970* (1970); JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774–1970* (1973); JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* (1977).

49. To which we have to add the simultaneous production of the Wisconsin monographs by Hurst's students and colleagues under Hurst's close personal direction. Hurst explained the level of his own involvement in the production of those works:

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. . . . 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.

Interview by Laura Smail with Willard Hurst in Madison, Wis., *supra* note 48.

## II. THE STUDY OF TECHNOLOGY AND LAW

One can only imagine the trajectory Hurst's work on the automobile could have set for the future study of law's relationship with technology. The conventional approach today is to characterize the law as primarily reactive to technological change<sup>50</sup> and to assess each individual technology in isolation.<sup>51</sup> Hurst's manuscript suggests a richer and more nuanced path. While the bulk of the chapter focuses on the automobile's impact on law, Hurst's first sentence stakes his view that law and technology are mutually constructive forces: "In this chapter we are going to talk about some of the effects that the automobile has had upon the law, and some of the effects that the law had upon the automobile."<sup>52</sup> Moreover, he goes beyond the law's response to the automobile to put this case study in dialogue with the law's contemporary responses to radio and aviation.<sup>53</sup> For all Hurst's case study on the automobile tells us about the limits of tort law or the pitfalls of assembling a regulatory apparatus, he offers still deeper insights by contrasting the law's responses to different technologies.

As a matter of structure, Hurst funnels his analysis from the broad to the increasingly specific. The manuscript opens with a grand survey of the impacts of the automobile, best exemplified in the aforementioned 119-point list of "Derivative Effects of the Auto Upon the Law."<sup>54</sup> Hurst does not limit his sights to the obvious technical concerns of an automotive society like road safety or highway infrastructure; given the era, design specifications for features like seatbelts or anti-lock brakes are not part of the discussion at all. Hurst's focus is not on the automobile as artifact, but instead on those features of social change that the automobile made especially salient, particularly in the expansion of what everyday people could actually do and how they lived their daily lives.<sup>55</sup> Such concerns went far beyond the need to manage traffic. Half a century before parallel discussions of norms in the emergence of cyberlaw, Hurst recognized that

50. See Gaia Bernstein, *When New Technologies Are Still New: Windows of Opportunity for Privacy Protection*, 51 VILL. L. REV. 921, 929–31 (2006); Meg Leta Jones, *Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw*, 2018 J.L. TECH. & POL'Y 249, 256.

51. See Rebecca Crootof & BJ Ard, *Structuring Techlaw*, 34 HARV. J.L. & TECH. 347, 349 & n.4 (2021); Hin-Yan Liu, Matthijs Maas, John Danaher, Luisa Scarcella, Michaela Lexer & Leonard Van Rompaey, *Artificial Intelligence and Legal Disruption: A New Model for Analysis*, 12 LAW INNOVATION & TECH. 205, 214 (2020).

52. Hurst, *supra* note 8, at \*714; cf. Jones, *supra* note 50, at 252 (arguing for recognition of mutual shaping and co-production in law and policy scholarship).

53. Hurst, *supra* note 8, at \*742–43.

54. *Id.* at \*720–35.

55. For full articulation of an approach to law and technology that focuses on the "features of social life the technology makes newly salient," see Jack M. Balkin, *The Path of Robotics Law*, 6 CAL. L. REV. CIR. 45, 46 (2015) (emphasis omitted).

the automobile's capacity to undermine the regulatory force of social norms opened the door for law, somewhat ominously, "to carry added burdens of social control."<sup>56</sup> Further, Hurst recognized that technology may not only present new challenges, but also shape the law's priorities. The list references no fewer than eleven times how the adoption of automobiles made society more sensitive to the business cycle;<sup>57</sup> in turn, Hurst explained, this sensitivity played a role in legitimating the state's growing role in market regulation.<sup>58</sup>

Hurst rounds out his list with the automobile's more concrete ramifications for core legal subjects like contracts (to keep up with trends like the installment contract),<sup>59</sup> property (given the challenges of title for an asset so valuable but also so mobile),<sup>60</sup> and bankruptcy (having propelled competitors in the railroad industry into insolvency).<sup>61</sup> So, too, did he map technological impact on the nascent fields of civil rights law (as discrimination became more salient with the explosion of travel)<sup>62</sup> and environmental law (given the automobile's intimate relationship with the oil industry).<sup>63</sup> Of special concern were the automobile industry's contributions to the concentration of wealth and power in private hands, so much so that Hurst connected the automobile not only to the growth of antitrust law but also to matters as unexpected as the inheritance tax.<sup>64</sup>

The facet of the automobile's intersection with law that most thoroughly captures Hurst's attention, however, is the problem of automobile accidents. This focus becomes Hurst's vehicle for examining the operation and evolution of the legal system alongside widespread social change. Through it, he recounts the legal system's long journey from handling these concerns through tort law to entrusting them, imperfectly, to a more proactive administrative regime.

Hurst found tort law, as administered through the judicial system, ill-suited to accidents as frequent and costly as those wrought by the automobile. He advanced the idea that the advantages society enjoyed thanks to the automobile depended on their widespread use, casting doubt

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56. Hurst, *supra* note 8, at \*727 no. 82; *see also id.* at \*724 no. 52, \*726 no. 73, \*730 no. 114 (further developing this insight). The significance of norms as a regulatory modality would emerge fifty years later as a major theme in Larry Lessig's account of cyberlaw. *See* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

57. *See* Hurst, *supra* note 8, at \*721 nos. 3, 8–9 & 13–14, \*722 nos. 19 & 26, \*723 nos. 31 & 36, \*727 no. 83, \*730 no. 115.

58. *See id.* at \*721 no. 3.

59. *See id.* at \*723 no. 31.

60. *See id.* at \*725 no. 63.

61. *See id.* no. 62.

62. *See id.* no. 69.

63. *See id.* at \*723 no. 39, \*728 no. 93.

64. *See id.* at \*722 no. 24.

on the notion that we ought to impose all its costs on the unlucky few who would inevitably crash.<sup>65</sup> This redistributive impulse sat uneasily, however, with tort law's fault requirement and the attendant supposition that the costs of accidents must be paid by the parties involved.<sup>66</sup> Anticipating law and social norms theory, Hurst highlighted that the disconnect between the blameworthiness of a driver's momentary lapse and the severe harm following that lapse gave many courts and juries pause.<sup>67</sup> He found the courts fared no better as an administrative matter. Auto accident cases took years to litigate notwithstanding the victims' immediate needs<sup>68</sup> and the public expense associated with court proceedings could approach half the plaintiff's total recovery in the typical case.<sup>69</sup> The shortcomings of the judicial system, combined with the magnitude of the harms associated with automobile accidents, would ultimately propel accident insurance—and its regulation—to a place of central prominence in securing compensation.<sup>70</sup>

Though the courts' shortcomings are abundantly clear in hindsight, Hurst shows that more preventive regulation of automobiles through legislative or administrative action proceeded in fits and starts. It was not until 1924 that "expert investigation and careful thought" entered the conversation around traffic laws.<sup>71</sup> Even where traffic laws were enacted, many states did not make them available or reader friendly.<sup>72</sup> The adoption of driver's licenses—and of revoking them to deal with irresponsible drivers—was hampered by the lack of reporting and record-keeping systems to track the driver's prior offenses.<sup>73</sup> In Hurst's view, it was not

65. *Id.* at \*752–53.

66. *Id.* at \*757–59. Democratization of the automobile due to falling prices and the emergence of the used-car market contributed to the difficulty. *See id.* at \*746. In addition to creating a larger volume of cases than the courts were prepared for, the increasing affordability of automobiles meant that a great many defendants lacked the means to pay any substantial damages. *See id.*

67. *Id.* at \*748–49; *see also* Bernstein, *supra* note 50, at 943 ("The literature shows that laws are less likely to be effective where they sharply digress from existing social norms.").

68. Hurst, *supra* note 8, at \*767.

69. *Id.* (observing "direct daily cost to the public" as high as \$232 in Philadelphia, while "many verdicts were for no more than \$500 or, at most, \$1000"). "The courts, moreover, lacked the funds, staff, experience, and time for special inquiry with which to do more." *Id.* at \*743.

70. *Id.* at \*760–70 (tracing intersecting developments in insurance practices, insurance law, and states' "financial responsibility laws"); *id.* at \*770 ("By round-about ways, practice thus arrived at the payment of a material part of automobile accident losses with little or no regard to the prior determination of 'fault' on which theory insisted.").

71. *Id.* at \*775.

72. *Id.* at \*776.

73. *Id.* at \*782 ("These sanctions were especially weak because of the lack of record systems that would permit ready check of a violator's history of previous offenses . . ."); *id.* at \*783 (addressing the lack of reporting on accidents and violations).

until the 1930s that the law finally came around to comprehensive preventive techniques by publishing traffic regulations in a more digestible form and implementing safety education—for drivers and pedestrians alike—in the schools.<sup>74</sup> Hurst also found roadway improvements instrumental to the “preventive-administrative approach.”<sup>75</sup> “By reducing grades, increasing visibility, and banking curves, the engineer could often do more to reduce traffic hazards than any amount of the law’s regulations.”<sup>76</sup>

This thick account of the law’s treatment of automobile accidents grounds Hurst’s comparative inquiry into the law’s response to the problems of a “society built on applied science and technology.”<sup>77</sup> Here is where the treatment of aviation and radio also becomes important to his overarching analysis. Hurst saw the arc of the law’s treatment of all three technologies as the move from penalty to correction and, ultimately, prevention.<sup>78</sup> As to air safety, in particular, Congress “followed the rise of the problem with a speed unmatched in the history of industrial or automobile safety,” moving from its preliminary interventions to a preventive regime in just twelve years.<sup>79</sup> Automobile safety languished in the courts for forty years before basic measures like licensing and driver’s education took firm hold.<sup>80</sup> Why? Hurst’s explanation was rooted in concerns of political economy. Society conflated the automobile with progress and enjoyed its material benefits<sup>81</sup> while discounting its costs;<sup>82</sup>

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On the centrality of access to information to the function of the administrative state, see Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369 (2019).

74. Hurst, *supra* note 8, at \*786–87.

75. *Id.* at \*780.

76. *Id.* This insight prefigures recognition by early cyberlaw scholars Joel Reidenberg and Larry Lessig that the design of a system imposes rules in addition to those imposed by law. See Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 554 (1997); Lessig, *supra* note 56, at 507.

77. Hurst, *supra* note 8, at \*742. Or, as Hurst framed it in a subsequent passage, this comparison illuminates law’s response to “troubles that seemed so naturally induced by a machine society.” *Id.* at \*743.

78. *Id.* at \*780.

79. *Id.* at \*742.

80. *Id.* at \*743 (“[I]n most states as late as 1940, both in handling accident litigation or traffic violations, the courts still held the field, after nearly a generation of mass use of the motor car.”).

81. As Hurst described the perspective, “The Industrial Revolution had opened up infinite roads to material progress; society would move best by encouraging as many people as possible to explore these roads; the law should be cautious about adding to the inevitable risks of these explorations by the regulations and liabilities it set.” *Id.* at \*744.

82. *Id.* at \*746–47; see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977) (tracing the transformation of law to favor economic growth and development); cf. JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 91 (2019) (problematizing the

the risk of car accidents was not as gripping as that of the plane crash.<sup>83</sup> Compounding the problem was path dependence with respect to the tort system where the problem was first recognized. Anticipating more recent articulations of the pacing problem,<sup>84</sup> Hurst closes his chapter by recommending that the legal system overcome this inertia and “speed up the pace of adjustment” in the face of technological and social change.<sup>85</sup>

At least one puzzle also emerges alongside these insights. Hurst’s wholesale embrace of preventive regulation over the judiciary has the flavor of technocracy—he faults the legal system for being so slow to apply “controls natural to society built on applied science and technology.”<sup>86</sup> Given Hurst’s apparent skepticism of the legal system’s deference to the rhetoric of innovation and progress, this orientation is perhaps surprising to today’s reader. But such faith in scientific management was a common progressive impulse<sup>87</sup>—especially when combined with the more substantive socioeconomic ends progressives aimed to achieve through what they called “democratic administration.”<sup>88</sup> Hurst had uncovered the successful application of scientific management techniques to other emerging technologies during the very same years that the legal system was determined to entrust automobile regulation to the vagaries of traffic court. From Hurst’s vantage point, the potential of

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contemporary “rhetoric of freely flowing innovation as the lifeblood of the economy, and of regulation as its enemy”).

83. Hurst, *supra* note 8, at \*747. Popular disregard of “costs [that] might fall with unfair or crushing burden on a few people,” *id.* at \*746, and attention to dramatic accidents over the “dry reading” of automobile statistics, *id.* at \*747, reflect insights later formalized by proponents of public-choice theory and behavioral economics. *See, e.g.*, Neil Komisar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 WIS. L. REV. 265, 295 (explaining the theory that consumers will fail to mobilize their interests relative to a concentrated interest group, like the automobile industry); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1518–19 (1998) (invoking the availability heuristic to explain the law’s greater regulation of more vivid accidents). The mobilization of private interests was not as central to Hurst’s account as it has been to more recent work on the political economy, but neither was it absent; Hurst noted the rise of new interest groups as one of the impacts of the automobile on the law, Hurst, *supra* note 8, at \*722 no. 21, and he also documented the role of the insurance companies in resisting compulsory insurance for fear it would open their industry to greater regulatory scrutiny. *Id.* at \*762.

84. *See generally* Gary E. Marchant, *The Growing Gap Between Emerging Technologies and the Law*, in *THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM* 19 (Gary E. Marchant, Braden R. Allenby & Joseph R. Herkert eds., 2011).

85. Hurst, *supra* note 8, at \*787.

86. *Id.* at \*742.

87. *See* COHEN, *supra* note 82, at 248.

88. On “democratic administration,” see Dwight Waldo, *Development of Theory of Democratic Administration*, 46 AM. POL. SCI. REV. 81 (1952); William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823 (2019).

scientific regulation to be not only more efficient than the status quo, but also more just, would have been palpable.

Hurst's account provides fresh perspective on the directions open to scholarship on technology and law. Thick descriptive accounts of the law's response to particular technologies are enormously valuable, but they need not be siloed. Hurst brings vitality and reach to the project of studying the relationship of technology and law by asking what we might learn by comparing across technologies, across time, and across doctrinal divides.<sup>89</sup> The manuscript also offers fodder for the ongoing debate over what makes a technology "exceptional" or "disruptive"—and whether technologies recognized as such should be the central focus of scholarship on technology and the law.<sup>90</sup> While Hurst suggests, provocatively, that "we should probably find that [the automobile] had left no aspect of life untouched,"<sup>91</sup> his account suggests that its impact stemmed not from any sudden shock nor any feature inherent to the technology, but from the dynamics that unfolded throughout its adoption<sup>92</sup> and the unsuitability of established modes of problem-solving for the challenges it presented.<sup>93</sup> Just as Hurst once took conventional legal scholars to task for being too narrowly focused on conspicuous controversies, missing the richness of the law's intersections with everyday life,<sup>94</sup> his unpublished work pushes us to widen our scope beyond the overtly disruptive to appreciate what

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89. Of special interest to cyberlaw scholars, Hurst traced the legal impact of the automobile on "the horse trade as a subject for disputes at law." Hurst, *supra* note 8, at \*729 no. 115; see also Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; Lessig, *supra* note 56. One gets the sense it was perhaps more credible as an area of specialization before the automobile decimated it. For those of an earlier scholarly vintage, it bears noting along the same lines that Hurst was asking whether laws defining the rules of the road for horse-drawn "carriages" would apply to the automobile some nine years prior to the publication of that germinal exchange between Hart and Fuller on the scope of a prohibition on "vehicles" in the park. Hurst, *supra* note 8, at \*731; see H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

90. See, e.g., Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 549–50 (2015) (focusing on exceptional technologies and the "essential qualities" that make them transformative); Jones, *supra* note 50, at 251 (complicating the link between a technology's intrinsic qualities and its impact); Liu, Maas, Danaher, Scarcella, Lexer & Van Rompaey, *supra* note 51, at 207 (distinguishing "legal disruption" from "technological disruption that happens to have legal consequences").

91. Hurst, *supra* note 8, at \*720.

92. See Balkin, *supra* note 55, at 49 ("As we innovate socially and economically, what appears most salient and important about our tools may also change.").

93. See BJ Ard, *An Institutional Account of Legal Disruption* (Dec. 3, 2020) (unpublished manuscript) (on file with authors) (arguing disruption is a function of whether existing institutions are equipped to answer the legal questions posed by technological change).

94. See *supra* note 3 and accompanying text.

even these less dramatic episodes in the history of technology and law can teach us about the operation of our legal system.

### III. HURST'S UNFINISHED HISTORY OF THE MODERN REGULATORY STATE

In its elucidation of the important interplay of technological and legal change, Hurst's unpublished manuscript is innovative and ahead of its time. But there is a secondary theme embedded in this document that similarly anticipates future legal scholarship as well as current legal policy debates. As suggested above, that theme concerns the rise of the modern American administrative state. Though Hurst is deservedly famous for what he had to say about nineteenth-century legal history in terms of the release of economic energies and the transformation of "the common law tradition,"<sup>95</sup> his unpublished manuscripts return us to a point in his career when his attention was firmly fixed on some other equally important matters—namely, the rise of distinctly new kinds of legislative, administrative, and regulatory state authority in the twentieth century. Anticipating the development of today's law school courses in Legislation, Regulation, and Administrative Law,<sup>96</sup> Hurst was eager to produce a legal history that not only looked backwards into a distant legal past, but one that forwardly explained our complicated legal present. Hurst's coursework with Frankfurter on Federal Jurisdiction and Administrative Law prepared him well to reorient legal study around the actual, pragmatic functioning of complex and interconnected modern legal systems (as did his subsequent wartime experience at the Board of Economic Warfare and the Bureau of Naval Personnel).<sup>97</sup>

Garrison and Hurst's *Law in Society* was an original testament to their eagerness to push legal scholarship beyond convention—beyond courts and cases and judges and common law doctrines. And Hurst's "Principal Agencies" continued in that tradition. "We wanted a course which would expose students to a much broader range of legal agencies than just courts," Hurst explained; "[w]e wanted something that would involve the development of legislation and administrative law . . . to give them a sense

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95. See, e.g., Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC'Y REV.* 9 (1975).

96. LEGISLATION AND REGULATION: CASE MATERIALS (John E. Manning & Matthew C. Stephenson eds., 2010); CASES AND MATERIALS ON LEGISLATION AND REGULATIONS: STATUTES AND THE CREATION OF PUBLIC POLICY (William N. Eskridge Jr., Philip Frickey, Elizabeth Garrett & James J. Brudney eds., 5th ed. 2014); ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM (Jerry L. Mashaw, Richard A. Merrill, Peter M. Shane, M. Elizabeth Magill, Mariano-Florentino Cuéllar & Nicholas R. Parrillo eds., 7th ed. 2014); THE REGULATORY STATE (Lisa Schultz Bressman, Edward L. Rubin & Kevin M. Stack eds., 2010).

97. Ernst, *The Ideal and the Actual in the State*, *supra* note 14, at 149.

of the process of how public policy through law grows and develops.”<sup>98</sup> In *Law in Society*, Garrison and Hurst focused on the complicated development of modern workers’ compensation acts and their implementation for exactly that purpose:

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. . . . 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.<sup>99</sup>

Obviously, Hurst aimed to illuminate similar modern legal processes in his study of the impact of automobile accidents on an antiquated judicial tort law regime.

Thus, while Hurst envisioned his automobile chapter as principally a case study into the interrelationship of law and societal and technological change, concern for what he called “the balance of power” in America was never far from view. In *Law and the Conditions of Freedom*, Hurst defined this as a concern for the “wider sharing” of freedom as well as the development of “community strength and security” through the “rationalization” of social and legal processes.<sup>100</sup> Hurst understood the balance of power as a deeply rooted American constitutional ideal or aspiration “to make all public and private power accountable to serve men’s welfare according to criteria not in the sole determination of particular power holders.”<sup>101</sup> The problem of the “balance of power”

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48. 98. Interview by Laura Smail with Willard Hurst in Madison, Wis., *supra* note 48.

99. *Id.*

100. HURST, *LAW AND THE CONDITIONS OF FREEDOM*, *supra* note 48, at 40.

101. HURST, *JUSTICE HOLMES ON LEGAL HISTORY*, *supra* note 48, at 32.

would increasingly define twentieth-century legal history as much as “the release of creative energy” preoccupied the nineteenth century. And the chief mechanisms for that legal rebalancing of modern social and economic power would be legislation, administration, and regulation. “Particularly since the 1880s,” Hurst noted, “social developments [had] fostered a society of increasing interlock of processes and relations,” resulting in a vast expansion of “both statute law and administrative regulations of the twentieth century.”<sup>102</sup>

Hurst’s second unpublished manuscript from this period—on the federal antitrust laws—was explicitly framed around this concern with the modern balance of power and the growth of legislative and administrative regulation.<sup>103</sup> One can also see such emphasis throughout the Wisconsin legal history monographs that so thoroughly transcended histories of the common law or the release of middle-class economic energies—from Hurst’s own sophisticated treatment of the “police power” in the Wisconsin lumber book to Samuel Mermin’s study of the Wisconsin Development Authority to Earl Murphy’s treatment of the State Committee on Water Pollution to Spencer Kimball’s handling of the Wisconsin Commissioner of Insurance.<sup>104</sup> With projected coverage of topics like urbanization, bureaucratization, communications, the military-industrial complex, and morals and criminal policing on the national level, Hurst’s plan for three additional supplements to *The Growth of American Law* focused explicitly on “Balance of Power,” “Community,” and “Morality” might have allowed for a more thorough explication of the rise of a modern American legislative and administrative state. And had Hurst followed through on his plan to consolidate the Wisconsin monographs, we might also have had an equally compelling, in-depth state study as a complement. As things stand, Hurst (together with his students) compiled a substantial and original body of American legal history research and writing that might never be equaled in its depth and breadth and conceptual sophistication. And we currently have enough in *Growth*, the Wisconsin monographs, and even the published law lectures to see the horizon for a thoroughgoing history of the rise of modern American legal statecraft along all of its most complicated dimensions. We aim through the publication of these previously unknown manuscripts to rekindle interest in this vital legal history project—charting the complex interrelationship of law, technology, economy, and society as the United States moved from a nineteenth-century common law tradition to a modern twentieth-century administrative regulatory state.

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102. James Willard Hurst, *The State of Legal History*, 10 REV. AM. HIST. 292, 294, 300 (1982).

103. Hurst, *supra* note 9.

104. See *supra* note 4.