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LEGAL REALISM AND HISTORICAL METHOD: J. WILLARD HURST AND AMERICAN LEGAL HISTORY

*Stephen Diamond**

LAW AND SOCIAL ORDER IN THE UNITED STATES. By *James Willard Hurst*. Ithaca, New York. Cornell University Press. 1977. Pp. 318. \$17.50.

For many years, J. Willard Hurst has been the dominant figure in American legal history. He is one of the few legal historians whose work has been enthusiastically received both by professional historians and by lawyers. Historians have traditionally insisted upon a research monograph as an entrance credential into their community and Hurst has produced a massive and impressive example of such a work.¹ Hurst and his students have analyzed in detail the interaction between law and particular economic activities in nineteenth-century Wisconsin.²

Lawyers, on the other hand, have typically applauded histories of their subject that are broad in scope, believing that without great effort (and thus usually with little attention to primary materials), they can grasp the main themes in the evolution of their discipline. Such synoptic overviews have frequently been presented first as a series of lectures, among the most notable being works by Holmes, by Pound, and by Gilmore.³

Hurst has himself contributed greatly to this tradition. In *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956) he summed up a century of legal development in the phrase, "the release of energy"—a theme now familiar even to those who have not read Hurst's book. In *Law and Social Process in United States History* (1960) the scope was even broader—the entire national period of American history—as was his task understanding the role of law in America. Hurst's most

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1. J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE WISCONSIN LUMBER INDUSTRY* (1964) [hereinafter cited as *LAW AND ECONOMIC GROWTH*].

2. The list of such works includes L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965); R. HUNT, *LAW AND LOCOMOTIVES* (1958); S. KIMBALL, *INSURANCE AND PUBLIC POLICY* (1960); G. KUEHNLE, *THE WISCONSIN BUSINESS CORPORATION* (1959); AND J. LAKE, *LAW AND MINERAL WEALTH: THE LEGAL PROFILE OF THE WISCONSIN MINING INDUSTRY* (1962).

3. O. HOLMES, *THE COMMON LAW* (1881); R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938); G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

recent book, *Law and Social Order in the United States*,⁴ is an equally ambitious effort. Not surprisingly, much of it is a recapitulation and condensation of his earlier works, which are frequently cited in the footnotes.

Since Hurst has so significantly determined the direction and shaped the structure of recent writing about American legal history, it is perhaps somewhat difficult to remember that he too was the product of a certain time, of certain attitudes and interests, in American legal studies. Hurst is in many ways the product of legal realism, loosely defined. Like the realists, he has emphasized the relationship between law and society; legal history could not simply chronicle the emergence and development of legal doctrines, nor treat them largely as intellectual insights divorced from the actual world in which they occurred. Hurst, like the realists, minimizes the autonomy of law; law rather reflects changes in society, most often or most critically, changes in the economy. With realism, "Cases & Materials on . . ." replaced "Cases on . . ." as the standard law textbook title. This often, however, meant only the inclusion of descriptions of the legislative or administrative process. This approach broadened the scope of legal research, but preserved, as the domain of legal academics, law as a subject distinct from the social sciences in general.

Much like the realists, Hurst, even as he insists that law be seen in a larger social context, devotes himself almost entirely to an analysis of legal materials. He examines trial court results, statutory materials, and executive actions, particularly those taken by administrative agencies as well as appellate opinions. In doing so he at least implicitly adopts Roscoe Pound's rather formal definition of law as the product of just such governmental institutions, as the systematic application of force by politically organized society. Hurst calls this "the operation of distinctive . . . legal agencies."⁵

Hurst similarly reflects the realist denigration of the importance of courts, as against other branches of government, in the creation of law.⁶ This attitude described both the real and the ideal to many liberal academics in the 1930s, as it was a conclusion which supported opposition to judicial interference with legislative decisions. Hurst somewhat anachronistically continues to insist that the courts are relatively unimportant in spite of the clear evidence of the growing influence of federal courts over more

4. J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* (1977) [hereinafter cited as *LAW AND SOCIAL ORDER*].

5. *Id.* at 25.

6. *Id.* at 38, 100, 132-43, 186-87.

and more aspects of contemporary American society.⁷

Hurst again reflects the realist tradition in his emphasis upon the relationship between law and the market and his relative lack of interest in other social institutions. Although Hurst has written at length about the American commitment to individualism, particularly as it relates to economic behavior, he has almost entirely ignored the family and religion, both institutions whose study would test the depth and breadth of this commitment. Hurst assumes that, after 1800, the market was the sole object of interest for Americans, apparently because, in the nineteenth century, they concentrated entirely upon accumulating wealth, and in the twentieth century upon enjoying what it brought.⁸

Other issues, however, did hold the attention of Americans. The nature and role of government was still problematic, and the frequent state constitutional conventions attest to strong yet divided opinions about government beyond its effect on the market.⁹ Suffrage, apportionment, slavery, prohibition, and civil rights were all at various times issues of great moment, and ones to which Hurst devotes little attention. It has been noted that Hurst's focus upon the relation between law and the market—a subject on which he has shaped the structure of subsequent research and analysis—minimizes any harmful consequences of his failure to use extra-legal materials.¹⁰ The legal materials themselves present a relatively clear picture of economic behavior—despite the cautioning of realists and their descendants that contract law in the abstract is often a poor guide to business behavior. The relation between law and the family, a social institution still relatively less influenced by and described in legal materials, could not be so studied without greater recourse to extra-legal sources.

Law and the Social Order recapitulates the sequence of Hurst's publications. The book is divided into four chapters. The first presents a strategy for legal history; the second records the development of legal agencies in America; the last two chapters

7. See G. GILMORE, *supra* note 3, at 15. It is not unfair to emphasize here the recent influence of federal courts because Hurst focuses his presentation of twentieth-century developments on national, rather than state, law.

8. LAW AND SOCIAL ORDER, *supra* note 4, at 125. See Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744, 752 (1970).

9. Scheiber, *supra* note 8, at 752-53.

10. See Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC. REV. 9, 52-53 (1975).

finally turn to the substance of legal doctrine. Hurst first published "Legal History: A Research Program";¹¹ he next wrote *The Growth of American Law; The Law Makers* (1950), a lengthy history of the development of the branches of government; and then in *Law and Economic Growth* and, in a more discursive form, in *Law and the Conditions of Freedom* (1956), he examined legal decisions themselves rather than the bodies that made them.

In Chapter I, in which Hurst attempts to define the subject of legal history, his adoption of Pound's approach to law as the product of governmental institutions has the merit of limiting the scope of the legal historian's enterprise. It does, however, confine a scholar who insists that law be examined in relation to society in general. Hurst recognizes this, and thus, includes a section in this chapter entitled, "Although the operation of legal agencies provided the core of legal history, realism requires also a history of law's relation to other institutions and ideas." Hurst here avoids the pitfalls of an unduly restrictive definition of his subject, but does so at a level of abstraction that leaves little content to the generalizations that remain.

There are other instances in which Hurst presents a broad principle and then qualifies it with its negation. He reiterates his view that the principle underlying much nineteenth-century law was the "release of energy," a belief in individualism and in entrepreneurial activity as the basis of economic growth. But he does not conclude with such a sweeping overstatement. He also finds in nineteenth-century law the principle of constitutionalism, "a stubbornly persistent demand that all organized power be accountable to others than the immediate powerholders for the quality of the ends and means of using power."¹² This principle, which emerged as a limitation on governmental power, was also applied to private power. Hurst has thus provided a principle and a counter-principle. Individual activity is to be encouraged, but it is to be evaluated by social norms. The analysis thus retains subtlety, but at the cost of indeterminacy. Content can be given to the operation of these two principles only by a more precise examination of their applicability in a particular context.

In Chapter II, Hurst describes legal decision-makers with a realist's emphasis upon legislatures and administrative agencies. In Chapter III, he turns his attention to the substance of legal

11. Hurst, *Legal History: A Research Program*, 1942 Wis. L. Rev. 323.

12. LAW AND SOCIAL ORDER, *supra* note 4, at 45.

decisions, in particular to the relationship between science and technology and the law. The choice of this topic—the relationship between man and his environment—to introduce the treatment of substantive law itself recapitulates the evolution of Hurst's publications.¹³ This approach generally emphasizes the technical and technological rather than the political content of the problems legal agencies face.

Hurst in general thinks that bad decisions are not caused by favoritism or political preference, so much as by a lack of information and foresight. For him, the opposite of consensus is drift and inertia; the opposite of agreement is not disagreement, but ignorance and confusion. He criticizes courts because they easily lose sight of affected interests not represented by the opposing parties, and he criticizes legislatures for not gathering information as well as they could.

Hurst is most critical of nineteenth-century law for its failure to overcome a contemporary tendency to favor short-run results at the expense of long-run interests, an attitude he describes as "bastard pragmatism." Law is not autonomous; its task is not to make society's choices but, in a role similar to that given economics by many of its modern practitioners, it is at least to make society aware of the true costs involved in its choices.¹⁴ If, as Hurst argues, law is a method for the national exploitation of the physical environment, difficult problems of distributional choice can be avoided as long as productivity is increased. Hurst finds this technique has typified American law in general; it is an approach of which he apparently approves.¹⁵ To the extent that social conflicts—the confrontation of groups—erupt, they are implicit generational ones, as bastard pragmatists with a short-run view impose costs upon their descendants; they are not contemporaneous social divisions, which are explicit and articulated.

In its first three chapters, *Law and Social Order* clearly tracks Hurst's earlier work, presenting it in summary form. In the

13. In *LAW AND ECONOMIC GROWTH*, *supra* note 1, Hurst analyzed in detail the effect of law on the exploitation of Wisconsin's timber resources in the nineteenth century.

14. Here, again, Hurst reflects his realist heritage. For the realists, it was easy to announce that law should reflect contemporary values when the Supreme Court was, in some celebrated cases, rejecting such values as expressed in legislative decisions and instead enacting "Mr. Herbert Spencer's *Social Statics*." The extent to which law could be used to initiate change, not to reflect a social consensus, but to create one, was a subject on which realists remained ambiguous and tentative.

15. In this context Hart and Sacks discuss the fallacy of the static pie. On the relation between Hurst and what loosely can be called the legal-process school, see Tushnet, *Lumber and the Legal Process*, 1972 Wis. L. Rev. 114, 115 n.7.

final chapter, "Consensus and Conflict," Hurst looks not at the relationship between man and his environment, but at relations between groups of men. The emphasis, of necessity, is less on technology and more on politics. This is new, a substitution of consensus-conflict for the consensus-inertia polarity that Hurst employed in the past. There is at least now the suggestion that profound disagreement rather than haste, inadvertence, or ignorance might sometimes explain the failure to consider what Hurst would deem all of the relevant factors in reaching a decision.

This chapter appears to be Hurst's response to criticism that he has exaggerated the element of consensus in American history, that he has written the victors' view of history, and failed to consider contemporary opposition to the nineteenth-century use of law to facilitate market capitalism and generate economic growth. Hurst may in particular have been reacting to Morton Horwitz's *The Transformation of American Law, 1780-1860* (1977).¹⁶ Horwitz explores much of the same ground as Hurst—the relation between law and the economy in the nineteenth century—but appears to offer a very different interpretation, one which, according to Hurst, stresses conflict rather than consensus.¹⁷

While Hurst has now formally recognized conflict as a possible explanation of various aspects of American society and of its law, he is actually much more confident in and comfortable with a consensus approach. It is not simply that Hurst believes that American development has been dominated by a consensus on middle-class values.¹⁸ That is a substantive conclusion which may well be justified; it is, at any rate, one that is shared by many others. Hurst, however, goes further; his very definition of "consensus" almost inevitably leads to the conclusion that consensus has dominated the American experience. Consensus, as used by Hurst, included situations in which there is disagreement, or no agreement; it can comprehend near-unanimity of sentiment and the absence of strong disagreement. Given Hurst's terminology, there appears to be no issue so divisive it cannot be described as demonstrating a consensus of a sort. When discussing state abandonment of corporate regulation in the late nine-

16. While both books were published in 1977, many chapters of Horwitz's book had earlier appeared in various journals and the thrust of his argument was certainly well-known to Hurst at the time he delivered the lectures at Cornell, in April 1976, which later became *LAW AND SOCIAL ORDER*, *supra* note 4.

17. See Hurst, Book Review, 21 *AM. J. LEGAL HIST.* 175 (1977).

18. See *LAW AND SOCIAL ORDER*, *supra* note 4, at 43-44, 64.

teenth century and interstate rivalry, especially between Delaware and New Jersey to be corporate refuges, Hurst refers to an "evident prevailing consensus" on this issue.¹⁹ He apparently cannot fully accept the existence of a widely shared confidence in unrestrained corporate activity. There is, after all, well-known nonlegal muckraking and trust-busting literature that clearly suggests disagreement on the issue of corporate power. The actions of the federal government also suggest that state laws did not reflect a unanimity of approach.²⁰

Although Hurst seems more comfortable focusing upon consensus, he does maintain that many situations in American law reflected varying degrees of both consensus and conflict. Laws to regulate hunting emerged, he suggests, from the pressures exerted by hunters and in the absence of any clear expression of view by those not directly concerned.²¹ In effect, hunting laws exemplified what Hurst has generally called inertia and drift. Hurst then presents the case of competition between railroad and trucking interests, as the former attempted to thwart the latter's requests for authorization to carry larger loads. There were clear adversaries here and it was thus less likely that a decision would result from drift, from a failure to have its possible adverse consequences clearly articulated. What conflicts existed, however, were between two parties competing in a game, the rules of which they both accepted. They did not criticize the game itself. Hurst describes this as a situation in which there were adversarial interests, but a consensus that the legal processes should resolve the issue. Any litigation would, by this standard, apparently reflect both conflict and consensus.

Hurst writes of antitrust law at greater length. There, the acceptance of the rules of the game is more problematic. He describes the alteration in American policy between efforts to maximize competition and to increase economic stability. He refers also to the strong political component, which feared the accumulation of power in private hands, in some antitrust sentiment. He

19. *Id.* at 242.

20. Hurst suggests that consensus is demonstrated by the fact that all states abandoned regulatory efforts. The absence of regulation in any one state, however, (in an application, in effect, of Gresham's law to this subject) made such regulation impossible in any other state. Moreover, even if the abandonment of regulation was a truly independent decision in each state, this does not mean that, within each state, there was not still significant opposition. Hurst sometimes suggests that continuity demonstrates consensus, and, at other times, admits the fact of power and the possibility of a consensus only among the victors. *Id.* at 220.

21. *Id.* at 215.

states that these political, "balance-of-power" views were "not rejected in a clear-cut debate between political and economic priorities, but rather [were] lost to sight in an opportunistic, unplanned course of action by those charged with enforcing the antitrust laws."²² Here, again, what appears to be "conflict" turns out to be "inertia." Hurst concludes that forty years of antitrust law failed to evolve into a "reasonably definite and coherent set of ideas with a firm base in popular understanding and acceptance."²³ The consensus was "ambiguous."²⁴ It may be simply a matter of point of view whether one describes a glass as half empty or half full; Hurst, at any rate, prefers to find, not disagreement, but the failure to reach agreement.

Hurst prefers to discuss issues in which the question of redistribution is muted and can be avoided by a strategy of enlarging the pie rather than redividing the shares; he avoids those issues which, in a zero-sum world, must have both winners and losers. He devotes almost no attention to labor law, finding little of it in the nineteenth century because "the times had to ripen for effective legal intervention,"²⁵ an explanation that obviously skirts the issues of power and class conflict. What conflict existed Hurst sees as part of a larger consensus; twentieth-century labor law enforced collective bargaining, reflecting, he feels, a consensus in favor of "limited, generally peaceful conflict."²⁶ Hurst also has almost nothing to say in this chapter about taxation; elsewhere in the book, he does briefly describe conflict over the extent to which taxation should redistribute wealth. Here, again, the conflict is part of a larger consensus. "[C]onflict seems to be over the extent and conditions of such transfer payments, not over the legitimacy of government use of its resource-allocating authority to some extent to increase the life options of individuals of small means."²⁷

Every legal doctrine, every institutional statement or pattern of behavior can be viewed as expressing consensus, a shared belief, either a homogeneous response or a conscious compromise. It can, on the other hand, be seen as mediating an underlying

22. *Id.* at 265.

23. *Id.* at 257.

24. *Id.* at 263.

25. *Id.* at 46.

26. *Id.* at 236.

27. *Id.* at 122. Hurst ignores issues like suffrage, apportionment, and prohibition, on which disagreement was fundamental and no solution could satisfy everyone. See Scheiber, *supra* note 8, at 752-53.

contradiction, as attempting to reconcile or hide a potential conflict.

Hurst believes that one of law's primary purposes is to provide society with the information necessary for informed choice, to force it, for instance, to consider its long-run as well as its immediate interests. Law in Wisconsin failed, as Hurst so thoroughly explained in *Law and Economic Growth*, when it let the lumber industry destroy itself by thoughtless overcutting. Implicit in Hurst's criticism of law's failure in this regard is the belief that, when the costs of activities are revealed, a consensus responsive to the additional considerations will evolve. But conflict may be more deep-seated, based not on misinformation, but on well-founded perceptions of opposed interests. At such a time, a choice between the opposed groups must be made; in such a circumstance, law's task in reducing social conflict may become not to reveal where the possible sources of conflict lie, but rather to hide these social seams, to submerge group conflict, letting groups and individuals live comfortably with others and with themselves, without resolving apparently irreconcilable, but not fatal, conflicts of interest or contradictions in ideology.²⁸

Whether American law reflects consensus or conflict is a question whose answer may very well reveal more about the author than the subject. Consensus and conflict are as likely to be approaches to a topic as descriptions of it. Hurst's present interest in consensus and conflict, and his influence within the discipline, suggest that there is a danger that American legal historians, perhaps with Hurst and Horwitz as the standard-bearers, will now debate the relative merits of these two paradigms.

It will be particularly easy to be adversarial since American historians have relatively recently engaged in just such a controversy. For several decades, they disputed the merits of consensus and conflict as descriptions of the American experience.²⁹ "Progressive historians" and their progeny discovered repeated conflict between classes and masses, between the special interests of property and the principles of egalitarian democracy. They have portrayed the Jeffersonians, the Populists, the Progressives, and the New Dealers as recurrent challengers to the asserted privileges of the propertied. For such scholars, American history has been discontinuous, as one side or the other, justifying itself

28. This point has been made by Gordon, *supra* note 10, at 53, among others.

29. See, J. HICHAM, *HISTORY* 171-232 (1965).

on ideological grounds, seized power in what were called revolutions:³⁰ the War for Independence, the Constitutional Convention, Jacksonian Democracy, the Civil War, and the New Deal, among others.

“Consensus historians,” on the other hand, have emphasized continuity and stability in the American experience. They have seen American politics, not as the battleground in a struggle between the propertied and the masses, but as an expression of middle-class values which were shared by most of the population. Disputes were pragmatic, not ideological; outsiders demanded equal opportunity, but not a restructuring of society.

It would be particularly unfortunate for legal historians to recreate this debate. It obscures, by the rhetorical excesses it generates, the similarity between Hurst and Horwitz. For both historians, the major achievement of nineteenth-century law was the creation of a system of market capitalism. While Horwitz is more explicitly critical of this result, Hurst does not accord it unqualified approval: “bastard pragmatism” is, after all, hardly a term of approbation. And while Hurst does not claim that what happened was good for everyone, Horwitz does not actually accuse law-makers of disingenuousness in appealing to the public good as a criterion of decision. Much of the divergence between them reflects differing evaluations of the extent of ideological opposition to the prevailing ethos. Both, moreover, generally limit their researches to legal materials. Hurst does not look to literature, or to sermons, for instance, to see if they reveal attitudes about individualism or economic growth similar to those expressed in legal materials, an investigation which might help corroborate his claim that law in these regards simply reflected popular values. Horwitz does not examine the hard economic data that might demonstrate the extent to which law did affect economic growth or the distribution of wealth.³¹

With so much of American legal history still unexplored, it is tempting to over-generalize: to assume the representative na-

30. These might just as easily be called “transformations.” This is the kind of conflict that Horwitz describes, but Hurst rejects.

31. See Williams, Book Review, 25 UCLA L. REV. 1187, 1210-14 (1978). Both Hurst and Horwitz also tend to use regional materials to make generalizations about the entire nation. In his review of Horwitz, (Hurst, *supra* note 17, at 176), Hurst notes that Horwitz focuses on the eastern seaboard, especially the middle and New England states. Hurst himself has been criticized for taking Wisconsin, especially considering that state’s refusal to undertake internal improvements directly, as representative of the United States in general. See Scheiber, *supra* note 8, at 753.

ture of a relatively narrow body of primary materials or to support large abstractions on a fragile base.

A debate over consensus and conflict is particularly vulnerable to such over-generalization because the legal historian can too easily borrow an already developed rhetoric. Consensus and conflict are certainly not inappropriate categories of analysis and it may even be that one or the other best describes the character of American legal history, but much careful and particularized research is needed to confirm such a judgment. Moreover, consensus and conflict are only appropriate categories; they are not the only categories and it would be unfortunate to ignore the possibility of different theoretical structures. Hurst himself concludes that consensus and conflict are both present in most situations and implies that efforts would better be spent examining agreement, conflict, compromise, and inertia in particular circumstances. Such exhortations for future research are useful, but are needed less than is the research itself, the kind that Hurst has in the past so impressively produced.