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Hurst: Law and Social Process in United States History

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RECENT BOOKS

LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY. By *James Willard Hurst.* Ann Arbor, Michigan: The University of Michigan Law School, 1960. Pp. xvii, 361. $6.

For many years Willard Hurst has been thinking long and hard about law and life in these United States. From time to time he has put his thoughts in writing: *The Growth of American Law* and *Law and the Conditions of Freedom in the Nineteenth Century United States* were pioneering works; his law review articles have also been guideposts to his thinking.[1] Here in *Law and Social Process in United States History* is set forth Professor Hurst's philosophy of legal history. He would eschew the word "philosophy" just as he would disavow "jurisprudence" because both terms encompass a universality he does not claim. It is with the role of law in the United States, and it alone, that he deals. Yet jurisprudence and philosophy intrude on every page of this book—the published version of the 1959 Thomas M. Cooley lectures at the University of Michigan Law School.

Four features, Hurst finds, have shaped law's character in United States history: force (placing in government the legitimate monopoly of violence); constitutionalism (our tradition that official power is accountable, that the legal order is not an end in itself but is meant to serve human life); procedure (the formal ways of finding facts, making choices, and relating general propositions to particular instances); and resource allocation (the use of law as one important means to distribute resources so as to affect life's conditions).

With a scholar's caution, Hurst, in his chapter called "Drift and Direction," urges us not to exaggerate law's role in United States history. Change, he says, has been the dominant, and stability the recessive, characteristic of our experience, not because of conscious direction, but resulting from accidents of time and place: a vast, new land endowed with physical wealth, a people of middle-class outlook and Protestant ethic ideally suited to populate and develop that land, a state of knowledge historically ready for use. All these combined to produce a society of great opportunity in

1 THE GROWTH OF AMERICAN LAW: THE LAWMAKERS (1950); LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1958); *Content of Courses in Legislation,* 8 U. CHI. L. REV. 280 (1941); *Legal History: A Research Program,* 1942 WIS. L. REV. 232; *Uses of Law in Four "Colonial" States of the American Union,* 1945 WIS. L. REV. 577; (With B. R. Brown), *Perils of the Test Case—An Episode in the History of the Wisconsin Supreme Court,* 1949 WIS. L. REV. 26; *Who is the "Great" Appellate Judge?,* 24 IND. L. J. 362 (1949); *Law and the Balance of Power in the Community,* 6 RECORD OF N.Y.C.B.A. 149 (1951); *Research Responsibilities of University Law Schools,* 10 J. LEGAL ED. 147 (1957); *Funds for Individual Legal Research,* 12 J. LEGAL ED. 592 (1960).

which people could live far above marginal subsistence, in which class and religious struggles were largely absent, and in which the scale of operations was typically big. These massive facts of history, ramified by cumulation (the sum and total of our culture), context (the sheer volume and complexity of extrinsic forces compared to the small area in which directed effort could play), and pace (the rapidity of change in our history), decreed that unplanned drift should be the id, and purposed direction the superego of our national personality.

Yet Hurst is no Savigny describing a *Zeitgeist* with a life of its own. The social role of law added only a marginal increment to the sum of the causes that made us what we are, but this increment was critically important. For it is a central function of law, Hurst says, to see that major decisions are not taken by default. So, after warning us not to give too much importance to law and after making it clear that drift prevailed over direction, he proceeds to show—and this is the substance of his book—how law operated to achieve purposed direction, or, at times, how he felt it it could have operated but didn't.

He turns—in his chapter, "Initiative and Response"—to the way law fostered purposed direction by helping man see the facts of his situation and the nature of his problems. Here, as elsewhere, Hurst notes that law's role was conditioned by a unique pragmatism having both true and bastard strains. It was the bastard strain that disabled us from distinguishing management from opportunism, egalitarianism from mediocrity, dispersion of power from parochialism. It was the bastard strain also, hell-bent for getting things done quickly, that drained off our energies entirely to private affairs in the post-Civil War years and, a generation later, made us completely production-minded. These two sides of our pragmatism are not so easy to distinguish as Hurst makes it seem, but at least one role of a professor, I suppose, is to tell the rest of us which is the good turtle soup and which is the mock.[2]

Hurst finds that the procedural and constitutional character of our law helped increase purposeful initiative in our society by fostering "creative tension between form and substance and between generals and particulars." (p. 131) By form he means the definition our legal system gives to the formal procedures for finding facts, for weighing those facts, for making choices of ends and means, and for determining which choices should be backed with public policy and power. "By channeling into law's forms the flow of life's substance from outside the law we increased purposeful initiative in at least four ways: attracting desire, cultivating awareness, economizing effort, and legitimating will." (p. 137)

The availability of the law's formal process attracted desire by providing

2 *Cf.* Porter, "At Long Last Love," YOU NEVER KNOW (1938).

a realizable goal to men: *viz.*, possession of the powers of government, whether legislative, executive, or, to a lesser extent, judicial, for purposes of molding public policy to their liking. It cultivated awareness by insisting on precise definition as a condition of getting what men wanted from law (a bill to be drawn, pleadings to be filed, forms to be filled out), by focusing men's attention on the political dimension of life (if men lacked the market power to get their way, they might seek a statute from the legislature or file a suit at law), and by providing means of communication among people of diverse points of view (national political parties provide the best example). The availability of law's forms economized effort by helping to concentrate intelligence and disciplined feeling in one spot, particularly in the legislature; and it legitimated will by providing regular and established forms through which social change must move.

Hurst's discussion of the creative tension that legal structures and processes fostered between generals and particulars—he calls it a special instance of the interplay of form and substance—is more difficult to grasp. One example he finds in the kind of legislative authority we inherited. The legislature of Revolutionary and Federal years—with its power of the purse, its power of investigation, its police power—was designed to deal with the large framework of social living. Yet as we broadened the elective base of the legislature, shortened the terms of office, and insisted on geographical districts, we thrust matters of extreme particularity through the legislative process until, Hurst fears, we have created a parochialism that raises doubts about the legislature's capacity to produce generalizations adequate to the times.

This interplay of generals and particulars he finds also in the authority vested in the courts to declare and supply values reaching beyond the immediate bounds of the litigants' claims (limited, to be sure, by the format of a lawsuit), and, after about 1905, in the expansion of the executive branch, particularly through the administrative agencies, which provides the most striking structural development of mingled emphases on general and particular. The American philosophy of constitutionalism also proscribed areas within which the competition of generals and particulars operated: the concept of "reasonable," the development of the substantive meaning of due process and equal protection, the definitions of police power and the commerce clause, and, in the twentieth century, the expanding fiscal authority of the central government.

Turning to the weight given to particulars, the key proposition, Hurst says, is that, under our constitution, law exists to serve the individual—in a sense, the ultimate of human particularity. Examples are the Bill of Rights, the hedge we put around the highest crime against the political community, treason (on which Hurst, incidentally, is an authority[3]), and,

3 *Treason in the United States*, 58 HARV. L. REV. 226, 395, 806 (1944-45); *English*

of course, the work of the judicial branch, which provides the most distinctive form in law for expression of particular wants and desires.

After looking at *how* law—through initiative and response—gave purposed direction to our history, Hurst turns—in his chapter, "Leverage and Support"—to *what* law did. Whereas law's role in stimulating initiative and response went to the constitutional and procedural aspects of our legal history, leverage and support concerned the resource allocation feature.

By leverage Hurst means the use of law to help create new knowledge or purpose or action, and by support, its use to maintain values already formed. He takes each chapter of the 1853 General Acts of Wisconsin and classifies it as either a leverage or a support statute. He also uses the legal history of milk regulation in Wisconsin to illustrate the distinction: a statute defining minimum behavior by milk producers and dealers is an example of the support role because it sustained an already existing frame of relations in Wisconsin life; contrariwise, acts creating specialized agencies to gather information and initiate plans about milk supply and quality—the state university, the office of food and dairy commissioner, the department of agriculture—manifested law's leverage effect since they gave new impulse to action in the regulation of milk.

The leverage role, which we have never hesitated to assume, has always been a part of our social structure. Again the bastard pragmatism intrudes: we tend to use the leverage function only for objects close at hand and readily seen, and we granted, largely by default, a tremendous delegation of power to the market for the purposes of developing our natural resources and fixing the patterns of sectional and national commerce.

Hurst discovers four main expressions of the law's leverage function: (1) legitimating and arming men with capacity to make choices of action—*e.g.*, the delegation of powers to the three major branches of government and to private initiative under licensing; (2) legitimating sources of dissent and criticism—*e.g.*, the veto of the chief executive, the two-chamber legislature, the unusual tenure of United States Senators, life tenure for federal judges, chartering of religious and educational institutions; (3) helping advance and exploit knowledge—*e.g.*, the legislative power of investigation, the corraling of expertise and opinion by the executive, the creation of scientific and research organizations by the legislature, the appellate court opinion which defines the assumptions of fact and judgment implicit in existing policy; and (4) providing means for more rationalized law-making—*e.g.*, the Field code, the Commissioners on Uniform State Laws, the development of rule-making by administrative agencies.

Hurst avoids assigning relative importance to the leverage and support

Sources of the American Law of Treason, 1945 WIS. L. REV. 315; *The Historic Background of the Treason Clause of the United States Constitution*, 6 FED. B.J. 305 (1945).

functions of law. But he does find that the support role loomed larger in the simpler days of our society, and, concerned as it was with keeping social processes going, it necessarily dealt in great part with law's own order. Four general themes in our history, he suggests, gave coherence to law's support functions: continuity, economic productivity, context, and community. The law supported social continuity by enforcing free access to our cultural inheritance: *e.g.*, through sanctioning a free press and free church, prohibiting feudal tenures, establishing compulsory public education, extending the suffrage, according favor to freedom of contract, limiting the years of a patent or copyright. The law encouraged economic productivity by supplying techniques that produced multiplier effects from investing relatively scarce cash and manpower, and thus provided a climate in which the economy could grow: *e.g.*, favoring use of the corporation, controlling credit and public land policy, and giving federal protection to national markets. As more importance surrounded this aspect in the twentieth century, Hurst finds that law's greatest failure is in meeting the challenge of urban living. The law contributed to context—*i.e.*, the concern for the efficiency and decency of working relations men have to each other —both directly (discussed at length in Hurst's last chapter) and indirectly through supporting broad freedom of association in education, welfare, religion, and business. The law abetted community—*i.e.*, man's life in society and his satisfaction in that life—by supporting attitudes that made United States society in the nineteenth century, with the sole and tragic exception of the American Negro, one of consensus, without significant class or religious conflict. The fact that men in general found life satisfying was a gift of time and place that the law supported, sometimes at the price of imbalance of power and over-concentration of wealth.

In his final chapter, "Force and Fruition," Hurst discusses the law's basic characteristic of force, which he calls merely a direct manifestation of the role of leverage and support. The legitimate monopoly of violence, Hurst says, is the most distinct attribute of our law. From his words in this chapter he will undoubtedly be branded by the natural lawyers as a wicked and brutal positivist. Such a branding would be unfair because, after stating this bald fact of life—*i.e.*, that force is the distinct attribute—Hurst emphasizes again and again that it is the secondary or indirect or reserved use of force that has counted for success in our law. Success, in other words, of placing the legitimate monopoly of force in the law is measured by how little force need be used.

What he says in his last chapter is perhaps not so novel as what he has said earlier, and he covers ground familiar to all lawyers. He observes that force, when it must be used, always plays a negative role. That is to say, it is used to avoid something worse—namely, the breakdown of legal order itself. And we have always believed that power over the legitimate monop-

oly of violence exists to serve individual life and must always be held in check. Ultimately this power must account to the electorate, but over the years we have developed four[4] additional safeguards in our formal legal processes: (1) the civilian control of the military; (2) the limitations on political disqualification (for example, the narrow definition of treason, the prohibition of bills of attainder or ex post facto laws, the forbidding of religious tests as qualifications to public office, the guarantee of trial by jury, the absolute privilege of legislators against libel and slander); (3) the protection of limited political commitment (*i.e.*, the concern of the law only with man's overt acts and not with his inner thoughts or feelings, and the general refusal—relaxed somewhat in the 1950's—to recognize guilt by association); and (4) the accountability of civil authority (*e.g.*, the internal checks and balances of government, the protection of dissent, and most important, Hurst believes, the role of court and bar in reviewing official action).

As we enter the second half of the twentieth century Hurst finds new developments in the indirect use of force through preventive law techniques such as licensing and administrative rule-making, through the expansion of taxation and public spending, and through the use of advisory committees. He also sees Madison Avenue extending into official operations: the common inclusion of public information officers in the typical public agency table of organization causes him some concern; for they can hoard knowledge and withhold facts as well as improve the quality of performance. Nor does Hurst feel we can rest complacently in the belief that faith in our constitutional tradition alone is enough to give us all the security we need against abuse of official power; since law holds the ultimate means of violence, possession of government itself is a natural prize of ambition, greed and passion. On this rather somber note he stops.

Hurst has done here, I believe, what has not been done before. He has related law to life in United States legal history as a systematic whole. Others—McDougal and Lasswell, Edmond Cahn, Jerome Frank, Underhill Moore, Karl Llewellyn, and more—have either done this kind of job in specialized fields or have approached it from *a priori* precepts. But none, I suggest, has given us a unified, compact, and cohesive account of law and social process between the covers of a single book.

This work is the product of prodigious scholarship in the behavioral sciences. To use Selig Perlman's phrase, Hurst has placed himself in the

4 Like the American Indians of the Great Plains, Hurst seems to be intrigued with the number four: thus, he finds four distinctive features of our legal order (pp. 3-5); four ways we increased purposeful initiative through the interaction of life's substance with law's forms (p. 137); four main expressions of law's leverage function (p. 194); four ways in which the support functions of law maintained values (p. 226); and four principles to prevent subversion of the law's legitimate force (p. 311). See KROEBER, ANTHROPOLOGY 253 n.1 (1923).

middle of a problem and crossed all jurisdictional bounds. He has attempted to live by his creed that a historian is a man who can see an event whole. The fact that no man can ever possess such vision is no reason not to try.

Of course there will be controversy aplenty. The book abounds with generalizations about the nature of man—a species located somewhere between St. Francis and Mack the Knife—that should shake many boughs in the groves of Academe. Will historian and political scientist agree that change and not stability has been the norm of our experience? Does it square with current social anthropology, or even traditional theology, that, survival aside, "man's primary problem as man, has been to make some sense for himself out of experience" (p. 102) or that in North American society "men felt that the human meaning in life lay in their search to create meaning"? (p. 64) What will the psychiatrist, Freudian or otherwise, say about "the unique quality of the human brain has proved to be its capacity for general and flexible rather than specialized adaptation"? (p. 105) How consistent with contemporary biology and anthropology is "life consisted in organization imposed on matter, and human life consisted in accomplishing this with maximum awareness"? (p. 108) Will the psychologist concur in the statement that "[Men] do not think about what they see; they see what they think about"? (p. 141) Will sociologist and cultural anthropologist endorse the remark that "A man grew as an individual by organizing ideas and emotions into relatively dependable habits of will which would press him beyond the limited objectives of his animal nature and sustain him against awareness of his lonely human condition"? (p. 227) How will theologians, metaphysicians, and philosophers react to, ". . . the universe tendered [man] no meaning other than he perceived for himself" (p. 108), or to Hurst's discussion of what, if anything, the Present owes to the Past and the Future? Does "the Present [owe] the Future the chance to grow, because this is the only sense in which life has human meaning"? (p. 232) And how will a philosopher, hedonist or otherwise, feel about, "Satisfaction from human relations rests on exchange of ideas and feelings and not on mere response to stimuli or mere technical performance"? (p. 254)

These are but a few of the generalizations that Hurst has formulated from other fields of learning, and I, for one, don't have the foggiest notion whether he has spoken the gospel or not. When the smoke clears, though, it is a probable twelve to seven that he will be more right than wrong, and if what he says is more true than not true, he has sustained his burden of proof.[5] Moreover, there are no souls around to say him nay because no one has tried to do this job before. In the country of the blind the one-

[5] *Cf.* ILL. PATTERN JURY INSTRUCTIONS, Instruction 21.01, at 16 (1961).

eyed man is king. Even if he is not right he will have served a great leverage function, if I may use the term, by stimulating comment, criticism, and carping.

How remote this study is from anything traditionally regarded as legal history: obscure investigations into writs of Aiel, Besaiel, and Cosinage; empty and formalistic studies of the United States Supreme Court and the sifting committee; narratives of the Nullification controversy and the *Dartmouth College* case. As to the emphasis on high politics and dramatic incidents, Hurst states: "I confess to some irritation that the writing of legal history tends to take the cream off the top of the bottle and let the nutritious skimmed stuff flow down the drain because it is bulky to handle and not so immediately pleasing to taste." (p. 18)

Hurst has exploded some tough and tenacious myths. Let no one now perpetuate the fable of laisser faire. Hurst has shown how, time and time again, we have used law, consciously and affirmatively, to advance social or economic gain for purely selfish purpose. Let no one accept the easy generalization that we are a materialistic people; we used materialistic means, to be sure, but only for the ultimate objective of promoting advancement and expression of the individual. Similarly, the generality is a superficial one that we, as a people, have no respect for law. We are chronically impatient and we wanted to get on with the job; this gave us a matter of fact attitude toward government as an instrument of utility, not an object of awe. But that is not to say we were lacking in respect. We also tried to use law where it should and could not be used—*e.g.*, the eighteenth amendment—and, as a result, had visited upon us a myriad of tragic consequences.

Hurst's book should have an important impact in stimulating further studies. What we don't know about our own legal history is appalling, and much of what we do know has come from the studies of Willard Hurst and his students. Up to this time we have been content to leave the whole subject to the political scientists, but they have looked mainly at the formal structure of government or at political parties. This is anomalous: lawyers in their day to day operations are knee-deep in all the matters Hurst writes about; it is as though it were enough for us to do these things but never to think about them.

The Odette-Odile nature of American pragmatism, for example, needs study in depth, for it provides, Hurst says, one of the organizing themes of the social history of law in the United States. From the standpoint of law's relation to realizing man's distinctive quality as man, he calls it the most important theme. The whole role of law in creating tensions between generals and particulars to aid purposeful direction, Hurst finds largely unexplored. The indirect use of force, he states, offers a rich mine of material in United States legal history. The law's performance in making

many irrevocable choices in men's lives, suggests much useful work to be done. And the variety of problems posed by assessment of the relation of law to increased economic productive capacity outlines an area of high priority.

This book is hard to read. If Clifton Fadiman wants to spend another summer of "hard" reading, I recommend it to him heartily. Perhaps it could not be otherwise: a book about abstract matters must perforce use abstract language. Hurst has not helped matters much by his organization, which, at times, is confusingly loose. For instance, he discusses the fostering of creative tension between generals and particulars and between form and substance at two different places; for the more simple minded of us, it would have helped had he discussed each of them completely at one point. His characterization overlaps in many places, but, being no Aristotelian, he freely admits to this and in dealing with such general ideas we can hardly take him to task.

To Hurst's credit, he has not invented a new vocabulary to describe his concepts. He has used words and phrases that have common usages, albeit outside the law. "Creative tension," for example, is not a lawyer's term; it is not even a law professor's term. Nor are "attracting desire," "energizing will," "cultivating awareness," "cumulation," "context," and many others. This is not to say that using language unfamiliar to lawyers is improper—perhaps it is high time that we begin to think in these terms—but its use, unadorned, makes the book hard to understand. A close reader, to be sure, will find explanations of key terms imbedded in this tight-packed prose, but some plain and simple definitions, *qua* definitions, would have been a boon. And to make confusion more confounded Hurst has not used the same terms in referring to what, I believe, are the same things. For example, one has to assume that "purposeful" and "purposed" direction are the same, that "energizing will" (pp. 138, 140) is the same thing as "attracting desire" (p. 137); that "cultivating awareness" (p. 137), "sharpening perception" (p. 140), and "enlarging perception" (p. 160) are synonymous; that "competition" as between generals and particulars is the same as "creative tension." Conversely, Hurst has used one word—context—to describe two different concepts: the relationship of extrinsic forces to directed effort (pp. 71-72), and the kind of working relations that men have to one another (pp. 249-53). Granting that a book like this need not abide by the canons of drafting a utility indenture—where, on penalty of death, the same word must always be used to describe the same thing—a poor wretch of a practitioner finds himself wondering at times if he has correctly associated word to idea.[6]

[6] Remaining adverse comment runs only to minutiae. Hurst likes the noun-adjective-verb: energize, legitimize, personalize. He has the second edition of Webster's Dictionary on his side, but not E. B. White ("As for us, we would as lief Simonize our

As must be obvious from the tenor of this review, I believe Professor Hurst has broken new paths again just as he did twelve years ago in *The Growth of American Law. Law and Social Process in the United States* is a classic example of the product of a first-rate mind working on an incredibly complex and bulky body of material. The impact of this book, I suspect, will not be felt for some time to come; the number of people—and I do not count myself one—who can read it with full comprehension may be few indeed. But if he has reached those who are at the well-springs of ideas and scholarship, he will have fulfilled a critical role. For if we are even to investigate, not to mention understand, the role of law in United States society, studies growing out of a work like this must be undertaken by the scholarly community throughout the land. When that job gets underway, and when its results begin to appear, the participants can look back to their intellectual birth in the historical world of Willard Hurst.

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grandmother as personalize our writing." WHITE, THE SECOND TREE FROM THE CORNER 166 (1954)). Professor Brinton's first name is "Crane" (p. 332); the title of Walton Hamilton's book is *The Politics of Industry* (p. 333); and why, of Gunnar Myrdal's works cited, is THE AMERICAN DILEMMA omitted?