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Hurst Recaptured

ROBERT W. GORDON

Anyone who lived and worked within range of Willard Hurst's benign, if also rather insistent, influence is necessarily somewhat disabled from detached assessment of his legacy. We owe him too much. Not just for the continuous rapid fire of comment, criticism, recommendation, and encouragement that rattled off the famous ancient typewriter; but also for his intellectual and moral example. He set himself long-range projects and finished them; he surveyed large themes and explored them to the bottom. He used his authority to try to get us both to read more broadly and get down into the details. We responded because we were touched that he thought our work might matter, and because he did not spare himself. Even when rebelling against that authority (as I for one often did), we wanted his attention and judgment even when we could not hope for his approval, and he gave them generously.

So I have long been curious to see what a younger generation of legal scholars, unattached in its affections and unburdened with personal obligations, would make of Hurst's work. There was reason to think their reception of it might be fairly critical. Last fall I read *Law and the Conditions of Freedom* with a group of legal history graduate students. They had a hard time at first getting past their incredulity at what Hurst did not talk about in the book to focus on what he did. As William Novak points out, much of the best American legal history since the 1980s has been devoted to issues missing or minimized in Hurst's vast body of work. He said little about the history of groups partly excluded from or subordinated within the legal system, such as blacks, women, laborers, immigrants, paupers, and Native American peoples. The legal instruments of subordination—slavery, segregation, convict labor, coverture, Indian removal, crop liens, labor injunctions—are mentioned only in passing in his books; the active movements of the excluded to reform or abolish these instruments, such

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as the civil rights, women's, and labor movements, are mentioned hardly at all. Hurst did not think human beings generally or Americans specifically cared only about business and making money; but his work did primarily concern itself with economic activity and policy. It revealed little interest in the legal regulation of crime, morals, welfare, religion, war and national security, political dissent or the family.

Hurst wrote intellectual-cultural as well as social history; and that field too looks very different now. Hurst's central subject, as Novak and Carl Landauer note in their essays here, was that of how "we" (as he called Americans generally, across time and space) brought a practical consciousness, a body of working principles, to the task of generating legal responses to the mundane challenges of making a life for ourselves on the North American continent. He treated that consciousness (a "middle-class outlook") as an inheritance from the Reformation and the constitutional and commercial revolutions of the seventeenth and eighteenth centuries, pretty well fixed in its essentials when it arrived in the New World, persisting mostly unchanged through the nineteenth century, and transforming itself only when the accumulating social consequences of its unreflective application ("drift and inertia") jolted "us" into more deliberative and longer-range modes of legal planning. To any reader of the last generation's historical work, this picture of a largely static and uniform consciousness is bound to be unsatisfactory. Just as recent general and legal history have stressed social conflict, so too they have focused on dissent from the mainstream consensus on values expressed in law and, even more pointedly, on variety, change, and contradiction within the consensus itself: on civic-republicanism, the Scottish Enlightenment, liberal and evangelical Protestantism, classical political economy, race science, European legal thought, and pragmatism, to name just a few, as sources of legal ideology; on the rise, elaboration, and collapse of the "classical" legal thought of the late nineteenth century; on the radically different applications that generally accepted slogans of liberal legalism ("so use your own as not to injure another's," "free labor," "freedom of contract," "equal protection") could have in practice.¹

1. Landauer's excellent essay for this symposium on the social-science sources of the 1950s on which Hurst drew for his general ideas greatly helps to clarify why Hurst was inclined to portray the practical consciousness structuring the workings of the legal system as so general and uniform. Landauer tells us that he had adapted from contemporary cultural anthropologists and post-Freudians their theory of a "fully articulated cultural structure . . . in which the parts work perfectly together" as the governing value system of a society (80). As Landauer says, pieces of the "puzzle that did not quite fit"—for instance, Jacksonian anti-corporate sentiment, abolitionist and temperance societies, "controversies over Masonic lodges, Catholic convents and schools and Mormon communities"—Hurst set aside as marginal.

As Hurst's account of consensus has come to seem over-general to latter-day readers, so too his account of social motives seems unduly flat and affectless. He was concerned, and reasonably so, to emphasize the everyday rather than the exceptional in legal history, the practical, local, mundane motives that brought people to sign a contract or file a lawsuit or enact a statute. He wanted to emphasize structural over Great Man explanations for legal change and unintended over intended consequences of social action; to understand crises as the result of accumulated drift rather than Manichaeian struggle. It was in this spirit that Hurst, not altogether unjustly, criticized the radical historians of the 1960s and 1970s for over-dramatizing and over-moralizing as well as over-emphasizing social conflict.² But in the process he tended to so flatten American mentalities into short-term calculation ("bastard pragmatism" as he called it) as to make invisible the vast "irrationalities" at their core: the strength of racial and ethnic pride and hatred; the power of masculine images of honor and mastery; the allure of violence; the "paranoid style" of politics expressed in fears of sexual license and miscegenation, urban masses, socialists, aliens, bankers, Catholics and Jews; imperial dreams of conquest and missionary zeal for conversion of the world to American ideals; the pervasive utopian longings for promised lands of milk and honey and millennial visions of ecstasy and catastrophe. It is hard to imagine that a nation of such Babbitts as Hurst tended to portray "us" could have been moved to acquire and settle a continent; build a transcontinental railroad system, consolidate steel companies and national unions; fight a bloody civil war and stave off racial reconstruction for a hundred years; create a political party system regularly organized around positions on racial and moral-cultural issues such as temperance, welfare, and abortion; sustain slavery in a liberal polity; sustain a civil rights movement through decades of adversity; sustain a fervently religious culture in a secularizing industrial world; conduct several nota-

2. If I may use this occasion to continue an argument to which, alas, my friend can no longer respond: Hurst's critique of radical legal historians always seemed to me a bit indiscriminate. Hurst believed that those who focused on domination overstated the importance of villains, with conscious motives to oppress or subordinate others, to the routine operations of the legal system. Yet the aim of many of the "critical" legal historians he disparaged was not to moralize legal history by turning it into a struggle between virtuous victims and their evil oppressors but rather to produce a structural account, similar to Hurst's own, of legal ideology. They also aimed to use that account to explain how legal ideology had, relatively independently of the specific intentions and interests of the social actors involved in making and maintaining it, facilitated forms of domination. Nor was their point to condemn liberal-legal ideology as irredeemably oppressive; it was rather to argue that, since the ideology was crammed with contradictions and suppressed alternatives, it always presented progressive possibilities as well as conservative ones, some of which had actually been realized in historical and current social arrangements.

bly hysterical purges of foreigners and radicals; and send soldiers to die in foreign fields in five major wars.

Since, as I say, the legal history of the last thirty years has mainly emphasized the topics Hurst left out and given particularity to those he treated very generally, one might have expected a cooler response to his work than the principal contributors to this symposium provide. To their great credit, they pass up the occasion for what would be relatively cheap shots and concentrate instead on historicizing Hurst, locating him in the context of the legal-political preoccupations and intellectual influences of his formative years, 1930 to 1960. The results are really illuminating. They considerably clarify what Hurst owed to his major mentors and influences and how he departed from them. They elucidate what he conceived to be the purposes of his life work. Yet ironically, in the process of historicizing Hurst and placing him back in his own formative context, the contributors also highlight the ways in which his project and ideas for realizing it are still living and important. Because of limitations on length, I will confine my comment to the essays of Daniel Ernst and William Novak.

Ernst's article is a fascinating and valuable work of intellectual biography. It does a good job of portraying the young Hurst as already in possession of formidable maturity, integrity, and independence of mind. The essay's centerpiece is the story of Hurst's collaboration with his two powerful mentors, as Professor Frankfurter's research assistant and Justice Brandeis's law clerk. Ernst shows how much of Frankfurter's outlook the young Hurst absorbed—the interest in statutes and administrative law, the belief in a large administrative discretion and in the well-trained lawyer as the coordinator and applier of public-policy initiatives, the repudiation of a narrow originalism in favor of a broad survey of historical trends and tendencies in constitutional interpretation. But Hurst also went well beyond his teacher in some ways, especially in his interest in the substance of administrative decisions as well as in judicial review of them, and in his decisive repudiation of a judge- and court-centered approach to history.

Ernst is even more interesting in describing Hurst's subtle deviations from Brandeis. Both wanted constitutional courts to find a *via media* between *Lochner* and *Schechter*; that is, between inflexible judicial condemnation of the experiments of the regulatory state on the one hand, and a blank check to administrative delegation run amok on the other hand. But even though, interestingly enough, Hurst was if anything more skeptical than Brandeis of the motives of regulators and interests behind much regulation, he was more willing than Brandeis to argue that legislators and administrators had behaved reasonably and to defer to their decisions.

In his essay Novak argues that Hurst's lifelong enterprise is best understood as an effort to develop an ambitious historical sociology in the tra-

dition of the grand synthesizers such as Marx and Weber. I think Novak has got through to the essence of Hurst in this piece. A lot of people have thought that what was distinctive about Hurst's work was its focus on the low-level working detail of the legal system. That is true, but the detail was always marshaled into the service of a grand social-theoretical scheme. Novak gives a very useful account of this scheme, especially through his division of Hurst's project into its "function," "value," and "power" components. He also has an insightful discussion of Hurst's notions of the weight of habit and inarticulate assumptions: as he says, Hurst does not celebrate consensus, but views it as the product of unexamined, tacit habits of mind. And his noting of Hurst's association of time (the weight of unconscious tradition on law) with Holmes, and of context (law's interaction with the nonlegal surround) with Brandeis, is really brilliant.

Novak's account reminds us of both the virtues and the dangers of historical-sociological method. The virtues are of course the spaciousness of perspective and the production of generalizations for use in other contexts. The dangers are that very broad cross-time generalizations tend to flatten out specificity and historicity and that a very high level of abstraction risks vagueness and banality. Novak's fine summary of Hurst's ideas makes at least this reader think that he did not entirely escape the dangers. The generalizations, like the Parsonian theory they so closely resemble, seem to be chiefly taxonomic; they are heuristics for organizing historical material rather than theories about causal sequences or associations. And as Novak notes, many of Hurst's master concepts—such as "individualism" or the "middle-class outlook"—seem to have no history themselves, to come into the world as uncaused causes, and not to change much thereafter. Moreover a true historical-sociological method probably has to be comparative; and Hurst, by limiting himself to the U.S.A. and, more specifically, to Wisconsin, always left unclear how much of his story was an exceptionally American or Wisconsin one. My own view is that the evidence for Hurst's (indisputable) greatness as a historian is to be found in his most detailed and specific works, such as the magisterial lumber book,³ and in the mid-level generalizations (land was cheap and abundant, labor and working capital scarce; application of fee-simple concepts regarding land use to licenses to cut timber was woefully inappropriate, and so forth) he pulled out of this detail, rather than in his ventures into grand theory.

Ernst and Novak differ at some points. Novak sees Hurst's main project as that of developing a historical sociology of law. Ernst sees it as developing a historical-sociological jurisprudence—that is, as a project for train-

3. James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge, Mass.: Belknap Press, 1964).

ing *lawyers* to do the important jobs they need to do: coordinating administrative functions, allocating resources, and holding power accountable. These do not necessarily conflict—the historical sociology could be both an end-in-itself and a handmaiden to training lawyers, and I think it was. But I also think Ernst is right to believe that training reflective lawyer-statesmen through uncovering the historical “record,” largely one of short-sighted legal-regulatory failures and mistakes punctuated by the occasional successful piece of rational planning, was Hurst’s primary aim. This aim is nicely revealed in Hurst’s repeated references to American history as “the record,” as if it were evidence in a pending legal proceeding, for that was exactly how he saw it. After expanding the relevant record beyond prior appellate cases and their facts to all prior legal acts and the social influences on them, and the pending proceedings to the overall task of designing workable legal-regulatory arrangements for the present age, Hurst wrote his books as background briefs for present-day lawmakers.

Ernst and Novak also seem to differ on Hurst’s views about the importance of law in constructing markets and the relations of market actors. Novak quotes all the (many) passages in which Hurst seems to insist on the marginality of law to the economy. Ernst however treats Hurst as having very early on adopted the legal-realist view of the “public constitution of private rights”—that the decision to confer discretionary authority on private actors in markets was a legal choice as much as the decision to give that authority to some official. Perhaps this is not a real difference. Ernst is talking about Hurst’s ideas about law, especially the constitutional law of the Fourteenth Amendment, in which context Hurst’s concern would be to refute the action/omission distinction as a touchstone for distinguishing “state” from “private” action. Novak is talking about Hurst’s views of historical causation—what has been the role of official legal agencies and the law they make in constructing market relations? Even so, it is hard to square the legal-realist Hurst with the postwar Hurst—especially because even the postwar Hurst attributed major force to basic legal concepts in the design of market ground rules. For instance, he assigned primary responsibility for the legal-planning defaults that devastated the Wisconsin forests to uncritical applications of fee-simple ownership and freedom-of-contract ideas.

I would like to end by supplementing the principal papers’ ideas about what is most vital and useful to be taken from Hurst’s work for the education of present-day lawyers and legal scholars with my own brief list of suggestions:

1. Attention to the economic, understood as culturally shaped. Hurst may have slighted other motives and fields of conduct. But there is no doubt that the overwhelming bulk of American effort in lawmaking (statutory, admin-

istrative, judicial output and the work of lawyers' offices) relates to economic transactions and relations. Though there are some fine legal histories of economic regulation since Hurst's, legal historians have lately tended relatively to neglect business and the economy. By default the field has been largely turned over to legal economists, whose rational-choice models tend to leave out entirely what Hurst (an admirer of Karl Polanyi, as Landauer reminds us) insisted on keeping centrally in view: the embeddedness of economic decision making in a framework of cultural and social assumptions. Economic rationality for Hurst is always a strictly bounded rationality: the fixation on immediate costs and gains; the highlighting of some risks and prospects; the discounting or ignoring of others.

2. *The critique of laissez-faire.* Hurst was grimly distressed, but not particularly surprised, by the return in the 1980s and 1990s to some of the highest circles of legal policy making and policy thinking of the libertarian anti-statism that, he believed, had obscured perceptions of reality and frustrated constructive legal responses to it in the nineteenth century. Hurst critiqued laissez-faire both as fact and as guiding constitutional norm, though he recognized its power as ideology. As fact he knew the American night-watchman state was a myth, since he had written a 946-page book chronicling the massive detailed regulation by a single state of a single industry, through its property, tort, contract, and water law and general police power, during the supposed high period of laissez-faire. As a norm he knew that libertarianism was a seriously incomplete account of the aims of American constitutionalism, whose purposes had never been limited to restraining governments, but included holding both public and private power accountable to serve human values and the general ends of "the commonwealth." As ideology he knew laissez-faire was destructive in its effects: indeed one of the most powerful things he ever wrote was his scornful, passionate polemic in the lumber book against the opinion of Wisconsin's Justice Roujet Marshall that invalidated, as an unconstitutional exercise of state power, Wisconsin's attempt to establish a forest reserve by buying up timberlands—a minimal stab at administrative planning to save some of the forest acreage from devastation.⁴

From his study of the timber catastrophe and similar debacles, Hurst was disinclined to romanticize markets or praise their virtues as "spontaneous orders" (in F. A. Hayek's phrase). Though he had a healthy respect for markets as engines of innovation and prosperity, virtually his entire oeuvre is about how by the end of the nineteenth century the unreflective cult of free enterprise had brought about major crises in the form of unforeseen

4. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331 (1915), analyzed in Hurst, *Law and Economic Growth*, 571–91.

externalities such as resource exhaustion and a dangerous concentration of political and economic power. But neither did he romanticize the administrative state. He was a Progressive New Dealer, but a hard-headed and skeptical one. A reader can readily find in his work all the important elements of modern public-choice theory, especially the policy failures likely to result from the legislative influence of concentrated private special interests at the expense of diffuse and unorganized interests. Like his mentors Brandeis and Reinhold Niebuhr he stressed the limitations of deliberate action to understand and control social change. But he also recognized some policy successes. He thought that pragmatic experimentation in administrative regulation, informed by the knowledge of those successes as well as past failures—the knowledge acquired from legal history—was the only stay against the randomly chaotic destructiveness of unrestrained capitalism and the only hope for orienting public as well as private action toward “commonwealth” values.

3. *The “whole record” and the “working level.”* As Ernst shows, Hurst began his scholarly career with a repudiation of “originalism,” the idea that legal history was most useful to present-day legal argument and decision making if it were the history of (a) high doctrine and legal theory (b) at constitutional founding moments. He insisted, and helped to instill as the core Wisconsin-Madison ethic, that the relevant historical record for current understanding was the whole sweep of modern history; that the most reliable guides to legal policy in action were the “mine run” of ordinary statutes and cases and administrative actions. From the start he took a broad view of who lawmakers were: not just courts and legislatures, but the executive and administrative agencies, the people assembled in constitutional conventions, and practicing lawyers and the organized bar. From the vantage point of the present he might perhaps have added social movements.⁵

4. *Law as a public profession.* As Aviam Soifer has said, Hurst’s study of lawyers as lawmakers is probably his “most radical scholarly departure” and “remains one of the very best analyses of the bar’s role in American

5. Then again he might not. Alfred Konefsky is surely right to identify Hurst as a democrat in important respects, especially in his view of law as a field of democratic experimentation and of its major purposes as the channeling and holding accountable both public and private power to the service of enhancing the quality of lives for everyone. But he was not a populist: though he considered popular movements to be invaluable signals of social malfunction, he distrusted what he considered to be their limited vision and unreflective enthusiasms; and, like his contemporary Richard Hofstadter, he deplored their suspicion of trained intellect. For informed long-range policy, he looked as a good Progressive to expert (though preferably self-effacing, responsive, and accountable) administrators. Lawrence Goodwyn’s work on the agrarian populists, however, converted Hurst from Hofstadterian distrust to respect for their sophistication on issues of money and credit.

society.”⁶ It is also probably the place in which his method of putting dispassionate narration of history to the service of reforming the present is most successful. As no one had done before him, and few since, Hurst brought out the manifold functions that lawyers had performed in American society: adapters of old doctrines and instruments to new purposes, architects of novel corporate-contractual and regulatory structures, administrators of social relations as mediators between private interests and governments, providers of political and civic leadership, and finally “symbol makers” or ideological spokesmen. Having offered many examples of the constructive social roles lawyers could play at their best, Hurst then characteristically pointed out the ways in which most lawyers had failed to seize the opportunities offered them. He judged the lawyers of his own time, in contrast to founding generation lawyers like Alexander Hamilton and John Marshall, to be cautious, timid, and narrow, to be either “technicians” unconcerned with the larger goals of law and policy, or “partisans,” unthinking extensions of clients’ short-term values and interests. The role of advisor to business interests who must take account of the policy purposes expressed in new forms of legislation and regulation, and the extension of cost-effective services to unserved clienteles, however, might still redeem the profession from its narrowness. His analysis of the profession seems as fresh and pointed now as it was forty-nine years ago; and his vision of the public functions of the private bar as useful and inspiring.

Willard, thou should’st be with us at this hour!

6. Aviam Soifer, “In Retrospect: Willard Hurst, Consensus History, and *The Growth of American Law*,” *Reviews in American History* 20, no. 1 (1992): 135, 136, commenting on “Part V: The Bar,” in James Willard Hurst, *The Growth of American Law: The Lawmakers* (Boston: Little, Brown, 1950), 249–375.