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The Voice of Willard Hurst

ALFRED S. KONEFSKY

Though I corresponded with Willard Hurst over the last twenty-five years, I met him only once. Hurst did not often attend events or meetings outside of Madison,¹ but in 1971 he appeared at a legal history conference at the Harvard Law School to herald the renaissance in the field of American legal history, a renewal in many ways directly traceable to Hurst's own work and influence. I had just graduated from law school and was beginning my apprenticeship as a legal historian. With great trepidation I walked up to him to introduce myself at a reception on the first day of the conference. I was surprised when he seemed to recognize my name (I think a list of conference participants may have been circulated in advance), but even more astonished when he said, "Let's go find a quiet corner, I want to talk to you about your father." My father, Samuel J. Konefsky, had died less than a year before, and Hurst's brief conversation with me was the first of the many kindnesses of his that I experienced.

In any appreciation of Hurst's work, some mention must be made of his body of *unpublished* work—that is, through the medium of his correspondence, his constant and unflagging encouragement of the work of younger legal historians. Most of us experienced Hurst's kindness through the mail. Hurst's letters to colleagues were legendary for a variety of reasons. First, there was his typing. Let's just say it was engagingly erratic and that over time it got worse. It only made me look forward even more to his letters. Somehow the letters seemed more endearing, charming, and useful because

1. On Hurst's reluctance to travel, see Lawrence M. Friedman, "Remembering Willard," *Wisconsin Law Review* 1997: 1137, 1138; and Bill Foster, "Recollections of Willard Hurst," *Wisconsin Law Review* 1997: 1139, 1142.

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of the personal effort that went into them. Second, there was that venerable, old typewriter on which Hurst obviously hammered out his correspondence himself. I have Hurst's letters to my father in the 1950s and 1960s, and Hurst's letters to me in the 1970s through the 1990s and, though I am hardly an FBI expert on the subject, it certainly looks like all of them were typed on the same typewriter, a machine that probably belongs in the Smithsonian to commemorate the impact it had on the writing of American history, particularly the history of American law.²

Finally, there are the letters themselves. Though I am sure that there must be surviving letters on general historiographical and theoretical subjects, most of the correspondence I know of can be placed into two general categories when Hurst responded to manuscripts and reprints that people sent to him. As far as I can tell, Hurst responded to everything that was sent to him. I think it fell under his definition of good Athenian citizenship or of being a gentleman—a dying if not lost art in today's academic culture. He took the occasion to encourage and support the work of everyone in a thoughtful and analytical way. If you sent him a manuscript, you often received in return a long letter with detailed comments carefully walking you through your evidence and arguments, incredibly detailed, probing, and thorough. I believe this technique may have been a product of Hurst's *Harvard Law Review* editorial experience. If you sent him a reprint of an already published piece, you got back a shorter letter (it usually seemed by return mail—I don't know where he got the time) that was organized into two parts. The first part repeated the real "holding" of the article (what you were driving at, but were afraid nobody would notice), thereby reassuring you that somebody out there actually understood and appreciated what you were trying to do. The second part of the letter posed an absolutely disarming and acute question about the article, demonstrating that you had not buried all the bones as successfully as you had hoped. The letter concluded with encouragement and praise—and a reminder to keep producing.³

With Hurst's reputation for being helpful already well established by the early 1950s, it is not surprising that when my father, then a young assistant professor of political science at Brooklyn College, began working on

2. Needless to say, I am not the first to notice the typewriter. See, e.g., Aviam Soifer, "In Retrospect: Willard Hurst, Consensus History, and *The Growth of American Law*," *Reviews in American History* 20 (1992): 124, 128; William N. Eskridge, Jr., "Willard Hurst, Master of the Legal Process," *Wisconsin Law Review* 1997: 1181, 1189; John P. Frank, "J. Willard Hurst—Memorial Remarks," *Wisconsin Law Review* 1997: 1131, 1133; Friedman, "Remembering Willard," 1138.

3. I am also not the first to talk about these letters and comments. See Friedman, "Remembering Willard," 1137–38; Stewart Macaulay, "Willard's Law School," *Wisconsin Law Review* 1997: 1163, 1171–72.

his book, *The Legacy of Holmes and Brandeis*,⁴ he turned to Hurst. One of the first aspects of my father's project was to sit down and talk to a variety of people who had known the Justices in one capacity or another—primarily former and present Supreme Court Justices and law clerks or secretaries to Holmes and Brandeis. Holmes had been dead for less than twenty years; Brandeis for only a decade, and recollections were still likely to be relatively fresh. One of the first persons my father contacted was Willard Hurst, who had been a Brandeis law clerk for the 1936 Term. In May 1951, my father wrote to Hurst introducing himself as the person “about whom John Frank has recently written to you”⁵ and asking if Hurst would be willing to talk about the projected book in the event Hurst was planning a trip East or, if not, would he be willing to correspond with my father. Hurst, of course, immediately responded, reassuring my father that “I shall be very glad to give any help I can to your project, which naturally engages my interest and sympathy. I am sure that firsthand talk would be very much superior to correspondence, though I'll be happy to do anything I am able to by way of written response to questions, if that seems the only feasible way to do business.”⁶ Hurst suggested they meet in New York City in September when he would be attending a meeting of the Social Science Research Council.

What Hurst called “firsthand talk” my father described as “interviews.”⁷ As my father wrote to Hurst in one of his letters confirming arrangements for their meeting: “I should mention perhaps that I am a blind person and that my wife will be with me.”⁸ My mother accompanied my father everywhere on his academic journeys. The “interviews,” therefore, were recorded in stenographic notebooks by my mother, Roma T. Konefsky.⁹ No tape recorder was used. Though the interviews were preserved in stenographic

4. Samuel J. Konefsky, *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas* (New York: Macmillan, 1956).

5. Letter from Samuel J. Konefsky to Willard Hurst (20 May 1951) (on file with author). John P. Frank, a former student of Hurst's at the Wisconsin Law School, was a law professor at Yale in 1951. See Frank, “J. Willard Hurst—Memorial Remarks,” 1132.

6. Letter from Willard Hurst to Samuel J. Konefsky (22 May 1951) (on file with author).

7. For the list of the thirty-five law clerks, scholars, and judges interviewed, see Konefsky, *The Legacy of Holmes and Brandeis*, vii–viii.

8. Letter from Samuel J. Konefsky to Willard Hurst (27 Aug. 1951) (on file with author).

9. Eleven of these notebooks have survived. At least one, apparently containing the earliest interviews in April and May, 1951, with Mark DeWolfe Howe, Warren S. Ege, and Horace Chapman Rose, is lost. Howe and Rose were law secretaries for Holmes in 1933–1934 and 1931–1932 respectively; Ege was a Brandeis law clerk in 1924–1925. See the lists in G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 489; Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (New York: Viking, 1946), 690.

notebooks, they were not recorded in shorthand, which my mother did not know. Instead she wrote in longhand or cursive, primarily in sentence fragments, skipping words and omitting punctuation as she attempted to keep pace with the rapid flow of ideas. Yet the interview notes help us imagine the voice of Willard Hurst. It helped a lot, I think, that she was very familiar with the ideas being discussed as a result of her own graduate education (cut short to devote herself to helping my father) and her years spent as a reader for him. My mother generally described these interviews more as pleasant "conversations" and dialogues than as a formal series of questions and answers. My father seemed to ask very few questions—only a few are identifiable, for instance, in his interview with Hurst. But he appeared to be particularly concerned with questioning Hurst about certain impressions left by David Riesman, who had been critical and outspoken about Holmes and Brandeis when my father interviewed Riesman two days before he talked to Hurst.¹⁰ Riesman had been a Brandeis law clerk in the 1935 Term, just a year before Hurst's clerkship. My father seemed a little unsure about Riesman's evaluations and took the occasion to explore with Hurst the information he had received from Riesman. Usually, however, only a few general questions started the interchanges.

The notebooks contain my mother's transcription of the words of two other people talking in a room. The reliability of the historical information recalled was directly dependent on my mother's ability to be accurate as she recorded the dialogues, and my father's considerable ability later to remember and fill in the blanks as he wrote his book. Knowing their abilities myself, I have a high degree of confidence in the authenticity of what appears in both the notebooks and the book. As far as I can tell from examining my father's correspondence, no one ever complained about being misquoted.¹¹

10. In the transcription that follows, I have completed contractions that would help identify persons and meanings, and I have corrected obvious errors in punctuation, spelling, and grammar. In the footnotes accompanying the interview with Hurst, below, I have noted where Riesman's observations prompted my father's questions to Hurst. I doubt whether Hurst knew that the source of these questions originated with Riesman's comments. For Riesman's later views on Brandeis, still critical, see his autobiographical essay, "Becoming an Academic Man," in *Authors of Their Own Lives: Intellectual Autobiographies by Twenty American Sociologists*, ed. Bennett M. Berger (Berkeley: University of California Press, 1990), 38–40.

11. Riesman wrote to my father, for example, that he was "particularly happy that you found my own thinking helpful in connection with the book." Letter from David Riesman to Samuel J. Konefsky (6 Nov. 1956) (on file with author).

Interview with Willard Hurst—9/14/51

- [Hurst:] B[randeis] unusually keen sense of husbanding time
 Ruthless but not impolite about time
 very pressing sense of what he wanted to do¹²
 much less outgoing to his clerks than Cardozo & Stone¹³
 [Cardozo] used his law clerks before the case was argued
 Stone great freedom to his clerk to opinions to write
 B very steely sort of man tough minded
 Prime example = of American Puritan
 (somewhat sinful to enjoy oneself too much)
 May explain affinity to [Woodrow] Wilson
 Not direct Feels increasing admiration
- [Hurst:] Contrast to H[olmes]—early admiration
 steady rating down of [Holmes] as a human being & law man
 for B—it mounts though B may have been less
 urbane & adroit in niceties
 H[olmes]—intellectual dilettante—reputation was inflated because of
 his doubts—his ability to articulate—may have been just intellectually
 lazy
 B = “Jewels 9 words long”
 secret joys of a thinker apt description of B.
 Holmes was a man of catholic interest
 B’s interest in economy of the law developing in social science
 Holmes eclectic
 B’s interest in Louisville & zionism—interest of a statesman
 How can you make it a going concern
- Hurst[:] B. quality of interest different than Holmes
 didn’t want to be an observer—wanted to be
 able to talk on the level with the expert.
 Parrington’s¹⁴ reading—part of integrated plan to put them to use
 Travel reading—for diversion—B
 The Late George Apley¹⁵—B read it

12. Jack Schlegel observed that Hurst’s account here of Brandeis’s working habits also describes Hurst himself, including his direction of younger scholars. (Personal communication.)

13. David Riesman claimed that “other clerks were closer to their judges.” Interview with David Riesman (12 Sept. 1951), 4 (on file with author) [hereafter Riesman Interview].

14. Probably a reference to the work of the Progressive historian, Vernon Parrington (1871–1929) and his *Main Currents in American Thought* (New York: Harcourt, Brace, 1927).

15. John P. Marquand, *The Late George Apley: A Novel in the Form of a Memoir* (Boston: Little, Brown, 1937). The novel’s appeal to Brandeis may have been in its satirical treatment of Boston Brahmin culture.

Represents a lack in scope of B's interest¹⁶

if he had been more open to the arts

Ruggedness of living

Personal freedom & standard of living is a ball & chain

& it should be kept down for a maximum of freedom

Puritan temperament—cramping narrowness v. tremendous richness

just a personality quirk—not a miser—a generous spirited man

B. pathological sense of obligation

" " trusteeship

regarded himself sternly

[Konefsky:] Was he trying to keep up a legend?¹⁷ [Hurst:] not in 1937
personal austerity throughout—no self-consciousness [of] creation of a
legend

B was conscious of being part of an institution

As practicing lawyer & pragmatic approach to things—yet with that
background acutely conscious of playing a role

the S[upreme] C[ourt] was a drama staged—part of its function to play
the role.

Definite in instruction to Hurst—to be cagy with press. Contemptuous
of Drew Pearson's 9 old men.¹⁸

Part of severe limits in relation to clerk—

strong sense not to loosely spread abroad gossip about Court

Court's public announcement of principles should not be obscured by
personal squabble by which it arrived at them¹⁹

B social job—Not the adjudication of cases but the role to play on the
court is important

Didn't tell Hurst not to talk to other justices' clerks²⁰

Much more reserved in the freedom he allowed himself than other judges

1 Highly sophisticated—least naive

2 didn't regard himself as devoted to the adjudication of cases

3 In a practicing philo[sophy] = Court essentially a dramatic spectacle—
dramatizing principles, value judgments—an educative function

16. Riesman said of Brandeis that he "had no use for philosophy" and that he "was a bore, a barbarian, no classicist." Riesman Interview, 6.

17. Riesman reported that he was "aware of B's legend of holiness," and he intimated that he thought there was a "discrepancy" between the legend and reality. *Ibid.*, 2.

18. Drew Pearson and Robert S. Allen, *The Nine Old Men* (Garden City, NY: Doubleday, Doran, 1937).

19. Riesman noted that Brandeis "was loyal to the team, might fight with them within but defended them outside." Riesman Interview, 7.

20. Riesman had reported that Brandeis "didn't want his clerks to fraternize with other clerks." *Ibid.*, 4.

Felt Court to be sort of Holy Synod untouchable, should be unsullied
Stressed symbolic aspect of the institution (S.C.)

[Konefsky:] Was Battle over nomination responsible for stress on judicial?

[Hurst:] B Remarkable capacity for detachment

Drew distinction between Court & other branches of Leg.

Mrs. B. was more aware of protocol—punctilious about Court procedure

Enormously withdrawn

Paradox of judicial job—

[Konefsky:] Did you feel that B had a closed mind on question in a case?²¹

[Hurst:] B. Had come to conclusion in certain fields & wouldn't reexamine premises but not a dogmatic mind

outstanding aspect—welcome & ask for the expression of view in ref. to cases

general atmosphere—gave little leads but accorded his comment respect & consideration

Development in line of argument

No window dressing very detached—minimum of ego about his job. well qualified to be a judge

Transition from partisanship to judgeship was in [that] his [partisanship] was [now] based on fact (wanted never to be caught out on facts) help[ed] make the remarkable transition

Was a reasonable man—the rational quality had upper hand

Was not a W[illiam] J[ennings] Bryan

[Konefsky:] Did he ever ask how Hurst would decide a case?²²

[Hurst:] No—Cardozo did

Hurst first heard of a case—would be the galley of first draft of B's opinion

[Konefsky:] Was clerk's work creative & invited by the justice?

Hurst—left to determine the bounds of his work by himself subject to the judge's acts

B Didn't need a clerk—an educational experience

Probably steered H into university teaching

21. Riesman commented that Brandeis "didn't have an open mind, a great lawyer but not judge. All B's opinions are all ingenious briefs (they can't be trusted to report all the evidence)," and that he was "exceeding[ly] rigid, was gracious but wouldn't budge an inch, not open-minded." *Ibid.*, 2, 4.

22. Riesman observed that Brandeis "never asked R for his opinion, just a leg man, his strategy even was all set. Would listen to R on point of style didn't like R's lack of legal ingenuity." *Ibid.*, 4.

H had offer from Reed (Ass't Solicitor Gen)²³

either B or Mrs. B. mention[ed] the vacancy at Madison = asked him to talk [to] Garrison²⁴

B—had an interest in young men & had ambition for them—Like[d] to manipulate them into positions where there was work to be done²⁵

Garrison = might talk to him

[Konefsky:] New Deal = How did he feel about FDR's administration?²⁶

[Hurst:] Didn't talk much about politics

Possible for a man to do to[o] much to be able to use his best judgment

H[urst] got the impression that B was condemnatory of the court packing bill—felt it wasn't done morally—it wasn't presented on its real merits. He was revolted by the shabby "smartness" of the presentation. Showed a lack of moral fiber. shabby & sophomoric

B. wasn't an "operator" was a brilliant strategist

Dishonest or immoral that a practice of ghost writing should spread in D.C.

B = TVA was a great achievement in great inventiveness—regional decentralization—grass roots angle—as working partners in shaping an enterprise

Great issues should be fought greatly.

Soc Sec. Act—doesn't remember²⁷

Sunday teas = was obviously a good listener, soaked up information

[Konefsky:] Did he [Brandeis] exploit people[?]²⁸

[Hurst:] He wanted to get something out of them or put into them—not egotistically

23. Stanley F. Reed (1884–1980), Solicitor General of the United States, 1935–1938; appointed in 1938 by President Roosevelt to the Supreme Court.

24. Lloyd K. Garrison (1897–1991), at the time, Dean of the Wisconsin Law School.

25. Riesman characterized Brandeis as having a "certain presumptuousness in pressing people (to be a pioneer)," and that in his case Brandeis "wanted him to go to pa minn or tenn and adamant against his going back to Boston." Riesman Interview, 3. Riesman still seemed to resent this years later. See Riesman, "Becoming an Academic Man," at 40.

26. Riesman seemed to suggest that Brandeis was an "enemy of the New Deal" because he was a "rabid decentralist." Riesman Interview, 1, and that he "was no Dem. or Liberal in the New Deal sense." *Ibid.*, 5.

27. Riesman asserted that Brandeis "was against Soc[ial] Sec[urity]." *Ibid.*, 9.

28. Riesman observed that he had "watched" Brandeis "at Sunday teas draw people out," but that he was "incapable of genuine interest in people, just exploiting them. Should not be criticized because obviously he also exploited himself." *Ibid.*, 2. For a description of the Sunday (and Monday) teas, see Mason, *Brandeis*, 603; Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge, Mass.: Harvard University Press, 1984), 362; and Dean Acheson, *Morning and Noon* (Boston: Houghton Mifflin, 1965), 49–50.

tea was a purely utilitarian function—heard what was going on political gossip
 Very deliberately used it as a calculating sense of encouragement
 in men he wanted to [encourage]
 People buoyed up by the justice's interest
 chief was adroit at [it]
 B. very affectionate toward Cardozo a protective feeling, but not in a contemptuous sense²⁹
 Thanksgiving {Monsignor Ryan³⁰
 dinner guest {Joseph Eastman³¹
 {Cardozo
 {clerk
 Holmes may have taken B under his wing
 H may have been offended by the attitude to B. in the nomination
 H had contempt for the moneyed people
 [Konefsky:] Was B much of an influence on young people?
 [Hurst:] B's name was as familiar as H.
 B A symbol of an effort to grapple with fact
 Dissent in ice case known³²
 check standard text (nonlaw) to see to what extent B figures in there
 1925–35 in eco, pol.sc. etc.
 B was the name—the bridge of between what was & what was being
 done legally about eco matters
 Harvard L. School {high grade school for legal plumbers
 Contribution[:] To elevate the popular application of rational fact (dealing)
 an effort to establish premises
 [Konefsky:] [Was Brandeis] Anti-intellectual[?]³³

29. Riesman claimed that “B thought Cardozo was a weak man” and that “Cardozo had doubts B [therefore] didn't respect him.” *Ibid.*, 4–5.

30. John Augustine Ryan (1869–1945), prominent Catholic educator (a theology professor at Catholic University in Washington, D.C.), social reformer (an early proponent of the minimum wage), and New Deal supporter. Alpheus Mason included Ryan on a “typical list of dinner guests, as of 1927” in the Brandeis home. Mason, *Brandeis*, 604. “The Brandeises regularly invited lonely bachelors to dinner on Thanksgiving and before Christmas.” Andrew L. Kaufman, *Cardozo* (Cambridge, Mass.: Harvard University Press, 1998), 478.

31. Joseph B. Eastman (1882–1944), early Brandeis protégé, public servant, member and chairman, Interstate Commerce Commission. Acheson also reported that Eastman occasionally appeared at the Sunday teas. Acheson, *Morning and Noon*, 50.

32. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

33. Riesman asserted that Brandeis was “anti-humanistic, he was intelligent but not an intellectual. Had no interest in ideas for their own sake. B never had an idea really interesting.” Riesman Interview, 9.

[Hurst:] One of the leaders of trying to achieve public status for the man of ideas
 Holmes too in some respects
 [H] stood as a symbol of it being respectable to be a m[an] of i[deas]
 B took oratory out of liberalism—too much wind—put fact in
 Make a list of men accepted by the general public to think in a self-consciously directed fashion
 B an expression of the procedural side of his thinking—not the substantive.³⁴

Hurst and the Democratic Process

Hurst granted a number of interviews during his lifetime that either focused on Brandeis or at least devoted some portion of the discussion to Brandeis.³⁵ Though Hurst claimed that Brandeis was not an important influence on him as a legal historian,³⁶ that was only to say, I think, that Hurst did not consider Brandeis a historian, legal or otherwise. That was not to say, however, that Hurst was not influenced by Brandeis in any sense, particularly in the identification of what interests and ideas were important in understanding the growth and development of law and the American polity. I leave to others in this symposium, as has also been pursued elsewhere, an evaluation of the impact and significance of Hurst's work.³⁷ I merely wish to point to an area of investigation that I think is suggested by what Hurst chose to emphasize about Brandeis and what previously has not attracted much attention as a underlying focus or premise of Hurst's work—faith in or ef-

34. The transcription concludes with abbreviations of a brief collection of citations, probably (and characteristically) a list of suggestions from Hurst to my father for helpful sources to consult. It ends with a reference to Hurst's own work, "The Uses of Law in Four 'Colonial' States of the American Union," *Wisconsin Law Review* 1945: 577.

35. See Hendrik Hartog, "Snakes in Ireland: A Conversation with Willard Hurst," *Law and History Review* 12 (1994): 370–90; Strum, *Louis D. Brandeis*, 486; Oral History Project Interview, Oral History Project, University of Wisconsin Archives, Madison (1981). There is also a memorandum on the subject of Brandeis prepared in 1941 by Hurst for Alpheus Mason for his biography of Brandeis. See Mason, *Brandeis*, 643.

36. Dirk Hartog asked Hurst, "Did Brandeis have much influence on your thinking about legal history?" Hurst replied, "No, not a great deal." Hartog, "Snakes in Ireland," 375.

37. Representative samples include Arthur F. McEvoy, "Willard Hurst's Scholarship: Pragmatism and Morality," *Wisconsin Law Review* 1997: 1191; Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 9; Soifer, "In Retrospect"; Harry Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," *American Historical Review* 75 (1976): 744.

forts to improve a democratic process that would reflect more responsively the needs of the people whom the process is intended to serve.³⁸

Though I do not wish to walk the reader through the interview or suggest major organizing themes, I believe a number of clues emerge that reveal a good deal of what Hurst absorbed about Brandeis and applied in his own work. The importance of legislatures and state or local governments rather than courts as the center of the universe is apparent, as is an insistence that legal ideas operate within a socioeconomic context. But most important is Hurst's emphasis on what he construed as Brandeis's stress on "facts."³⁹ The connection between (1) law broadly conceived beyond the work produced by judges deciding litigated cases, (2) law *in* society rather than law *and* society, and (3) the importance of establishing "facts" is illustrated by Hurst's reference to the powerful Brandeis dissent in *New State Ice Co. v. Liebmann*,⁴⁰ the only case he cited in the interview. Immediately after characterizing Brandeis as "[a] symbol of an effort to grapple with fact," Hurst mentioned that Brandeis's "[d]issent in ice case [was] known."⁴¹ The relationship between Hurst's own body of work and the "Ice" dissent is suggestive.

In *New State Ice*, the Supreme Court declared unconstitutional an Oklahoma statute that required anyone seeking to enter the ice business in Oklahoma first to obtain a license from a state agency. In order to justify its regulation of access into the ice business (generally conceived to be within the realm of private enterprise), the legislature declared in the statute that the business was instead a public business, in other words "affected with" a public interest. Concerned about the anticompetitive, monopolistic implications of the law, the Supreme Court held that the statute violated the Due Process Clause of the Fourteenth Amendment. Normally one would have expected Brandeis to be concerned about the fate of small entrepreneurs and to support a result that apparently would encourage competition that might benefit consumers.⁴² But Brandeis had another concern here, what he termed "experimentation."⁴³

If a state wished to pursue a strategy to address a perceived social and

38. A fruitful place to start might be determining just what definition of democracy emerges from Hurst's work and exactly what relationship he perceived between freedom and democracy.

39. For reference to Hurst's devotion to factual inquiry, see Soifer, "In Retrospect," 139; McEvoy, "Willard Hurst's Scholarship," 1192; Samuel Mermin, "Thoughts on the Legendary Willard Hurst," *Wisconsin Law Review* 1997: 1155, 1157-59.

40. 285 U.S. 262, 280-311 (1932) (Brandeis, J., dissenting).

41. See above, 155 and note 32.

42. Konefsky, *The Legacy of Holmes and Brandeis*, 177.

43. *New State Ice Co. v. Liebmann*, 310-11.

economic problem, Brandeis could not understand why there should not “be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”⁴⁴ It was, he continued, “one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁴⁵

In explaining why “experiments” were necessary, Brandeis evoked some social realism, “[t]he long-continued depression,” which left the nation “confronted with an emergency more serious than war.”⁴⁶ Brandeis reminded the Court that “[m]isery is wide-spread”⁴⁷ and that “[s]ome people believe that the existing conditions threaten even the stability of the capitalistic system.”⁴⁸ In searching for the causes and solutions of the economic crisis, Brandeis wanted to know why a state’s proposal to address partially a potentially destabilizing problem of unregulated competition might not pass constitutional muster.

Brandeis thus suggested that constitutional law ought to engage social and economic reality within its scope. “Physical science” reveals “the value of the process of trial and error,” he proclaimed.⁴⁹ Why could not similar experiments in the laboratories of state government or legal experience likewise yield valuable data and results? “Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise.”⁵⁰ Rejecting evidence gathered from these experiments—indeed obstructing the ability in a decentralized system to conduct the experiments in the first place—was particularly dangerous because “[m]an is weak and his judgment is at best fallible.”⁵¹ Policy leaders informed with the results of experiments held the promise of making man’s judgment less fallible.

44. *Ibid.*, 311.

45. *Ibid.* Justice Sutherland responded for the majority that “[t]he principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.” *Ibid.*, 280. On Brandeis’s point about states as laboratories, see generally Maeva Marcus, “Louis D. Brandeis and the Laboratories of Democracy,” in *Federalism and the Judicial Mind: Essays on American Constitutional Law and Politics*, ed. Harry N. Scheiber (Berkeley: Institute of Governmental Studies Press, University of California, 1992), 75.

46. *New State Ice Co. v. Liebmann*, 306.

47. *Ibid.*

48. *Ibid.*, 306–7.

49. *Ibid.*, 310.

50. *Ibid.*, 310–11.

51. *Ibid.*, 310.

In other words, if law was still to be a science, it would have to become a social science.

A number of these observations resonate in Hurst's work and in his recollections of his experiences as well.⁵² Brandeis was confrontational about forcing the Court to recognize that an economic depression was in progress, the country was suffering, and that constitutional abstractions were not acceptable. Years later, Hurst commented with disdain that, during his years as a law student from 1932 to 1935, "he could recall hearing the Depression mentioned 'only two or three times' in law school classes."⁵³ (This is, of course, consistent with Hurst's remark in this interview that the Harvard Law School at the time was a "high grade school for legal plumbers.")⁵⁴ Law could do better if it expanded its vision. On the other hand, a social

52. What resonates as well in Hurst's work is Brandeis's loving, and occasionally minute, attention to detail, to the facts. In his *Ice* dissent, "Brandeis quoted the mean normal temperature each month in Oklahoma, showing the need for ice; the dependence of industries and retail dealers on ice; the lack of refrigerators and their cost as against the lower cost of ice." Strum, *Louis D. Brandeis*, 302–3. In addition, "[a]t every major point, Brandeis cited a host of sources: thirty-seven books, articles, reports, scholarly papers, and congressional hearings." *Ibid.*, 304. In other words, the "facts" were marshalled to support the argument that there was plenty of evidence to justify the state legislative activity. For a comparison of the method, I commend to the reader's attention a quick run through Hurst's footnotes in James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1964).

In arguing that Hurst was influenced by Brandeis, I do not mean to exclude the possibility that Hurst was influenced by others, including Felix Frankfurter. Hurst openly talked of the impact Frankfurter had on him during his legal education at Harvard, as well as the year Hurst spent working as a research assistant for Frankfurter between his graduation from law school and the start of his clerkship for Brandeis. See Hartog, "Snakes in Ireland," 373–74. Of course, in measuring the ultimate impact on Hurst, one probably should not discount the relationship between Brandeis's attitudes and Frankfurter's ideas. For instance, as early as 1913, Brandeis was communicating to Frankfurter certain themes that anticipate his dissent in *New State Ice* by nearly twenty years:

To secure social advance we must regard the field of sociology and social legislation as a field for discovery and invention. Research is necessary as in the field of science and invention, as in the field of mechanical and other arts. In the field of mechanical invention, as in other fields of human enterprise, the successes are few and the failures are many.

Letter from Louis D. Brandeis to Felix Frankfurter (28 Jan. 1913), in *3 Letters of Louis D. Brandeis*, ed. Melvin I. Urofsky and David W. Levy (Albany: State University of New York Press, 1973), 19.

53. Quoted in Soifer, "In Retrospect," 127. Hurst also noted that while enrolled in a law school course on courts and mortgages, "the course never mentioned the idea of a mortgage moratorium, which was going on all over the United States. . . ." Hartog, "Snakes in Ireland," 372.

54. See above, 155.

vision of law needed to be tested because, according to Brandeis, “man is weak” and his judgment fallible at best. This is akin to Hurst’s belief that “[p]eople are limited” and “that human beings are finite creatures, in that there are limits to what they can do and accomplish,” ideas that he attributed to the influence of Brandeis and Reinhold Niebuhr.⁵⁵

As a result of the fact that “[w]e are all limited in vision,”⁵⁶ the risk is that a short-sighted pragmatism will emerge and govern our actions. In a letter of recommendation Hurst wrote to a foundation supporting my father’s grant application for his Holmes and Brandeis book, Hurst noted,

the two men . . . reflect the strengths and limitations of pragmatic thinking. Since, for better or worse, pragmatism seems the nearest we as a people are going to get to a decent working philosophy in our time, the issues involved here go right to the center of the question of the viability of our society.⁵⁷

The limits of pragmatism (obviously not necessarily an enemy of observation and experimentation) needed to be tested by investigating the actual factual reality or consequences of conscious or unconscious value choices made in society. Hurst identified the Brandeis contribution as “elevat[ing] the popular application of rational fact” in “an effort to establish premises.”⁵⁸ Brandeis himself was explicit about the role of rationality in constitutional evaluations of social policy. He concluded his *New State Ice* dissent by declaring, “[i]f we would guide by the light of reason, we must let our minds be bold.”⁵⁹ Hurst internalized the message and learned from Brandeis the importance of rationality in the legal process—empirically verifying the conditions under which law functioned. Facts mattered.

It is tempting, of course, to place Hurst’s role as a historian into categories reflecting the evolutionary patterns of the profession. Hurst’s work contains the elements of a number of movements (and contradictions) in law as well as history—realist, reformer, empiricist, progressive historian,

55. Hartog, “Snakes in Ireland,” 375–76. Hurst reported that Brandeis once talked to him “on the subject of Woodrow Wilson and his disastrous last period as president and the fight over the League of Nations, and Brandeis said he thought he’d always remember that as an historic example of the fact that a man shouldn’t try to do too much, that there were limits to the human capacity to create and act.” *Ibid.*, 375.

56. *Ibid.*, 389.

57. Letter from Willard Hurst to [Henry Allen Moe] (c. 4 Mar. 1954), James Willard Hurst Papers, Box 1, Folder 1954, University of Wisconsin Archives, Madison. I am grateful to Dan Ernst for bringing this correspondence to my attention.

58. See above, 155.

59. *New State Ice Co. v. Liebmann*, 311. My father titled chapter eight of *The Legacy of Holmes and Brandeis*, “If we would guide by the light of reason,” and he asked that the full sentence be his own epitaph. The chapter concludes with a discussion of the *New State Ice* case (*ibid.*, 177–80).

consensus historian, economic determinist, materialist, economic liberal, social scientist, and so forth—all associated in some fashion with modernism, and not postmodernism. But I would like to suggest a way of looking at his thought that incorporates many of these categories in service or furtherance of another idea—faith (sorely tested) in a democratic vision. The connection is again made through Brandeis.

My father wrote of Brandeis that he was a “social scientist with a conscience” and that “what mattered most was continued progress toward a better society. Whatever the issue—differentiation in the tax structure, the growth of chain stores and cooperatives, the basis for determining public utility rates—to all of these problems he brought the creative approach of one who cared deeply about the results of social arrangements.”⁶⁰ Hurst similarly observed of Brandeis that his “skepticism of men’s capacity to handle themselves well in the face of demands made by the great institutions they had set up, extended fully, I think, to government,” and that he had “some conviction that the meaning of life . . . lay in the effort to shape the formless and stubbornly resistant matter of general experience into patterns of understanding and of directed control in the interest of values that would enhance the worth of men.”⁶¹

This pursuit of “understanding” can be divided into two parts, one methodological or procedural, the other substantive. For Hurst, the question of how we arrive at “understanding” was directly related to our need for knowledge in order to strengthen society’s ability to respond to people’s concerns. The capacity to respond began with the process of determining exactly what had transpired historically. In describing this process, Hurst concluded that Brandeis

found one road to the responsible use of power in a constant insistence that definition of ends and means be kept close to regular, realistic search for facts. Too sophisticated by far to fall victim to a naive empiricism, he sought always for a working philosophical frame for action. But the philosophy must likewise regularly be checked against experience.⁶²

Four times in the interview with my father, Hurst invoked the image of Brandeis’s obsession with factual inquiry: “[H]is [partisanship] was based

60. *Ibid.*, 163.

61. Letter from Willard Hurst to Charles Wyzanski (20 Mar. 1954), James Willard Hurst Papers, Box 1, Folder 1954, University of Wisconsin Archives, Madison. I am grateful to Dan Ernst again for bringing this letter to my attention. Hurst later voiced similar sentiments on the reason for doing history in order to “enlarge understanding, to increase men’s control of their affairs.” Hurst, *Law and Economic Growth*, viii.

62. Willard Hurst, “A Tribute,” in *Fiftieth Anniversary Convocation of Justice Brandeis’s Appointment to the Supreme Court of the United States* (Louisville, Ky.: University of Louisville School of Law, 1966), 2.

on fact (wanted never to be caught out on facts),” he was “[a] symbol of an effort to grapple with fact,” his “contribution” was “to elevate the popular application of rational fact,” and finally, that he “took oratory out of liberalism—too much wind—put fact in.”⁶³ Over forty years later, Hurst was still speaking about facts, though no longer with the direct reference to Brandeis. In his talking with Dirk Hartog, Hurst commented, sometimes with frustration, about modern students’ misunderstanding about the reasons for “recording the facts.” More generally, he remarked that it is “a matter of fact,” or “I think it’s just the facts,” or “it is an important social fact,” or “just dealing with the facts,” or finally, “[i]f general ideas and theories about what’s going on in society are going to be anything other than moonshine, they have to be rooted in hard-bought knowledge of what in fact is happening in people’s lives.”⁶⁴

Gathering facts, however, has a wider purpose or function. Many of the key themes of Hurst’s work demonstrate this design. McEvoy has observed that Hurst “found the essence of nineteenth-century law, not in the pronouncements of high public officials, but in the practical day-to-day uses of law by ordinary people. . . .”⁶⁵ This is not unlike Brandeis seeing “democracy as free citizens making intelligent choices about matters affecting their joint lives.”⁶⁶ How do we know whether intelligent choices have

63. See above, 153, 155, 156. Because Brandeis “wanted never to be caught out on facts,” the law clerks “found themselves spending endless hours in libraries,” including “the Library of Congress, where they sought out the innumerable citations to sociological material that Brandeis demanded.” Strum, *Louis D. Brandeis*, 355. Since, in particular, the Brandeis opinions “had always to be factually correct,” it “was a burden the clerks carried.” *Ibid.*, 356. There seems to be no question that this Brandeis trait left an impression on Hurst. Strum reports that “[w]hen counsel did not present all relevant facts, his clerks were expected to compensate for the deficiency.” *Ibid.* Strum’s source for this statement seems to be her interview with Hurst. *Ibid.*, 470, n. 5.

64. Hartog, “Snakes in Ireland,” 385, 386, 387, 390. Samuel Mermin, in discussing Hurst’s penchant for facts, quotes a Holmes letter to Pollock in which Holmes good-naturedly reports being chided by Brandeis, “Why don’t you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is.” Holmes’s response to Pollock about Brandeis’s suggestion was to observe laconically, “I hate facts.” Mermin, “Thoughts on the Legendary Willard Hurst,” 1158. Hurst does not seem too concerned about the postmodern skepticism that calls into question the objectivity or scientific reliability of observations or interpretations of “facts.”

65. McEvoy, “Willard Hurst’s Scholarship,” 1192.

66. Strum, *Louis D. Brandeis*, 62. On Brandeis and democracy, see generally Alpheus Thomas Mason, *The Brandeis Way: A Case Study in the Workings of Democracy* (Princeton: Princeton University Press, 1938); and *Brandeis on Democracy*, ed. Philippa Strum (Lawrence: University Press of Kansas, 1995). Brandeis applied this democratic vision in his judicial writing. “In a sense, the very length of Brandeis’s opinions bears testimony to his faith in democracy. If all the facts were known and understood, people would choose the wisest course of action. And so the Brandeis brief . . . was transformed into a judge’s opinions designed to educate the people.” Strum, *Louis D. Brandeis*, 347–48.

been made? We expose to a withering historical glare both the process by which those choices have been made and the results of those decisions. The inquiry has a moral tone or quality, revealing what has been good or bad. This is because so much is at stake in a democratic society in making arrangements that affect the well-being of all of us. Only after investigating the past are we capable of exercising meaningful democratic control of our lives to better our common lot.

Many of the common, recurring themes in Hurst's writing take on new meaning when seen through this lens. Hurst's indictment of "bastard pragmatism"⁶⁷ and "drift and default"—along with his focus on legislatures and problems of statutory interpretation—stemmed from his attempt to ensure that the democratic promise was fulfilled as a result of informed judgments about what would yield benefits to a people who had often not chosen to exercise sufficient power or control over their own destinies. How can we restore responsibility in the face of historical accounts of society's frequent abnegation, resignation, or failure to require public accountability in the face of unchecked private power that is selfish, insular, narrow, and, even worse, irrational?

Democracy, of course, has had different meanings at different times, as well as different meanings at the same time in different places. By the time that Brandeis and Hurst were thinking and writing about democracy, Tocqueville's vision of American democracy may have become nothing more than a quaint memory, though it may still have suggested a promise not yet fulfilled. Hurst's college focus on the work of the Progressive historian Charles Beard is instructive.⁶⁸ Hurst's interest in Beard at this formative moment in his career seems consistent with the obsession with social relations or social class in the work of early twentieth-century democratic theorists. The promise of democracy seemed to be primarily associated with equality; an increasingly stratified society nullified the goal of equality. Maldistribution of wealth enhanced hierarchy, inhibited the pursuit of equality, and frustrated the will of the relatively voiceless majority who, nevertheless, had a significant stake in the implications of democratic theory. History empirically demonstrated the consequences of the failure of government to provide democratic opportunity. To address the crisis caused by the growing evidence of inequality, democratic theory underwent a subtle shift, and began gradually emphasizing individual or group interests and identities rather than social class. This shift allowed a more effective expression of

67. See Hartog, "Snakes in Ireland," 389–90; see generally James Willard Hurst, *Law and Social Process in United States History* (Ann Arbor: University of Michigan Law School, 1960); Hurst, *Law and Economic Growth*.

68. Hartog, "Snakes in Ireland," 371. See especially in this symposium Daniel Ernst, "Willard Hurst and the Administrative State: From Williams to Wisconsin," *Law and History Review* 18 (2000): 1–36.

the ambiguity of countermajoritarian demands. It highlighted, in a different way, the paradoxes, dangers, and inconsistencies of continuing inequality in the face of a world of democratic goals. In the mid-twentieth century, with totalitarian fascism and communism lurking as competing systems of thought, America found it imperative to set freedom's house in order.⁶⁹ Hurst tried to help by pointing out that law's expression did not always reflect the promise of democracy. That promise was perceived as increasingly ambiguous and complex by the late twentieth century.

In Hurst's writing (as well as in Brandeis's), there is a tension, perhaps a legacy of Progressivism, between seeking a better future through informed democratic decision making and placing the responsibility for gathering the facts or evidence to advise citizens in the hands of a relatively few individual experts. The risk, of course, is that elites will have disproportionate, unregulated control or power over shaping people's beliefs. The Progressive response generally was that, in an increasingly complex society, expert opinion is needed to investigate social events and circumstances that are technical and that might no longer be susceptible to analysis by the general population. The purpose of seeking technocratic insights is to provide a means to the end of informed democratic judgments, not to substitute the will of elites for the popular will. Indeed, the popular will would be better informed as a result of the efforts of the experts. Brandeis seemed aware of the problem at an early stage when he wrote to Frankfurter: "I should have little faith . . . in a small group of men evolving a social system or important elements of such a system. We must rely upon all America . . . for our social inventions and discoveries; and the value of the inventions and alleged discoveries can best be tested by current public discussion." "On the other hand," he said, "it seems to me that a small group of able, disinterested, well-equipped men, who could give their time to criticism and discussion of legislative proposals, discouraging those which appear to be unsound, and aiding those that appear to be sound, would be of great assistance in the forward movement."⁷⁰ As Hurst approvingly once said of Brandeis, "[h]e held power in trust."⁷¹

69. On this last point in particular, see generally Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973), 159–78.

70. Letter from Louis D. Brandeis to Felix Frankfurter (28 Jan. 1913), in *3 Letters*, 20. It was almost certainly not an accident that Hurst migrated to Wisconsin, which was well known for its Progressive legislative tradition (heavily reliant on experimentalism), and the role of its state university, including its law school, in maintaining and participating in that tradition. See generally Paul D. Carrington and Erika King, "Law and the Wisconsin Idea," *Journal of Legal Education* 47 (1997): 297; Macaulay, "Willard's Law School," 1163–65; Hartog, "Snakes in Ireland," 377–78. Hurst acknowledged as much in a 1938 letter to Frankfurter explaining his decision to remain at Wisconsin rather than accept an offer to teach at Yale.

As both a symbol of power and a factor in the democratic equation, law, therefore, must be placed in context, that is, in society, to unveil its true (or real) impact. If we are to determine if law has lived up to its democratic aspirations in a free society, it cannot be judged by its own internal standards. Therefore, it is imperative to take law out of its box⁷² and to observe, as it functions, what impact it has had on people's lives. Only then can we ascertain whether law has helped or hindered the growth and development of freedom in a democratic culture designed to make that society a better place to live. Hurst was a (small "d") democrat, with all the frustrations and hopes a believer in democracy inspires.

Wisconsin, wrote Hurst, "is just about an ideal 'laboratory' situation from the [sic] standpoint of studying the legislative process: a state in which there is a long tradition of political experiment, which seems to go on pretty well even when there is not a La Follette ascendancy; and some first rate civil service people . . . within a ten minute walk of the campus." As quoted in Soifer, "In Retrospect," 129.

71. Hurst, "A Tribute," 2.

72. Gordon, "Introduction: Hurst and the Common Law Tradition," 9-12.