

Reflections on the 40th Anniversary of Hurst's Growth of American Law

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JAMES WILLARD HURST, *The Growth of American Law*. Boston: Little, Brown & Co., 1950.

It is well known that James Willard Hurst's *The Growth of American Law* "represented something new" and that it "dissolved constraints" and helped start Hurst's successful effort to expose "the hitherto invisible ways in which the apparently most commonplace incidents of a legal order illuminate social values."¹ In the early 1950s, reviewers recognized the book as a pioneering effort. Time has enhanced Hurst's achievement. He is the legal historian who broke out of the limits of traditional legal history. His work made him "the leading exponent and practitioner of an external historiography."² Although the legal process approach began to supersede

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1. Robert Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," 10 *Law & Soc'y Rev.* 9, 45, 54 (1975). Gordon's study remains an exemplary overview of American legal historiography, as well as a particularly insightful commentary on Hurst's contributions. For a companion piece, illustrating the importance of Hurst's work by criticizing and expanding on it, see Harry N. Scheiber, "Federalism and the American Economic Order, 1789-1910," 10 *Law & Soc'y Rev.* 57 (1975). A good Hurst bibliography through 1975 is available (Ronald Eskin & Robert Hayden, "A Bibliography of Work by and about J. Willard Hurst," *id.* at 326); another accompanies a festschrift in his honor published in 1980 *Wisconsin Law Review* 1093.

2. Gordon, *Law & Soc'y Rev.* at 12. These days, the very idea of an "outsider's perspective" is controversial; see, e.g., Marc Galanter, "Review Essay: Outside, Inside: Jewish Justices in the Homeless Society," 14 *Law & Soc. Inquiry* 507 (1989) (reviewing Robert A. Burt, *Two Jewish Justices: Outcasts in the Promised Land* (1988)). Gordon is surely accurate, however, when he stresses how innovative Hurst actually was in adopting an outsider's perspec-

legal realism in American law schools in the wake of World War II, Hurst's book actually was the first sustained example of legal realist history.

Hurst's approach moves far beyond the traditional box of autonomous legal doctrine; he concentrates instead on economic and social factors that continuously interfere with any and all efforts through law "to order men's affairs according to rational weighing of values and the means of achieving them" (at 25). His tale is a generally grim account of omissions and actions that undercut whatever creativity and commonwealth ideals remained from the 18th century. Hurst notes, moreover, that since about 1870 there has been precious little creativity, and virtually no success in legal planning or response. Thus, "[t]he law has no very proud story to tell of itself" (at 17). Yet there is great reason for pride in the story of the man and the book. Unfortunately, both are in danger of becoming forgotten classics. Neither is flashy or easy to categorize. Moreover, both Hurst and his pioneering book now are victimized by pigeonholing. Many who do not read the work nevertheless discuss it as celebratory consensus history, premised on uncritical functionalism. Actually, Hurst manages to combine extraordinary attention to detail with direct critical treatment of some of the biggest questions society confronts. So it is particularly important to attend carefully to a rarity: a complex path-breaking book produced by an extraordinary scholar.

In 1950, *The Growth of American Law* made it clear that to be a legal historian would mean thereafter that "You're either a Hurstian or a reviser of Hurst."³ Forty years later, it has become necessary to puncture some myths. In particular, the dragons to be coaxed from their caves today are the prevalent assumptions: (1) that Hurst assumes consensus in American legal history and (2) that he celebrates it. We will see instead that Hurst tells a tale of dissensus. He tracks missed opportunities. The trend he notes is historical decline. Yet he clearly seeks to write for the ages, and he remains a committed reformer rather than a cynical observer.

Pictures and paradoxes illuminate the statistical detail and painstakingly gathered evidence central to *The Growth of American Law*. Hurst's phenomenal attention to, and appreciation for, institutional details is noteworthy. His pervasive faith in the possibility for democracy and ac-

tive in contrast to previous legal historians. See generally Morton Horwitz, "The Conservative Tradition in the Writing of American Legal History," 17 *Am. J. Legal Hist.* 281 (1973). Nevertheless, Hurst has been subject to criticism for not adequately attending to the perspective of those outside his primary concern with the routine business, institutions, and ordinary people of society. Thus, rebels and outlaws, ethnic and racial minorities are rarely subjects for Hurst's scholarly attention. For critical commentary, see, e.g., Eugene Genovese, "Law and the Economy in Capitalist America: Questions for Mr. Hurst on the Occasion of His Curti Lectures," 1985 *A.B.F. Res. J.* 113; Sidney L. Harring & Barry R. Strutt, "Lumber, Law, and Social Change: The Legal History of Willard Hurst," *id.* at 123; and sources cited *infra* note 15.

3. Lawrence Friedman, quoted in David Margolick, "At the Bar," *N.Y. Times*, 23 Mar. 1990, at B5, col. 1.

countability—a faith he has maintained despite the drift of the data he so studiously marshalled—seems heroic and suddenly quite *au courant* in the wake of the European revolution of 1989. It is worth exploring how this doubting optimist achieved the extraordinary feat of quietly, studiously establishing a new paradigm.

I. SOME BIOGRAPHICAL NOTES

Scores of scholars have learned that no one reads a draft and provides meticulous comments the way that Willard Hurst does. He types pages of comments in long, single-spaced letters that gently push for more research beyond the usual subjects and that critique, even more gently, in his quiet way. Yet few of us know much about his own life. Despite his drive to teach large truths about law and social and economic forces through meticulous mastery of details, he has, with customary humility, neglected to let us know much about himself.

Hurst was born just across the Wisconsin border in Rockford, Illinois. He attended Williams College, where he studied history and economics, and graduated from Harvard Law School in 1935. He then worked for a year as a research assistant to Felix Frankfurter at Harvard and clerked for Justice Brandeis in the 1936 Term.

Notes of an interview Samuel Konefsky conducted with Hurst in 1951 reveal much about Brandeis—and Hurst. In that interview, Hurst acknowledged Brandeis's starkly austere habits and the distance Brandeis maintained from his clerks. Yet Hurst did not attribute these traits to miserliness or to rigidity. And he praised Brandeis for making it respectable to be “a man of ideas” in the eyes of the common man and for pursuing “the secret joys of a thinker.”⁴

After his clerkship, Hurst returned to the hinterlands and Brandeis urged—to the University of Wisconsin. Hurst considered Wisconsin “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 [sic]; and some first rate civil service people . . . within a ten minute walk of the campus.”⁵ For Hurst, the function of government involved “a positive duty through cooperative aid to set men free from the tyrannies that otherwise might be imposed by nature and other

4. Samuel Konefsky, Interview Notes, 14 Sept. 1951, Book 1, at 6–11, graciously made available to me by his son, Fred Konefsky.

5. Hurst to Felix Frankfurter, 3 Jan. 1938, Frankfurter Papers, Manuscript Division, Library of Congress. Stanley Kutler found this letter and graciously made it available to me. In it, Hurst considered with characteristic care the costs and benefits in the first of many attempts made by Yale and Harvard law schools to lure him to join their law faculties.

human beings.”⁶ A central point throughout his work was that by supplying order in any form, government involved series of choices. In frontier communities and New Deal agencies alike, fundamental normative decisions established the crucial legal framework within which groups and individuals made further, relatively fettered choices. The obligation of the academic was to learn about and become involved in reforming government.

It is hardly surprising, therefore, that the case study that Hurst and Lloyd Garrison chose to pursue through the first volume of their pioneering *Law in Society* casebook of 1941 involved various ways that law in Wisconsin intersected with a widow’s claim for damages after her husband, a carnival worker, was crushed beneath a company tractor. The casebook includes witnesses’ accounts that vividly portray the gory scene as Gervase Hannon literally poured out his guts before his death. But this prototype for the law and society movement was designed to equip undergraduates as well as law students with enough sophistication about law to realize that neither legislative, judicial, nor administrative treatment of Hannon’s case—nor of any other case large or small—is inevitable in itself or commanded by law.

There was no claim to neutrality here. *Law in Society*, and more vividly Hurst’s later work, contains elements of a radical reformist, one might even say utopian, agenda. Facts may always caution and generally suggest decline rather than improvement over time, making the use of “growth” in the titles of several of Hurst’s books seem problematic at first glance. Yet, with a combination of Holmesian toughness and Hurstian faith, the facts matter. Facts set severe limits, yet change must still be attempted. With Holmes, Hurst has “no belief in panaceas and almost none in sudden ruin” (*Growth* at 209, quoting Holmes). At best, growth leads to decline and death, yet growth still merits attention and care.

In a 1942 article setting forth a “Research Program” for legal history, Hurst doubted that each generation learns much from its predecessors. “But,” he continued, “civilization is a minority affair. To believe in education is to believe that there are opportunities to apply informed, humane reason to influence the course of events.”⁷ Soon thereafter, Hurst went to Washington, first served in the general counsel’s office of the U.S. Board of Economic Warfare. He tried to use wartime contracting power to improve working conditions of Bolivian miners, for example. Hurst then joined the Navy, where he was assigned work on the famous *Cramer* trea-

6. Donald Richberg, “The Industrial Liberalism of Mr. Justice Brandeis,” in Felix Frankfurter, ed., *Mr. Justice Brandeis* 138 (1932).

7. 1942 *Wis. L. Rev.* 323, 324.

son case, which ultimately led to his first published work in legal history, a detailed study of the origins of the law of treason.⁸

By 1945, Hurst was arguing that there seemed “no reason except tradition, never itself adequately founded, why legal history should be narrowed to a study of the resolution of social conflicts by litigation.”⁹ In an essay analyzing books written by nonlawyers about Wisconsin, Michigan, Montana, and Oklahoma, Hurst noted that perceptions about the relative role of legal institutions in history by laymen “may be the fresher and the more unbiased.”¹⁰ He emphasized what he called the colonial relationship of raw-material-producing states to older regions; the persistent tension between debtors and creditors in American history; and “the surge of clashing interests of all kinds.”¹¹ Even in 1945, he focused on the repeated “failure,” “default,” “do-nothing line,” and “inertia” of government. To help explain the failure of legal controls, Hurst explored the distinction between an unhealthy balance of power on one hand, and social inertia and simple failure of intelligence on the other. Ranging from attention to the dogmatic application of the crop-farm ideal in Montana to the rise of the Ku Klux Klan in the 1920s, which suggested “that the victory of reason and decency is precarious and open to constant challenge,” Hurst hardly proclaimed an upbeat American consensus. He even doubted progress. Instead, he stressed the wasteful exploitation of natural resources; “waves of agrarian, lower-middle, and middle-class revolt”; and “public acquiescence in, and even approval of, shortsighted taking of public wealth for immediate private gain.”¹²

Although in this review the nexus of law and the economy emerged as the most pervasive interrelation, Hurst insisted that more attention ought to be paid to the effects of other types of power on legal institutions. He specifically mentioned the impact of family, church, education, and technology. Even within the law, he claimed, a narrow focus on litigation seemed “particularly absurd” in an age facing the central problem of “whether men will be able to use the power of the politically organized community to secure the basic conditions of a decent life for the individual, without thereby destroying the very values they are trying to realize.”¹³

Hurst’s vigorous doubts were not tailored to fit the exuberant fashion of post-World War II America. Instead, Hurst called for an entirely new

8. *Cramer v. United States*, 320 U.S. 730 (1943). The articles Willard produced out of that wartime experience were republished, with additional material, in J. Willard Hurst, *The Law of Treason in the United States* (1971).

9. Hurst, “The Uses of Law in Four ‘Colonial’ States of the American Union,” 1945 *Wis. L. Rev.* 577.

10. *Id.* at 579.

11. *Id.*

12. *Id.* at 589.

13. *Id.* at 577. Hurst was careful to note that these opinions were those of the author, not of the United States Navy “with which he is at present connected.”

approach. And the rest is history: our basic approach to legal history still builds on the background theory initially sketched and then realized by Hurst.

II. THE GROWTH OF AMERICAN LAW: THE BOOK

The extent to which *The Growth of American Law* was a departure from the legal history that had come before it, and not a legal history in any conventional sense, is difficult to recapture, largely because so many of us have been influenced by the work of Hurst, whether or not we are conscious of the impact. In the numerous reviews published soon after the book appeared, reviewers repeatedly noted that the book, because it was more physiology than anatomy, said something new and provocative about American law.¹⁴ It is easy to forget how Hurst achieved his breakthrough. Let us first review the book's careful, innovative structure, and then briefly consider its message, which is more jeremiad than apologetics.

A. Physiology, not Anatomy

Hurst believes that "[t]he deeper we probe to explain shifts in legal doctrine, the less we are satisfied with what at first seem the practical answers" (at 12). Therefore, he examines law from as far outside the doctrinal box as he can get.¹⁵ In doing so, he discovers that the reality

14. For good, sprightly examples of the general enthusiasm for the book, see, e.g., John Frank, 59 *Yale L.J.* 1381 (1950); Frank Horack, Jr., 64 *Harv. L. Rev.* 866 (1951); Robert Hunt, 35 *Iowa L. Rev.* 730 (1950); and John Roche, 99 *U. Pa. L. Rev.* 263 (1950). Many others, including Max Radin, Thomas Reed Powell, Philip Kurland, and Phil Neal from the law schools, and a smattering of political scientists, historians, and sociologists, heaped praises on what they repeatedly called a pioneering book. A list of these early reviews is available in 10 *Law & Soc'y Rev.* 330 (1976).

There were a few exceptions to the general run of rave reviews. The most interesting were those by Mark DeWolfe Howe, who derided Hurst's "faith in statistics" and criticized his "cavalier dismissal of the law that was created in the colonies before 1750," *N.Y. Herald Tribune Book Rev.*, 2 July 1950, at 6; by Erwin Surrency, 24 *Temple L.Q.* 509 (1951), who gave the book a mixed review, since he considered it "a great contribution to the field of political science" but questioned the book's standing as history; and by Ford W. Hall, 28 *Tex. L. Rev.* 992, 994 (1950), who noted Hurst's lack of adequate attention to the influence of treatise writers on states such as Texas, which were settled in the latter two-thirds of the 19th century, but who presciently observed that Hurst "provides a view of a sizeable portion of the forest."

15. Hurst's ability to break entirely outside the box is central to Robert Gordon's discussion of his work (10 *Law & Soc'y Rev.* cited in note 1). Critics of Hurst's work have challenged his ability to do so and suggest that he is actually at times an apologist for the status quo who seems to write winners' history. For perceptive criticism that focuses primarily on Hurst's magisterial lumber book, see Harring and Strutt, 1985 *A.B.F. Res. J.* (cited in note 2), as well as an article by Eugene Genovese and Hurst's brief response in that Review Symposium. Other important articles at least partially critical of Hurst's work include Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Wil-

underneath the toughness of institutional structure is that “law has been more the creature than the creator of events” (at 6). His analysis proceeds through the impact of physical, technological, and social facts on law in the United States.¹⁶ He does not deny that ideas matter, however, because “ideas tie in closely with habits of action, and both change institutions” (at 14). In fact, this pioneer of the impact of economic and social forces on legal institutions maintains that people are the essential moving causes behind change. The key issue is “what they have in their minds, whether they are thinking things through more or less consciously, or are acting out of habit” (at 15). This hardly seems consistent with the commonplace portrait of Hurst as a pure functionalist, nor does it fit neatly with Talcott Parsons’s criticism of Hurst’s later work for “failing to distinguish three closely related but still . . . importantly different categories, namely the legal, governmental, and the political.”¹⁷

One of the most significant innovations in the book is the structure, which departs from the usual analysis of three branches of government. Hurst studiously seeks to avoid the customary excessive focus on either appellate judicial opinions or on the impact of great individuals or great cases. Instead, the book analyzes five legal institutions: the legislature, the courts, the constitution makers, the bar, and the executive.

Each of these five divisions may be read as a separate essay, but they have common themes, developed quite schematically within each section as well as in the book’s introduction and conclusion. While there is some overlap, one finds little repetition. Hurst’s clear writing style moves the reader along at a nice clip no matter where she starts or stops. Sprinkled

lard Hurst,” 75 *Am. Hist. Rev.* 744 (1970); Mark Tushnet, “Lumber and the Legal Process,” 1972 *Wis. L. Rev.* 114; and Stephen Diamond, “Legal Realism and Historical Method: J. Willard Hurst and American Legal History,” 77 *Mich. L. Rev.* 784 (1979).

16. Those who attack Hurst as a consensus historian tend to concentrate on his later *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (1964). Hurst’s critics claim that because of his concern with large issues and dominant institutions, his lumber book omits crucial elements of conflict of interests, corruption, and class confrontation. For example, Haring & Strutt, 1985 *A.B.F. Res. J.*, detail a dramatic series of clashes between John Deitz, a part-time employee and farmer, and the Weyerhaeuser lumber “pool” on the Upper Chippewa River in Wisconsin. After years of legal confrontations and sporadic violence, a posse of 40 men shot it out with Deitz and his family on land the lumber company wanted for a dam. Deitz subsequently got a life sentence for murder, but he went to jail a hero, sent off by a receiving line of hundreds of supporters and national press coverage. The story of the Deitz affair—the shoot-out occurred the month Willard was born—is not included in the lumber book. Willard’s response was that such clashes were marginal, and that his book focuses instead on “conflict typically among contenders for the stakes in fast exploitation of the forest.” Hurst, “Response,” 1985 *A.B.F. Res. J.*

17. Parsons, “Hurst’s *Law and Social Process in United States History*,” 23 *J. Hist. Ideas* 558, 562 (1962). Parsons’s review of Hurst’s 1960 book nevertheless was overwhelmingly favorable. Parsons proclaimed that Hurst “may be claimed to stand in the best sociological traditions” and described Hurst’s work as “very illuminating, not simply to those interested in American history, but to all social scientists who are concerned with the society and hence must pay attention to the historical background of the problems they study.” *Id.* at 561, 558.

throughout the book are marvelous nuggets of buried information from a remarkable array of sources, along with Hurst's clear interpretations. He repeatedly indicates when there is substantial evidence for the general points he makes and when there is not, and he is hardly shy about sharing his judgments. This scholar does not hide behind the screen of academic neutrality, yet he is more judicious than most scholars and judges who do.¹⁸ Moreover, a reader can clearly find Hurst anticipating some of the most important subsequent contributions in legal scholarship since 1950, such as Guido Calabresi's work on accidents and social cost (at 12); Charles Reich's ideas about new property created by judges out of procedural protections (at 91); and Morton Horwitz's thesis about the *sub rosa* subsidization of the powerful through judicial decisions and so-called private legal ordering (at 72–73, 242–44).

A careful reading of the book discloses flashes of dry humor (e.g., “[t]he earlier casebooks were as bare of assisting or amplifying footnotes as a Dissenters’ chapel of sacred ornament,” at 265), and Hurst's fascination with irony helps make the book seem both contemporary and strangely like a product of the late 18th century. Even if it is not the case that “[t]here is nothing like a paradox to take the scum off the mind,”¹⁹ Hurst's examination of numerous paradoxes in the main currents of American thought is particularly intriguing. Thus, for example, perhaps the United States has been an unusually legalistic society because people “were looking for beliefs to which they could hold fast, in a country of change; they also wanted change which would fulfill the promise of a new continent and advance their personal fortunes” (at 357). And “the extent to which Americans put issues into legal terms and tried to use and control the legal agencies reflected a lesser role for the law” (at 4). Unlike many of us, however, Hurst does not use paradox to avoid revealing his own position. To the contrary, he is unusually frank about what he believes the facts to be and what he makes of them.

It may be useful to consider one of the book's sections in some detail both to get a sense of where Hurst comes out on the questions he addresses and to begin to examine the criticism that misses the critical fire smoldering beneath Hurst's low-key writing style and his kindly disposition. Section V, “The Bar,” probably constitutes Hurst's most radical scholarly departure. Nobody had ever done such a synthesis before or considered the many ways in which lawyers are a separate institution worthy of examination. While we have since had much excellent historical

18. Hurst's work anticipates G. Kitson Clark's well-known advice to anyone who seeks to generalize: “do not guess, try to count, and if you cannot count, admit that you are guessing.” *The Making of Victorian England* 14 (1962).

19. 1 *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1925*, at 389 (M. Howe ed. 1953).

work on the bar,²⁰ Hurst's chapter remains one of the very best analyses of the role of lawyers in American society.

B. The Bar: "Real Points for Moral Indictment"

Hurst begins the chapter "The Character of the Lawyer in United States Society" by describing ambivalent popular attitudes toward lawyers. He briefly reviews the central role of lawyers in typical American success stories, along with long-standing, widespread anti-lawyer sentiment. Hurst then makes a revealing move. He condemns popular criticism for missing "the more real points for moral indictment." These are: first, "the intellectual dishonesty" with which influential lawyers supported private against public interest; next, the "inertia" of lawyers despite blatant defects in the administration of justice, "though such defects robbed ten thousand of their due for every one whose money was misappropriated by a faithless counselor." Finally, Hurst points out that criticism of lawyers for pursuit of their own economic interest comes "with poor grace from generations that subscribed to the ambitions they saw in others" (at 252).

One should not be misled. In his customary fashion, Hurst builds his generalities from scrupulous attention to details. These details ranged from the structure of law firms to education and admission to the bar and include the exceedingly conservative role of bar associations representing a profession whose members on the whole "were among the most unthinkingly and stubbornly individualistic members of the loosely organized American society" (at 285). Moreover, Hurst does a wonderful job of exploring the tensions within the concept of being a professional in a society dominated by middle-class attitudes—a nation, that is, "characteristically distrustful of speculative thought and the grand manner in action; a society which was interested in what could be accumulated, counted, and used; a society that had concern for righteousness, but under a scale of values formed in a period highly individualistic and competitive in its measure of a man" (at 305–6). At times, Hurst's indictment sounds like some of the best of the contemporary critique of possessive individualism. So why isn't Hurst read, or at least claimed as a progenitor, by vehement critics on the left or the right in legal education today?

The primary reason, I think, is that Hurst eschewed flamboyant passion to such an extent that his passionate criticism has been buried. (An-

20. See, e.g., Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976); Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (1976); Gerald Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760–1820* (1979); Robert Stephens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983); Robert Ferguson, *Law and Letters in American Culture* (1984); Robert Gordon, "The Independence of Lawyers," 68 *B.U.L. Rev.* 1 (1988).

other reason, of course, is that many of us do not read the books we talk about.) There is a commonplace, faulty assumption that Hurst is either an extreme, unsophisticated functionalist or one of those post-World War II apologists for the status quo now generally lumped under the label "consensus historians."²¹ It is true that over and over Hurst suggests an American mainstream. But he hardly celebrates it.²² The mainstream is a torrent of old forms and beliefs ill-adapted to control the selfish and the powerful. The American character he examines is remarkably short-sighted. At least since 1870, Americans have been recklessly exploiting the environment and one another. All the while, as Hurst puts it, Americans "have demanded their 'rights' and at the same time concerned themselves in fixing the other man's 'duties'" (at 3).

Additionally, Hurst's work is overlooked or rejected precisely because he downplays the drama of individual lives. He believes that such drama increases our temptation to attribute too much weight to individual contributions. And he can be justifiably criticized for concentrating so much on the facts and faults of the mainstream that he hardly touches on the unique problems of discrete and insular minorities. There is little about African Americans, for example, though he does note their omission from the American society he describes, and nothing about Native Americans. But these gaps hardly mean that Hurst embraces the status quo, or that he does not believe deeply that individuals ought to try to resist the trends he decries.

III. HURST'S LEGACY

The Growth of American Law is a tale of towering limitations, of no easy successes, and of great complexity. That Hurst offers no panacea does not mean that he is satisfied. Nor does his adamant refusal to engage in conspiracy theorizing connote complacency about the tragic consequences wrought by the largely unplanned combination of overemphasis on pro-

21. For a recent discussion of the consensus approach, describing it as the counter-progressive trend that dominated postwar America historical writing, see chap. 11, "A Convergent Culture," in Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* 320-60 (1988). Novick notes that the University of Wisconsin remained "something of a Progressive redoubt" and a "besieged outpost" for historians "holding out against postwar tendencies." *Id.* at 345-47. Novick never mentions Hurst, however, and pays scant attention to legal history.

22. Perhaps only in this sense, Hurst echoed Richard Hofstadter's early statement of the consensus idea of America as "a democracy in cupidity rather than a democracy of fraternity" (*The American Political Tradition* xxxvi-xxxvii (1948)). But this is a far cry from Hofstadter's later work or from the work of Daniel Boorstin, for example, who led the way toward a general consensus approach that involved "an attempt to give some positive content and direction to the essentially negative and critical counterprogressive venture." Novick, *That Noble Dream* 334.

duction and private power, lack of long-range responsibility, and lack of interest in facts. The growth of American law, as Hurst describes it, has not been positive growth. Driven by social and economic forces, unconcerned about conservation, unaware of rampant exploitation, Americans and therefore American legal institutions grow increasingly out of control.

In fact, there is something almost utopian in Hurst's faith in the discovery of facts as the basis for improvement despite all the sobering facts and trends he has discovered. He recognizes that the political Progressivism behind the Wisconsin idea "had the weakness of believing too much in the power of facts and disinterested expertness" (at 65). Yet Hurst remains closely linked to the Progressives and shares with them a belief in the affirmative obligation of government to act for the general welfare. Nevertheless, he concludes *Growth of American Law* with a pessimistic assessment. He notes both "diminished political sensitivity" and "growing impersonality in people's dealings with one another" after 1870. Both worked to give undisciplined freedom to particular interests at the expense of the individual and community life" (at 440).

The Conclusion, entitled "To . . . Promote the General Welfare," concentrates on the breakdown of the sense of community. Hurst thereby anticipates much of the current debate about republicanism and interest group pluralism. He clearly sides with those who aspire to civic virtue and republicanism. Like them, he has not solved the problem of modern interdependence; unlike them, at least Hurst's vision comes to grips somewhat with the sobering lessons of history. While he states that "[g]roup interest was the most dynamic force that played on our law," Hurst somewhat surprisingly invokes John C. Calhoun and the danger Calhoun accurately noted of different interests combining to produce "a spurious expression of majority policy" (at 439-40). Where once there was a sense of belonging, and of connection to a community, Hurst sees preoccupation with private business; lack of interest in the efficiency of public institutions; and reduced involvement in, and even appreciation for, politics. Unlike constitutional law scholars who have led the revival of republicanism during the 1980s, however, Hurst does not turn to the courts as a likely source for promoting the general welfare. If he has any hope at all in contemporary legal institutions, it is in the possibility of some movement on behalf of the general welfare made by the executive branch of federal and state governments. In this respect at least, painful experience reminds us of how many years ago this book was written.

More fundamentally, Hurst believes in education as crucial and in gathering facts as the essence of power. As Keats once said, however, "A fact isn't true until you love it."²³ But Hurst is a populist as well as a

23. Shelby Foote, quoting Keats's letter in Mark Muro, "Shelby Foote Makes His Presence Felt in PBS Epic," *Boston Globe*, Living sec., 26 Sept. 1990, at 47.

progressive. Despite all, Hurst remains a believer somehow in the basic good of humankind. He decries romanticism and demands that the historian, even the generally rugged Holmes, not forget to "respect[] the stubborn resistance of the raw materials."²⁴ In responding to some of his critics, Hurst declares himself the kind of legal realist who is concerned with the deficiency of political processes and the fragmentation of policy-making into merely responding to organized groups. He views his Wisconsin forest history as the story of "failure to fulfill commonwealth criteria of rational public policy through adequate accounting for social income and cost, to the detriment of the long-term vitality of the whole society."²⁵ Behind all the ledger-sheet rhetoric, however, there lurks an engaged, even a quietly enraged, moralist.

Hurst's own values may be evident in his quotation of words used by Felix Frankfurter in praise of Florence Kelley. Frankfurter wrote:

There are two kinds of reformers whose chief concern has been that earning a living shall not contradict living a life. One type is apt to see evil men behind evils and seeks to rout evil by moral fervor. Florence Kelley belonged to the other, the cooler and more calculating type. Not that she was without passion. But passion was the driving force of her mind, not its substitute. She early realized that damning facts are more powerful in the long run than flaming rhetoric, and that understanding is a more dependable, because more permanent ally than the indignation of the moment.²⁶

And Hurst praised Brandeis because Brandeis "took the oratory out of liberalism . . . [and] put fact in."²⁷ In a sense, Justice and law clerk somehow absorbed so much flinty Yankee reserve while at Harvard that they each made it a virtue.

Hurst also noted, however, that Brandeis believed that the Supreme Court should be "a sort of Holy Synod, untouchable" and stressed the symbolic aspect of the institution. Hurst's enthusiasm for the power of facts has battered down the symbolic redoubt of the Court, and he has gone beyond the Brandeisian-Wisconsin faith in detached facts and experts. Hurst instead makes an ironic Niebuhrian leap and embraces engaged fact-facting in democratic politics without the manipulation of symbols as the last, best hope. In many ways, Hurst is the last, best legal

24. Hurst, *Justice Holmes on Legal History* 61 (1964). Hurst criticizes the normally tough-minded Holmes for romanticizing the social sciences, and for failing to perceive the effort of history to "grasp the whole event" in contrast to the abstraction of the social scientist's attempt to limit and control variables.

25. J. Willard Hurst, Author's Note, *Law and Economic Growth* xviii; 2d ed. (1984).

26. Frankfurter, quoted in Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* 106-7 (1956).

27. Konefsky Interview at 9 (cited in note 4).

realist. He has been the most consistent over time, the legal realist most able to bridge the gap between finding the facts and trying to do something in the real world once the facts are known. In Hurst's career there may be no prescription for how to achieve utopia, or even lasting reform, but there is surely an exemplary answer to the charge that legal realism really is nihilism.

Hurst's credo and, more unusually, also his meticulous work push us outside the judicial framework. He wants us to concentrate on affirmative efforts to use law to supply a better framework to resolve societal conflicts, despite a long national history of drift. Legal institutions are not to be found within the four corners of appellate decisions, which are primarily the museums and galleries of the wealthy and well connected. He is able to convey the mood and personality of individuals in the context of their environments with unusual sympathy but without actually sketching in the details of their faces.

Discussions of legal realists and the ideas of community and commonwealth again fill the law reviews. Across 40 years, *The Growth of American Law* speaks directly to some of our most important academic debates. Virtually all of Hurst's work demonstrates the difficulties and limitations of reform. Yet he remains entirely committed to the effort to gather facts to help liberate us from past mistakes. More basically, Hurst believes with quiet passion that law can be used to push back our limits somewhat, and that such an effort is well worth a lifetime's dedication.

