

## BOOK REVIEWS

LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY. By James Willard Hurst. Ann Arbor: The University of Michigan Law School, 1960. Pp. 330. \$4.64.

James Willard Hurst delivered the ninth series of the Thomas M. Cooley lectures at the University of Michigan Law School in November, 1959. These lectures have been published as five essays entitled "Law and Social Process in United States History."

In earlier works,<sup>1</sup> Professor Hurst has described and discussed the institutional growth of American law and the relation between that growth and our economic, political, social and technological development. In these essays, Professor Hurst uses his considerable knowledge of American legal history and his impressive power of synthesis to develop and expand these themes. With these themes he has interwoven ideas of the nature of man and of the purpose of human existence. The result is stimulating and rewarding reading. These essays contribute significantly not only to the study of American legal history but also to American jurisprudence.

The first essay concerns the proper scope of the study of American legal history and stresses the need for a definition and philosophy of American legal history. The second examines the historical relation between stability and change in our legal structure, the influence of non-legal factors in its development, and the extent to which its development has resulted from short-range decisions taken in ignorance of and with lack of concern for non-immediate results. The third and fourth describe and analyze uses of law to increase awareness and purposeful initiative. The fifth essay discusses the implications of the law's "legitimate monopoly of violence"<sup>2</sup> and its relation to the allocation of power in our society.

This review does not attempt to synopsise these essays. The abundance of concepts and insights found in the essays precludes substantial compaction. This review attempts only to sample some of the material in the essays. It tries to indicate briefly the breadth of Professor Hurst's approach to American legal history; it also examines his concepts of "drift" and "direction."<sup>3</sup>

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1. Hurst, *The Growth of American Law: The Law Makers* (1951); Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956).

2. Hurst, *Law and Social Process in United States History* 267 (1960).

3. I have tried not to distort these concepts; nevertheless some distortion may have occurred.

Legal history should increase our understanding of the realized and potential uses and limitations of law. Professor Hurst recognizes that realization of this function requires reference to non-legal data. Law is an integral part of culture; the understanding of legal history is impossible without reference to total cultural growth—its economic, political and social organization and development, and the course of ideas and emotions. "Full-dimensional legal history must tell of the shaping force exercised upon the law from outside it, by what people wanted, by the functional needs of other institutions, and by the mindless weight of circumstances."<sup>4</sup> It must also tell of the means by which law influenced non-legal developments, and of the extent of that influence.

In addition, legal history can and should be a valuable part of human history—at least in an American context. Only the development of men's knowledge, ideas, attitudes and emotions qualitatively distinguishes human history from the evolutionary record of other species. Our legal history offers a rich source of data relating to this development, because men viewed law as an instrument by which non-legal aims might be achieved and because the structure of our law tended to force men to rationalize and to verbalize those aims.

The second essay introduces the concepts of "drift" and "direction." Professor Hurst characterizes "direction" as "the impact of inquiry, debate, and decision proceeding out of awareness and calculated effort to define ends and means";<sup>5</sup> it is decision-making based upon at least some knowledge of the factors which will influence the results of decision, and with at least some concern for and conscious definition of non-immediate results. He described "drift" less explicitly. By "drift" he seems to mean decision-making based primarily upon widely-held, persistent attitudes and values, made with little or no concern for non-immediate results.

The difference between "drift" and "direction" is one of degree rather than of kind. How many influencing factors are known? How far-reaching is the prediction and valuation of results? Drift merges gradually into direction; short of the fortunately unobtainable point where all influencing factors and the totality of results are known, direction remains drift.

Differences of degree are nevertheless differences. Professor Hurst believes that in law direction is preferable to drift. Direction, he says, "is the type of response to life which most truly belongs in the law and to which the law belongs."<sup>6</sup> The "direction" preferred by Professor Hurst is not synonymous with socialistic planning or any other

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4. Hurst, *Law and Social Process in United States History* 10 (1960).

5. *Id.* at 42.

6. *Ibid.*

form of statism. "Direction" refers only to the method of decision-making; it implies almost nothing about the values used in decision-making. Professor Hurst's preference for direction must be qualified by reference to the other values he adopts.

He believes that one purpose of human existence is the realization of man's distinctively human capabilities of awareness and choice. He measures his values by their tendency to promote this realization. He also believes that opportunities for this realization should be available to all. One secondary value which he derives from these primary values is that the range of practical choices available to men should be expanded.

Some emphasis must be placed upon the practicality of the available choices. In any society there exists a consensus of accepted customs, opinions and beliefs. This consensus is necessary for social existence and prosperity.<sup>7</sup> It also precludes some choices; actions not in accord with the consensus may be physically possible, but generally they are not practical alternatives.

One way in which law affects the range of available practical choices is through its relation to our consensus. In our society the consensus contains most values which are legally recognized. Our law responds to and reflects changes in the consensus. We use the formal sanctions of the law to enforce adherence to at least some consensual patterns of behavior; this use of law tends to decrease deviations from the consensual norms. Our respect for law generates respect for values which receive legal recognition; in this way also the law reinforces the consensus.

The consensual-legal preclusion of choice in some instances may effect a net over-all increase in available practical choices. The standardization of weights and measures, for example, facilitates commercial transactions and thereby increases material prosperity; prosperity results in an expansion of the range of practical choice. Such net increases are perhaps most likely to occur in instances in which the sole purpose of consensual-legal preclusion is uniformity. In other instances, however, the consensual-legal preclusion effects a net decrease in available practical choices. There is no significant indirect expansion of choice resulting from the prohibitions on public nudity. Net decreases occur if the primary purpose of regulation is to secure universal adherence to majority-morality.

"Direction" guided by Professor Hurst's values would tend to minimize consensual-legal preclusions which effect net decreases in the range of available practical choices. Although the example is perhaps extreme, such "direction" might well remove the legal

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7. See de Tocqueville, 2 *Democracy in America* 8 (Bradley edition 1956).

restrictions on public nudity. In any event, the result would not be statism.

Professor Hurst examines policies adopted in our law which increased the range of practical alternatives. Two of the most significant of these are: (1) the dispersion of economic and political power; and (2) promotion of material productivity. The value of dispersed power is evident; power implies the ability to make practical choices.

The value of material productivity is almost as evident; a man who must work twenty hours a day to procure his minimal needs of food and shelter has few available practical choices. Professor Hurst states that we view material well-being as a means to individual fulfillment. It is difficult to demonstrate whether we view material comfort as a means or as an end itself; although we have rejected material comfort in favor of survival in time of war, we have never been forced to reject it in favor of individual development.

In the twentieth century at least, the policy of dispersing power conflicts with the policy of increasing material productivity. Our productivity is increasingly dependent upon organization; organization requires concentration of power. We have permitted concentrations of power in corporations, labor unions, and in government itself; the decisions allowing these concentrations have been made by drift or by default (which is one form of drift). The balance between productivity and dispersion should be struck by "direction." If those who "direct" share Professor Hurst's values, the practical possibilities for individual fulfillment and freedom will be increased.

This review has tried to sketch Professor Hurst's expansive view of American legal history and his broadly humanistic concept of the proper uses of law. It is a sampling rather than a condensation. It is hoped that this review gives some indication of the nature and extent of the contribution which Professor Hurst has made to American legal history and jurisprudence.

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SELECTED PROBLEMS IN THE LAW OF CORPORATE PRACTICE. Edited by Thomas G. Roady, Jr. and William R. Andersen. Nashville: Vanderbilt University Press, 1960. Pp. 423. \$10.00.

This is a selection of articles, certain of which, as hereinafter indicated, have appeared in somewhat similar forms in law reviews and elsewhere upon selected problems involving corporate practice in its more complicated form. Essentially, it would seem to the writer, that its appeal will be to lawyers engaged in such practice who have

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