

WILLARD'S LAW SCHOOL?

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Willard Hurst's influence on the University of Wisconsin Law School seems obvious. When we act in the best traditions of this institution, it is because it is Willard's Law School. However, if we ask what the University of Wisconsin Law School would be like had Willard never been a part of this faculty, the answer is uncertain. Hurst came to an institution with an established culture, and he would be the first to point out that he was not the only member of his generation of law teachers interested in studying law in its social context. We cannot know what would have happened if something else had not happened, but, nonetheless, we can build a plausible case that Wisconsin became Willard's law school.

Let's begin by looking at a devil's advocate's brief on Willard's role in shaping today's University of Wisconsin Law School: could we argue that Hurst was not the most important contributor to Wisconsin's legal culture today?

There was a history of interdisciplinary work at Wisconsin when Hurst joined the faculty in the mid-1930s. David Margolick reported: "It was [Justice] Brandeis who urged Mr. Hurst to head for Wisconsin and study its democratic institutions. While there Lloyd Garrison, then the school's dean, urged him to create a program in 'law and society,' investigating how the state's legal system and economy cross-pollinated."¹ This statement is slightly misleading because Dean Garrison was asking Willard to help revive a tradition rather than create one anew.

Paul Carrington reminds us that in the first quarter of this century:

One effect of the Wisconsin Idea was to bring the university's new, young law teachers into contact not only with public affairs, but also with academic colleagues in other disciplines who possessed useful expertise. The law school

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1. David Margolick, *At the Bar*, N.Y. TIMES, Mar. 23, 1990, at B5.

established liaison with the political science department in 1907-08, a liaison designed with the purpose of "relating" legal instruction "to modern social and economic conditions." Between 1904 and 1910, law faculty, [Dean] Gilmore in particular, similarly collaborated with economics faculty such as John Commons and Richard Ely in a large-scale endeavor to document the history of labor in America. . . . By 1915, law school bulletins actively advocated a mixture of law classes with history, economics, political science, and philosophy classes.²

Carrington also notes that Professor Oliver Rundell produced a report in 1912 about whether

"there had been undue delays in the institution, trial, and disposition of criminal cases." The final product was a thirty-page study of criminal cases brought in three Wisconsin counties—specifically, all criminal cases brought in the municipal courts over a five year period, and all criminal cases brought in the circuit courts over a ten year period.³

Willard Hurst, himself, called my attention to a publication by one of my predecessors as a Wisconsin contracts teacher. In 1914, William Herbert Page had written a report about Eugen Ehrlich's work on the "living law."⁴ The living law was the law in action. Sometimes it flowed from public government; sometimes from non-governmental associations and organizations. Ehrlich is the intellectual father of today's concern with

2. Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297, 324 (1997) (footnotes omitted); see also W. Scott Van Alstyne, Jr., *The University of Wisconsin Law School 1868-1968: An Outline History*, 1968 WIS. L. REV. 321.

3. Carrington & King, *supra* note 2, at 329.

4. Page presented this report at the Association of American Law School's Annual Meeting in 1914. It is reprinted as William H. Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, in READINGS IN JURISPRUDENCE 825 (Jerome Hall ed., 1938). Ehrlich's living law was

"in contrast to that which is in force merely in the courts and with the officials. The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law."

Id. at 825 (quoting Ehrlich); see also N. S. Timasheff, *Ehrlich, Eugen*, in 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 540, 541 (David L. Sills ed., 1968).

legal pluralism. Professor Page discovered Ehrlich's work before World War I, and made a presentation to the Association of American Law Schools about it.⁵

When we turn to the present day, we must recognize that the legal culture of Wisconsin involves at least three elements: (1) law in action scholarship that creates knowledge about the role of law in society; (2) law reform, drafting and lobbying for changing the law; and (3) participation in public events as a player in the ongoing policy process.⁶

5. Jeffrey Rosen, *The Next Crimebuster: The Social Police*, NEW YORKER, Oct. 20 & 27, 1997, at 170, 172 writes about "the most provocative new movement in the legal academy." He reports that a group of younger scholars at the University of Chicago Law School is studying social norms. "Laws threaten you with criminal and civil punishment; norms threaten you with being shunned and ostracized by friends, neighbors, and fellow-citizens." *Id.* The Chicagoans are "studying ways that norms can influence behavior more effectively than law; ways that norms and law together can influence behavior; and ways that norms and law can influence each other." *Id.* Willard Hurst would have been amused. He was too kind to have suggested that Chicago might have caught up with Herbie Page in 1914, but there is a striking resemblance in the work of the so-called "Chicago School" to Ehrlich's "living law." Compare the classic study of norms and social structure, Richard D. Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L.J. 471 (1954). Schwartz's article should not have escaped anyone interested in this area. It is, for example, reprinted in LAWRENCE M. FRIEDMAN & STEWART MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 509 (1969); LAWRENCE M. FRIEDMAN & STEWART MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 579 (2d ed. 1977); STEWART MACAULAY ET AL., LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 171 (1995); see also BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995); Armando Guevara-Gil & Joseph Thome, *Notes on Legal Pluralism*, BEYOND LAW, July 1992, at 75, or any issue of the *Journal of Legal Pluralism*.

Of course, the scholars at the University of Chicago are not responsible for Rosen's characterization of their work. Indeed, one could see the project as Chicago's return to the tradition of such scholars as Harry Kalven, Walter Blum, Hans Zeisel and Karl Llewellyn and Soia Mentschekoff who were at the school in the mid-1950s. Lawrence Friedman and Marc Galanter were students at Chicago at that time. Marc Galanter and I were both teaching fellows at the University of Chicago Law School during that era. Our Chicago backgrounds probably had something to do with finding law and society work appealing when we went elsewhere.

[Editor's Note: The *Wisconsin Law Review* will publish a more extensive discussion of the "New Chicago School" by Mark Tushnet in May 1998.]

6. The University of Wisconsin Law School is not unique in having these elements in its legal culture. The distinctive thing is the prominence given to them. Carl Auerbach was a noted member of the Wisconsin faculty when I came to the school in 1957. Hurst had met Auerbach in Washington during World War II and started the process that brought him to Wisconsin. See Robert A. Stein, *Carl A. Auerbach—A Tribute*, 68 MINN. L. REV. 255, 256-57 (1983). Auerbach always told the younger members of the faculty: "If it is entirely original, it is probably wrong." The important thing is the blend of common elements and the emphasis given to them. Clinical

Hurst's work fits largely into the first category and only incidentally into the other two. Can we ask what part of the legal culture of the law school can be traced to Hurst and what part to his contemporaries and colleagues such as Nate Feinsinger, Bob Bunn and Jake Beuscher?⁷ What part can be traced to those who came to Wisconsin after World War II such as Carl Auerbach, Abner Brodie, John Conway, Gus Eckhardt, Dick Effland, Bill Foster, Herman Goldstein, Jim MacDonald, Margo Melli, Sam Mermin, Frank Remington and Bob Skilton?⁸ This list alone comprises the core of a great law faculty. And don't we have to concede that there are now and there always have been some on the Wisconsin faculty who ignore the Hurst tradition and march to a different drummer? There isn't a party line at the University of Wisconsin Law School enforced by the KGB.

Two famous students of the legal system, much influenced by Hurst when they were beginning scholars, Lawrence Friedman and Jack Ladinsky, wrote a classic article that expressed great skepticism about explaining events on the basis of any "great man."⁹ We have named the faculty tower in the newly remodeled law building after J. Willard Hurst. This means that, as is usually true, we are free to forget why we did this as time passes. Who, for example, were Bascom, Birge, van Vleck, Chadborne or Elvehjem? Most of us at Wisconsin pass university buildings named after these great scholars with no idea who they were. Close to half the faculty came to the Law School after Hurst retired in 1981. While a few of them may have had contact with him, most did not. How many members of the faculty have read a substantial portion of his many books and articles? How many haven't even read a single article?¹⁰ Most of those with whom he worked closely as a mentor have left Wisconsin: Friedman, Handler, Hartog, Gordon, Tushnet and others are an all-star cast that now performs at other theaters.

education and public interest programs today are a significant part of the Wisconsin legal culture, but, largely, they came after the time I am talking about.

7. Feinsinger came to Wisconsin originally to work in family law, and he had been influenced by the work at Columbia in the late 1920s and early 1930s. Beuscher spent time as a graduate student at Yale during the mid-1930s and absorbed lessons about legal realism and field research there. See FRAN THOMAS, *LAW IN ACTION: LEGAL FRONTIERS FOR NATURAL RESOURCES PLANNING: THE WORK OF JACOB H. BEUSCHER* (1972). Both were part of a school being built by Lloyd Garrison, the dean who brought Hurst to Madison. Professor Margo Melli says that you cannot pull apart the mutual influence of these people because they interacted and supported each other in many ways.

8. Lists such as this one always are dangerous. I may have omitted others because of a lack of knowledge about their connections to this culture. If so, I apologize.

9. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

10. I am not foolish enough to seek accurate answers to these questions.

While the Devil always can make a good case, in the end this one is not compelling. Arthur McEvoy noted: "If Wisconsin Law School was already relatively congenial to interdisciplinary research [when Willard arrived in 1937], Willard made it the organizing principle of the school's culture."¹¹ David Margolick of the New York Times said of Hurst: "In an era when academia, like sports, has been watered down through expansion, he is an old-fashioned towering figure."¹² Just by being who he was as a scholar and teacher, Hurst gave the law and society tradition at Wisconsin legitimacy and space in which to work. Here is Hurst in 1960 on the subject of studying law and doing legal history:

Aside from providing concepts and ordering judicial precedents for the immediate operating needs of bench and bar, legal research has a thin record of accomplishment over the past ninety years in which university law schools have grown to some stature. . . .

. . . . Anglo-American law men¹³ are by tradition and training biased toward equating law with what judges do, to the neglect not only of legislative, executive, and administrative activity, but also to the neglect even of the out-of-court impact of the work of lawyers, let alone the additions or subtractions made in legal order by lay attitudes and practices affecting legal norms. . . .

. . . . There is no more badly neglected area of legal research than that of sanctions, the comparative study of methods of implementing policy. Given life's infinite variety and the hard limits of social science research techniques so far available, the study of sanctions is an area in which we now stand to gain most from history. Nor should we view it as the study of factors of secondary importance. The more difficult the basic policy choices, the more surely must judgments of the promise and costs of implementation enter into the basic

11. Arthur F. McEvoy, *Memorial Comments*, L. & SOC'Y NEWSLETTER, Aug. 1997, at 8.

12. Margolick, *supra* note 1, at B5.

13. In his writings in the 1950s and 1960s, Hurst used "men" to mean both male and female. Hurst certainly was not threatened by strong women with ideas, and he formed a number of important professional relationships with women such as Shirley Abrahamson and Margo Melli. I will leave Hurst's language as he wrote it and ask readers to remember in the times he was writing about, there were hardly any "Anglo-American law women" to consider.

decisions. Moreover, we grow into some basic decisions out of experience of what we can expect to do.¹⁴

Hurst invested his reputation, his time and the money he had obtained from grants into the creation of the law and society tradition at this school. Thorstein Veblen said: "[T]he law school belongs in the modern university no more than a school of fencing or dancing."¹⁵ Hurst firmly rejected the idea that a law school was necessarily a trade school teaching only intellectual fencing and dancing around the merits of cases. He argued that the law school in a modern university had a duty to create knowledge about the place of law in society.¹⁶ Hurst did this and brought the knowledge that he had discovered and created to his courses in legal history and legislation. He wrote teaching materials in all these subjects that drew upon his work. He showed us all that adopting a famous professor's case book and adding little to it was not great teaching.

Margo Melli pointed out to me that many members of the Wisconsin bar took Willard's classes and remember his teaching as important in their careers. While the bar always wants legal education to do better in preparing young lawyers for practice, Willard was a large reason why so many lawyers were proud of their law school and its law and society tradition. Hurst never romanticized law, legislators or lawyers, but taught that law could matter in the development of a society, and that lawyers could play critical roles in making the innovations necessary for social progress. In this way his teaching helped many of his former students give meaning to their law practice.

Hurst also gave legitimacy to the law and society enterprise among his colleagues. In the 1950s and early 1960s, we could point to the jury project at the University of Chicago¹⁷ and we could remember the grand projects at Columbia¹⁸ and Yale during the early 1930s.¹⁹ Nonetheless,

14. Willard Hurst, *The Law in United States History*, 104 PROC. AM. PHIL. SOC'Y 518, 520, 521, 524-25 (1960).

15. THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 211 (1918).

16. See, e.g., Willard Hurst, *Changing Responsibilities of the Law School: 1868-1968* WIS. L. REV. 336; James Willard Hurst, *Research Responsibilities of University Law Schools*, 10 J. LEGAL EDUC. 147 (1957).

17. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

18. See Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331 (1951); Brainerd Currie, *The Materials of Law Study*, 8 J. LEGAL EDUC. 1 (1955).

19. See, e.g., John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); John H. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill*

younger law professors at most law schools then were not following in these directions. They were working through the implications of legal realism in the text of the proposed Uniform Commercial Code or worrying about the Hart and Sacks approach to what they called "legal process."²⁰ Things were different at Wisconsin. Frank Remington taught that the reality of criminal law is not found in Supreme Court opinions or theories about deterrence, retribution or rehabilitation. He said that reality was found in the front seat of a squad car. Criminal law was not Hurst's major focus, but Remington had been greatly influenced by Hurst when he was Hurst's student and a member of the *Wisconsin Law Review*. Remington wanted to bring Herman Goldstein to the faculty. Herman had been closely working with the Chicago police. However, although he had a Master's degree in government administration and practical as well as research experience in criminal justice administration, he had neither a law degree or a Ph.D. It was not easy to get a law school appointment for someone lacking the traditional credentials. At the right moment, Hurst asked who knew more about the police in action. Willard's question and its implicit answer swept aside any formal objections, in large part, because he had asked it. Willard was always interested in bringing people to Wisconsin who would add something new to the group at the law school, and he was usually successful in his campaigns for new hires. He backed the appointment of many of the people who are now closely identified with the institution.²¹

Moore, 29 BUFF. L. REV. 195 (1980). Also, we could recall the "sociological jurisprudence" of Roscoe Pound and the work of Karl Llewellyn. The latter, like most of those identified with Wisconsin, did not think that empirical work alone could solve the problems of legal scholarship. Nonetheless, he was concerned with the commercial context of sales disputes and co-authored a study of how the Cheyenne dealt with their "law jobs." See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE-LAW IN PRIMITIVE JURISPRUDENCE* (1941). See generally N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN* (1997).

20. See Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571 (1996). Sebok points out that Hart and Sacks's work was related to the materials written by Hurst and Dean Garrison for a course on the legal process. *Id.* at 1572, 1578 n.28. However, the Garrison and Hurst materials were primarily descriptive rather than normative; Hart and Sacks reversed this emphasis.

21. See, e.g., John S. Skilton, *Seventy-Five Years of the Wisconsin Law Review: Turning the Pages*, 1995 WIS. L. REV. 1461. John Skilton reports that his father, Robert H. Skilton, met Hurst in the Navy War Department during World War II. Hurst and Jake Beuscher recruited Skilton to join the Wisconsin faculty. Skilton produced a number of important empirical works in the area of sales and commercial paper. See, e.g., Robert H. Skilton, *Cars for Sale: Some Comments on the Wholesale Financing of Automobiles*, 1957 WIS. L. REV. 352, 352 n.* ("In addition to the usual work in the library, this study represents the results of inquiry into garage practice; various officers of automobile manufacturers and financial institutions were interviewed in an effort to obtain a picture

Hurst, furthermore, undertook the development of a group of younger scholars at the University of Wisconsin who would create a law and society field. He was the ideal mentor for many of us. Over lunch or in a meeting in his office, beginners would get the Willard treatment. We were told that we should plan a career and think in terms of five to ten year projects if not more; we should not waste time responding eclectically to the latest appellate decision or big event in the *New York Times*.

Hurst stressed to us that law could not be studied as a system apart from the society that created it, and top down approaches always must be balanced with those from the bottom up. He told us to take risks, think broadly and make connections with worlds of ideas outside of the law schools.

Willard also knew that the law-trained people of the 1950s and 1960s needed to educate themselves if they were to break out of conventional patterns of law school thought. He obtained grants under which he could give a younger scholar a summer or a seminar off so that they could read or do research. For example, I spent a summer in Berkeley early in my career, working my way through books Hurst had recommended such as Max Weber's work on the place of law in society²² and Talcott Parsons and Neil Smelser's *Economy and Society*.²³ Later I had a semester's research leave to read and to do the research that produced my *Non-Contractual Relations in Business*.²⁴ That article was published in the *American Sociological Review*, largely because Robert Merton, the great sociologist, told the editor to print it. Merton knew about my work because he was Willard's friend from their days together on the Social Science Research Council.²⁵

Willard took seriously the ideas of younger scholars. At the beginning, it was daunting to discuss one's career and research interests with the great legal historian. Once the process was underway, it was great fun. Willard was never patronizing nor impatient with a beginner.

of the relation between law and practice."). Bob Skilton was extraordinarily kind and helpful to me when I was a beginning contracts teacher trying to sort out the field.

22. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Edward Shils & Max Rheinstein eds., 1954).

23. TALCOTT PARSONS & NEIL J. SMELSER, *ECONOMY AND SOCIETY: A STUDY IN THE INTEGRATION OF ECONOMIC AND SOCIAL THEORY* (1956).

24. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). I reconsidered this article at a conference marking its twenty-first birthday. See Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465.

25. I told the story of the publication of my article in the *American Sociological Review* in more detail in Stewart Macaulay, *Crime and Custom in Business Society*, 22 J. LAW & SOC'Y 248, 249-251 (1995).

He listened to our ideas, showed us their implications, connected them to bodies of thought that were unfamiliar to us, and suggested ways to proceed that would have taken most of us a decade if not a career to carry out. We welcomed his suggestions eagerly even if we later decided that we couldn't follow them.

Hurst regularly responded to long manuscripts that we gave him by providing detailed and tough comments. For example, here are three paragraphs from four single-spaced pages of comments he wrote in 1983 about my paper on Private Government²⁶:

I'm glad to have the working paper on private government. It is a stimulating piece, and introduces me to some jurisprudes [sic] I'm not familiar with. It also stirs me to a few questions, which I submit in case you expect to consider any further tinkering with the manuscript. I don't try to set them down in neat order, figuring that if I made that a prerequisite to responding I'd likely not get around to it.

I finished the paper sensing some feeling of incompleteness about it, despite its breath and detail. You make the case for the realities of private government, including both its reach and its wielding of forms of compulsion or discipline, and for the blurring of lines between "public" and "private." But it doesn't strike me that you squarely confront a question that all this inevitably poses: Can we derive from experience or logic or whatever some persuasive explanations or demarcations of why and where people turn to law and on the other hand to various kinds of private governance? At page 83 there is a rather tangential posing of the question, why and when do non-legal factors take over the human relations scene. But I'd think the question calls for more extended treatment, even if the upshot is going to have to be largely to confess ignorance. Legal institutions continue to be large, stubborn facts of our social experience, granted all the division of labor, competition, and blurring of lines that other kinds of social ordering introduce. Doesn't a satisfying explanation or analysis of private government derive its contours, inescapably, in large part from understanding where and how far law is used?

Finally, a minor point or irritant of style: "problematic" has become a buzzword in current learned journals, to an extent

26. Stewart Macaulay, *Private Government*, in LAW AND THE SOCIAL SCIENCES 445 (Leon Lipson & Stanton Wheeler eds., 1986).

that grates on this ear at least. It turns up in this manuscript oftener than seems artistic. Webster offers some perfectly usable substitutes: questionable, unsettled, doubtful, unproved, equivocal.²⁷

As is apparent, one did not get unconditional applause from Willard; one got needed directions for revisions.²⁸

All of this effort produced a group of young law professors and scholars in other departments who saw that law had to be studied in its social context. Perhaps the one unifying theme was that legal doctrine could be important, but that doctrine alone was only part of the story. Some members of the group turned to sociology, political science or psychology to seek social context. Others turned to legal history.

In addition, Willard taught us not to be afraid of studying legal events in Wisconsin as case studies of law in context. Those at many law schools worry about being provincial if they focus on events in their own city or state. They aspire to be great national schools and assume that local events are not worthy of serious attention. This means that professors focus on the Supreme Court of the United States, federal legislation or uniform statutes. Sometimes they treat the common law as the brooding omnipresence in the sky, and review appellate opinions from all over the nation. In following this approach they seldom see the context of these opinions and overlook what the opinions are likely to mean to the people of the state where they were decided.

I've heard people joke at conferences that much of our law and society knowledge is about law in a Wisconsin context. Hurst recognized that we needed case studies elsewhere or we risked presuming that Wisconsin was the United States. Nonetheless, a specific case study is always better than assumptions, anecdotes and projections of the scholar's biases. Hurst stressed the value of focused case studies that would be about something particular, something that might challenge conventional wisdom. Moreover, case studies of events in Wisconsin cumulated. As the work was done, later legal writers could build upon their predecessors and see events over time. When we ask about the impact of a statute within a year or two after it was passed, we get a snap shot. When we

27. Letter from J. Willard Hurst to Stewart Macaulay 1, 4 (May 17, 1983) (on file with author).

28. Compare Bob Gordon's acknowledgment of Hurst's comments about Gordon's work in Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 57 n.* (1984): "Willard Hurst gave the manuscript his usual incredibly close attention, wrote a dozen pages of detailed comments, approved what he could with characteristic generosity, and vigorously challenged what he could not; this article continues a longstanding conversation with him."

look at it over five or ten years after passage we may be able to see how those affected by it cope and deal with the law's demands, sometimes complying and sometimes learning to evade.

Hurst's devotion to institution building while carrying on major research, teaching classes and working with graduate students, was not lost on younger colleagues. One of those regularly talking with Hurst, for example, was Harry Ball, a sociologist who had been brought to Madison to work with Frank Remington on his research into the criminal justice system. With the help of a number of others, Harry did the hard work of organizing the Law and Society Association (LSA). Hurst himself went to few LSA meetings. He did not like to travel, and he did not enjoy particularly the small talk and making contacts that comprise so many academic meetings. However, he read the *Law & Society Review* regularly, and I remember many telephone calls after he retired when he wanted to point out to me something in the latest edition of the *Review*.

The law and society tradition continues and is a significant part of the culture of the University of Wisconsin Law School. Of course, not everyone does empirical research and the entire faculty does not routinely discuss such classics as Weber and Ehrlich²⁹ or more modern work by, say, Rick Abel³⁰ and Rick Lempert³¹ in the hallways. Yet even those who participate in more conventional academic conversations are used to questions from their law and society colleagues such as: "How does this work in practice?" "Who benefits from this kind of a rule or does it make any difference in settlement negotiations?" "How will those with large legal staffs cope with this attempt at regulation?" "Why is it that the Supreme Court of the United States always writes ludicrous opinions in the contracts area, ignoring the practical impact of its decisions?"

And apparently the school is known elsewhere as a home of law and society research. Seven outside candidates for dean of the school recently appeared before the faculty. They may have been only telling us what we wanted to hear, but all of them cited the law and society tradition as a reason why they might want to move from their present job and undertake our deanship. Those of us who go to Association of American Law Schools conferences and workshops know that law professors from elsewhere will let us know that they see Wisconsin as different. While their comments are not always meant as praise ("eccentric" is one of the

29. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll trans., 1936); Timasheff, *supra* note 4.

30. See, e.g., Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982).

31. See, e.g., Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981).

kinder remarks), they further confirm that this part of our law school culture is widely known.

The mentoring of younger colleagues isn't the same since Willard retired. It could not continue in the same way without Willard to do it. No one else had the reputation, the respect and the manner to bring it off just as he did. Some of our present colleagues fault the institution for failing to promote enough help to our younger colleagues; some report that they feel that they have no one to talk with. Nonetheless, some of this tradition remains. All untenured assistant professors are assigned a tenure mentor. Sometimes the chemistry is good; sometimes it is not. However, those of us who remember what Hurst did and how much we owe him cannot in good conscience say no to requests to read one more draft. This also prompts us to try to get younger colleagues included on conference programs and to write letters supporting grant applications. The results of this mentoring program suggest that it might serve to continue some of the Hurst tradition.

Hurst also was a great mentor in indirect ways. Although he would not have liked the term, he was a "role model." He valued the faculty as a social enterprise where ideas could be exchanged and discussed. Willard showed us that scholarship was important work, but it was work. The range of Hurst's reading was incredible. He spent hours digging through historical records. He advocated writing books and not mere law review articles. Being a legal scholar at Wisconsin was not for those who wanted to dabble in this or that. One had to take the risk of investing great amounts of time and producing very little. At the same time, if one of us was working on a project and had reached an impasse, a conversation with Willard over coffee or in his office would usually help right the enterprise and get the project back on track. With a few suggestions from Willard, we saw that we could learn much from patterns hidden in ordinary everyday experience. Indeed, Hurst was suspicious of work focused on great legal events.³² Almost by definition, they are not typical. He viewed most great events as likely to be symbolic, reflecting major social changes that had begun long before the big case or the great reform statute. The flow of business to the courts likely was more meaningful than any one opinion. What Hurst advocated, as a result, required a scholar to leave his or her office and dig through data. The difficulty of doing this, I've often thought, is why many legal scholars cling to their advance sheets or the ambiguous writings of their favorite famous dead Europeans.

32. See JAMES WILLARD HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 17-18* (1960) [hereinafter HURST, *LAW AND SOCIAL PROCESS*].

Wisconsin has not been a place where many scholars spent much time pondering grand theories of the place of law in society without testing their ideas against experience.³³ In part, this can be traced back to Hurst. One of his major findings about American law was that there is always an interaction between "generals and particulars."³⁴ He said:

General propositions are necessary instruments to make sense of particular experience and to cultivate judgment and emotional poise in meeting it. But they are not the only kind of dependable knowledge. Indeed, they may do harm, where they tempt men to treat useful abstractions or fictions as if they were full-dimensional, existent entities. The immediate perception of experience is always particular. Perception of the particular provides not only raw material for generalization but the sharp sense of differences out of which generalization is born and the means for checking its utility.³⁵

Theory and generalization are essential, but they must be modified if experience does not fit.³⁶ A noted scholar at a distinguished law school,

33. See Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 *LAW & POL'Y* 149, 164-168 (1984), where I look at Johan Galtung's suggestion that there are distinct theoretical styles in social science, (what he calls the saxonic, teutonic and gallic) and the consequences of these styles.

The continental styles tend to be what we could call "theories of adhesion"—one converts to the faith and then the theory just seems right; if a theory "rings true", it will then explain everything. Almost all experience can be transformed and translated into it, and so what would seem to be common sense counter-examples are "transcended."

Id. at 165; cf. Frank Munger, *Sociology of Law for a Postliberal Society*, 27 *LOY. L.A. L. REV.* 89 (1993), where Professor Munger criticizes continued debunking of the assumptions of liberal legalism and offers several more promising theoretical approaches. I find important traces of his suggestions anticipated in Hurst's work.

34. See, e.g., HURST, *LAW AND SOCIAL PROCESS*, *supra* note 32, at 152.

35. *Id.* at 162.

36. Judge Posner criticized Hurst's *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964), as "a dense mass of description—lucid, intelligent, and I am sure scrupulously accurate, but so wanting in a theoretical framework—in a perceptible point—as to be virtually unreadable." Richard A. Posner, *The New Institutional Economics Meets Law and Economics*, 149 *J. INSTITUTIONAL & THEORETICAL ECON.* 73, 74 (1993). However, Hurst did have a theoretical basis for his lumber study. Perhaps it is just not one that Posner's own point of view allowed him to recognize easily. It is much easier to grasp Hurst's points in the study of the lumber industry, if one reads that study together with HURST, *LAW AND SOCIAL PROCESS*, *supra* note 32. The problem might be that what Hurst calls mindless "drift" and "bastard pragmatism," Posner would call the market. Hurst saw the destruction of the forests of Wisconsin as a tragedy. Posner might see exploiting these

for example, once asserted to a number of colleagues that a Wisconsin professor must have made up her data because the findings reported in her article did not fit his theories. She had hesitated before submitting all her unpublished data to him because of the cost of duplicating the enormous number of pages. Willard and the rest of us in Madison were both annoyed and amused by the arrogance.

Wisconsin professors have long participated in the legislative process, drafting bills and testifying before committees. This work was not a direct focus of Hurst's career, but he supported such efforts in a number of ways. He created one of the first courses on legislation in any American law school, and he edited teaching materials for it. He questioned overemphasis on the judge and the appellate opinion as the focus of legal study. Hurst saw the common ideological assertions that regulatory legislation was a wicked invention of the New Deal as a fantasy useful for political purposes. He stressed that throughout American legal history, we had sought to use government to foster economic development. Wisconsin has been a school that has focused on training our graduates to serve at all levels and in all branches of government; we have never seen statutes as threats to the purity of the common law. Hurst was aware that graduates of this school would serve as elected representatives or as influential staff members of various bodies. He advocated teaching both policy and legislative technique. His scholarly attacks on what he called "drift" and "bastard pragmatism" called for training lawmakers who would confront hard choices head on and who would know what might be done to implement them.

Many on the Wisconsin faculty have improved the quality of public policy, supplying, in Willard's terms, direction rather than drift. Political factors have lessened this role of the our faculty in recent years, but they have not eliminated it. Governor Tommy Thompson has enlisted the services of Professor Walter Dickey to help formulate directions in the field of criminal justice. Professor Marc Galanter has been fighting for a number of years to bring some rationality to the various proposals for what is called "tort reform." Much of the call for changing this body of law has been based on anecdotes that prove to be apocryphal.³⁷

natural resources as simply the satisfaction of the desires of people in the nineteenth century.

37. See, e.g., Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, in 11 STUDIES IN LAW, POLITICS, AND SOCIETY 95 (Austin Sarat & Susan S. Silbey eds., 1991); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992). Of course, pointing out that the emperor has no clothes seldom makes the emperor happy. In a letter to the editor of the magazine of the State Bar of Wisconsin, one writer asserts: "Prof. Galanter

Galanter, true to the approach Hurst tried to build, has looked at the data or the lack of it.³⁸

Finally, Willard saw that we had to study lawyers and what they do. *The Growth of American Law: The Law Makers*, published in 1950, was the first serious treatment of the contributions of lawyers to the development of the United States.³⁹ In it, Hurst describes how lawyers "contrived or adapted institutions (the corporation), tools (the railroad equipment trust certificate), and patterns of action (the reorganization of corporate financial structure or the fashioning of a price structure for a national market)."⁴⁰ These social inventions made possible the growth of railroads. In turn, this provoked the expansions of markets. Nineteenth-century Americans moved from buying and selling within the reach of a horse and wagon to regional and then national opportunities to market what was produced on farms and in factories. It could not have happened without the structures invented by lawyers that allowed entrepreneurs to invest in laying track and buying equipment. Hurst's book still stands up well almost fifty years after he wrote it. Other Wisconsin law professors have followed his lead and investigated the many roles played by practicing lawyers in giving law its impact and helping clients cope with various problems by invoking its language and potential sanctions.⁴¹ For example, the "Wisconsin" contracts

has been feeding at the public trough so long that his bias is at least understandable." *Letters*, WIS. LAW., July 1997, at 4. I think that Willard would have smiled and told Marc to keep reporting the data in the hope that fact might eventually prevail over propaganda, at least to some extent.

38. See, e.g., Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

39. Frank Munger says:

James W. Hurst's far-reaching study of "law-makers," focusing primarily on lawyers, has been the starting point for work that is once again addressing . . . the role of lawyers in society. Professor Hurst has offered one of the first and still one of the best descriptions of professional differentiation, law firm growth, the changing nature of law practice, and the diverse roles played by lawyers. The historical dimension of his description is important, because it suggested important qualifications in the Weberian thesis about the role of professional autonomy. Professor Hurst's work demonstrated that lawyers are linked to law through their client's interests.

Frank Munger, *Sociology of Law for a Postliberal Society*, 27 LOY. L.A. L. REV. 89, 113 (1993) (footnote omitted).

40. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 337 (1950).

41. See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 40-41 (1991); Marc S. Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner*

materials⁴² frequently look at contract doctrine from the standpoint of the lawyer rather than the appellate judge and stress how trends in case law affect the bargaining position of parties.⁴³

Wisconsin will remain Willard Hurst's law school for some time to come. Hurst initiated a course in legal history in the late 1930s and taught it for almost forty years. We recruited other legal historians while Hurst continued teaching the legal history course, taking the position that legal history was a method that could be used by those working in any legal field. However, working at Willard's school put these people in the academic spotlight, and they accepted advantageous offers to go elsewhere. We came to a point after Hurst had retired when Wisconsin had no one in the area. However, this happened during the hard times for state universities in the 1980s. The Law School had to make unhappy choices because we needed teachers in many core areas of the curriculum. Someone suggested at a faculty meeting that we not fill the legal history position, or at least that we not fill it right away, because our needs in other areas were more pressing. We all agreed that we did have pressing needs in other areas. Nonetheless, at the urging of Arlen Christenson we rejected the suggestion that we give a back seat to legal history. As a graduate of this school and a long time faculty member, he could not imagine Wisconsin without a first class legal historian. Once he said it, we recognized that he was right.

We then interviewed a number of the top people in the field and found someone worthy of following Hurst in the position that he created. We brought Arthur McEvoy to Madison. Willard told me later that he thought that we had made the right choice. I passed along Willard's comment to Art, and I think that I made his day if not decade. We will not forget why we named the structure the J. Willard Hurst Faculty

Tournament and the Growth of Large Law Firms, 76 VA. L. REV. 747 (1990) (discussing development and characteristics of large law firms); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & SOC'Y REV. 115 (1979) (contrasting conventional models of law practice with a gate keeping and bargaining function); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177, 192 (Robert L. Nelson et al. eds., 1992).

42. STEWART MACAULAY, JOHN KIDWELL, WILLIAM WHITFORD & MARC GALANTER, *CONTRACTS: LAW IN ACTION* (1995).

43. I described in my memorial comments published in the *Law & Society Newsletter*, Stewart Macaulay, *Memorial Comments*, L. & SOC'Y NEWSLETTER, Aug. 1997, at 2-3, the authors' pleasure at Hurst's enthusiastic response to *Contracts: Law in Action*. He said that he picked up the copy that I had given him, intending only to skim it for a few minutes. However, he spent the weekend reading the whole thing. Had Willard been younger and in better health, I am sure that we would have received pages of comments and suggestions for a second edition.

Office Tower. We will make sure that our new colleagues and students understand the significance of the name. The University of Wisconsin Law School is something different and special. If we lose the law and society tradition that Willard Hurst did so much to pioneer, we risk falling into the role of a conventional state university law school. Most state schools play this part as well as they can, and there is no reason to think that we would do it any better than they do. Willard's whole career and devotion to this institution reminds us not to lose the most important thing that we have: the widely held idea that this is "Willard's law school."