

**DEVELOPMENT IS NOT A DINNER PARTY:
A HURSTIAN PERSPECTIVE ON LAW AND GROWTH IN
CHINA**

BY JOHN OHNESORGE¹

Much has been written, and remains to be written, about the many roles law has played in China's economic development since 1978. Without minimizing the value of what has been written so far, this essay seeks to broaden the discussion by applying to China's recent history certain ideas of the great historian of nineteenth century American law and economic development, James Willard Hurst. The essay proceeds by providing a brief introduction to Hurst and his work on law and economic growth in the United States, then explores how those ideas might be applied to assist our understanding of what has happened in China.

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¹ John Ohnesorge is a Professor of Law at the University of Wisconsin Law School. Professor Ohnesorge teaches Business Organizations and Administrative Law, as well as seminars in Chinese Law, and in Law and Development.

[A] revolution is not a dinner party, or writing an essay, or painting a picture, or doing embroidery; it cannot be so refined, so leisurely and gentle, so temperate, kind, courteous, restrained and magnanimous. A revolution is an insurrection, an act of violence by which one class overthrows another.

Mao, Ze-Dong, “Report on an Investigation of the Peasant Movement in Hunan” (March 1927), Selected Works, Vol. I, p. 28.

INTRODUCTION

Much has been written, and remains to be written, about the many roles law has played in China’s economic development since 1978, when China began reopening to the West.² Without minimizing the value of what has been written so far, this essay seeks to broaden the discussion by applying to China’s recent history certain ideas of the great historian of nineteenth century American law and economic development, James Willard Hurst. The essay proceeds by providing a brief introduction to Hurst and his work on law and economic growth in the United States (Part II), then explores how those ideas might be applied to sharpen our understanding of what has taken place in post-Mao China (Part III). Applying a Hurstian lens to China’s recent experience turns out to serve as a valuable corrective to certain ideas common in

² See generally John Ohnesorge, *East Asia and the study of law and development*, in ROUTLEDGE HANDBOOK OF ASIAN LAW 41 (Christoph Antons ed., 2017) (containing selected references to literature on law and development in China).

Law and Development circles,³ though doing so does not convey lessons that could be easily turned into a new approach.

I. HURST ON LAW AND DEVELOPMENT IN NINETEENTH CENTURY AMERICA

James Willard Hurst, arguably the twentieth century's leading historian of American law, was an extraordinary intellectual. Despite being a star graduate of the Harvard Law School, research assistant to Felix Frankfurter, clerk to Supreme Court Justice Louis Brandeis, and receiving offers to move to more prestigious law schools, Hurst spent his entire academic career at the University of Wisconsin Law School.⁴ At Wisconsin, Hurst “developed an entirely new mode of thinking about American legal history,”⁵ turning the field away from either chronologies of doctrinal change, or “gossip” about Supreme Court justices, to a field devoted to studying legal change within the larger context of social change. Hurst aspired to “discover how law had actually worked

³ Law and Development here refers to the intellectual field focused on understanding the role of law in modern economic development, especially in less-developed countries.

⁴ See Aviam Soifer, *Reflections on the 40th Anniversary of Hurst's Growth of American Law*, 17 L. & SOC. INQUIRY 167, 169 (1992); *Why Was James Willard Hurst Important for Legal History?*, DAILY HIST. (Nov. 22, 2018, 9:14 PM), https://dailyhistory.org/Why_was_James_Willard_Hurst_important_for_legal_history%3F.

⁵ Stanley N. Katz, *James Willard Hurst*, 144 PROC. AM. PHIL. SOC'Y 459, 460 (2000).

in the lives of Americans,”⁶ an aspiration for a legal historian that now seems so obvious that it is hard to imagine a time when that was revolutionary. Hurst did lead a revolution in legal history, however, and to help him carry it off he brought many aspiring legal historians to Madison, some as SJD candidates or visiting researchers, and some to join the faculty. In order to focus intensely on the interactions between law and social life through historical time, Hurst at times narrowed his geographic focus to the Upper Midwest, and browsing the bibliographies of his works reveals many references to doctoral dissertations on various aspects of Wisconsin legal history.⁷ Scholars who joined the Law School faculty during Hurst’s tenure went on to become leading legal historians of the next generation, including Lawrence Friedman,⁸ Bob Gordon,⁹ Dirk Hartog,¹⁰ as did long-term Law School visitors such as Stanley Katz.¹¹

⁶ *Id.* at 461.

⁷ *See, e.g.*, James Willard Hurst, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836–1915*, 615–16 (1964) (listing ten University of Wisconsin graduate degrees among the sources, including two S.J.D. dissertations from the Law School) [hereinafter *LAW AND ECONOMIC GROWTH*].

⁸ *Lawrence M. Friedman*, STANFORD L. SCH., <https://law.stanford.edu/directory/lawrence-m-friedman/> (last visited Mar. 30 2021).

⁹ *Robert W. Gordon*, YALE L. SCH., <https://law.yale.edu/robert-w-gordon> (last visited Mar. 30 2021).

¹⁰ *Hendrik Hartog*, PRINCETON UNIV. DEP’T HIST., <https://history.princeton.edu/people/hendrik-hartog> (last visited Mar. 30, 2021).

¹¹ *Stanley N. Katz*, PRINCETON UNIV. SCHOLAR, <https://scholar.princeton.edu/snkatz/biocv> (last visited Mar. 30, 2021).

Hurst's approach to legal history was very much in tune with Wisconsin's growing emphasis on Law and Society, of which it should be understood as a major contributor. Hurst and Wisconsin's dean at the time, Lloyd Garrison, offered in the 1940s a course they called "Law in Society," an early example of a legal process course.¹² One of the social aspects of law that most interested Hurst was how law was created, so in addition to focusing on law's origins in his historical works,¹³ Hurst also pioneered a course on the legislative process as part of the general law school curriculum.¹⁴ In describing what set Hurst and his approach to legal history apart from what had come before, Stanley Katz cites Hurst's "concern for law in local settings, for the role of individuals and non-legal organizations in making law, for the importance of conflict in shaping law, and for the possibilities of a creative role of law in a developing economy."¹⁵ While Hurst is not generally associated with the Law and Development tradition

¹² Katz, *supra* note 5, at 461. For a published version of Wisconsin Legal Process materials, see Carl Auerbach, Lloyd K. Garrison, Willard Hurst & Samuel Mermin, *THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES* (1961).

¹³ See, e.g., James Willard Hurst, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950).

¹⁴ Katz, *supra* note 5.

¹⁵ *Id.* at 461.

that began to flower at Wisconsin in the 1960s,¹⁶ his interests in external approaches to law, and specifically in understanding interactions between legal and economic change, certainly supported the Law and Development activities of younger faculty such as, Marc Galanter,¹⁷ Robert Seidman,¹⁸ David Trubek,¹⁹ Joe Thome,²⁰ Charles Irish²¹ and others. Lawrence Friedman, for example, known now primarily as a legal historian, was an early contributor to the scholarly literature on Law and Development, expressing substantial skepticism about such efforts.²² In discussing the Law and Development program at Yale Law School in the early 1970s, David Trubek described the group's scholarly aspiration as being the creation of "comparative sociology of

¹⁶ On the origins of the Law & Development movement, see David M. Trubek, *Law and Development: Forty Years After 'Scholars in Self-Estrangement,'* 63 *Toronto L.J.* 301 (2016).

¹⁷ *Marc Galanter*, UNIV. WIS. L. SCH., <https://law.wisc.edu/profiles/msgalant@wisc.edu> (last visited Mar. 30, 2021); see, e.g., Marc Galanter, *The Modernization of Law, in MODERNIZATION; THE DYNAMICS OF GROWTH* 153 (Myron Weiner ed., 1966).

¹⁸ *BU Law Mourns the Loss of Longtime Professor Bob Seidman*, BOS. UNIV. SCH. L. (Apr. 15, 2014), http://www.bu.edu/law/news/bob_seidman_memoriam.shtml; see, e.g., Robert B. Seidman, *Law and Development: A General Model*, 6 *L. & SOC'Y REV.* 311 (1972); Robert B. Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 *WIS. L. REV.* 999 (1966).

¹⁹ *David Trubek*, UNIV. WIS. L. SCH., <https://law.wisc.edu/profiles/dmtrubek> (last visited Mar. 30, 2021).

²⁰ *Joseph Thome*, UNIV. WIS. L. SCH., <https://secure.law.wisc.edu/profiles/jrthome@wisc.edu> (last visited Mar. 30, 2021).

²¹ *Charles Irish*, UNIV. WIS. L. SCH., <https://law.wisc.edu/profiles/crirish> (last visited Mar. 30, 2021).

²² See, e.g., Lawrence M. Friedman, *Legal Culture and Social Development*, 4 *L. & SOC'Y REV.* 29 (1969); Lawrence M. Friedman, *On Legal Development*, 24 *RUTGERS L. REV.* 11 (1969).

law,”²³ an ambition that would have been entirely understandable to Hurst, though he himself seems to have limited himself to comparisons between the American past and present.²⁴

The most accessible window into Hurst’s ideas about law and economic development is his short book, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956) (hereafter cited in text as *Conditions of Freedom*), which is based on his Rosenthal Lectures at Northwestern University Law School.²⁵ In it, Hurst demonstrates several aspects of his approach that set it apart from much thinking about law and economic development, and can provide an interesting lens through which to view China’s recent experience.

²³ See David M. Trubek, YALE UNIVERSITY PROGRAM IN LAW AND MODERNIZATION, *report to AGENCY FOR INTERNATIONAL DEVELOPMENT* 5 (1972) (defining comparative sociology of law as “[a] social science discipline allied with legal sociology, legal anthropology, comparative sociology and cooperative politics on the one hand, and legal studies (jurisprudence, legal history) on the other, this field attempts to formulate and test universal propositions about relationships between law and society. Among these are included propositions about the relationship between legal systems and industrialization, both historically and in the contemporary Third World. CLS employs the methods of the social science fields to which it is allied.”).

²⁴ It is possible to see Hurst’s argument about the U.S. experience as being set against a background of England or Europe, and he does refer to other jurisdictions from time to time, though without casting his work as comparative.

²⁵ LAW AND ECONOMIC GROWTH, *supra* note 7, published in 1964, explores many of the themes introduced in the earlier book, but has a well-earned reputation for being a difficult read. See, e.g., Mark Tushnet, *Lumber and the Legal Process*, 1972 WIS. L. REV. 114, 115 (1972) (“On first reading, *Law and Economic Growth* may seem a confused mixture of unrelated material.”).

Most broadly, Hurst presented economic growth in the nineteenth century U.S. as resulting from the “release of energy,”²⁶ a way to conceptualize economic endeavor that bears important connections to Wisconsin historian Fredrick Jackson Turner’s emphasis on the frontier in shaping the path of American history,²⁷ and economic historian Alexander Gerschenkron’s views on the role of economic backwardness in development.²⁸ The westward expansion of the United States across the continent, especially in the north, supplied the primary stage upon which Hurst saw American’s entrepreneurial energy being released, and one of the primary functions of law was to assist in this release of this private, entrepreneurial energy.²⁹ Hurst’s vision of economic development as resulting from the release of pent-up creative energy is suggestively similar to Gerschenkron’s image of how rapid economic growth occurred historically in such “late” developers as Imperial Germany.³⁰ “Backwardness” for Gerschenkron provided an opportunity for rapid economic development, provided

²⁶ JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3 (1956) [hereinafter *CONDITIONS OF FREEDOM*].

²⁷ See Frederick Jackson Turner, *The Significance of the Frontier in American History*, Address to the American Historical Association, Chicago, Illinois (July 12, 1893), in *FREDERICK JACKSON TURNER, HISTORY, FRONTIER, AND SECTION: THREE ESSAYS BY FREDERICK JACKSON TURNER* (1993).

²⁸ Alexander Gerschenkron, *Economic Backwardness in Historical Perspective*, in *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE: A BOOK OF ESSAYS* 5 (1962).

²⁹ *CONDITIONS OF FREEDOM*, *supra* note 26, at 1–6.

³⁰ Gerschenkron, *supra* note 28, at 7.

appropriate policies could be adopted, not unlike what Hurst chronicled in the nineteenth century U.S., and Hurst's release of energy image shares something with the "animal spirits" that Keynes thought drove capitalist risk taking.³¹ The theorist whose ideas seem most directly comparable to Hurst's, however, is Joseph Schumpeter, who identified the process of "creative destruction" as the engine of capitalism.³² In *Conditions of Freedom* Hurst chronicles how the energy-releasing policies reflected in the legal rules and institutions of the nineteenth century U.S. drove this country's rapid economic expansion.

For Hurst, law's function in development was thus not of the narrow technocratic type so often discussed in Law and Development literature, to provide particular rules to govern this or

³¹ See generally Roger Koppl, *Retrospectives: Animal Spirits*, 5 J. ECON. PERSP. 203 (2001).

³² See generally THOMAS K. McCRAW, *PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION* (2007). The influence of Schumpeter's ideas on Hurst will not be explored here, nor will the influence of Max Weber. Hurst's works contain citations to both Schumpeter and Weber, however, and the fact that all three engaged in macro-level theorizing about economic, social and legal change over time suggests intellectual influences worthy of further research. To quote Schumpeter, "[t]he continental student of economics [such as himself] absorbed a sociology of legal institutions—that meant much for his intellectual equipment—in many cases before he had had a word of technical economics." JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 407 (Elizabeth Boody Schumpeter ed. 1954). See also JOSEPH SCHUMPETER, *Theoretical Problems of Economic Growth*, in *ESSAYS ON ENTREPRENEURS, INNOVATIONS, BUSINESS CYCLES, AND THE EVOLUTION OF CAPITALISM* 232 (Richard V. Clemence ed. 1989). Resonances between this historically and institutionally informed approach to economics and Hurst's work are clear; in fact a succinct description of much of Hurst's work would be as an inquiry into the sociology of legal institutions as they related to American economic life.

that facet of economic activity, but was much more wholistic. As Katz put it, Hurst “did not assume that ‘law’ was what happened exclusively in the courts . . . , nor did he think of it as a static body of rules and structures. He envisioned law as dynamic, as a living organism, the product of human interactions.”³³ Hurst believed that the careful study of law in its wider social context, could reveal implicit public policy, which played itself out through identifiable “working principles concerning the uses of law.”³⁴ Working principles of a society’s law were for Hurst not what a people’s philosophers of law said they were doing, but were instead to be inferred from what a people were actually doing.³⁵ Looking back at U.S. law during our most dynamic period of economic expansion, 1800 to 1870, Hurst identified two primary principles. First, “[t]he legal order should protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression.” To do this,

law might be used both (a) to secure a man a chance to be let alone, free of arbitrary public or private interference, . . . and (b) to provide instruments or

³³ Katz, *supra* note 5, at 461.

³⁴ CONDITIONS OF FREEDOM, *supra* note 26, at 5–6.

³⁵ *Id.* at 5.

procedures to lend the support of the organized community to the effecting of man's creative talents, even where this involved using the law's compulsion to enforce individual arrangements.³⁶

While this first principle might suggest that Hurst held what would now be called a “neoliberal” view of law's role in development, emphasizing property and contract, and a limited role for the state, the second fundamental working principle he identified was that “[t]he legal order should mobilize the resources of the community to help shape an environment which would give men more liberty by increasing the practical range of choices open to them and minimizing the limiting force of circumstances.”³⁷ Hurst took pains to emphasize that, despite his emphasis on the role of private actors pursuing their individual material goals, an honest assessment of the U.S. experience did not support a policy of *laissez faire* or a “Night Watchman” state. Instead, according to Hurst, “[w]here legal regulation or compulsion might promote the greater release of individual or group energies, we had no hesitancy in making affirmative use of the law.”³⁸ “Not the jealous limitation of the power of the state, but the release of individual

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *Id.* at 7.

creative energy was the dominant value.”³⁹ Hurst’s holistic, or perhaps environmental, definition of law allowed him to also recognize that law might facilitate the release of energy by its non-enforcement, as well as its enforcement. It was true that Americans valued law’s role in protecting private property, but for Hurst this was primarily a political rather than an economic ideal. Americans valued law’s role in protecting private property because this guaranteed “a wider dispersion of the powers of decision in the community; this it did by committing to private hands legally protected control over the bulk of economic resources.”⁴⁰ This did not, Hurst believed, result in American law sanctifying private property above all else; rather, private property in nineteenth century America was “pre-eminently a dynamic, not a static institution.”⁴¹ “We did not devote the prime energies of our legal growth to protecting those who sought the law’s shelter simply for what they had; our enthusiasm ran rather to those who wanted the law’s help positively to bring things about.”⁴² Thus when the law had to deal with questions such as the vested rights of private owners of infrastructure such as roads and bridges, courts were

³⁹ *Id.*

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 10.

⁴² *Id.*

generous in allowing communities to exercise eminent domain,⁴³ and also allowed delegation of the power of eminent domain to private corporations, “generally in the field of communications or water power development.”⁴⁴

Self-described “Hurstian” Stanley Katz describes Hurst as “at heart an optimist about the social and economic possibilities of law in American society.”⁴⁵ A sense of this comes through in *Conditions of Freedom*, especially in sections focused on the latter decades of the nineteenth century, 1870 onwards, and the rise of legal regulation to curb earlier excesses. While this progressive optimism separates Hurst from more critically-oriented historians who followed him, including at Wisconsin, Hurst could not be accused of being ignorant of the “negative face of law,” one of the self-criticisms leveled by David Trubek and Marc Galanter in their 1974 article about their own law and development approach, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*.⁴⁶ Hurst adopted

⁴³ *Id.* at 27.

⁴⁴ *Id.* at 63.

⁴⁵ Katz, *supra* note 5, at 461.

⁴⁶ David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1083–85 (1974).

a descriptive rather than normative stance in describing how he believed law had in fact supported rapid economic expansion, but he clearly believed that some of the results were very damaging. In particular, as he put it, “[n]ineteenth-century public policy . . . declared itself for the ambitious demands of the present over the claims of the future.”⁴⁷ Law facilitated the rapid growth of the railroads, but Hurst described that development as being done “at wasteful speed, inviting fraud in aid grants and construction costs, overbuilding, and saddling local governments and farmers with unwisely apportioned and burdensome debt. The third quarter of the century mortgaged the future for present haste in building railroads,”⁴⁸ Hurst was also deeply interested in how the northern forests of the Midwest were ravaged during the westward expansion, and how public lands policies, embedded in law, encouraged the destruction:

We would realize the greatest present production we could from the land, though in the contemporary state of the economy this meant throwing away much that a broader future development could use. So farmers burned off great stands of hardwood to clear fields. Lumbermen mined the forests for the most immediately marketable timber, leaving

⁴⁷ CONDITIONS OF FREEDOM, *supra* note 26, at 67.

⁴⁸ *Id.*

uneconomic islands of residue and cutting without regard to new growth or control of fire hazards.⁴⁹

What is interesting about this in the context of contemporary law and development debates is that Hurst did not feel compelled to find a theory of law and development that would make economic development depend upon law that was “good,” beyond being good at releasing economic energy. In current parlance, it seems clear that Hurst did not believe that America was engaged in sustainable development for most of the nineteenth century, but as a scholar it was still important for him to honestly describe the various roles that law was playing, some good and some bad.⁵⁰

Finally, an important implication of Hurst’s approach, and one that makes his approach useful comparatively, may be that all episodes of successful, market-based economic development are similar at a high level of abstraction in that they all involve law facilitating the release of individual energy, but at a lower level of abstraction they are very likely to differ significantly, as in each society the challenge of what law will have to do to facilitate such release energy will depend on actual social conditions, which are almost

⁴⁹ *Id.* at 70.

⁵⁰ *See generally* Tushnet, *supra* note 25, at 125–26 (applying the language of negative externalities and citing the work of Albert O. Hirschman on “unbalanced growth.”).

certain to vary. The realization that there is no one-size-fits-all when it comes to law and development, a lesson that seems to get learned over and over by succeeding generations of practitioners and observers, would likely have seemed quite obvious to Hurst. Law in his sense could play many different roles in an economy, and what would be required of law to release the economy's animal spirits in any particular society would obviously depend on the *status quo ante*. What Hurst never saw in his lifetime was Soviet-style economic system transform itself into a market-driven system, as China has done, though his intellectual curiosity and deep interest in law and social change suggest that he would have found it a fascinating test of his ideas.

II. A HURSTIAN TAKE ON LAW IN CHINA'S POST-1978 ECONOMIC HISTORY

The following section begins to do for China's post-1978 experience of rapid economic growth what Hurst did for the nineteenth century U.S., examining well-recognized aspects of China's economic development experience and exploring their relationship with the Chinese legal system of the time.

A. Early Agricultural Reforms

Private ownership of land was abolished in China after the communist victory in 1949, and in the countryside this was the first step toward the collectivization of the agricultural sector. Forced collectivization proved to be bad agricultural policy, as it suppressed productivity for decades.⁵¹ As China turned toward market-oriented reforms in the late 1970s, one of its first policy experiments was to allow farmers to keep a portion of their crops to sell on newly-sanctioned private markets.⁵² This resulted in a major surge in agricultural productivity, and accords very well with a Hurstian story of economic growth being triggered by the release of a people's productive energies. The role that law played in these agricultural reforms is probably best thought of as permissive, allowing Chinese farmers to do what had previously been prohibited, but not telling them what exactly *to* do with their new freedoms, nor guaranteeing that anything they might want to do would be allowed. Chinese farmers did not require full legal certainty to begin taking advantage of their new freedoms, however, a pattern that has been repeated over and over as China

⁵¹ BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* 88–91 (2007).

⁵² *Id.* Around the same time the government also allowed rural residents more freedom to engage in non-agricultural enterprises. See NICHOLAS R. LARDY, *MARKETS OVER MAO: THE RISE OF PRIVATE BUSINESS IN CHINA* 17 (2014).

has developed economically and legally. Measures have been taken on a local and/or provisional basis, and if they prove effective in driving economic growth they are enacted more formally, and implemented more broadly. This pattern of development with relatively minimal law, after which more formal law is adopted, can challenge conventional thinking about law and development,⁵³ but would probably not have surprised Hurst. He began *Conditions of Freedom* with the story of the Pike Creek Claimants Union, an organization formed by illegal settlers amongst themselves “for the attainment and security of titles to claims on Government lands” in present-day Wisconsin to which they had no actual legal claims.⁵⁴

In addition to buttressing Hurst’s observation from U.S. history that robust economic activity and growth does not always depend upon legal formality, the role of law in China’s agricultural reforms is also relevant to the question of whether China’s Communist Party deserves credit for lifting the Chinese people out of poverty.⁵⁵ From a Hurstian perspective this would not seem to

⁵³ Ohnesorge, *supra* note 2.

⁵⁴ *CONDITIONS OF FREEDOM*, *supra* note 26, at 3–5.

⁵⁵ See, e.g., Tess Bonn, *Sanders: China Has Done More to Address Extreme Poverty Than Any Country in the History of Civilization*, THE HILL (Aug. 27, 2019).

be a particularly fruitful debate, as it would turn on the definition of “lifting.” If episodes of successful economic development generally result from legal or policy changes that release human energy, as Hurst believed had happened in the U.S., should the rulers be praised for abolishing, or ignoring, fetters on economic striving that they created in the first place? In other words, has the Communist Party been lifting people from poverty since 1978, or just releasing them from economically perverse constraints that the Party imposed in the first place? Perhaps since 1978 the Chinese people have lifted the Party out of poverty, rather than the other way around.⁵⁶

B. Decentralizing Economic Controls and Incentivizing Local Officials

In addition to the agricultural reforms discussed above, observers of Chinese economic reform have long pointed to the importance of Beijing’s decision decades ago to decentralize approvals over some types of economic activity, particularly foreign direct investment,⁵⁷ and to adjust the cadre evaluation system to emphasize economic development metrics in evaluating the

<https://thehill.com/hilltv/rising/458976-sanders-china-had-done-more-to-address-extreme-poverty-than-any-country-in-the>.

⁵⁶ Sky News Australia, *China Lifted Out of Poverty ‘By the People, Not the Communist Party,’* YOUTUBE (Oct. 1, 2019), <https://www.youtube.com/watch?v=RZhsiTij3u4>.

⁵⁷ NAUGHTON, *supra* note 48, at 410–11.

performance of many local officials.⁵⁸ Either move alone would likely have incentivized local officials to direct their energies in growth-supporting ways, but with respect to encouraging foreign direct investment, a key element of China's export-oriented development path, the two policy changes in combination seem to have been remarkably effective, setting off a competition among local governments to attract foreign investment that helped China succeed in this respect beyond any other developing country.⁵⁹ These are not the type of legal reforms that are typically addressed by law and development scholars, as the former involves an internal reallocation of authority between to levels of government, and the latter involves adjustments to the internal workings of China's civil service system. It is easy to appreciate the growth-producing potential of these reforms from a Hurstian perspective, however. Both policies adjusted existing systems without overturning them, and adjusted them in ways that released energies to pursue personal gain, by foreign and local businesses seeking to

⁵⁸ Tom Hancock, *Why China Can't End Its Romance With GDP Growth Target*, BLOOMBERG, (Mar. 7, 2021, 11:05 PM), <https://www.bloomberg.com/news/articles/2021-03-07/why-china-can-t-end-its-romance-with-gdp-growth-target>. "Cadre" originally referred to higher-level members of the Communist Party, but because the government and the Party are so closely intertwined, the cadre evaluation system has also served as the main system for review government staff, include those who are not Party members.

⁵⁹ NAUGHTON, *supra* note 48, at 410–11.

work together, and by local government officials seeking to climb the career ladder.

C. Releasing Energy by Not Enforcing Law

The fact that Hurst understood law as a dynamic social system, rather than as a system of rules, meant that his theorizing could incorporate the idea that law could contribute functionally to the release of energy through its non-enforcement, as well as through its enforcement. It would have been hard to study law and the economy in the nineteenth century U.S. without coming to this realization, as the westward expansion that drove economic growth involved repeated instances in which the legal rights of Native Americans were trampled upon. A Hurstian view of law in Chinese economic development also reveals instances of non-enforcement being not simply weaknesses or flaws in the system, but integral to the economic development model itself.

An key example of this would be the policy of ignoring core aspects of the household registration, or *hukou*, system, the internal restrictions on movement that China imposed decades ago to

control its populace.⁶⁰ For decades the *hukou* system formally segregated China's rural and urban populations, rigidly segmenting its labor markets.⁶¹ China's post-1978 economic expansion depended upon rural workers moving to the cities however, to build the skyscrapers and to staff the factories, so the *hukou* system potentially represented a major obstacle to the release of this vast reservoir of human energy. Rather than formally revoking the *hukou* system, however, the Chinese government's dominant strategy has been lax and highly selective enforcement, which has served the Hurstian function of releasing the energies of rural workers to pursue economic opportunity in urban areas. Though reformed, the *hukou* system remains largely in place to this day, demonstrating that a policy change crucial economic growth was thus implemented largely through non-enforcement rather than legal change.⁶² Similarly, China's lax enforcement of intellectual property law can be viewed through the Hurstian lens, and doing so may facilitate understanding, though without answering larger

⁶⁰ *Id.* at 124; LARDY, *supra* note 49, at 19–20.

⁶¹ LARDY, *supra* note 49, at 19–20.

⁶² Efforts to legally reform or do away with the *hukou* system have been a regular topic of debate during the reform era. See, e.g., NAUGHTON, *supra* note 48, at 124–5; An Baijie, *Hukou Reforms Target 2020: Official*, CHINA DAILY (DEC. 18, 2013), http://www.chinadaily.com.cn/china/2013-12/18/content_17180844.htm; *Changes to China's Hukou System are Creating New Divides*, THE ECONOMIST (Aug. 19, 2020), <https://www.economist.com/china/2020/08/19/changes-to-chinas-hukou-system-are-creating-new-divides>.

questions. It is often noted in discussions of China's record on intellectual property rights protection that in the nineteenth century the U.S. was a major infringer of the intellectual property rights of the British and the Europeans.⁶³ This might be noted to accuse the U.S. government of hypocrisy for advocating greater intellectual property protection in developing countries, but governments are not people, and we should all hope to see governments pursuing what is in the interests of their people today, even if that means objecting to something that the same government did in the past. A Hurstian perspective on the issue is more interesting, as from this perspective weak intellectual property protection can be understood as highly functional economically, in the U.S. in the past and in China today, even if objectionable at the same time. In a condition of economic and technological backwardness such as China faced in 1978, forcing China's nascent entrepreneurs to pay market prices for foreign technology would have meant that much, much less technology would have been available to support growth. Whether or not weak intellectual property protection has

⁶³ See, e.g., Mike W. Peng, David Ahlstrom, Shawn M. Carraher, & Weilei (Stone) Shi, *History and the Debate Over Intellectual Property*, 13 *MGMT. & ORG. REV.* 15, 16 (2017).

cultural roots in China or other East Asian societies,⁶⁴ it is deeply woven into China's economic development policies, a feature not a bug. Countries in the midst of rapid economic development episodes are likely to resist abandoning core features that are working for them, as the U.S. resisted in the past and as China continues to resist.

III. A LOOK TO THE FUTURE

In addition to adopting a Hurstian perspective to examine China's recent past, as we have done above, we might also benefit from applying Hurst's perspective in considering where China is likely to go from here. In the later sections of *Conditions of Freedom*, Hurst turns to developments in the latter decades of the nineteenth century, as the country began using the legal system to moderate many aspects of the preceding era. He describes this era, which began around 1870, as being characterized by "a renewed political focus upon the general organization of power."⁶⁵ This highlights an important aspect of Hurst's vision of American history, as well

⁶⁴ For an exploration, see WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

⁶⁵ *CONDITIONS OF FREEDOM*, *supra* note 26, at 71. The previous era, 1800–1870, the era of most rapid economic growth and change, he had described as being preoccupied with "the economic challenge of physical and social circumstance." *Id.*

as a fundamental difference between China today and America in the nineteenth century.

Due to the democratic nature of the American political system, the prime mover in American history was “us,” or “we,” terms that Hurst used throughout his telling of the history. A standard criticism of Hurst has been that his “we” did not include large groups of people (women for the most part, African Americans, Native Americans),⁶⁶ and it is possible that Hurst would now state things differently. It is also possible, however, that he would insist that using his largely white, male “we” to describe the motive force in American legal and economic development during that period was historically accurate, while at the same time describing a morally flawed social order. It was characteristic of Hurst to proceed as if it were useful, possible, and perhaps even important, for scholars to separate the *is* from the *ought*, description from approval.⁶⁷ The changes that came about from 1870 onwards, to

⁶⁶ See, e.g., *Why Was James Willard Hurst Important for Legal History*, *supra* note 4.

⁶⁷ This is one of the commitments that Hurst shared with Joseph Schumpeter. See, e.g., Joseph A. Schumpeter, *Science and Ideology*, 39 AM. ECON. REV. 346, 346 (1949) (“To investigate facts or to develop tools for doing so is one thing; to evaluate them from some moral or cultural standpoint is, *in logic*, another thing, and the two *need* not conflict. Similarly, the advocate of some interest may yet do honest analytic work, and the motive of proving a point for the interest to which he owes allegiance does not in itself prove anything for or against this analytic work: more bluntly, advocacy does not imply lying.

ameliorate the worst excesses of the previous era, were a result of the democratic political process employing legal tools to bring about social change. This was in part due to “we” expanding to include women and others who had been excluded earlier, developments of which Hurst, as a Progressive, approved.

In any case, however, this all presents a major contrast from China, where the prime mover in the use of law to release energy, and to shape the path of economic growth, has not been the Chinese people, or even a subset of them, acting through a representative democracy, it has been the top leadership of the Communist Party. For example, Hurst believed that in America, as many believe has been true in China, the shift to a socio-legal system oriented toward rapid, market-based development was supported by an ideological shift that helped provide justification. As Hurst put it, “[t]he release-of-energy faith demonstrated in our law expressed one aspect of a social value scale which measured men by their accomplishment in striving toward self-appointed material goals, rather than by their status,” citing influential social scientists of the

It spells indeed misconduct to bend either facts or inferences from facts in order to make them serve either an ideal or an interest.”).

day.⁶⁸ However in America it was Hurst's "we" who embraced that social value scale, who declared that to get rich was glorious, while in China it had to come from supreme leader Deng Xiaoping.⁶⁹ If recent Chinese history had played out differently, and more like many once hoped it would, China would not have reached its current level of economic development without that triggering fundamental political reform to make the leadership more responsible to the people. If that had occurred, then at some point it would have become extremely unlikely that China could have returned to more statist, authoritarian governance, and instead the more likely path might have resembled Hurst's story of Progressive social and political reform in late nineteenth and early twentieth century America. Policies favoring growth at all costs would have been moderated through an increasingly democratic political process, maintaining the basic structures that had supported rapid growth, but moderating them at the behest of a society increasingly interested in environmental protection, a broader distribution of wealth, and a more fair society.

⁶⁸ CONDITIONS OF FREEDOM, *supra* note 26, at 109 n. 2.

⁶⁹ Whether Deng ever actually said this is a matter of dispute. See Eoin O'Carroll, *Political Misquotes: The 10 Most Famous Things Never Actually Said*, CHRISTIAN SCI. MONITOR (June 3, 2011), <https://www.csmonitor.com/USA/Politics/2011/0603/Political-misquotes-The-10-most-famous-things-never-actually-said/To-get-rich-is-glorious.-Deng-Xiaoping>.

Predicting the future is always fraught, but one recent development may suggest that China's current paramount leader Xi Jinping is willing to reverse innovations that seemed so functional to earlier Chinese growth.⁷⁰ With respect to the relationship between the top leadership and local authorities, a recent essay by political scientist Minxin Pei argues that Xi has

launched a vigorous campaign of ideological re-indoctrination to strengthen the commitment of Chinese officials to regime values. Taken altogether, it is not an exaggeration to argue that Xi has replaced an incentive-based system with one centered on fear and ideology. The former, according to Xi's speeches on corruption, was responsible for endemic corruption, loss of ideological commitment, and lax organizational discipline. In Xi's view, continuation of such a system will threaten the long-term survival of the Chinese Communist Party (CCP).⁷¹

The incentive-based system for local officials that Xi now attacks has been seen as one of the most important mechanisms for releasing entrepreneurial energy in China, however.⁷² What is interesting is that Xi may be correct that it has also been responsible for endemic corruption, ideological wavering, and lax

⁷⁰ Minxin Pei, *Bureaucratic Strategies of Coping with Strongman Rule: How Local Officials Survive in President Xi Jinping's New Order*, CHINA LEADERSHIP MONITOR (Sept. 1, 2019), <https://www.prcleader.org/pei-bureaucratic-strategies>.

⁷¹ *Id.*

⁷² See *supra* notes 54–56 and accompanying text.

bureaucratic discipline, and in furtherance of his desire to preserve CCP rule he may be willing to abandon the economic advantages that the incentive-based system introduced several decades ago. If he has the power to enforce policy changes like this it will demonstrate that the decades of economic development have not really broadened out who must count as the prime mover behind Chinese legal and economic reform. Hurst's "we" was certainly not representative of the entire society, but at least he could present a compelling argument that that segment of society drove law forward, and other segments of society were able to use the political system to expand the "we" to push the legal system to pursue wider goals. Unfortunately, China under Xi Jinping appears to be moving in the opposite direction.