
Calvin Woodard
Book Reviews


Professor Willard Hurst has written one of the most stimulating books that this reviewer has run across in some time. He has made a careful and scholarly survey of the nineteenth century from a unique point of view and come up with some most interesting, indeed remarkable, conclusions. Certainly the book deserves the attention of lawyers who are concerned with the perennial problem of the relationship between law and society, and politicians who are sometimes given to unfounded generalizations about the “good old days,” as well as historians who are interested in the past as such.

The purpose of this book is, as Professor Hurst puts it, to seek “to understand the law not so much as it may appear to philosophers, but more as it had meaning for workaday people and was shaped by them to their wants and visions.” (p. 5) And in order to so understand the law he looks to the actual uses to which it was put rather than to the ways in which nineteenth century philosophers or historians said it was used. For, as he says, “one usually senses that he is closer to apprehending the decisive faiths and beliefs of our nineteenth century ancestors when he reads these out of what they did and said as they acted, rather than out of their self-conscious philosophizing.” (p. 5)

The conclusions he reaches are startlingly different from the traditional laissez faire picture of the period in which the law “played a minimum positive role in shaping nineteenth century society.” (p. 7) In fact he finds that the law was used to an extent that would undoubtedly still alarm many present-day conservatives, for, he concludes:

“Relative to the great simplicity of structure in the Wisconsin community of 1836-1870, for example, there was hardly less readiness to use the positive power of the state than one sees in 1905-1915 as we usher in the twentieth century of administrative regulations.” (p. 7-8)
The point is, of course, that the LaFollettes, John R. Commons, E. A. Ross, and Richard T. Ely flourished during the latter period.

Professor Hurst begins with three “base lines of nineteenth century public policy” which determined the attitude of the “workaday” people towards the law: (i) “human nature is creative, and its meaning lies largely in the expression of its creative capacity”; (ii) “the meaning of life for men rests in their possession of a wide practical range of options or choices as to what they do and how they are affected by circumstances”; and (iii) these propositions are of special significance in the United States where “unclaimed natural abundance together with the promise of new technical command of nature dictate that men should realize their creative energy and exercise their liberty peculiarly in the realm of the economy to the enhancement of other human values.” (p. 5-6)

Inherent in these tenets, he finds two “working principles concerning the uses of the law” (p. 6): first, it should be used to maximize the “release of creative energy” of the individual—which meant not only avoiding all unnecessary interferences with him, but also providing him with “instruments and procedures to lend support of the organized community to the affecting of man’s creative talents, even where this involved using the law’s compulsion to enforce individual arrangements” (p. 6); and, secondly, it should be used so as to “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 forces of circumstances.” (p. 6) Both of these principles clearly contemplate positive uses of the law.

This book consists largely of a study of the numerous applications of these “working principles” by nineteenth century society. Appropriately, therefore, the first two (of three) chapters are entitled “The Release of Energy” and “Control of Environment” respectively. The third is called “The Balance of Power” for it deals with the period after 1870, when the deep changes in American life made the “base line” assumptions, with their optimistic confidence in the individual, somewhat tenuous. And Professor Hurst shows how, as a result, the “working principles” were reshaped during that period to meet the particular “challenge” then facing society: economic power amassed in the
hands of private individuals. The solution, or "response," was, in accordance with Calhoun's principle of meeting "power with power and tendency with tendency," to reestablish a "balance of power" through collective (private and public) action.

The value of such a study is enormous. By cutting through misleading verbiage and analyzing the actual uses to which the law was put, Professor Hurst has given us a known factor in the nineteenth century equation. He has, one feels, provided us with the means to a deeper understanding of the period than was possessed by the actors themselves; for we are in the splendid position of being able to compare what they said with what they did. And every nineteenth century statement made relating to the law should be compared with and evaluated in the light of Professor Hurst's record of actual performance.

But a study based on "principles defined and expressed primarily by action," however admirable, has inherent limitations. Professor Hurst recognizes this himself when he says:

"Of course, this is not the only viewpoint from which to appraise the legal system. . . . We are simply trying one angle of vision provided by history for the distinctive reality it may disclose." (p. 5)

Notwithstanding this disclaimer, however, Professor Hurst has not always recognized the limitations to this approach; and as a consequence he has assumed one conclusion that is neither justified by his premises nor conclusively established by his facts. And that conclusion is of such importance that it sets the tone for the whole book. It is that laissez faire was a myth in the nineteenth century.

In order to explode the myth of laissez faire it is obviously necessary to understand the meaning of the term. Professor Hurst (like many others who have attacked this "myth") has not bothered to define it; but he has described it as a society in which people "got along well enough if the legislature provided schools, the sheriff ran down horse thieves, the court tried farmers' title disputes, and otherwise the law left men to take care of

1. See, for example, HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA 1776-1860 (1948) and O. AND M. HANDLIN, COMMONWEALTH MASSACHUSETTS, 1774-1861 (1947), two studies that have decisively influenced contemporary versions of the role of the law in the nineteenth century. For some of the possible ramifications of these books see Stone, The Myth of Planning and Laissez Faire: A Reorientation, 18 GEO. WASH. L. REV. 1 (1948).
themselves.” (p. 7) Accordingly, his case against laissez faire consists of a detailed account of the numerous ways in which the law was used; and as such uses are far more common than his word-picture implies, he concludes that it was a myth.

No one, certainly not I, will deny that he has amply proved his case. But one can wonder if the “laissez faire” he has routed is that which was advocated during the nineteenth century. There is, I think, at least one compelling reason for suspecting that it is not. That is, some of the most influential and dogmatic champions of laissez faire sanctioned many (if not all) of the uses of the law to which Professor Hurst has referred.

A large and influential contingency of nineteenth century writers advocated “hands off” only as a general rule and not as a literal absolute. Yet they were still zealous advocates of laissez faire. Take for example John Stuart Mill, whom T. V. Smith has obligingly called the “spokesman of laissez faire.” Though an Englishman, he may perhaps speak for Americans of this faith for an edition of his Principles of Political Economy was published in this country within a year of its original publication in 1848; and, as Joseph Dorfman has noted, “as an up-to-date edition of Wealth of Nations it became the standard authority.”

2. This group would include, according to Schumpeter, most political economists. As he puts it (in a suggestive passage): “Practically all economists believed—no matter what they desired—that, as J. S. Mill put it, laissez faire was the general rule for the administration of a nation’s economic affairs and that what was significantly called state ‘interference’ was the exception. And, though for different reasons in different countries, this was so in actual practice not only as a matter of fact but also as a matter of practical necessity; no responsible administrator could have held then, and no responsible historian should hold now, that, social and economic conditions and the organs of public administration being what they were, any ambitious ventures in regulation and control could have issued in anything but failure.” SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 548 (1954).

Certainly it would include most of the English classical political economists. See, for example, MALTHUS, PRINCIPLES OF POLITICAL ECONOMY 14-16 (2d ed. 1830); McCulloch, PRINCIPLES OF POLITICAL ECONOMY 262-300 (4th ed. 1849); CAIRNES, ESSAYS IN POLITICAL ECONOMY—THEORETICAL AND PRACTICAL 282-284 (1873).

For an example of a legal scholar (as well as political economist) who advocated this precise brand of laissez faire, see LIEBER, ON CIVIL LIBERTY AND SELF GOVERNMENT 207 (1859).

On the practical side there is reason to believe that Alexander Hamilton should be included among them; for it has been said that he based his celebrated Report on Manufacturers on The Wealth of Nations. Bourne detected twenty close similarities, both in ideas and expressions, that would seem to suggest that Hamilton tracked Smith’s argument, diverging only where he felt exceptions were warranted because of difference of circumstances. Bourne, Alexander Hamilton and Adam Smith, 8 Q.J. ECONOMICS 328 (1894).

3. 2 THE ECONOMIC MIND IN AMERICAN CIVILIZATION 710 (1948).
Mill declared his colors in a well-known passage: "Laissez faire, in short, should be the general practice: every departure from it, unless required by some great good, is a certain evil." But this did not mean that he advocated a one-horse sort of society as described by Professor Hurst. Indeed he sanctioned many uses of the law that, according to Professor Hurst, were not taken up in America. As Mill wrote in a passage all too often overlooked today:

“When those who have been called the laissez faire school have attempted any definite limitation of the province of government, they have merely restricted it to the protection of person and property against force and fraud; a definition to which they nor anyone else can deliberately adhere, since it excludes, as has been shown in a preceding chapter, some of the most indispensable, and unanimously recognized, of the duties of government.”

And in the “preceding chapter” Mill made a basic distinction between the necessary and the optional functions of government, the former being those “which are inseparable from the idea of

4. 5 Mill, Principles of Political Economy c. xi, § 7 (1865).
5. A striking example of Mill recognizing an “exception” to his general rule of laissez faire that was not accepted in this country until much later involved the regulation of railroads, canals, and other public utilities. Mill regards these industries as being inherently monopolistic and he says “a government which concede such monopoly unreservedly to a private company, does much the same thing as if it allowed an individual or an association to levy any tax they chose, for their own benefit, on all the malt produced in the country, or on all the coffee imported to it.” Id. § 11.

Professor Hurst, describing the nineteenth century use of the law with respect to railroads and canals, refers to a “broad pattern of mid-nineteenth century public policy by which legislation delegated public function, to private groups.” (p. 65) These “delegated” public functions included the right to fix tolls; and he admits that “in the absence of any effective administrative provision to enforce the statutory standards [of reasonableness of rates], the delegated toll powers left a large discretion to the grantees to exact from their customers contributions to the capital of the enterprise.” (pp. 63-64) “In practical effect,” he concludes, the government “delegated a taxing power to private decision makers to help mobilize their capital.” (p. 63) And therefore it follows that laissez faire was a myth!

In the light of these two quotations it seems almost incredible that Mill should be advocating laissez faire and Professor Hurst proving it a myth. Yet that is exactly what they are doing. It certainly seems that Professor Hurst has ignored the truth that Henry Carter Adams observed in 1883: “The importance [he wrote] of government, or the extent of the function assigned to it, is not measured by the amount of legislation which its law-making bodies turn off from year to year, but rather by the nature of the administrative duties imposed upon it, or by the extent of the power assigned to its courts. . . . It is especially the administrative functions of government that the doctrine of laissez faire attacks.” Relation of the State to Industrial Action in Economics or Jurisprudence: Two Essays by Henry Carter Adams 116-17 (Dorfman, ed., 1883).
6. 5 Mill, Principles of Political Economy, c. xi, § 2 (1865).
a government, or are exercised habitually and without objection by all governments."

Now Mill's point is this: the "laissez faire school" did not, or did not mean to, condemn the "necessary" function of government. It sought only to curtail "optional" functions — those "on which diversity of opinion does or may exist." And even as regards these latter functions Mill advocated, or recommended, certain exceptions in which the government was "justified" in "interfering." In short, Mill's particular brand of laissez faire condemned only "unjustifiable interferences." Thus to explode it as a myth one must show that during the nineteenth century the law was used for "unjustifiable interferences"; and conversely it cannot be exploded by showing that the law was used for "necessary function" or "justifiable interferences," both of which were recognized "exceptions."

Has Professor Hurst done this? His sweeping language certainly indicates that he has. Thus in one of the most remarkable passages in the book he says "the nineteenth century was prepared to treat law casually as an instrument to be used wherever it looked as if it would be useful" (p. 10) ; and, again, "where legal regulation and compulsion might promote the greater release of individual or group creative energies we had no hesitation in making affirmative use of the law." (p. 7) But he has not actually considered the possibility that the uses of the law to which he has referred were "exceptions" to a general rule of

---

7. *Id.* c. i, § 1.

8. The word "interference," or some obvious synonym, was constantly used by nineteenth century writers. For example, Francis Bowen (the Harvard professor who said laissez faire meant "of course that God regulates things by his General Laws") held that "the ruler or governor who is most to be dreaded is, not the tyrant, but the busybody." *The Principles of Political Economy* 23 (2d ed. 1859). And Judge Thomas Cooley, the author of the well-known treatise on *Constitutional Limitations*, severely criticized the Supreme Court decision in *Munn v. Illinois*, 94 U.S. 113 (1876) (which upheld state regulation of public utilities "affected with a public interest") on the grounds that the State should not "impede" or "interpose impediments." *Princeton Review* (March 1878), quoted in *Twiss, Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* 37 (1942). These terms are of course loaded. They imply that the authors are referring to those laws that in fact "interfere" or "meddle" or "impede"; and they also suggest that the authors have overlooked or taken for granted a whole host of laws that are not so offensive. In other words, many nineteenth century authors may have unconsciously condemned government in general (including beneficial laws) because of contempt for certain "interfering" laws. As noted in the text, Mill was conscious of this tendency in his fellow members of the "laissez faire school"; and he reminded them of the numerous beneficial laws they had overlooked. Professor Hurst has fulfilled the same function today. The only difference is that Mill considered these other laws compatible with, while Professor Hurst holds them incompatible with, laissez faire.
laissez faire. Nor could he, logically; for his study, which is based on “principles defined and expressed primarily by action,” (p. 5) excludes all evidence of non-action (laissez faire).\textsuperscript{9}

In fact the great bulk of uses of the law described by Professor Hurst are specifically sanctioned by Mill as either “necessary functions” or “justifiable interferences”\textsuperscript{10} and as such they

\begin{itemize}
  \item It should be noted that Professor Hurst gives a very interesting account of how the notion of laissez faire came to be applied to the nineteenth century in the first place; for, as he says, “there is likely to be some basis in experience for every myth.” (p. 8) He attributes it to two factors: the unquestioned devotion of nineteenth century society to “property”; and to the “frontier” which obscured the true role of law.

  As to the former, Professor Hurst says that we unconsciously associate “property” with the seventeenth century English institution which so stoutly resisted the Crown; and by analogy we have assumed that since nineteenth century Americans were devoted to property that they harbored the same negative ideas about law and government. But, he points out, this was not so for “property” was, in the nineteenth century, “preeminently a dynamic, not a static institution.” (p. 8) As a result, our energies were devoted not to protecting the \textit{status quo}, but to producing and acquiring new property. And this required and demanded positive law.

  Now I do not deny this. In fact, I think it is one of the most significant points in the book. But what does it prove? That the nineteenth century did not adopt the seventeenth century English attitude towards the law; and that the law was used positively. It tells us absolutely nothing, however, about the nature of that use—whether it was used “compulsively” or “permissively,” to promote the rankest individualism or to increase social responsibility.

  The remarkable similarity between Professor Hurst’s proof that laissez faire is a myth and Mill’s list of “necessary function” of government (bk. v, c. i), is indicated by the following comparison: the decision to reject feudal restraints on the alienation of land to which Professor Hurst refers (pp. 12-13) is regarded by Mill to be a determination of the laws of inheritance—a necessary and inescapable function of government; the allocation of natural resources so as to “shape the environment” (chapter ii generally), and the formulation of public land policy so as to promote commercial agriculture (p. 55) and to direct the flow “of domestic investment” (p. 61) which loom so important to Professor Hurst, are but the consequences of the government exercising its necessary powers—none of which, according to Mill, are “less optional”—over our “common inheritance” of natural resources; by relying upon the doctrine of consideration and refusing to uphold contracts against public policy (pp. 11-12), as well as by forbidding states and municipalities to repudiate their public debts (p. 62), the courts were simply deciding which contracts the government would enforce, as well as providing tribunals for civil disputes—functions which Mill regarded as quite necessary in any civilized society.

  There are others as well. But one more sample will suffice to show how radically different Professor Hurst and Mill construe the same use of law. As if administering a lethal blow to laissez faire Professor Hurst says: “nineteenth century policy did not confine the spending of public relief to maintaining police functions. The rational government used its revenues from taxes as well as from public lands to build lighthouses and improve harbours, particularly at first in aid of coastal navigation.” (p. 61) Mill, however, calmly acknowledges all these governmental activities as “necessary functions” which do not even intrude “upon disputed ground.” In fact he says “making and improving harbours, building light-houses, making surveys in order to have accurate maps and charts, raising dykes to keep the sea out, and embankments to keep rivers in, are cases” in which the government has acted and “no one, however, even of those most jealous of state interference, has objected to [such action] as an improper exercise of the power of government.”

  Mill also listed eight “exceptional” cases in which governmental interference
could hardly be proof that Mill's general rule was a myth. Indeed one could say — and, I take it, Mill and his followers would hasten to do so — that Professor Hurst is guilty of considering "exceptions" out of context, thereby appearing to explode a general rule he has really proved. For when all is said and done Mill still preached, despite his "exceptions," something he called, and others understood to be, "laissez faire."11

But Mill was admittedly one of the more open-minded champions of laissez faire; and it may be said that his views are not representative of the more dogmatic members of that "school." Thus it should be useful to consider the attitudes of Herbert Spencer and Francis Wayland towards certain uses of law that Professor Hurst has relied upon to prove that laissez faire was a myth.

Professor Hurst gives a good deal of attention to the phenomenal growth of contract law which he calls "the outstanding area of common law development in the first half of the century" (p. 13); and he concludes that this development "invoked the compulsive force of the State to set a framework for dealing, to an extent which must materially qualify appraisal of the laissez faire element of our policy." (p. 15) Yet Herbert Spencer — perhaps the most extreme of the champions of laissez faire — divided social organizations into two types, the "Regime of Status" (based on "compulsory" cooperation) and the "Regime of Contracts" (based on "voluntary" cooperation).12 And to him the problem was not whether the law should be used or not used, but whether it should be used compulsively, at the initiative of

was justified. For a reference to one of these see note 5 supra. The point that I am trying to make here is that despite all these recognized uses of the law Mill still advocated laissez faire. If, therefore, Professor Hurst has shown that the law was so used, Mill has shown that they did not effect his brand of laissez faire. The question, therefore, is not whether law was or was not used; but whether it was used in accordance with Mill's stipulations — only for "necessary functions" and "justifiable interferences." It remains unanswered.

11. Lest one think Mill's "exceptions" demolished his "general rule," consider the following appraisal of them by Henry Carter Adams, who attacked laissez faire in the 'eighties. "The concessions granted by Mr. Mill ... amount to little when we notice how strictly he guards his exceptions to the rule that the state should not interfere with industrial action." RELATION OF THE STATE TO INDUSTRIAL ACTION IN ECONOMICS OR JURISPRUDENCE: Two Essays by Henry Carter Adams 75 (Dorfman, ed., 1954). Cf. note 5 supra.

12. THE MAN VERSUS THE STATE 1 (1884). Hofstadter notes, incidentally, that by 1903, 368,755 volumes of Spencer's works had been sold in the United States. SOCIAL DARWINISM IN AMERICAN THOUGHT 34. Sir Henry Maine put contract law in its proper perspective vis-a-vis laissez faire when he observed that it was the "bulwark of American individualism against democratic impulse and socialistic fantasy." POPULAR GOVERNMENT 248 (1885).
the State, or voluntarily, at the initiative of the individual. Thus one can easily imagine that he would have been genuinely puzzled by Professor Hurst's use of the term "compulsive force" in connection with contracts. Certainly one could argue that the development referred to by Professor Hurst was evidence that voluntary cooperation — which was, to Spencer, tantamount to laissez faire — was increasing, not decreasing, in influence.

Another nineteenth century phenomenon that Professor Hurst refers to in his attack against laissez faire is the development of the corporation which he calls "the most potent single instrument which the law put at the disposal of private decision makers." (p. 15) He notes that "the East India Company as the type of the corporation — a rare thing, an unusual grant of special privilege in law for purposes of high policy" (p. 15), was rejected; and, he adds, "it was characteristic of the nineteenth century that there was here also a demand for positive help from the law" for, in the place of the rejected special charter corporations, was substituted general corporation statutes, making "the privilege of incorporation for ordinary business purposes . . . available to all on equal terms." (p. 17) Now, this is an important development — one well worth bringing to our attention. But is it evidence that laissez faire was a myth? Let us compare these developments with the teachings of Francis Wayland, one whose devotion to laissez faire would hardly be questioned and whose Elements of Political Economy was the standard American text-book for some forty years following its publication in 1837. Among the "forms of legislative interferences" that he objects to (on the solid laissez faire grounds that they prevent the individual from making use of his capital and labour as he sees fit) is the monopoly form of corporation; and to show the consequent evils of such a practice he, like Professor Hurst, explains that "such was the exclusive right granted to the East India Company." Thus Wayland would hardly have objected to the decision to reject the monopoly-type corporation. Nor would he have objected to the use of the law to make the privilege of incorporation freely available. As he wrote:

". . . when individuals wish to be associated for any innocent purpose, they may claim an act of incorporation as a right; and it is necessary for the protection of the community that

13. The Elements of Political Economy 69 (1878).
it should be granted. And hence, from both of these considerations, it is incumbent upon a legislature to grant it.’”

Wayland would hardly agree, however, that this privilege gave the State any special power over, or the right to regulate, the affairs of corporations. Indeed he goes to great pain to point out that “the act of incorporation 'like all legislation' — never confers any right whatever; it only confirms those rights which previously existed.” Hence, to the suggestion that corporations are creatures of the legislature subject to legislative control, he indignantly retorts:

“This is surely a novel doctrine to advance in the audience of a free people; and whenever it is advanced the time has manifestly arrived for a people which intends to continue free, to turn their attention to the consideration of first principles.”

It is hard for me to see how this use of the law Professor Hurst has cited differs from that sanctioned by Wayland; and it is even harder for me to see how it proves Wayland’s brand of laissez faire to have been a myth.

Thus we see that these acknowledged champions of laissez faire — Mill, Spencer, and Wayland — sanctioned most (if not all) of the uses of the law that Professor Hurst has relied upon to prove that laissez faire was a myth. This must mean one of two things: either these uses of the law were not inconsistent with laissez faire — in which case Professor Hurst has been wrestling with a strawman; or these nineteenth century writers did not advocate laissez faire — a conclusion I find hard to swallow in the face of their express statements to the contrary. To me the former seems most likely.

This conclusion is confirmed by considering, from a slightly different point of view, Professor Hurst’s two positive “working principles concerning the use of the law.” Suppose, rather than saying (as he does) that the law was used positively to “release the creative energy” of individuals we said that it was only made available to those who were willing to help themselves. Again, suppose, rather than saying that the law was also used positively to “increase the practical range of choices open to individuals” and to “minimize the limiting force of circumstances,” we said

14. Id. at 377.
15. Id. at 178.
that the only other way in which the law was used to assist individuals was by controlling their environment so as to make it easier for them to help themselves. We could then deduce from these two “working principles” a third one: though the law was used positively in the nineteenth century it was not used “directly” (or, to use Spencer’s term again, “compulsively”) to assist individuals; the most it did was to assist them “indirectly” by helping them to help themselves and by making their surroundings more conducive to such self-help.

Now Professor Hurst is justified in saying that this constitutes proof that his brand of laissez faire was a myth for, as he put it, if “enlargement of men’s freedom was the objective, it was, indeed, freedom under the law.” (p. 32) But he thereby creates the impression that all nineteenth century writers advocated a different sort of freedom, or literally anarchy—an impression that I think unfair and unwarranted. In the first place (as I have pointed out above) he has logically excluded all evidence of “non-action”—such as books advocating laissez faire—by limiting his study to “principles defined and expressed primarily by action.” Secondly he has assumed, after excluding such evidence, that nineteenth century authors were mere “self-conscious philosophizers” who were so out of touch with their times that they cannot be trusted to reflect “the decisive faiths and beliefs of our nineteenth century ancestors” (p. 5). Then, after clearing away the dead wood, he reveals the truth; and (as Bentham said of a friend that let him down): “Lo, the Mountain has delivered itself of a mouse.” For Professor Hurst’s description of the uses of the law comport almost exactly with the recommendations of the Classical Political Economists. And if he

16. Selections from works by two Classical Political Economists may serve to show the similarity between the teachings of these advocates of laissez faire and Professor Hurst’s positive “working principles concerning the use of the law.” J. R. McCulloch, the gentleman who is generally given credit (if that is the word) for inventing the phrase “Wage Fund,” wrote: “The function of government is not only to protect property; it is also bound to give every due facility to individuals about to engage in such useful undertakings as cannot be carried on without its sanction; and it should not only endeavour to protect its peaceable and industrious subjects from the machinations of the idle and profligate, but also against the accident arising from the operation of natural causes to which their persons and properties may otherwise be exposed.” THE PRINCIPLES OF POLITICAL ECONOMY 265 (4th ed. 1849). This statement seems to me to be a restatement—or, I should say, pre-statement—of Professor Hurst’s two working principles of using the law to “release creative energy” and to “control the environment” so as to enlarge opportunities.

The only real difference between them is, I take it, that McCulloch adds: “It cannot, however, be too strongly impressed upon those in authority, that non-
has proved laissez faire a myth, he has also shown the apparently enormous influence of its most articulate advocates.

For all these reasons I am hard put to agree that Professor Hurst has banished laissez faire from the nineteenth century—though I quite agree that he has shown that the law was used, and frequently used, throughout the period. Rather than dismissing it as an idle figment of "self-conscious philosophizing," however, I should say that he has given us every reason to analyze the term more carefully in its nineteenth century context. For he has not only shown the importance of law in the period; he has also shown (though he does not, and possibly will not, admit it) that "laissez faire" as used by nineteenth century writers did not preclude the coexistence of that law.

It may seem that my criticism of this book is unfair and irrelevant. After all, I have conceded that Professor Hurst has accomplished all that he set out to do: to show that the law was used positively in the nineteenth century. If, however, he claimed to have proved no more than that I should have cheerfully congratulated him on a job well done. But he claims more. Regarding "laissez faire" as simply a myth "propagated" by "political debate of the last sixty years" (p. 7), he claims to have cleared the past of this misconception; and in its place he substitutes something that sounds suspiciously like twentieth century legal pragmatism: a nineteenth century that was "prepared to treat the law as an instrument to be used wherever it looked as if it would be useful." (p. 10)

But what would ante-bellum writers like Jefferson and John Taylor of Caroline and Thomas Cooper and Nathaniel Beverley Tucker and John McVickar and Thoreau and Channing and Emerson and Kent and Story—all of whom advocated, at one time or another, something they thought was laissez faire—what would they think of the notion that "laissez faire" had been foisted on them by political debate of subsequent generations? Must we assume that these writers were mere "self conscious philosophers" who had no influence on the "workaday people" of their day? Were the "workaday people" really so free of the then oft-expressed fears of governmental despotism and corruption as to regard the law dispassionately "as if it were an instrument to be used wherever it looked as if it would be useful" (p. 10)? Does it, in short, follow that because the law was used as Professor Hurst has described, that legal pragmatism, rather
than laissez faire, was the "decisive faith or belief of our nineteenth century ancestors"? (p. 5)?

The unfortunate implication of this book is that, since the law was used in certain instances, laissez faire and everything consistent with it was nonsense. This is, of course, not true,—as Professor Hurst would, I am sure, readily agree. For he is fully aware of the fact that his book is based on only one aspect of nineteenth century law—that is, the ways in which it was used. And he knows that other equally important aspects—as for example the actual reasons and justifications for so using the law—are deliberately excluded. Thus we cannot quarrel with him for limiting the scope of his study; but we may object to the implication that the excluded aspects are unnecessary. The whole can never be understood solely in terms of one part; and until all the parts—including the "self conscious philosophizing"—are analyzed, and synthesized, conclusions are premature. And this is, I submit, the case with Professor Hurst's conclusions as regards laissez faire.

Laissez faire was an ideal that cannot be exploded or dismissed simply by proving that courts sat and legislatures passed statutes. It was a vital force in nineteenth century life and to consider it an outdated and exploded myth is to misrepresent the age and to distort its history. And I can but hope that interference should be the leading principle of their policy, and interference the exception only." Id. at 308.

Another illustration of the similarity between the ideals of the Classical Political Economists and Professor Hurst's "working principles" is found in Mill's essay entitled "Of the Influence of Production on Consumption": "The legislature [he wrote] has to look solely to two points: that no obstacle shall exist to prevent those who have the means of producing, from employing those means as they find most for their interest; and that those who have not at present the means of producing, to the extent that they may desire to consume, shall have every facility afforded to their acquiring the means, that, becoming producers, they may be enabled to consume." ESSAYS ON SOME UNSETTLED QUESTIONS OF POLITICAL ECONOMY 49-50 (1844).

And lest one think the classical political economists were abstract and unpractical "self-conscious philosophers," see Cannan's masterful destruction of this delusion in A HISTORY OF THE THEORIES OF PRODUCTION AND DISTRIBUTION IN ENGLISH POLITICAL ECONOMY FROM 1776-1848, at 385-92 (3d ed. 1929).

17. Proof that laissez faire was a vital force as an ideal in pre-Civil War America seems to me to be found in developments after 1870. Professor Hurst concedes that this latter period was "our most influential generation of laissez faire, if we ever had one." (p. 82) But he attributes it to "policy made by drift and default." (p. 75) I should think, on the contrary, that it was the direct consequence of the "self-conscious philosophizing" of the earlier period. As Professor Louis Hartz put it (in his attack on laissez faire in Pennsylvania): "Concept for concept, in a remarkable way, the ideas fashioned by the anti-State theorists towards the close of our period (1776-1860) found historical fulfillment in the subsequent age." ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA 1776-1860, at 329 (1948).

Laissez faire is, in one sense, a myth. If, that is, we accept the definition
fessor Hurst will, in his forthcoming volumes on "the history of the interplay of law and other institutions in the growth of the United States" (of which this book is but a "progress" report, p. vii), include also the "interplay" of the "self-conscious philosophizing" of the people themselves. If he does he will, I am sure, be more anxious to understand what laissez faire meant to nineteenth century people than he will be to exorcise it from our past.

Calvin Woodard*


Mr. Shields, who supplements his academic life as a teacher of political theory with lively practical interest in political activities at the local, state, and national levels, has written a volume for popular reading—for, as he puts it, people like the members of the "Westside Civic Improvement League." His style is both forceful and lucid and progresses gradually from patient exposition to impatient argument.

His thesis, however, does not correspond exactly to the title given it. Although it does concern the compatibility of "Democratic" theory and Catholic thought, and is addressed to American readers, it is not essentially, but only incidentally, about Democracy in America and Catholicism in America. Besides, Mr. Shields is as much concerned with opposing and condemning "Liberalism" as he is with his announced subjects. Democracy, Liberalism, and Catholic Political Thought, for example, would have been a more accurate title.

The chapters in which Mr. Shields gives expositions of "Liberal" political thought (in the original seventeenth and eighteenth century connotation), "Democratic" theory and practice (as he would have it), and Catholic thought on the form and substance of political and social institutions are extremely well and extremely honestly done. All fair-minded people will welcome this non-Catholic's unbiased and uncolored informative

Professor Richard Hofstadter has given it (in another context): "By 'myth', as I use the word here, [he writes] I do not mean an idea that is simply false, but rather one that so effectively embodies men's values that it profoundly influences their way of perceiving reality and hence their behaviour. In this sense, myths may have varying degrees of fiction or reality." The Age of Reform 24n (1956).

*A.B., University of North Carolina; LL.B., Yale Law School, Member, New York Bar; Research Student, Peterhouse College, Cambridge, England.