Herbert Johnson: A Legal Historian's Work and Times

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HERBERT JOHNSON: A LEGAL HISTORIAN'S WORK AND TIMES

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Herbert Johnson’s scholarship and professional life reveal wide interests, intellectual rigor, innovation, and deep humanity. A leading authority on Chief Justice John Marshall’s Supreme Court and American colonial and early national constitutional-legal history, Johnson’s many publications also include such subjects as comparative constitutionalism of the United States, Canada, and Australia, a photographic essay on New York court houses, the religious societies of South Carolina, Shakespeare’s legal and political background, and a history of United States Army aviation through World War I. Amidst this extensive research and writing program, Johnson taught not only constitutional-legal history or constitutional law in history departments and the law school, but also courses ranging from the legal and social consequences of industrialism, to domestic relations, and trusts and estates. His professional activities embrace bar admissions in several federal and state jurisdictions, administrative positions in Chase Manhattan Bank, private law practice in New York City, service in the United States Air Force Reserve—retired at the rank of Colonel—editorial positions at the John Marshall and John Jay papers, Chaplain Associate and Hospice Volunteer, Baptist Medical Center, Columbia South Carolina, Vocational Deacon of the Episcopal Church in the diocese of Upper South Carolina and of Western North Carolina, study at the Lutheran Theological Southern Seminary, and being sometime-president of the American Society for Legal History. In 1999 and 2001 he also promoted the diminishing field of constitutional history through conferences bringing together younger and older scholars.

The “times” of my title refer to changing phases of historiography since the 1950s when Johnson chose to become a legal historian. “It is perhaps inescapable,” wrote the historian of German historiography, Georg Iggers, “that the historian approaches history from a standpoint that reflects the imprint of his personality and of the social and cultural framework within which he writes.” Johnson’s engagement with legal history began in the early 1950s when, as a “professional option” student in Columbia University’s undergraduate and law school program, he came under the influence of the Law School’s Julius Goebel. Johnson later wrote that “financial considerations compelled me to transfer to the evening division of New York Law School,” where Paul Hamlin, a legal historian teaching constitutional law inspired him, upon completion of the law degree, to pursue the study of legal history rather than entering law practice. By the time he received his Ph.D. in American History and Comparative Law from Columbia University in 1965, Johnson had also studied at the United States Air Force’s Special Investigation School in Washington, D.C. and New York University’s School of Business Administration, practiced law, and worked in the Custody and Trust Divisions of Chase Manhattan Bank.

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Within these diverse personal and institutional imperatives, Johnson developed his approach to law and society. Inspired by Richard B. Morris’s revision of Frederick Jackson Turner’s “frontier thesis,” Johnson examined the impact geography, demographic density, land holding practices, scarcity of labor, and family relationships had on the market for legal services and the operation of courts in colonial and early national America. He drew lessons from Goebel’s study of American lawyers’ gradual, yet steadily growing, use of English rules—which ultimately revealed more continuity than difference between the two law regimes—and Morris’s focus upon departures from English legal forms, evidencing a process of Americanization. Like Goebel, Johnson demanded of legal historians a rigorous understanding of legal procedure and process. Yet Johnson successfully blended this faithful obedience to legal forms with Morris’s evaluation of how and why a provincial civilization slowly emerged possessing sufficient distinctiveness that elites such as John Jay or John Marshall could risk their fate and fortune on the struggle for Independence. More than his mentors, moreover, Johnson expanded this analysis to include lawyer biography, considering especially what the political, religious, and the British imperial context of law practice revealed about the ways in which civil and private institutions of governance fostered or impeded constitutional and social change. From George L. Haskins, Johnson learned to evaluate whether ideas reflected in the taught traditions of legal forms and law practice were malleable or static.

A few examples suggest Johnson’s influence on the study of colonial American law and society. An early examination of the reception issue in New York indicated that the common law’s Anglicization of the former Dutch colony during the later seventeenth century proceeded gradually and, ultimately, was never completed because the system of private manorial courts remained largely intact. The British accommodation of multiple jurisdictional authority promoted social and political pluralism among the Dutch and English settler communities, curbing but not extinguishing, the “extreme republican tendencies of the Puritan townspeople.” Remarkably, the manorial system’s imprint persists in New York property law down to the present. A more recent study of criminal sanctions in colonial North America considered such social outcomes as Massachusetts’ imposition of punishments through Biblical codes to maintain the spiritual and moral integrity of the community. Nevertheless, throughout colonial America, efforts to punish moral offenses declined; also, provincial authorities were unable to control “intercolonial and imperial crime syndicates.” Punishments were administered along social-class lines with lower ranks subjected to corporal punishment while gentlemen were fined, banished, or imprisoned. The lack of a circulating currency and widespread poverty nonetheless often limited the imposition of fines. English and colonial sanctions differed widely regarding forfeiture of real and personal property. The Americans anticipated Beccaria’s view that by impoverishing the family, forfeiture tempted them into a life of crime and thus defeated the “public purpose of punishment.”

As Johnson sharpened the focus upon the interaction between legal institutions and society, he developed innovative methodological techniques. Johnson’s broad

6. Id. at 147.
survey of some twenty-two lawyers' libraries showing relatively extensive holdings of imported eighteenth-century law treatises suggested the social and political dimensions of the law practice and the legal mind of Thomas Jefferson and John Adams, as well as lesser known lights at the bar such as Francis Dana, James Grindlay, Peter Leigh, John Mercer, Benet Oldham, Robert T. Paine, and St George Tucker. Even so, the survey indicated not only the inter-colonial and interstate variations in the subject matter of law practice, but more importantly, it provided a way to gauge American departures from English forms, including the inconsistent uses of equity, the weaker respect for precedent, and the preference for substance over form in property, criminal, commercial, and admiralty law. This study also exposed the habits of mind underlying the declaratory theory of law whereby American "[l]awyers in an age of reason sought in the immutable principles of the law of nature the foundation for man-made laws and regulations, as well as a legitimization of national and municipal law through its conformity with the historical practices of mankind." Combined with the editorial work in the Jay and Marshall papers and a thorough understanding of the period's legal records, case law and the administration of justice from the local to the trans-Atlantic level, the survey gave Johnson further insight into the ways legal institutions reflected and shaped social and political conflict.

This methodological creativity yielded Johnson's well known studies of the Marshall Court's litigation patterns. During his graduate work at Columbia University, Johnson acquired respect for what statistical data could reveal about institutional patterns. In 1968, the year after he began editing the Marshall papers, Johnson wrote a piece employing statistics to examine the Marshall Court's decision-making process and results. He sought from West Publishing Company the case law data organized as digest categories; when West was unable or unwilling to help, he developed his own computer program using punch cards. Over the years, Johnson developed a comprehensive record of Supreme Court and lower federal court decisions during Marshall's thirty-four year tenure as Chief Justice. Manipulating this data, Johnson revealed new insight into the small group dynamics of Marshall and his colleagues as they struggled to establish an independent judiciary against powerful Jeffersonian and Jacksonian adversaries from 1801 to 1835. The data constituted solid evidence for the emergence of a seniority rule among the members of the Court governing the assignment of opinions which demonstrated both the scope and limit of the Chief Justice's influence. In addition, graphs of the digest categories plotting the patterns of lower court and Supreme Court decisions demonstrated how—despite ongoing opposition and episodic defeat—the federal courts emerged, as described by Alexis de Tocqueville, as the most powerful judiciary in the world. The subject-matter outcomes also revealed how judicial, as opposed to legislative, process promoted a distinctive American capitalism, accommodating both free labor and slavery.

Johnson's photographic essay of New York courthouses of the eighteenth and nineteenth centuries further suggested a versatile imagination at work. Johnson's collection of photographs included "halls of justice" constructed prior to 1890 located across some forty-nine counties across the Empire State. Accompanying each photo is historical interpretation which presents architectural and other aesthetic points, as well as anecdotes—particularly famous cases—relating to

8. Interview with Herbert A. Johnson, Professor Emeritus of Law, University of South Carolina School of Law (Sept. 22, 2004).
dramatic events occurring within the judicial building. The book’s Introduction asserts that “the county courthouse occupies a unique and revered place in American life. More than any other structure, it symbolizes the formative and unifying influence that law and the tradition of constitutionalism have played in the history of the United States.”

Overall, the book’s words and pictures convey the human dimensions of Americans’ paradoxical faith that, ultimately, democracy should be subordinate to the supremacy of unelected judges. Thus, through the images of local judicial authority, the book manages to convey the peculiar democratic consciousness William Faulkner depicted in the novel Sanctuary: “The air entered the open windows and blew... back to... the door, laden... with that unmistakable odor of courtrooms; that musty odor of spent lusts and greed and bickerings and bitterness, and withal a certain clumsy stability in lieu of anything better.”

Robert Gordon noted Johnson’s wide ranging contribution to legal historiography in 1975. Gordon’s assessment of American legal history employed a distinction between “internal” and “external” approaches illustrated by a “box” metaphor. The “internalist” was preoccupied with “distinctive-appearing legal things” inside the box, “such as changes in pleading rules, in the jurisdiction of a court, the texts assigned to beginning law students, or the doctrine of contributory negligence.” Gordon described the “external historian,” by contrast, as one who “writes about the interaction between the boxful of legal things and the wider society of which they are part, in particular to explore the social context of law and its social effects” and “conclusions about those effects.” Gordon’s dichotomy is useful for my purposes because in the mid-1970s, he ranked Herbert Alan Johnson among the “best” of those “few exceptions” writing “American legal history” of the “external kind.” Others he noted were Daniel J. Boorstin, George L. Haskins, Stanley Katz, Lawrence M. Friedman, and Morton J. Horwitz. I find the metaphor helpful, too, because Gordon presented Goebel as a leading representative of “inside the box” legal historians. Thus, Johnson selected the appreciation of legal forms from his former teacher, but rather than being fixated with their autonomous institutional meaning, these forms were Johnson’s starting point for new ways to explore law’s interaction with the wider society.

Gordon’s assessment also infers an illuminating distinction between Johnson’s and Willard Hurst’s practice of legal history. Gordon recognized the philosophical pragmatism and the Brandeisian progressive tradition which shaped Hurst’s leading role in making “external” legal history dominant by the 1970s. He argues that while Hurst expanded the box to include virtually all law making authorities—not only courts oriented toward elites but legislatures and even private associations reflecting democratic interests—the emphasis was primarily on the “social functions” affecting ordinary people bearing the heavy and unequal burden of institutional inertia and drift. Johnson, by contrast, insisted as strongly as Goebel on the need to understand and correctly apply the procedural and substantive

12. Id. at 11.
13. Id.
14. Id. at 11 n.6.
15. Id.
character of legal rules with which lawyers, judges, and legislators worked amidst conflicting social, political, and economic demands and inequities. Unlike his mentor, however, Johnson developed evidence and methods which revealed how seemingly neutral and autonomous institutional forms and processes—both instrumentally and symbolically—defined and channeled the choices available to people within a given historical context. The focus firmly remained on individuals possessing and using their expertise to address the needs or resistance of other individuals or groups. Johnson’s focus upon a contextual analysis of the ways in which practitioners—usually lawyers, judges and legislators, but, most recently, also aviators—employ technical skill in relation to myriad concrete expectations and pressures constitutes the internals and externals of Johnson’s legal history “box.”

These two modes of “external” legal history present telling contrasts of the primary preoccupation of current American legal historiography. Since the 1970s, the work of older and younger generations of legal historians increasingly have diverged. Hurst’s influence remains strong among the former group, whereas the latter group has focused largely upon “law and society,” defined in terms of dominant institutional authorities imposing inequitable instrumental and symbolic “otherness” across gender, race, and class relations. Recently, Barbara Welke described present legal historiography as an “archipelago” in which the various islands of law and society remain isolated from one another. Citations to Hurst’s work rarely appear among the many studies of “otherness.” Notwithstanding massive “democratic detail” demonstrating that the “condition of growth” in American law “is the accommodation of conflicting interests,” Gordon observed, “Hurst’s normative view of the decision-making process may somewhat blunt a sense of historical irony.”

Thus, even though Hurst recognized that inequitable policy outcomes were inevitable, his Brandeisian progressivism and philosophical pragmatism led him to emphasize how this conflict reflected the strength or weakness of majoritarian democratic values and interests. Legal historians exploring the other’s struggle for empowerment against inequality and injustice assume that elites manipulate democratic institutions in order to maintain domination. Proceeding from that assumption, Hurst’s studies seem, indeed, to possess little relevance.

Johnson’s review of *The Many Legalities of Early America* suggests that his legal history remains more useful. This book, edited by Christopher L. Tomlins and Bruce H. Mann, includes wide-ranging studies which address the profound issues of otherness through deep understanding of legal forms. Johnson describes the work as a “land mark” in the study of early American law and society because its interdisciplinary social and economic perspectives reveal powerful insight into “substantive and procedural law.”

Thus, reflecting his own scholarly focus since the 1950s, Johnson lauds the “fact that the authors really understand the law” and praises them for successful efforts to “enrich our appreciation of traditional legal history.” One example is Katherine Hermes’ examination of English and Algonquian practices of intestate succession whereby the native custom steadily approached the English rule. Johnson gives particular attention to the essays concerning the “position of early American women.”

16. *Id.* at 53, 54.
18. *Id.*
19. *Id.* at 492.
Richard Morris’s pioneering studies of wives managing the absent husband’s business affairs within coverture to demonstrate how wives further weakened the system through powers of attorney. This power enabled widows to “administer her deceased husband’s estate even after remarriage,” served as antenuptial agreements giving the wife control of her separate property, and could function as a quasi-separation agreement as a result of the husband’s infidelity. Johnson concludes with Terri L. Snyder’s fascinating study of wives’ property rights being the basis for male relatives’ franchise qualification. Wives or slaves also circumvented statutes prohibiting an office-seeker “treating” voters, by offering alcohol and food when he was away.

This short review reflects more intangible attributes of Johnson’s career. His appreciation of younger scholars work recognizes how much legal history research and writing often are lonely pursuits which nonetheless directly or indirectly require ongoing assistance and support. “Only when you have worked alone—when you have felt around you a black gulf of solitude . . . and in hope and despair have trusted in your unshaken will—then only,” wrote Oliver Wendell Holmes, “can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought . . . ” Unlike Holmes, of course, Johnson freely acknowledged that all historians depend upon the contributions of many others. Still, Holmes’ basic appreciation of the costs and rewards of solitary endeavor rings true, I think, considering the originality and scope of Johnson’s scholarly accomplishment. Even so, Johnson’s assessment of Marshall’s humanity is true of Johnson himself:

Lawyers and judges are social pathologists; it is hard to remain an idealist about human nature while serving as a member of the legal profession. Yet Marshall, although acutely aware of the shortcomings that he and others shared, never lost his enthusiasm for life nor his interest, respect, and deep concern for people.

Here is an attitude toward life in legal history worthy of emulation.

20. Id.
21. Id. at 491.