

## New Directions for the Children of Hurst

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*Law and History Review*, Vol. 18, No. 1 (Spring, 2000), 177-180.

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*Law and History Review* is currently published by American Society for Legal History.

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# New Directions for the Children of Hurst

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MARY FRANCES BERRY

The five articles in this volume make clear the overriding significance of J. Willard Hurst (1910–1997) to the burgeoning field of U.S. legal history. They leave no doubt as to his contributions to interdisciplinary social science research, to collegial and supportive exchanges with budding scholars, and attest to the overall intellectual breadth and sensitivity of Hurst's scholarly persona.

It is indeed true, as these essays conclude, that U.S. legal history in a sense really begins with Hurst. The barren, dry bones and husks on the terrain, before him, made American legal history, an appendage to English legal history, terra incognita for most historians and other scholars. He almost single-handedly made legal experience a necessary part of social and economic history.

Hurst's emphasis on studying legislative actions and his criticisms of the scholarly overvaluing of appellate decisions have become uniformly accepted as the most valid approach to the field. His instrumentalism has become a well-known analytical framework for scholars in and outside of legal history. He opened windows and doors, let in fresh air, and made legal history seem appealing, interesting, and worth knowing more widely.

Beyond deepening our appreciation of the Hurst legacy, these essays provoke additional questions. Evident throughout is the same ethnocentrism found in Hurst's scholarship. Also apparent is the failure of some of the essayists to subject the "great man's" interpretations to serious analysis. For example, William J. Novak succeeds admirably in explaining why Hurst can be labeled a "historical sociologist." However Hurst's view that personalities and interests only account for 20 percent of law's content is not subjected to rigorous analysis.

In most instances, lawmakers are influenced to take positions, not just

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based on their personal beliefs, but by constituent pressure, or, in recent years, polling data or campaign finance considerations. They are also influenced by horse-trading with other members, or the president, that is personality-driven. Much legislation has failed to pass because a president did not have good personal relations with important legislators. Jimmy Carter had major problems achieving his legislative agenda because he had difficulty accomplishing easy personal interaction with Speaker Thomas "Tip" O'Neill and other key members of Congress. Bill Clinton's difficulties with Newt Gingrich were exacerbated by Gingrich's feeling that he was not personally well treated by Bill Clinton on Air Force One and in other settings.

Judicial biographies make clear the influence of personalities and interests. Those include the importance of significant intellectual others, or what Felix Frankfurter called the "smarties in the law reviews," on court decisions. But it is also true that peer pressure and personal relationships play a significant role. Historical examples include Oliver Wendell Holmes's shift from his majority opinion in *Schenck* to his *Abrams* dissent. Hurst's theories about the limited influence of personalities and interests require rethinking in view of such realities.

While applauding Hurst for opening doors and windows, we should also assess more directly and analytically the ones he left closed. Carl Landauer, for example, tells us that Hurst had no qualms about the exclusion of slavery from his economic analysis. However, the most important point is that Hurst could not validly ignore the impact of slavery as an economic institution in an analysis of any aspect of the antebellum economy. Given his interest in markets, Hurst showed a curious disinterest in the slave market or the market for agricultural commodities as compared to industrial manufactures. He also seemed disinterested in the comparative importance of free and slave labor in the overall market. Furthermore, it seems incongruous for Hurst or anyone to attempt to locate "America's defining imagery and values," without including the influence on the American psyche of slavery or the cross-cultural influences of Native Americans. Hurst need not have had an interest in race, gender or class or the powerless but his explanatory power stands diminished when so much is left out.

Alfred S. Konefsky's essay successfully evokes the voice of Willard Hurst. Because law expresses the will of the "people," Hurst's focus on legislative action and state and local governments seems consistent. However, Konefsky, like Hurst, largely ignores the sometimes problematic result of privileging democratic lawmaking in our constitutional system. When "democracy" and majoritarianism are seen to oppress minorities, there is, of course, the constitutional corrective of the Bill of Rights. We see this most clearly when controversial policies are legislated, such as a

state legislative decision to forbid education funding for the children of immigrants, or to outlaw assisted suicide. My students are always fervent admirers of Holmes's and Louis Brandeis's majoritarian opinions. However, when asked what if the state, as laboratory, decided to tolerate toxic dumps only in Latino neighborhoods, their admiration becomes less fervent. Konefsky spends time on the tension between democracy and government by experts but at least as much time needs spending on the tension between democracy and the protection of minority rights.

Further, Hurst's emphasis on remaining fact-bound and fact-driven is an important reminder to historians. Information concerning how burdened the state taxpayers are in providing education for the poor and information about the needs of the poor both constitute facts. However, even within Hurst's framework of the promotion of economic development, deciding which facts deserve greater emphasis is the more difficult task.

The Hurst commemorative issue should lead us to reassess and consider new directions for legal history. One area we might reconsider is our valuation of the importance of court decisions. Lawrence Friedman and others, following Hurst, have concluded that court decisions play only a minor role in making societal change compared to legislative and executive action. Recently political scientists such as Gerald Rosenberg in *The Hollow Hope* have argued that even great cases like the *Brown* decision have little impact on social change. This idea needs a critique. Of course two-thirds of black children and three-fourths of Hispanic children, and most white children, are still racially isolated in America's public schools. But little impact is in the eye of the beholder. The system was almost entirely segregated with the force of law before *Brown*. Even more important is the influence of the decision on the growth of the civil rights movement and legislation. Nonviolent direct action protest played a major role, but *Brown* helped to promote visible racial change in almost every area of American life.

Another area ripe for reconsideration is the role of legal historians. During the Clinton impeachment hearings what I had observed only through a glass darkly in years of policy making became clear. On even historical legal matters, legal historians are absent from the fray. Historians testified in the Congress on both sides in what was a legal dispute but they for the most part laid no claim to being legal historians. My dear friend, now departed, A. Leon Higginbotham, who would call himself a dabbler in legal history, testified in his capacity as a retired appellate judge with knowledge of the standards for perjury in the federal courts. Of course, scholars need respite and retreat from the public arena to research and write. But legal history expertise should not be left to politicians and self-appointed experts to define. Legal history scholars must lay claim to their rightful territory.

Another major contribution Hurst made was to use the funding he received from the Rockefeller Foundation to equip young men with cross-disciplinary techniques, to create the Law and Society field, and to nurture a whole generation of scholars to follow in his footsteps. Hurst's good fortune begs comparison with the inability of Carter G. Woodson, founder of the Association for the Study of Afro-American Life and History, the *Journal of Negro History*, and of what has become Black History Month, to obtain foundation support for his efforts. All support disappeared when it became clear that he was a race man, who ruffled feathers and was too proud to grovel. One prominent white expert on blacks dismissed him as "a propagandist with a distinct antipathy to movements for racial cooperation." Though Woodson's work was delayed because of an absence of financial resources, he struggled on.

The support Hurst received also begs comparison with the fate of W. E. B. Du Bois, another "Big Thinker," a historical sociologist of the first rank, who surely deserved the reputation, world-class scholar. The circumstances under which he worked make Du Bois's scholarly productivity all the more remarkable. The research he organized and pursued and the schedule he kept without graduate assistants or amanuensis is incredible. There stood or sat Du Bois thinking and writing for years, for the most part bereft of foundation grants, sabbaticals, or any of the other paraphernalia most scholars insist is essential to their work. In ten years, by the time he was thirty-five, Du Bois had taught every term, written two books, a dozen monographic studies, numerous articles, and laid the groundwork for much of twentieth-century scholarship on African Americans.

When I examine Hurst's work and that of his progeny, it is amazing, despite the changing currents in the country, how little effort they made to include African-American students and scholars in their largesse. One of the most important things we can learn from this commemoration of Hurst's legacy is the need to open the doors and windows wider. Perhaps leading scholars in the field, the children of Hurst, should ask for a foundation grant to attract more Latino, African-American, and Asian-American students and scholars to legal history and to take them under their wings. Demography alone argues that this is the path for the twenty-first century. Furthermore, such an emphasis might enable us to apply some exciting new angles of vision to the study of U.S. legal history.