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HERBERT JOHNSON AND THE WRITING OF AMERICAN LEGAL HISTORY

HARRY N. SCHEIBER*

A student encountering for the first time Herbert Alan Johnson's impressive corpus of writings in American legal and constitutional history might easily jump to the conclusion that this remarkable scholar could have had little time for anything else but research in his life. It is not only that the books and articles, the edited volumes (including a major book series), and the documentary projects are so numerous: His scholarship is also marked by extraordinary breadth of subject matter, both within and sometimes outside the boundaries of legal and constitutional history. His work also reveals a depth of learning and profundity of analysis. One has the sense that Herb is privately devoted to the concept of "authoritative interpretation," and that when he embarked on some of these research projects he set this as a goal for himself—and indeed he often demonstrated by the result of his work how authoritativeness really can be achieved!

We can appreciate the many facets of Herb Johnson's research accomplishments only by assessing the entire body of his writings—both as to his success in exploring unfamiliar methodological terrain and as to the richness with which he has set developments in legal doctrine, procedure, and systemic dynamics in the cultural, political, and social contexts that give his subject matter special distinction in the literatures of both constitutional jurisprudence and Anglo-American legal history.

None of this tells the full story, however, of his achievements as an historian, let alone even hints at the importance of his service and the high status he has variously achieved in the United States Air Force, in civilian service as a government lawyer, in private practice, in his church's ministries, and now, since his retirement from the university life, in his invaluable humanitarian work in hospice settings. Nor can the recitation of titles for his books, articles, and edited works reveal what is perhaps the most important thing of all that one may say about his character: that what he observes and describes so eloquently in the personal qualities of some of the judges and lawyers he most admires in his studies of the law's past—qualities of integrity, ability to articulate and pursue with civility a worthy objective, capacity for organizing and for leadership and, yes, for moderation and necessary compromise without abandonment of principle—are the qualities that his friends and colleagues most admire in Herb himself. I can say this with a special competence, because I had the privilege of being a fellow undergraduate in Columbia College, in Columbia University, and was his classmate when Herb's professional journey was first set in motion. Those same personal qualities that have been manifest in his career since those student days—along with an already well-disciplined work ethic and a wonderful dignity of bearing, even courtliness, that never diminished his openness to ideas or his friendliness to others, and never with a shred of prejudice or of self-importance—defined Herb Johnson then, in his youth, no less than they do today.

On this occasion, I would like to comment especially on Herb Johnson as the consummate professional historian, both with respect to scholarship and with respect, in particular, to his role in the American Society for Legal History. It is an especially fitting time for me to speak of the Society, for as its current president I have had the opportunity to appreciate afresh the singular contributions that Herb (together with John Reid of New York University, the late Milton Klein of The Stefan Riesenfeld Professor of Law and History, and Director of the Earl Warren Legal Institute, Boalt Hall School of Law, University of California at Berkeley. President, American Society for Legal History.

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University of Tennessee, and a few other notables in the field) made in putting the Society on a organizationally sound footing thirty years ago. In his informal remarks on the occasion of the present symposium event at the 2004 meeting of the Society in Austin, Texas, Herb spoke with great feeling about his special pride in the way the Society has flourished, after frail beginnings, so that today it provides a solid foundation for fellow scholars in the field with its annual meetings, publications, and above all in its nurturing of legal history both as a research field and as a teaching field. For him, as for others in the older cohort, nothing is as rewarding as to see the continued exploration of subject-matter and interpretive frontiers that has gone forward in the hands of a lively and dedicated younger set of legal historians during what can fairly be termed a renaissance of the field. That the Society stands now as one of the most respected learned societies in the profession internationally is in no small measure owing to the time, energy, and creative talent that Herb has given to it over so many years. The long-time members recall the many roles Herb played in earlier days as a master publicist, a gifted fund-raiser and financier, and an impresario of wonderful inventiveness. Herb's dedication has given the Society not only visibility but that welcoming of new ideas essential to a vibrant field with progressive infusions of new interpretations and the excitement of intellectual path-breaking.

Recently, the eminent legal historian Bruce Mann has recalled how, when "law and society" studies began to animate the field in new ways, at a time when the field's most prominent innovators were becoming more comfortable in their associations with social scientists than with the older "doctrinal and institutional legal historians of the American Society for Legal History," a process was set in motion in which the Society "subsequently shook off its torpor and regained its vitality." The happy outcome of this dialectic, as it were, owes as much to Herb as to any single individual in the Society's leadership ranks during the period of revitalization and expansion.

There was some concern along the way, to be sure, that traditional constitutional history would be lost in the surge of interest in the new socio-legal history.1 There was also concern that the importance of the historian's having a

1. Bruce H. Mann, The Death and Transfiguration of Early American Legal History, in THE MANY LEGALITIES OF EARLY AMERICA 442 (Christopher L. Tomlins & Bruce H. Mann eds., 2001). A survey and remarkably prescient analysis of the historiography of early American legal history (with an appreciation of the way in which Richard B. Morris had used legal history as a lens through which to see basic patterns of status, power, and change in social history) that became recognized as one of the seminal efforts pointing the way to reconsideration of basic canons and revitalization of the field, was the essay by Herbert A. Johnson, American Colonial Legal History, in PERSPECTIVES ON EARLY AMERICAN HISTORY 250 (Alden T. Vaughan & George Billias eds., 1973). As late as 1970, a full decade and a half after publication of Willard Hurst's LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956), American historians generally were only beginning to appreciate how the "law and society" approach to legal history exemplified in Hurst's studies was challenging the more traditional doctrinal and institutional studies of law's past and the long-dominant emphasis on law as an autonomous system. See Harry N. Scheiber, At the Borderland of Law and Economic History: The Contributions of Willard Hurst, 75 AM. HIST. REV. 744 (1970). Publication of Lawrence M. Friedman, HISTORY OF AMERICAN LAW (1st ed. 1973) marked a definitive turning point, and within a few years the programs of papers being read at the American Society for Legal History annual meetings were reflecting the diversity of methodologies and concern with economic and social history as they were linked to legal developments that the "Hurstian" challenge had brought to prominence. See generally articles in a festschrift to Willard Hurst, in 18 LAW & HIST. REV. 1 (2000).

2. Thus, a leading constitutional historian proposed a panel for the Organization of American Historians meeting under title "The Death of Constitutional History." The present writer accepted the invitation to write for the panel but declined to accept the premise of a demise, rather adopting an approach for his paper that stressed complementary aspects of the older doctrinal approach and the new

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firm command of relevant technical aspects of law, and especially procedure, would no longer be valued as historians veered over into the borderlands with social history and public-policy history, and away from the earlier standard focus upon the institutions and operations of the law more narrowly considered. Amidst this methodological hubbub, Herb coolly identified the perils of a loss of balance. He was not an advocate of mindless retrenchment: Drawing the wagons in a circle is not his style, any more than is the disorganized cavalry charge. Herb is more of a heavy-artillery man (even when he is writing about the Air Force). As early as 1964 he thus had commented upon "the malady of 'Constitution' fixation which burdens [American historians] with the handicap of being unable to distinguish between 'constitutional history' and 'the history of the 1787 Constitution,'" contending that "administrative, social and intellectual history" were essential for a full portrayal of constitutional change. Herb's numerous studies of lawyers and the legal profession are models of how social institutions and even high culture were interwoven with the history of law and legal systems. It is instructive to recall further that in the early 1970s, when Herb was already a leader of the American Society for Legal History, the annual meeting included papers "ranging from studies in biography to the role of the family in the Chinese legal system...[and] papers on actions of breach of faith in the English medieval church courts and...on the relationship between law and public health in 19th-century America," as well as on the Foley Square Smith Act trial and the E.C. Knight antitrust case.

Even in light of this forward-looking record of personal and institutional reorientation, Herb never compromised in his insistence that our subject, even when studied only as a single strand in a complex history embracing other aspects of life and its institutions, required that the scholar maintain a firm anchor in regard to the specifics of doctrine, procedure, and other aspects of law and of explicitly legal development. How else could an historian hope to cut through that complexity of institutional structures and law that so intrigues him in most of his studies? Complexity represents a robust challenge to the legal historian, especially in the scholar's quest to decipher the varied patterns of both evolutionary development and legal history. Harry N. Scheiber, American Constitutional History and the New Legal History: Complementary Themes in Two Modes, 68 J. AM. Hist. 337 (1981).


4. See, for example, the fascinating account of John Jay and other members of the New York Bar, as they engaged in the discussion of "theoretical, philosophical, political, and ethical issues" in the Debating Club, as they collected impressive libraries of legal and jurisprudential works, and as they expanded their intellectual horizons "beyond the pronouncements of the courts and parliaments at Westminster" and came into touch with the realities of cruelty in the law and society that awakened reformist sentiment. Herbert Alan Johnson, John Jay: Lawyer in a Time of Transition, 1764-1775, 124 U. PA. L. REV. 1260, 1291 (1976).


6. This was most clearly stated in his 1964 historiographical essay, supra note 3, at 265. ("an understanding of legal procedure is absolutely essential to telling the overall story of legal development" but should not be permitted to be "the alpha and the omega of colonial legal history"). See also Herbert A. Johnson, Civil Procedure in John Jay's New York, 11 AM. J. LEGAL HIST. 69 (1967), for an exemplary work that walks the reader through the elaborate procedural routes (or mazes, really) of each judicial institution in colonial New York—and indicates how institutional continuities marked the history of post-Revolutionary New York.
and "abrupt, calculated" change. Thus, Herb pleaded persuasively for maintaining the salience (although never insisting on dominance) of traditional subject-matter concerns, even as the focus of many fellow legal historians shifted over almost exclusively to the newly-fashionable grounds of socio-legal and legal-economic history, and later to the concerns of the briefly-ascendant Critical Legal Studies "school." Meanwhile, Herb's own continuing research demonstrated by example the rich possibilities of legal history written on a larger canvas than had ordinarily been used by "traditional" historians. His comparative study of the Marshall Court and the European Court of Justice, like his introduction of statistical analysis of appellate and Supreme Court dockets into his biographical study of John Marshall, exemplify the manifold ways in which Herb has moved beyond inherited subject-matter boundaries to enrich the literature and suggest new pathways of research.

I close with three observations that I think help capture the essence of why Herb Johnson is such a treasure to the profession and to his friends and colleagues. First, there is the obvious delight and enthusiasm with which he greets new ideas and departures from established norms in the field, though, of course, only when such initiatives are grounded on solid research and are convincingly argued from careful use of the evidence. Second, and perhaps most revealing of all, is his dedication to the use of primary sources, expressed in his remarks at the Austin meeting where he recalled the enormous satisfaction of discovering some interesting document not previously known or properly appreciated by historians; and then coming to understand how it might cast new light upon an important question of fact or interpretation that had long eluded investigators. Indeed, one is astounded by the depth of his research in archival sources, whether in the minute books, dockets, and declarations of pleadings in British and American courts, the Minutes of the Moot in New York, the records of legislatures, lawyers' and judges' correspondence and notes, Customs manuscripts, parole and pardon papers, or Patent Office filings and decisions-ranging in time from ancient English parchments to filings and exchanges over the rights to inventions that set the foundations of modern air flight and military aviation. Herb's sense of humor and appreciation for the ironic or absurd are an added bonus for his readers, who if they look carefully will learn, for example, of the unique adventure with the law of Herman Rosencrantz, who

7. Herbert A. Johnson, The Advent of Common Law in Colonial New York, in LAW AND AUTHORITY IN COLONIAL AMERICA 74, 75, 85 (George A. Billias ed., 1965) (exemplifying, as in many other works by Johnson, the emphasis on complexity and the quest to identify distant precursors and precedents for later configurations of legal issues as are central concerns of Johnson's research).

8. For a fine exposition on how Johnson developed new themes and broadened the scope of the canonical methodology, see Tony Freyer's essay in this symposium, Herbert Johnson: A Legal Historian's Work and Times, infra p.435.


10. For a vivid recent example, see Herbert A. Johnson, Book Review, The Many Legalities of Early America, VA. MAG. HIST. & BIOGRAPHY 491–93 (2003). Similarly, in his essay Sanctions in Colonial North America, in 4 PUNISHMENT: TRANSACTIONS OF THE JEAN BODIN SOCIETY FOR COMPARATIVE INSTITUTIONAL HISTORY LVIII (1991) [hereinafter Johnson, Sanctions], Johnson offered gracious acknowledgement of the contributions to a revised understanding of criminal punishment as was found in the new works by Kathryn Freyer, David Konig, William E. Nelson, and other fellow workers in the vineyards of early American history.


escaped hanging in colonial New Jersey only to be hanged later by the 
Commonwealth of Pennsylvania, and will be instructed in the finer points of how 
the "ducking stool" worked as an instrument of punishment, especially for women 
who were scolds or slanderers. (He further observes that husbands faced the hard 
choice of whether to pay a fine to save the wife from such humiliation, "or save the 
money and let her be ducked at the risk of domestic tranquility in the days 
ahead"
13)

Finally, there is the exquisite craftsmanship with which Herb works his 
materials into enduringly important historical scholarship. One could provide 
scores of examples, but I have some favorites to which I would like to point the 
reader. First is the book within a book, as it can fairly be termed, in his Marshall 
Court volume in the Holmes Devise series,14 in which he systematically presents 
and interprets with remarkable clarity the intricate doctrinal problems and practical 
issues of application associated with admiralty and the Law of Nations. Herb 
provides a truly fascinating portrayal of Marshall and his colleagues on the Court 
grappling with the daunting task of integrating international doctrines into the law 
of the new Republic. Second, Herb's study of the airplane patent issues in the early 
twentieth century, including a vexed and protracted history of litigation which, in 
his hands, comes through as a vivid case study of technological innovation in 
interplay with the modern legal system and its evolving rules. And finally, there 
is the monumental Marshall Papers enterprise that Herb initiated and led, which, 
along with the great project led by Maeva Marcus on the documents of the early 
Supreme Court, provides a new generation of legal and constitutional historians 
with the kind of documentary foundation for scholarship "from the sources" (as the 
stock phrase goes) that has been the Johnson hallmark during his long career of 
historical writing and leadership in the profession. It is a career, as his friends, 
fellow historians, and students are pleased to notice shows no evidence of any 
slackening! We cordially hope that it will continue for him, and that he will 
continue to enrich our field, for many productive and happy years in the days 
ahead.

14. 2 George L. Haskins & Herbert A. Johnson, History of the Supreme Court of the 