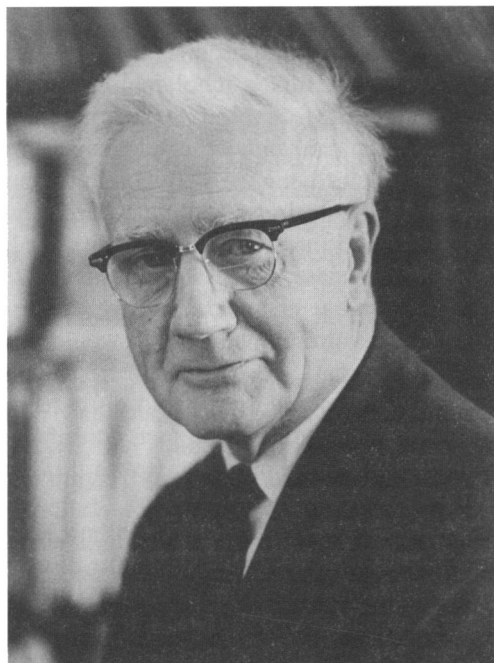


Engaging Willard Hurst: A Symposium



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JAMES WILLARD HURST, 1910–1997.

Courtesy of the University of Wisconsin-Madison Archives.

In this special symposium issue of the *Law and History Review*, the first of the new millennium, we offer an extended assessment of the scholarship and career of one of the most important legal historians of the twentieth century, James Willard Hurst, who died on June 18, 1997, at the age of eighty-six.

Willard Hurst, of course, was an American. It was as a historian of American law that he made his name as a scholar, remaking the discipline of legal history in this country in the process. As we put it three years ago

in announcing this project, “few American scholars, whether lawyers or historians—or both—would contest the *New York Times*’ description of Willard Hurst as ‘the dean of American legal historians.’” Unsurprisingly, then, it is primarily as an American legal historian that Hurst is remembered here. But Hurst’s scholarly reputation reached far beyond the boundaries of the United States. Hence we have included here means to assess the importance of Hurst’s influence beyond the sphere of specifically U.S. legal history.

This exercise has been designed to honor Willard Hurst as a great scholar, but to do so through engagement rather than simply through praise. Naturally we seek to engage with Hurst’s scholarship—to represent it as fully as possible, to understand it, to explore its origins, to acknowledge its achievements and its limitations, and perhaps to revise current understandings of it. But we also seek to engage with Hurst as himself a historical actor—with the detail of his training and early career; with the contexts that influenced him in his formative years; and with his later activities as a mature academic entrepreneur, when he used his growing influence to promote the intersection of law and social science, at Wisconsin and elsewhere, to which he was committed, and which would prove so important an underpinning of the Law and Society movement. Understanding Hurst’s impact, we think, requires that we understand his career as academic actor no less than as scholar. The former, in fact, contributes appreciably to a mature understanding of his scholarship. Hence it is with Hurst the actor that we begin.

In our first article, Daniel Ernst examines Willard Hurst’s training and suggests how Hurst put it to use in articulating a functionalist conception of law for the mid-twentieth-century American state. Ernst follows Hurst through four early career episodes: his year-long study of Charles and Mary Beard’s *Rise of American Civilization* at Williams College; his three years as a student at the Harvard Law School; the research fellowship he held during the 1935–36 academic year under the direction of Felix Frankfurter; and finally his service during the October 1936 Term of the U.S. Supreme Court as legal secretary to Louis D. Brandeis. Hurst’s study of the Beards and his labors on Frankfurter’s book on the Commerce Clause, Ernst argues, inclined him to see history less as an aid to the judicial interpretation of precedents, statutes, and constitutions than as a way to divine where the state should strike the “balance of power” in regulating the American economy and society. First as law student, then as legal secretary, Hurst embraced the Legal Realists’ skepticism toward judge-made law, but went beyond them to consider such other “law makers” as legislatures and administrative agencies. In the process he became a more enthusiastic defender of the administrative state than either of his eminent mentors, Frankfurter and Brandeis.

Our second article skips forward in Hurst's career to the post–World War II period in order to assess his influence on the development of the field of law and social science. Rather than examine Hurst's intellectual contribution, in this article Bryant Garth concentrates on Hurst as an academic politician—as an actor consciously trying to form alliances, attract disciples, and build a scholarly position. According to Garth, Hurst's ambition was to mobilize a conjunction of law and social science against the conception of law embraced by the elite law schools of the east. Garth finds evidence for this attack on (which was also a claim to be taken seriously by) the legal establishment in Hurst's entrepreneurial activities in Madison and in his dealings with the Rockefeller Foundation and with the Walter E. Meyer Research Institute of Law. One by-product of Hurst's investment in people and scholarship was the Law and Society Association, established in 1964 and centered soon thereafter in Madison. Garth argues that Hurst's alliance with social science against the elite schools, though potent, should not be seen as an effort to place social science on a par with law. Rather, Hurst was competing with the elite law schools over what was necessary for law-trained individuals to gain or hold their prominence in the United States.

Our third and fourth articles take us from examination of Hurst's career to close exploration of the intellectual conjunction of law and social science to which Garth adverts, and which comprised the essence of Hurst's scholarly project. In the third article, Carl Landauer offers a reading of Hurst's iconic work, *Law and the Conditions of Freedom in the Nineteenth-Century United States*. Landauer establishes the intellectual context in which Hurst wrote by working through his engagement and debate with some of the standard-fare texts of 1950s social science writing—the cultural anthropology of Ruth Benedict and Margaret Mead, the closely associated neo-Freudianism of Karen Horney—as well as texts in which Hurst evidenced a particular interest, such as the SSRC-sponsored studies of state government by the Handlins and Louis Hartz that debunked the mythology of *laissez-faire* and sought a nineteenth-century background for the New Deal. Landauer's reading of Hurst collapses the standard progressive/consensus polarity to describe Hurst instead as a progressive historian who interpreted American society through its communal values, a historian who saw even the sharpest nineteenth-century political divides as struggles “within the family.” Hurst's reluctance to acknowledge the importance of class conflict marks an important divergence from Karl Polanyi's *The Great Transformation*, which he otherwise followed in identifying both the market as the key institution of the nineteenth century and government correction as the ultimate reaction to the social damage the market had caused. The latter move marked for Hurst, as it had for Dewey, one from social drift to the prospect of ap-

plied intelligence in public policy. Landauer's reading of Hurst in debate with his sources identifies *Law and the Conditions of Freedom* as a cultural anthropological political economy of nineteenth-century America, one providing a prehistory of the New Deal.

Our fourth article, by William Novak, takes recovery and reinterpretation of Hurst's intellectual project several steps further by attempting a full-scale and broad-based reconceptualization of Hurst's scholarship from the perspective of historical sociology. Rather than locate Hurst by reference to the particular "schools" of legal history or socio-legal studies with which he is commonly identified and to which he made founding contributions, Novak argues that Hurst's work is best understood as part of a larger tradition of legal-historical sociology that includes the likes of Alexis de Tocqueville, Max Weber, Frederic William Maitland, Roscoe Pound, and Oliver Wendell Holmes, Jr. According to Novak, Hurst's was an ambitious attempt to grasp the totality of legal-historical change (action and structure, fact and norm, the individual and the collective), one that bequeathed to future scholars an elaborate analytical system as well as a compelling historical narrative. In part 1 of his article, Novak takes up Hurst's most important methodological concepts: sequence, context, structure, and complexity. In part 2 he unpacks Hurst's substantive tale of the changing roles of American law, market, and state from the early nineteenth to the early twentieth century. Doing so, Novak finds in Hurst's recognition of the multi-dimensionality of law in society (as function, value, and power) the true hallmark, often unacknowledged, of his history. Hurst stands revealed as a stunningly original participant in a broad and continuing trans-generational dialogue about law, history, modernity, capitalism, and the liberal state.

Our fifth and last article offers a final and original encounter with Hurst's mind, which also reminds us of the affection that Hurst's collegiality inspired in so many. On a number of occasions during the course of his career, Willard Hurst was interviewed by scholars interested in his scholarship and in his reflections on various legal and constitutional issues. Readers of this journal will be familiar with at least one of these interviews, an extended "conversation" between Hurst and Hendrik Hartog we published in 1994. Here Alfred S. Konefsky presents the text of a much earlier—indeed, the first known—recorded interview (or "firsthand talk" as Hurst referred to it), conducted by his father, Samuel J. Konefsky, in September 1951. At that time, Samuel Konefsky had begun working on his book, *The Legacy of Holmes and Brandeis*, and Hurst obliged him by discussing his experiences as clerk to Brandeis and his comparative views of the ideas and respective influence of Brandeis and Holmes. Here, Alfred Konefsky sets his father's interview in context and analyzes Hurst's observations for what they reveal about his own work and particularly about the relationship between social science,

law, and legal history. He suggests that one key to understanding Hurst may be the faith in and commitment to democratic theory and process that animated and informed his body of scholarship.

The issue's five leading articles are supplemented by brief essays from seven commentators—Robert W. Gordon, Mary Frances Berry, Ian Duncanson, Wesley Pue, Barbara Y. Welke, Harry N. Scheiber, and David Sugarman—all of whom were invited to offer their own reflections on the articles presented in this issue and to add some thoughts of their own. Gordon, Berry, and Welke focus in different ways on the question of how Hurst represented America and American law in his scholarship and on the extent to which that representation continues to be influential in current legal historical scholarship. Each offers valuable insights on how to retain an appreciation of Hurst's legacy in light of the very different concerns that have dominated American historical scholarship during the past quarter century. The essays by Duncanson, Pue, and Sugarman offer us additional points of reference—distinct national contexts and legal-historical traditions—against which to assess the contribution made by Hurst's scholarship. Each suggests that, set against those distinct backdrops, Hurst's scholarship appears strikingly innovative. Sugarman also reminds us, however, that, as a national history itself, Hurst's legal history shares certain common claims with other self-consciously "national" histories that are well worth exploring. Finally, Scheiber supplements the work of the article authors by offering a substantive exploration of the topic of federalism in Hurst's legal history.

Because this issue is intended to focus on the continuing engagement between legal history and Willard Hurst, we have postponed our regular feature, the *LHR* Electronic Resource Page. It will return in the next issue. This issue, however, carries our normal complement of book reviews.

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