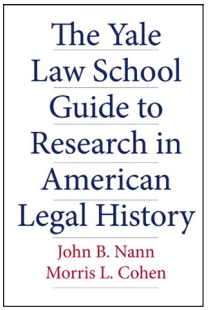
An Essential Resource for Researching Legal History

BY LEVIN



John B. Nann & Morris L. Cohen
The Yale Law School Guide to Research in American Legal History
New Haven, Yale Univ. Press, 2018

Why study legal history? How can historical understanding be of any professional value in a world which seems to change by the week?[1]

This excellent guide to legal history research answers Professor J. H. Baker's rhetorical question, at least in part. But *The Yale Law School Guide to Research in American Legal History* has not garnered the attention it merits. Authored by John Nann and the late Morris Cohen, the Guide provides a useful, readable, explanation of both how to access legal history and why that may be useful to a lawyer or jurist trying to understand the current state of the law.

This is not a *Nutshell* guide to legal research (a book Professor Cohen first wrote a half-century ago), but a reference for the experienced legal researcher that largely eschews the arcane and hypertechnical in favor of the practical. If used properly, it will save time and enhance understanding and accuracy in legal reasoning. I heartily recommend it.

Two Major Themes Drive the *Guide*

First, whereas historians may need to understand the applicable law during certain historical events or eras, in turn, lawyers may need to study history to properly interpret how the law being researched once functioned, as a foundation from which to understand what the law is now. Blithely using linguistic usages or assumptions in one discipline concerning material arising in another can be fraught, even given diligence and good faith by the researcher. The *Guide* helps historians and lawyers avoid such missteps.

Some concrete examples may illustrate the problem of cross-discipline confusion. One historian cited "judicial hostility" as an obstacle to road building in early California.[2] But the supporting authority was a California Supreme Court opinion that merely applied our constitutional debt limit to invalidate a road statute.[3] Another scholar misinterpreted the term "death recorded" as used in English criminal court records to mean that defendants had been executed for certain behavior. But that term meant the *opposite*, that the death was merely "recorded" (i.e., put down on paper).[4] Had these scholars understood legal history better, they would have avoided such mistakes.[5]

Second, even in our increasingly web- and AI-driven research world it may be necessary or at least helpful to know *how* legal information was gathered and disseminated in the past to best utilize the most current but often scatter-shot databases that are available. What exists digitally now and for the near future is a collection of databases, each of which has different origins, was organized differently for different purposes, and may be differently accessible. This may present the researcher with so many potential avenues to explore and so many ways to explore them that the most useful material might be missed or simply buried. The *Guide* helps lead legal researchers through the morass to the sets of historic data most helpful in resolving the present-day legal question at hand.

1. J. H. Baker, *Introduction to English Legal History,* New Haven: Oxford U. Press, 4th ed. 2007, v.

2. B. Lamb, "Highways and Waterways: Two Episodes in California's Transportation History" (1996) 75 *Calif. Hist.* 12.

3. *See People v. Johnson* (1856) 6 Cal. 499.

4. *See* discussion at *https://en.wikipedia.org/wiki/Death_recorded* and at *www.bbc.com/news/entertainment-arts-50153743* [as of Feb. 11, 2021].

5. Examples of jurists disagreeing about history abound, particularly in high-profile cases. *See, e.g., Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 580 (conc. & dis. opn. of George, C.J. [disagreeing with the majority opinion's "serious distortion of history" of affirmative action]; *District of Columbia v. Heller* (2008) 554 U.S. 570 [majority and dissent present sharply divergent views of the historical background of the Second Amendment]).

The Authors

Morris Cohen (1927–2010) was a prominent modern law librarian. When his law degree proved unfulfilling, he obtained a master's degree in library science, then worked as a librarian and law professor for the rest of his career. His works and lectures inspired law librarians during a time of great change, both through the early years of computerization and through the increasing dominance of proprietary databases. Among many (and remarkably diverse) works, he was the original author (in 1968) of the first-year primer *Legal Research in a Nutshell*, and 30 years later he issued the six-volume *Bibliography of Early American Law*, an invaluable compendium for scholars researching pre–Civil War American legal issues.

John Nann is a senior librarian and lecturer at Yale Law School. He was an early computer services law librarian, and later became Cohen's colleague, co-teaching a seminar on advanced legal research. Nann still conducts similar seminars, now attended by a mixture of law students and social sciences graduates. After Cohen died, Nann continued working on the book the two started. The resulting *Guide* was published in 2018, to scattered reviews, though those were generally favorable.[6]

I hope this review spreads the good word more broadly.

Lawyers as Historians

According to Nann, the *Guide* intentionally sidesteps the "third rail" of originalism. It is described briefly (but neutrally, and with sources for exploring the multifaceted debate). But by now, the more nuanced iteration, "textualism," clearly dominates legal interpretation.[7] That may be why a lawyer or jurist needs or wants to consult legal history.

The outcome of a given case is not dictated by textualist arguments. Reasonable minds may and do disagree about meaning.[8] They may also disagree about what kinds of evidence of meaning are most persuasive, or even relevant.[9] But few would now dispute that the public context of words in a legal text (constitution, statute, or rule) informs as to meaning.

One plausibly could view "the law" as "the rules which were law at the Founding and everything that has been lawfully done under them since."[10] The "law" at the time of Founding was English common law, and in most jurisdictions that law was adopted via "reception" statutes, whereby the common law governs unless displaced or found to be repugnant to a higher law.[11] Thus, knowing the law today may require an understanding of the law of the past. After all: "Part of a fair reading of statutory text is recognizing that 'Congress [or a state legislature] legislates against the backdrop' of certain unexpressed presumptions."[12] History forms a large part of those presumptions, and knowing relevant history enhances understanding of the law.

How the *Guide* Helps

One trap for the unwary is that terminology and underlying assumptions differ between disciplines and differ over time. Another trap may be created by a lack of understanding of how the original written material was organized. This problem persists despite (and in part because of) the digitization that allows the online or text searching on which we now largely depend. As the *Guide* explains, digitization was not done uniformly. Some databases may consist of proof-read text that allows Boolean searching. But some efforts were merely a chop-and-scan of source books that may allow only optical character recognition (OCR) searching, with its attendant problems. The *Guide* gives the example of the "long s" in Colonial writing (ſ) that to modern eyes looks like an "f"; an OCR search for a term with an "s" in it would require great care. Further, consolidation of publishers and the proprietary nature of many databases creates practical and equitable issues. Each database has its own idiosyncrasies, gaps, and algorithms,

6. Kent Olson, who worked with Cohen on prior editions of the legal research *Nutshell*, and is now its lead author, described the *Guide* as "a welcome addition to the literature of legal research and a valuable trove of insights and tips. It goes a long way to bridging the divide between historians and legal scholars." *See* "MoreUs. Blog of the Arthur J. Morris Law Library," *https://library.law.virginia.edu/ajm-blog/2018/07/12/a-new-guide-for-legal-historians* [as of Feb. 9, 2021].

7. *See* D. O'Scannlain, "'We are all Textualists Now': The Legacy of Justice Antonin Scalia" (2017) 91 *St. John's L. Rev.* 303, 304, n. 1 [quoting Justice Kagan]. More recently, this reality was illustrated by *Bostock v. Clayton County* (2020) 140 S.Ct. 1731, in which each of the opinions relied heavily on textual analysis and avoided the lofty rhetoric presented in much of the briefing and expected by many commentators. And although the use of "legislative history" is less controversial in California courts, judges here begin their analysis with the text. *See* Rick Sims, "What Appellate Judges Do" (2005) 7 *J. Appellate Pract. & Process* 193, 196–200.

8. M. Cohen, "Researching Legal History in the Digital Age" (2007) 99 *Law Lib. J.* 377, 388, ¶ 33 ["disagreements over the interpretation of words and phrases are frequently divisive in . . . deliberations and decisions"]; A. C. Barrett, "Assorted Canards of Contemporary Legal Analysis: Redux" (2020) 70 *Case W. L. Rev.* 855, 861 ["even card-carrying originalists don't always wind up at the same spot"].

9. For example, a historian would view a legislator's personal diary entry about a bill as a "primary" source; a lawyer or jurist decidedly would not. But the *Guide* is not focused on the narrower subject of *legislative* history — the materials gathered and (sometimes) disseminated during the statute-making process — but on the much broader subject of *legal* history.

10. W. Baude & S. Sachs, "Originalism and the Law of the Past" (2019) 37 *Law and Hist. Rev.* 809, 812; see O. W. Holmes, *The Common Law: Early Forms of Liability* (1881) ¶ 73 ["The history of what the law has been is necessary to the knowledge of what the law is"].

11. *See* Stats. 1850, ch. 95, p. 219; Civ. Code, § 22.2; W. Morrow, *Historical Intro. to Cal. Jurisprudence*, San Francisco: Bancroft-Whitney Co. 1921, xxxvi–xxxviii.

12. *Bond v. U.S.* (2014) 572 U.S. 844, 857.

and understanding how they were compiled helps the researcher know which to consult and how to extract the information most efficiently therefrom. Not everything is easily findable, and in some cases is not findable at all, or is findable only at a cost.[13]

The "meat" of the *Guide* — its detailed description of what written and electronic material exists and how to use it — is just that, a guide, and does not purport to provide a comprehensive explanation of every source. And of necessity it reflects a snapshot in time, because the databases and technology are in constant flux. But it helps focus the researcher, and does it well. For example, knowing when and why the Code of Federal Regulations Act was adopted (a half-century after the Interstate Commerce Commission began regulating behavior), and understanding how federal regulations were and are compiled, would not come intuitively from browsing online to find when a material change occurred. As another example, trying to understand the structure of the myriad colonial courts by reading cases would be fruitless. The *Guide* explains these and many similar kinds of source-specific problems.

The *Guide* need not be read at one sitting, nor is it designed to be. About 80 pages can be read to acquire a feel for how and why different kinds of legal sources were written and how to find and understand them.

The Introduction and Chapter 1 ("General Bibliographic Sources") explain the overall purpose and contours of the *Guide*. Chapter 6 ("Research Gets Organized") and "The Current Era" part of Chapter 7 describe the rise and fall of structure in the law: *Written* law began with the chronological publication of statutes and cases. The nineteenth century brought organization through codification, West's national reporters, Shepard's, and new topical treatises. Computerization freed researchers from editorially imposed structure, then structure was reënabled via indexes and so forth. Knowing the ebb and flow of structure makes it easier to use and understand both written and scanned materials. Finally, the first seven pages of Chapter 10 discuss dictionaries, their origins, purposes, and usefulness: Not all were created equal.[14]

The subject-specific sections ("English Foundations of American Law," "Colonial Law," "Constitutional Law," "The Early Republic," "The Administrative State," "International and Civil Law in the U.S.") and those on archival, biographical, and non-law sources, can be read when needed.

Four practical and very useful things can be found at the end of almost every chapter: (1) a concrete research problem to illustrate the application of the materials discussed, (2) a detailed bibliography, (3) a list of sources cited, and (4) a good collection of relevant online databases (proprietary and open-source).

Finally, in a telephone conversation, Nann offered me what perhaps may be the *most* useful advice: "Please use your librarian!" They don't just shelve books and insert pocket-parts.[15] ✯

Levin was a Third District Court of Appeal research attorney for over 30 years and now works part-time as of counsel to Colantuono, Highsmith & Whatley. He is a longtime supporter of the CSCHS and its mission of preserving and disseminating California legal and judicial history.

13. *See* M. McAlister, "Missing Decisions" (forthcoming 2021) 169 *U. Pa. L. Rev.* [describing a large body of unpublished federal cases available only via PACER and only if one already knows what to look for]; *see also generally* R. Bering, "Losing the Law: A Call to Arms" (2007) 10 *Green Bag 2d*. 279. Equitable issues about access are in part being addressed by the rise of open-source databases (such as those that disseminate PACER documents). But the proprietary nature of most databases can also cause quality issues: Nann sees a decline in the maintenance of some sources. As an exception, he points to *Moore's Federal Practice*; because it is used nationwide it generates income to support good, continuous, scholarship. More specialized or localized treatises have not all fared as well.

14. *See also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, Eagan, MN: Thompson/West 2012, 415–24.

15. In this connection, I would like to thank law librarians Holly Lakatos, Linda Wallihan, and Fran Jones for their vital help and many kindnesses to me throughout my career as a court research attorney interested in history.