ON THE BOOKSHELF

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.


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


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 (f) 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, enhancing understanding of the law.


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

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.


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.

Do You Remember Bernie Witkin?

Bernie Witkin died 25 years ago last December. To commemorate his passing and celebrate his profound and lasting influence on California law, the California Supreme Court Historical Society will be collecting and preserving remembrances from those who knew Bernie so that they are not lost. We hope you will join in this effort. If you have a personal story about Bernie that you would be willing to include, please contact John Wierzbicki, who is leading this project, at witkinstories@gmail.com.

Bernie’s achievements have stood the test of time; now let us preserve his stories, his humor, his humanity.