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Sources in American Legal History

M. Jennifer Parrish, JD, MLS

Becoming an expert in American legal history is as easy as becoming an expert on all topics of American law. It is impossible. Acquiring at least minimal knowledge about American legal history is, however, a desirable goal for law librarians.

The recent annual meeting of the American Society for Legal History included a program of four speakers who have written, or are in the process of writing, biographies of judges, living and dead. The two-hour session, while fascinating, assumed a level of understanding by the listener about how one researches and composes a biography of a judge (or indeed of anyone) that may not have been warranted. Although each author's approach may be totally unique, making a standard research methodology impossible to delineate, every biographer has to start with certain basic sources. Every legal historian must start with the basics as well. This article is intended to offer to the neophyte some thoughts about sources of American legal history and how at least one person started down the interesting, if sometimes tortuous path, to such historical knowledge.

Bibliographical essays always seem to start with references to other bibliographies. While there are definitely some bibliographies of American legal history worth knowing about, it hardly seems worthwhile for the beginner to start wading through lists of titles before s/he knows anything substantive. So this essay will buck the trend and start with a few specific titles.

If you had only one week in which to gain an overview of American legal history, what books would you read/skim? My choices would be the following, to be read in this order:

Friedman, Lawrence M., *A History of American Law*. (New York: Simon and Schuster, 1973).

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- Horwitz, Morton J. *The Transformation of American Law, 1780-1860*. (Cambridge: Harvard University Press, 1977).
- Gilmore, Grant. *The Ages of American Law*. (New Haven: Yale University Press, 1977).
- Presser, Stephen B., and Zainaldin, Jamil S. *Law and American History: Cases and Materials* (St. Paul: West, 1980).

Friedman's book represents a very solid attempt at compressing the legal history of this country from colonial days to the beginning of the 20th century into one highly readable volume. The more one studies American legal history the more awesome Friedman's achievement becomes. This is not to suggest, however, that the book and its author lack critics. In fact, the reading of a legal historical monograph is never finished until one has also read all the critical reviews of it. Book reviews can be found using the *Index to Legal Periodicals* as a guide.

Horwitz' book consists of eight essays on various areas of the law. Four of the chapters appeared previously in other books or law reviews. This monograph treats specific topics in the law rather than following the global historical narrative approach of Friedman's work. While not as easy to read as Friedman's work, Horwitz' book may ultimately prove more thought-provoking.

If you've gotten through Friedman and Horwitz and are still willing to go on with this educational endeavor, you're in for a treat. My next recommendation, *The Ages of American Law*, is an expanded version of a series of lectures given by Professor Gilmore at Yale Law School in 1974. This brief book is a very personal and often iconoclastic look at the development of American law in the nineteenth and twentieth centuries. It is a relief to read after the highly factual works discussed above and offers yet a third perspective from a renowned legal scholar.

The fourth suggested title in this introductory reading session is one of the few published casebooks on American legal history, Presser's and Zainaldin's *Law and American History*. When asked recently why there weren't more legal history casebooks published, a representative of a major legal publisher told me that professors of legal history tend to want to compile their own materials for students, so as to emphasize what each considers important. Whether or not one agrees with this as being the reason behind the lack of commercially published legal history classroom teaching materials what is undoubtedly true is that Presser and Zainaldin have com-

piled a valuable casebook, one which certainly bears study by the law librarian interested in American legal history. It has the same advantage and disadvantage of any other casebook. The advantage is that the reader is exposed to a great many cases and there are numerous references to relevant secondary sources. The disadvantage is that the severe editing done to most cases appearing in casebooks can give the reader a diluted, anemic version of some of this country's major historical court opinions. The remedy for this however is to seek out the full opinion in the appropriate reporter and rely on the casebook as a guide to and summary of major cases.

Reading or skimming these four books and their reviews serves to give a background basis, a panoramic view, of American legal history. While older titles could be cited which would expand and strengthen the overview, these four share the characteristic of being interesting and readable. In an era which has tended to devalue history, dry prose in ponderous tomes will not sell.

At this point appears a fork in the road. You can continue down the path of commentary or you can venture into primary sources or, depending on your own unique interests, you may wish to crisscross back and forth between these paths.

For more commentary, the footnote references, bibliographies, bibliographical essays, and tables of authorities in the four works discussed above will give numerous citations to monographs and law review articles. Some standard bibliographies include the following:

- Association of American Law Schools. *Law Books Recommended for Libraries*. No. 25: *Legal History*. (Fred B. Rothman: 1968, supp. 1975).
- Bander, Edward J. *Legal Research and Education Abridgment*, "Legal History," pp. 116-118 (Cambridge: Ballinger, 1978).
- Hall, Kermit. *A Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979*. 5v. (Millwood, N.Y.: Kraus, 1983).¹
- Harvard Law School Library. *Annual Legal Bibliography*. 1961-1982.

Journal literature should not be overlooked. You will certainly want to consult the *Index to Legal Periodicals* and *Legal Resource Index (Current Law Index)*. You may wish to consult the tables of contents of new issues of the *American Journal of Legal History* and

the new *Law and History Review*. The *ASLH Newsletter* always lists recent publications of interest.

It may occur to you in the course of all this legal historical research, that your knowledge of American history generally is not all you thought it was. For references to historical journal articles and other works on history, consult the following:

American History and Life

American History Periodical Index

Combined Retrospective Index to Journals in History, 1838-1974

Dissertation Abstracts International-Humanities and Social Sciences

Historical Abstracts

Writings on American History²

At some point in the reading of all these generalized secondary sources on American legal history, two feelings will come over you. One is a desire to know more about a *specific* historical topic. The other is a desire to read primary source material so as to check the accuracy of all the commentators' perceptions. These two feelings overwhelmed me about the same time and the topic which interested me was the law of slavery. (This peculiar interest in the "peculiar institution" is discussed further below.)

The same indices and bibliographies in which you found references to general works on American legal history will refer you to works on more specific topics. The books and articles you read will cite both the primary materials (landmark cases, etc.) and other commentary. It is a building block process.

The *Century* Edition of the *American Digest* is a good source of case law, particularly if you are looking for more obscure cases on a particular topic.

If you find a federal case (or federal statute) of particular interest, track the citation in *Shepard's Federal Law Citations in Selected Law Reviews*. This will assist you in finding commentary citing the case in the top twenty law reviews published in this country during the last decade. It is also worth noting that citations to law review articles can be tracked down in *Shepard's Law Review Citations*. So, for example, if one finds a slavery case decided in federal court, one can discover what recent articles have appeared in the well respected law reviews citing this case, by using the *Shepard's Federal Law Citations*. Then to find out how the courts and other law review

commentators view these articles, their citations should be looked up in *Shepard's Law Review Citations*. Again, the building block analogy comes to mind.

To illustrate what may seem a very abstract process from what has been described thus far, it might be worthwhile to discuss my own interest in the law of slavery and the process I have used to learn about it. First, it must be said that nothing on earth motivates someone to master a subject like preparing to teach it. For example, you may have thought you knew legal research but until you have to teach it your knowledge may remain at a surprisingly superficial level. The same is true with legal history.

An argument has long been waged in legal historical circles as to whether one should teach legal history in broad, objective strokes, or whether one should give in to one's own idiosyncratic notions of what is important and worthwhile in legal history and teach only that. I chose the latter course for two reasons: 1) there is not sufficient time in a two hour seminar to cover all the important events; 2) I can do a better job teaching what I know than teaching what I do not know.

Slavery has fascinated me ever since as a child I saw photographs in my uncle's house of slaves once owned by my great-grandparents. The prospect of one human being owning another struck me as so bizarre that I have spent at least two decades trying to figure it out. When given free reign to cover any aspect of American legal history in a seminar, the law of slavery came to mind immediately. Not only is primary source material plentiful (the section entitled "Slavery" in the *Century Edition* of the *American Digest* is 165 pages long and covers more than 3,000 cases) but there has also been a resurgence of scholarly interest in the field in the last decade or so, making commentary quite plentiful.

Slavery is not dry. Law students who are not turned on by contracts or property law or commercial law are nonetheless likely to be interested in slavery. Judicial reasoning, reflecting societal reasoning, in the early nineteenth century cases, especially in the Southern states, is so irrational to the twentieth century mind as to instantly provoke heated arguments. It is a great subject to teach. Additionally, it will provide ample opportunity for research and writing, the inevitable next step for the law teacher.

Following the steps outlined above and gaining all this knowledge through research and study is essential to the beginning legal historian. Reliance on books, however, is only part of the process.

Legal history is made up of ideas and interpretations of events, not all of which have been written down. This is why getting to know people interested in legal history is so important. People sources include law school faculty members,³ history department faculty members, librarians at the state historical society, other librarians—law school and university. Find these people and introduce yourself.

Consider joining the American Society for Legal History. The annual dues of \$13.00 entitle you to receive the *ASLH Newsletter* and the *Law and History Review* twice per year. There is a two-day annual conference in late October and the group is sufficiently small and friendly to enable the newcomer to meet people who teach and publish in various areas of legal history.

Other organizational sources of people contacts are the Association of American Law Schools' Section on Legal History and the American Historical Association.

Besides increasing your legal historical knowledge, these contacts help in other subtler ways. Listening to these people talk about their scholarship and their experiences in teaching, researching, and writing can make the whole situation far less intimidating.

Whether your goal is becoming a knowledgeable student of legal history or preparing to teach a legal history course some day, following the steps described here will get you started. The single most important thing to remember is not to become discouraged by the vastness of the subject matter. The second most important thing to remember is that everyone is entitled to his/her own unique interpretation of historical events, even if it contradicts the opinion of a renowned commentator or two.

Thoroughness, persistence, and courage are good characteristics to develop as a budding legal historian (and, indeed, as a law librarian!). I will end this piece with one more illustrative anecdote. As I was preparing to venture forth into the treacherous waters of law teaching a year and a half ago, the following appeared as part of an editorial in the *Journal of Legal Education*:

Courses in legal process, legal philosophy and legal history ought to be required. . . . To ascertain their success, they should be taught by experienced and highly effective teachers since the fledgling teacher will necessarily have considerable difficulty convincing students of the relative importance of such courses.⁴

The author was right, of course. He also happens to be my dean. I did teach the seminar and received strongly positive student reviews. Miracles happen. To paraphrase the old Singer sewing machine commercial, "If I can 'do' legal history, you can 'do' legal history."

FOOTNOTES

1. This recommendation is based not on a thorough examination of the volumes as they have not yet been published at this writing, but on two lengthy conversations with the author.
2. Marc Silverman, *Bibliography on American Legal History*, (unpublished, 1983).
3. I have not met a law school faculty member yet who did not consider himself a legal historian to some extent. Armchair legal historians are like armchair law librarians—they're everywhere!
4. John E. Murray, Jr., "From the Editor," 31 *Journal of Legal Education* 253, 254 (1982).

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