Researching Legal History in the Digital Age*

Morris L. Cohen**

The renaissance of interest in American legal history has been greatly aided by a variety of developments in the materials and methods of legal research. Legal history has become a new center of attention in American legal education and scholarship and has attracted similarly enhanced interest in university history departments. Fortunately, this comes at a time when increasingly sophisticated research techniques and sources are gaining wide acceptance in both the academic and legal communities. Professor Cohen surveys the effects of these advances on research in American legal history.

¶1 Research sources of American law have varied over the four hundred years of our legal history, although, with a few exceptions, the sources of law have remained the same. As American law has developed, its published sources have changed both quantitatively and qualitatively. To see those changes most vividly, it may help to divide American legal history into the following four periods, based on changes in the ways law and information about law have been disseminated:

- from approximately 1620 to 1789 (the beginning of American settlement to the federal constitution);
- from 1789 to the 1880s (i.e., to the introduction of several new publishing schemes);
- from the 1880s to 1975 (to the approximate beginning of significant use of electronic legal research (i.e., LexisNexis and Westlaw); and
- from 1975 to the present (the period marked by extensive use of electronic legal research sources and methods).

¶2 For the purposes of this article, I have conflated the last three periods, since the basic forms of legal publication have remained largely the same since the colonial period. The source materials and research techniques for the colonial period are significantly different from those of the later periods. There were important changes in the research apparatus at the beginning of the third period and then again in the last period. The changes in the third period consisted initially of the publishing innovations that developed near the end of the nineteenth century. The end of that period (from the 1950s onward) saw the large-scale introduction

---

** Professor Emeritus of Law and Professorial Lecturer in Law, Yale Law School, New Haven, Connecticut.

of microfacsimiles, including massive collections of historical legal material on microfilm and microfiche.

¶3 The major changes of the fourth period have centered on the electronic storage and retrieval of vast quantities of legal information made possible by digitalization. Those changes are the main focus of this article, which is stimulated by Bob Berring's very important role in studying, publicizing, analyzing, and encouraging applications of new technologies to legal research. I know of no individual who has been as constructively influential in these developments.

¶4 Before getting to the specifics of how technology has affected historical legal research, I should note the several different ways in which that impact has occurred. Consider the following.

- Technology has vastly reduced information storage needs in comparison to the traditional space needs of books, and accelerated the processes of information retrieval.
- Technology has made easily accessible materials that were not otherwise available or only available with great difficulty.
- Technology has enhanced searching by creating a multiplicity of access points through advanced search techniques.
- Technology has made possible searching for the occurrences of words or phrases in new full-text databases.
- Technology has greatly improved bibliographic searching by providing huge new bibliographic utilities like Eureka and Worldcat, and enabling research libraries to put their catalogs online, thereby making them widely available.[1]

The process of innovation is ongoing and will undoubtedly lead to more changes, both incrementally specific and grandly systemic. For now let's look at some specific examples of the changes that have occurred so far.

Colonial Period

¶5 If we begin with the American colonial period, from the earliest settlement to 1789, we must take into account English law. The law of the mother country was the most important shaping force in our early legal history, and for well more than a century American law actually was English law. The transfer of English law to the colonies was not a simple matter—it was not merely carrying something called the common law of England and planting it in America to take root and

---

1. With the acquisition of RLIN by OCLC, Eureka, of course, will no longer be a separate entity, but its records will continue as part of Worldcat. Press Release, OCLC Online Computer Library Center, RLG to Combine with OCLC (May 3, 2006), *available at* http://www.oclc.org/news/releases/200618 .htm ("RLG's online products and services would be integrated with OCLC service offerings as appropriate. . . . For example, RLIN, the RLG Union Catalog, would be integrated into WorldCat, delivering economies of scale and reach that would benefit members of both RLG and OCLC.").

flourish. The seventeenth century, when settlement began, was a time of great legal and political turmoil in England—war, revolution, regicide, and the republican Commonwealth, followed by restoration and reform.

¶6 Furthermore, English law was not a monolithic entity but was made up of a variety of sources. Coke, in his *First Part of the Institutes of Lawes of England*, states that "there be divers lawes within the realme of England" and then goes on to list fifteen different forms of English law.[2] Anyone undertaking research in early American legal history will have to study the primary published sources of English law—statutes enacted by Parliament and judicial decisions as reported in the many volumes of *nominate* reports, or, as most of us call them, *nominative* reports. The conscientious researcher would also need access to the other forms of English legal literature, including comprehensive surveys like Coke's *Institutes*, monographic treatises on particular subjects, law dictionaries and books of maxims, form books and legal manuals, abridgments of cases and statutes, and compilations of constitutional documents. Furthermore, we must remember that English law was being modified in its colonial applications, both in London and in the colonies.

English Case Law and Statutes

¶7 New information technology has greatly improved the storage and retrieval of much of this material which has long been available in paper in most research law libraries. The most important of these developments was the digitization of both case law and statutes by the English publisher, Justis. Justis now offers an online version of the full text of the *English Reports, Full Reprint*; the database contains more than 100,000 court decisions decided between 1220 and 1873, which were originally published in 176 print volumes with no subject indexing.[3] (It should be noted that this set is now also available on LLMC Digital (http://ets.umdl. umich.edu/l/llmc). The service includes cases reported in the many volumes of the *Yearbooks* and the nominative reports. Justis has also created a database that contains the Acts of Parliament from 1235 to 1866, as originally published in Ruffhead's edition of the English *Statutes at Large*.[4] Both of these sets are now fully searchable online via Justis which allows for sophisticated research into the primary sources of English law for the colonial period.

Secondary Sources of English Law

¶8 English court decisions and statutes are not the only sources that relate to the reception of English law in the American colonies. The late legal historian, Joseph

---

2. SIR EDWARD COKE, THE FIRST PART OF THE INSTITVTES OF THE LAWES OF ENGLAND, OR, A COMMENTARIE VPON LITTLETON: NOT THE NAME OF A LAWYER ONELY, BUT OF THE LAW IT SELFE § 3 (London, Printed for the Societie of Stationers 1628).

3. For more information on this database, see Justis, English Reports, http://www.justis.com/titles/ english-reports.html (last visited Dec. 13, 2006).

4. For more information on this database, see Justis, UK Statutes, http://www.justis.com/titles/uk _statutes.html (last visited Dec. 13, 2006).

H. Smith, in his useful essay, "The English Criminal Law in America,"[5] lists other materials that should be considered when determining how law was received in America. He suggests studying royal charters, gubernatorial commissions and instructions, colonial acts and laws, the opinions of colonial administrators and officials, and the views of English commentators.[6] Several databases provide online access to a vast body of secondary English legal material published during the American colonial period, including the sources Smith cited. The most important of these are Early English Books Online (http://eebo.chadwyck.com/home), which includes books listed in the *Short-Title Catalogue 1475–1640*[7] and in the Wing's *Short Title Catalogue 1641–1700*,[8] and the Eighteenth Century Collections Online (www.gale.com/EighteenthCentury).

¶9 Because the coverage of Early English Books Online stops at 1700, the Eighteenth Century Collections Online is essential to bring a search through the colonial period. These databases can be used to search not only the English colonial material listed by Smith, but also English treatises, pamphlets, tracts, peace officers' manuals, form books, trial accounts, and other parts of English legal literature that were either used in the American colonies or influenced legal development here.

English Trial Practice

¶10 English trial material during the colonial period is another useful research source for studying colonial American trial practice and the development of the American law of evidence and civil and criminal procedure. The Proceedings of the Old Bailey, London, 1674 to 1834 (www.oldbaileyonline.org) is an electronic resource of more than 100,000 criminal trials held at London's Central Criminal Court. It is searchable by subject, personal name, and other access points. These trial reports were originally available in the many printed pamphlets of the *Old Bailey Session Papers*, which are held by very few American libraries and could not be conveniently searched in print format.

Accounts of Colonial American Cases and Trials

¶11 Although there were no American court reports published in series prior to 1789, there are a few forms of publication that can be used to study case law in the American colonies. The accessibility of these forms has been greatly enhanced by technological developments. The first category consists of contemporary publications of noteworthy American trials.[9] There was no systematic arrangement for

---

5. Joseph H. Smith, *The English Criminal Law in Early America*, in JOSEPH H. SMITH & THOMAS G. BARNES, THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES 3 (1975).
6. *Id.* at 3–4.
7. A. W. POLLARD & G. R. REDGRAVE, A SHORT-TITLE CATALOGUE OF BOOKS PRINTED IN ENGLAND, SCOTLAND, & IRELAND, AND OF ENGLISH BOOKS PRINTED ABROAD, 1475–1640 (1948).
8. DONALD WING, SHORT-TITLE CATALOGUE OF BOOKS PRINTED IN ENGLAND, SCOTLAND, IRELAND, WALES, AND BRITISH AMERICA, AND OF ENGLISH BOOKS PRINTED IN OTHER COUNTRIES, 1641–1700 (1945–51).
9. For a scholarly discussion of the development of this literature, see DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1674–1860 (1993).

such publications, which are relatively few in number. Those that were printed were often prepared and sold at the initiative of individual printers who saw enough potential interest in a case to suggest a profitable market for its publication. Or they might have been published at the initiative of a court reporter, lawyer, judge, clergyman, party, or public official who had some interest in bringing the case to the public's attention. Those most likely to result in contemporary publication were prosecutions for piracy, religious dissent, and criminal libel.

¶12 The full texts of virtually all colonial publications printed in America before 1820, including trial accounts, have been digitized and can be read and searched comprehensively in at least one database and selectively in another. The most comprehensive of these databases is Early American Imprints. Series I of this database includes the full text of all American imprints from 1638 to 1800, as listed in Charles Evans's *American Bibliography*.[10] For the 1801 to 1819 period, Series II covers the publications listed in Shaw and Shoemaker,[11] the bibliographic series that continued the work of Evans. The Early American Imprints databases can be used to search the full text of any publication printed in America during those periods. Eighteenth Century Collections Online also can be used to search for eighteenth-century English and American imprints but, at least for American publications, it seems less comprehensive than Early American Imprints.

¶13 Colonial case material can also be found in archival manuscript records of court files. These exist in the archives of most states going back to their earliest years, even into the colonial period for the older states. Selections from these files have been transcribed and published by modern scholars who have often added explanatory notes and introductions, thereby enriching the research value of the records. The court files from which the transcriptions were made are located in a variety of institutions: state and county archives, historical societies, courthouses, etc., and are often difficult to identify and even more difficult to access. However, helpful bibliographies of these transcriptions have been published for New England and the Middle Atlantic states,[12] and a recent bibliographic compilation, *Prestatehood Legal Materials*,[13] may facilitate locating these records. Although

---

10. CHARLES EVANS, AMERICAN BIBLIOGRAPHY: A CHRONOLOGICAL DICTIONARY OF ALL BOOKS, PAMPHLETS, AND PERIODICAL PUBLICATIONS PRINTED IN THE UNITED STATES OF AMERICA FROM THE GENESIS OF PRINTING IN 1639 DOWN TO AND INCLUDING THE YEAR 1820: WITH BIBLIOGRAPHICAL AND BIOGRAPHICAL NOTES (1941–59). This database is the digital version of the Readex microfilm set EARLY AMERICAN IMPRINTS, 1639–1800 (1983?). For further information about the database, *see* Readex, Early American Imprints, Series I: Evans, 1639–1800, http://www.readex.com/readex/product.cfm?product=4 (last visited Dec. 11, 2006).

11. RALPH R. SHAW & RICHARD H. SHOEMAKER, AMERICAN BIBLIOGRAPHY: A PRELIMINARY CHECKLIST FOR 1801–1819 (1958–66). For further information about the electronic version, *see* Readex, Early American Imprints, Series II: Shaw-Shoemaker, 1801–1819, http://www.readex.com/readex/product.cfm?product=5 (last visited Dec. 11, 2006).

12. *See* WILLIAM JEFFREY, JR., EARLY NEW ENGLAND COURT RECORDS: A BIBLIOGRAPHY OF PUBLISHED MATERIALS (1954); William Jeffrey, Jr., *Early American Court Records—A Bibliography of Printed Materials: The Middle Colonies*, 39 U. CIN. L. REV. 685 (1970); DIANE RAPAPORT, NEW ENGLAND COURT RECORDS: A RESEARCH GUIDE (2006).

13. PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA (Michael Chiorazzi & Marguerite Most eds., 2005).

most of the published transcriptions have not been digitized, I expect that many of them will be in the future. In addition, virtually all states are now putting their current archives online, and some are already going back and digitizing earlier records retrospectively. The ability to search these voluminous records electronically will be a great boon to historical research.

¶14 Another important microform source for legal records of many kinds, including court proceedings, is the Family History Library of the Church of Jesus Christ of Latter-Day Saints. Founded by the Mormons in Salt Lake City in 1894 in order to gather genealogical records, it has now dispersed copies of these records to more than four thousand family history centers operating in eighty-eight countries. The collection, which includes more than 2.4 million rolls of microfilmed records, 742,000 microfiche, and 700 electronic resources, grows constantly; in 2003, approximately 50,000 rolls of film were added.[14] Plans for digitization of the library are underway and legal historians will have access to these records in a variety of ways. Because it includes court, town, city, and county records going back to the early seventeenth century, the Family History Library is a truly amazing and growing collection which sometime in the future will be searchable by sophisticated electronic means.

Personal Papers, Correspondence, and Memoirs

¶15 There are hundreds of thousands of unpublished manuscript collections that have research potential in American legal history in the colonial period and beyond. Our ability to identify and locate such collections and documents relevant to particular research subjects has been greatly improved by online bibliographic searching through the ArchivesUSA (http://archives.chadwyck.com) and ArchiveGrid (http://archivegrid.org/web/jsp/index.jsp) databases, each of which offers information about the location and contents of thousands of manuscript collections. Some manuscript collections of the papers of lawyers, judges, legal organizations, and trials have been filmed and are available at multiple locations around the country. The judicial papers collection of the Harvard Law School Library is a good example. We can look forward to a day when these microfilm files have been digitized and can be searched more effectively.

¶16 The papers of individual lawyers and judges are another important resource for the study of colonial American law. Modern scholarly editions of several of the founding fathers who were also active lawyers are particularly useful in this regard. The most valuable of these for their legal content are the papers of John Adams, Alexander Hamilton, Thomas Jefferson, John Marshall, James Madison, and John Jay. The papers of Madison[15] and Jay[16] are now searchable in electronic format,

---

14. About the Family History Library, http://www.familysearch.org/Eng/Library/FHL/frameset_library .asp (last visited Dec. 11, 2006).

15. American Memory, Library of Congress, James Madison Papers, http://memory.loc.gov/ammem/ collections/madison_papers/index.html (last visited Dec. 11, 2006).

16. Columbia Univ. Libraries, The Papers of John Jay, http://www.columbia.edu/cu/lweb/digital/jay (last visited Dec. 11, 2006).

and one can hope that the others will be digitized in the future. Even where the papers themselves have not been digitized, some libraries have put finding aids to some of their manuscript collections online.

Secondary American Sources

¶17 The two series of the Early American Imprints database described earlier can also be used to search the full text of a variety of early American legal publications, in addition to the trial accounts already mentioned. For example, the first real law book printed in the American colonies, William Penn's *The Excellent Priviledge* [sic] *of Liberty & Property Being the Birth-right of the Free-Born Subjects of England,*[17] can be found there, as well as in some other databases. All editions of other important documentary compilations on political and legal rights, such as Henry Care's *English Liberties, or the Free-Born Subject's Inheritance . . .*, first published in London in 1680,[18] reprinted there in 1700, 1703, and 1719, and then reprinted in America in 1721 and 1774, can be found and compared online in several databases, although printed copies are quite rare.[19]

¶18 When preparing my *Bibliography of Early American Law,*[20] I found that, despite the generally accepted view that American legal literature was virtually nonexistent until Independence,[21] there were in fact hundreds of publications on American law, legal institutions, and legal controversies during the colonial period. In addition to numerous volumes of enactments by colonial legislatures, there were approximately one hundred imprints in the seventeenth century and more than five hundred between 1700 and 1776, including reprints of English texts specifically intended for Americans. Virtually all of these volumes, including many that have been very rare, are now easily accessible for study and searching by legal historians in Early American Imprints.

Transition to the New Republic

¶19 The period from Independence to the beginnings of an autonomous legal system after the adoption of the federal constitution has always presented special research problems, including the fact that the states each had their own reception statutes. Consequently, controversies arose over the extent of English law's application in each state before a substantial domestic law had developed. Other

---

17. WILLIAM PENN, THE EXCELLENT PRIVILEDGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND (Philadelphis, William Bradford 1687).

18. HENRY CARE, ENGLISH LIBERTIES, OR, THE FREE-BORN SUBJECT'S INHERITANCE . . . (London, Printed by G. Larkin 1680).

19. Eighteenth Century Collections Online includes the texts of the 1703, 1704, 1715, 1719, and 1768 London printings of *English Liberties.*

20. MORRIS L. COHEN, BIBLIOGRAPHY OF EARLY AMERICAN LAW (1998 & Supp. 2003). Although the CD version of B.E.A.L. was not popular with researchers, the publisher is planning to put it on HeinOnline, where I'll be able to add newly discovered entries.

21. *See, e.g.,* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 59 (3d ed. 2005) ("In one sense, colonial legal literature is quickly disposed of: No such thing worthy of the name existed before 1776.").

problems involved the impact and interpretation of the new federal constitution and its interactions with individual state constitutions, and the sometimes difficult resolution of legal controversies among the three branches of government on both the federal and state levels. Research in these areas has been greatly aided by new databases offering access to sources hitherto not easily available and by advanced search techniques and multiple access points. Several databases now offer sophisticated searching of the numerous pamphlets, speeches, and writings arguing for and against the adoption of the federal constitution and the early congressional debates over constitutional issues and federal relations. Among these are two Library of Congress sites: American Memory (http://memory.loc.gov/ammem/index.html) and A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875 (http://memory.loc.gov/ammem/amlaw); Westlaw's Bicent database (now called *LH1776)*; and the Web edition of the Founders Constitution (http://press-pubs.uchicago.edu/founders).

¶20 Two important, early studies of American law dealt with the problems of integrating English law into the newly developing legal system on both the federal and state levels. Both Nathan Dane's *A General Abridgment and Digest of American Law*[22] and James Kent's *Commentaries on American Law* recognized that the reception of English common law in the new states was partial and was subject to local exceptions and modifications.[23] They also understood that the process and its results varied from state to state, creating differences that were reflected in their respective texts. Although both publications included indexes, our ability to search them online in the Making of Modern Law database (www .gale.com/ModernLaw) or in the Legal Classics Library of HeinOnline (www .heinonline.org/HOL/Index?collection=beal) facilitates their use to shed light on this important transitional period of our legal history.

Modern Period (1789–Present)

¶21 From 1789 to the last quarter of the nineteenth century there was little qualitative change in the methods and materials of legal research, although there was a huge growth in the quantity of published material. There was a growing volume of decisions coming from the federal and state courts; statutory enactments streamed out of the Congress and the state legislatures; and a domestic literature expanded broadly to include law texts, treatises, form books and practice manuals, encyclopedias, digests of cases and statutes, and journals.

¶22 Around 1880, a number of new bibliographic tools were developed by private law publishers that dramatically improved the research capabilities of the bench and the bar and of the growing academic community. The innova-

---

22. NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS (William S. Hein & Co. 1979) (1823–29).
23. JAMES KENT, COMMENTARIES ON AMERICAN LAW (Da Capo Press 1971) (1826–30).

tions included West Publishing Company's National Reporter System and its key-number indexing and digesting system; annotated law reports from Lawyers Cooperative Publishing Company; annotated statutes from West, Lawyers Co-op, and other publishers; and the Shepard's system of citators.[24] Legal literature, however, continued to grow in the century following the introduction of the new information technology of 1880 to the late 1970s. It grew in many ways: the explosion of litigation and legislative activity, the proliferation of documents from both federal and state governments, and the lawmaking of many new administrative agencies in the exercise of their quasi-judicial and quasi-legislative functions.

¶23 We are all familiar with the quantitative growth of legal publications that had, by the last quarter of the twentieth century, made focused research in law—whether historical or current—increasingly difficult. When I entered the law library profession in 1958, we spoke of three million published cases in American law, to which were added 100,000 new cases each year; now we speak of six million published cases, growing by 200,000 new cases each year.[25] In 1958, we spoke of 15,000 new pages of new federal and state statutes each year; now 50,000 new pages are added.[26] Yet, the publication patterns and research techniques developed at the end of the nineteenth century continued with only minor changes until the last quarter of the twentieth century.[27]

¶24 The big breakthrough was the introduction in the 1970s of LexisNexis and Westlaw, two large computerized legal research databases that affected both historical and current legal research in ways unbelievable to earlier generations. Each database includes all federal court decisions back to their published beginnings, including decisions from 1789 to 1880 that were included in *Federal Cases*, the thirty-volume compilation of lower federal court decisions rendered prior to the development of the *Federal Reporter* that West published in 1984–97. While neither includes the National Archives pre-1832 Supreme Court appellate case files, dockets, and minutes, most of those valuable files are available online from the National Archives database (www.archives.gov/search/index.html). Online access to the records and briefs of the Supreme Court of the United States has been greatly improved with the availability of a new Thomson Gale database, The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832–1978,

---

24. These developments and other aspects of late nineteenth-century legal publishing are described in ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING (1990).

25. Richard A. Danner, *Contemporary and Future Directions in American Legal Research: Responding to the Threat of the Available*, 31 INT'L J. LEGAL INFO. 179, 181 (2003) (citing ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 11 (8th ed. 2002)).

26. *Id.*

27. Of course, there was the introduction of the loose-leaf services, which were useful in public law fields where regulatory changes were frequent, and the introduction of microforms in the 1960s, which were most useful in making massive amounts of historical material available in any library that could afford them.

which is likely to be growing.[28] For researching decisions of the Supreme Court, I must also mention Oyez.org (http://oyez.org), a wide-ranging database created at Northwestern University that aims, among other things, to provide access to all audio recorded in the Court since 1955.[29]

¶25 Historical coverage of state court decisions in LexisNexis and Westlaw is still limited. Both systems cover the highest court of most states back to their published beginnings, but retrospective coverage of lower courts is much less extensive. Online coverage of early statutory law for most states in LexisNexis and Westlaw is virtually nonexistent. Some of the official state archives, however, offer historical coverage of their early statutory law online.

¶26 With respect to the online storage and retrieval of *secondary* materials, the new technology has facilitated vast improvements. The Thomson Gale database, Making of Modern Law, now contains the full texts of more than 22,000 English and American legal treatises published between 1800 and 1926, with additional volumes added constantly. HeinOnline's Legal Classics Library provides a more modest (but much less expensive) alternative treatise collection. The Early English Books Online, Eighteenth Century Collections Online, and Early American Imprints databases mentioned earlier provide excellent coverage of historical monographic literature. A massive trial database said to be in the planning stages by Thomson Gale would offer extensive online coverage of that important genre.

¶27 Most American academic legal periodicals going back to their first volumes are now available and searchable online in HeinOnline's Law Journal Library. The *New York Times*, the *London Times*, and many other current newspapers are similarly accessible. The Readex database, America's Historical Newspapers,[30] formerly called Early American Newspapers, provides access to many early American newspapers published between 1690 and 1922.

¶28 An extensive array of federal government documents are available from several different sources. Congressional documents and legislative proceedings have been digitized and are searchable via the Readex U.S. Congressional Serial

---

28. For information about this database, see Thomson Gale, U.S. Supreme Court Records and Briefs, http://www.gale.com/SupremeCourt (last visited Dec. 12, 2006). With Thomson Gale's frequent acquisition of databases started by others (e.g., LegalTrac; Eighteenth Century Collections Online; Biography Resource Center; Biography and Genealogy Master Index; The (London) Times Digital Archive), as well as its own Making of Modern Law, it has become an essential provider for researchers in legal history.

29. "Today, the OYEZ Project provides access to more than 3000 hours of Supreme Court audio. The aim of this latest effort is to create a public, searchable archive of all audio recorded in the Court since 1955. With this version of OYEZ, known as OYEZ5, our audio collection covers all audio from the 1990 Term through the end of the 2004 Term. Before 1990, the audio collection is selective. In the coming months and years, we shall add to the archive until it is complete. This means access to all audio recorded in the Court from October 1955 to the most recent audio release." Oyez, About Oyez, http://www.oyez.org/about (last visited Dec. 8, 2006).

30. For a description of this digital collection, see Readex, America's Historical Newspapers, 1690–1922, http://www.newsbank.com/readex/?content=96 (last visited Dec. 8, 2006).

Set, 1817–1980 database[31] and the Library of Congress database, A Century of Law-Making. The LexisNexis Serial Set database is searchable as part of its LexisNexis congressional database and is available separately. Documentation from more recent Congresses is available on Thomas, the Library of Congress database.[32] There are also plans for two projects to digitize all congressional hearings: LexisNexis is planning to convert all of the CIS microfiche of hearings, with a substantial subscription charge for use,[33] while Google is rumored to be planning a hearings database that would utilize the Library of Congress holdings and be available without charge.

¶29 Readex now offers a database of the American State Papers, 1789–1838, a collection of executive and legislative documents that is particularly valuable for the first fourteen Congresses (prior to the beginning of the *Serial Set*).[34] Although paper sets of *American State Papers* are not uncommon in American libraries, the electronic version offers search capabilities that will be invaluable to scholars of legal history and other disciplines.

¶30 Another Readex database, American Broadsides and Ephemera Series I, 1760–1900,[35] now enables historians to browse or search thousands of law-related publications printed between 1760 and 1900 that were previously difficult to identify, much less access, in print. Readex is also now offering its subscribers a beta version of a multiple database searching capability that has amazing potential for legal research.[36] Consider the power of being able to simultaneously search *all* of the databases in Readex's Archive of Americana.[37]

---

31. This database now includes congressional committee prints, reports, and documents, from both houses from the 15th Congress (1817) to the 57th Congress (1902), and its coverage will continue to the 96th Congress (1980). Readex, U.S. Congressional Serial Set, 1817–1980, http://www.newsbank.com/Readex/product.cfm?product=9 (last visited Dec. 12, 2006).

32. Thomas (http://thomas.loc.gov) carries full text of bills introduced in the current Congress, bill summaries and status from the 93rd Congress (1973) to the current Congress, and the full text of bills can be searched across multiple Congresses from the 101st Congress (1989) through the current Congress.

33. Press Release, Reed Elsevier, LexisNexis to Unveil Plans for Congressional Hearings Digital Collection, Forming the Largest Online Collection of Congressional Information (June 22, 2006), *available at* http://www.reed-elsevier.com/index.cfm?Articleid=1806; Product Announcement, LexisNexis, Introducing the New LexisNexis Congressional Hearings Digital Collection (n.d.) (copy on file with author).

34. For a description of this digital collection, see Readex, American State Papers, 1789–1838, http://www.newsbank.com/Readex/product.cfm?product=6 (last visited Dec. 12, 2006).

35. This database now includes approximately fifteen thousand broadsides and fifteen thousand pieces of ephemera, and the database is being added to currently. Readex, American Broadsides and Ephemera, Series I, 1760–1900, http://www.newsbank.com/Readex/product.cfm?product=2 (last visited Dec. 12, 2006). Although not all of this material is law-related, much of it is of interest to legal historians (e.g., court dockets, governors' proclamations, wanted posters, official notices of various kinds, execution handbills, etc.)

36. E-mail from Readex to Archive of Americana Subscribers, Archive of Americana—New Search Functionality (June 8, 2005) (copy on file with author).

37. Archive of Americana includes American Broadsides and Ephemera; Early American Imprints, Series I & II; America's Historical Newspapers; American State Papers; and the U.S. Congressional Serial Set, 1817–1980. Readex, Archive of Americana, http://www.newsbank.com/Readex/index.cfm?content=93 (last visited Dec. 12, 2006).

¶31 Plans are now underway for the digitization of most of the vast quantities of microfilm and microfiche of historical records and other documents that were produced in the second half of the twentieth century. These include the tens of thousands of microfiche produced by the Law Library Microform Consortium, including, for example, its excellent Native American collection, the Yale William Blackstone collection, a military law collection, and an historical collection of lawyers' directories.[38]

¶32 The Espy file, Executions in the United States, 1608–1991, offers unusually broad research potential for studying the administration of criminal justice over the centuries. The datafile (not a database) includes information about approximately fifteen thousand executions carried out under civil authority in America. It is searchable by name, age, race, sex, and occupation of the offender; place, jurisdiction, date, and method of execution; and the crime for which the offender was executed.[39]

Research in Legal Lexicography

¶33 Controversy over constitutional interpretation in the judicial process is but one of the areas in which there has been great interest in the meaning and history of law-related words and phrases. In the Supreme Court of the United States, disagreements over the interpretation of words and phrases are frequently divisive in the Court's deliberations and decisions. The 2001 Tarlton Law Library conference on Language and Law[40] revealed the wide-ranging academic interest in this area, as well as its practical ramifications. One of the most important research aspects of the modern study of the language of law has been tracing the origin, usage, and history of legally significant words. Fred Shapiro, a pioneer in this work, has described *historical lexicography* as follows:

> Historical lexicography is the study of the etymology, chronology, and meaning of words and phrases by means of a method first proposed in Germany in the early nineteenth century and later exemplified by the Oxford English Dictionary. This historical method requires that each meaning of each word be traced, to the extent practicable, to its earliest appearance in print, and that all developments in the word's usage be illustrated by dated and documented quotations using the word. The project of tracing words and phrases to their earliest appearances in print is an enormous and difficult one, involving research of a highly sophisticated and ingenious nature. Now, however, human ingenuity can be supplemented by automated searches retrieving the earliest usage of a term in the documents covered by a database.[41]

---

38. Telephone Interview with Jerry Dupont, Executive Director, Law Library Microform Consortium (Jan. 16, 2007) (describing LLMC's plans to digitize a collection of *Martindale-Hubbell Law Directories* and its predecessors going back to 1868).

39. The file was prepared by M. Watt Espy and John Ortiz Smykla and is listed in the NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA as ICPSR #8451. For further information, *see* Inter-Univ. Consortium for Political & Soc. Research, Description & Citation—Study No. 8451, http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/08451.xml (last visited Dec. 12, 2006).

40. *See* LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE (Marlyn Robinson ed., 2003).

41. Fred R. Shapiro, *The Politically Correct United States Supreme Court and the Motherfucking Texas Court of Appeals: Using Legal Databases to Trace the Origins of Words and Quotations, in* LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE, *supra* note 40, at 367, 368.

¶34 The online availability of the *Oxford English Dictionary* has been an enormous boon to lexicographical research, and the availability of many other full-text databases, both legal and general, has been an almost equally important development. The appendix to this article lists databases useful for researching both general language and legal language. These databases can also be used to search legal phrases, quotations, and proverbs. Fred Shapiro offers the example of the well-known quotation, "Justice delayed is justice denied," which was of unknown origin until he located an 1868 usage of it by William Gladstone in a House of Commons speech on the Irish question in the Questia database (www.questia.com).[42] This may be its original use. In a recent *Yale Law Journal* article on the origins of judicial review,[43] Mary Bilder uses lexicographical research to explore the meaning of the term "repugnancy" as a standard for evaluating colonial legislation.

Bibliographic Searching

¶35 Most legal history research begins with bibliographic searching and frequently continues to rely on it throughout the research process. Many of the specialized databases described earlier contribute significantly to bibliographic searching. Most important, however, are the huge bibliographic utilities, Eureka and Worldcat, and the online availability of the catalogs of many large research libraries. Not only is cataloging data now available electronically in uniform, MARC format, but that data may include information about the availability of a full-text online copy of the book or a microform copy. Searching is improved both by multiple access points (e.g., author, title, subject, keyword, publisher) and by setting limitations as to language, date, or place of publication. Although many researchers hated to see the demise of the card catalog, its replacement is a much more versatile finding tool.

Communication

¶36 New and improved communications technologies have aided scholarship and the study of legal history in a variety of ways. Interactive communication among historians and between historians and librarians via H-Law (www.h-net.org/ %7Elaw), the legal history electronic discussion list sponsored by the American Society for Legal History, has saved scholars vast amounts of time, facilitated the sharing of information, and made possible instantaneous notification to a widely dispersed community. H-Law has contributed immeasurably to communal discourse and the development of a community of legal history scholars. The multifaceted value of this now indispensable tool cannot be doubted.[44]

---

42. *See* FRED R. SHAPIRO, THE YALE BOOK OF QUOTATIONS 312 (2006).
43. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L. J. 502 (2006).
44. My own pet peeve about H-Law is its misuse by those who post queries that are easily answerable by consultation of standard reference sources, but that's a minor annoyance.

¶37 There are other new developments in scholarly communication, such as the collaborative databases SSRN (www.ssrn.com) and BePress (www.bepress.com) that facilitate the dissemination of recent scholarship and works-in-progress, thereby stimulating exchanges of views at early stages of the publication process. Podcasting offers potential as another means of disseminating ideas, lectures, and other forms of pre-publication presentation. While I don't know of any blogs that focus on legal history, they may well exist. There is an ever-expanding universe of new forms of communication to explore.

Negative Impacts of Technology

¶38 Having surveyed the many advantages of new technology, we must also consider the present or potential negative sides of these advances.[45] The ease of collecting apparently relevant authorities by electronic searching has sometimes led to superficial and sloppy research, particularly on the part of students. Cheating by plagiarism has certainly been made easier, but so has its detection. Bob Berring has observed that full-text searching often leads to factually similar materials while missing some conceptually relevant references, and that old-fashioned digest-searching is sometimes more effective than electronic searching.[46] There is concern that students or other researchers may be choosing areas of investigation because relevant materials are easily available via electronic sources and neglecting those topics that require extensive archival or other manuscript study. If so, that would certainly be a negative by-product.

¶39 There are also fears about the long-term physical survival of electronic data, particularly when paper holdings are discarded once digitized or when the information never existed in print. Potential danger of permanent loss may exist when libraries transfer ownership over unique holdings to commercial vendors without adequate assurance of retention and preservation. Finally, the still high cost of many commercial databases is a continuing problem for some scholars and institutions. Neither FindLaw nor Loislaw offer a realistic lower-cost alternative to LexisNexis and Westlaw for historical research.

¶40 Fortunately, we haven't seen much evidence of either a Luddite reaction to these changes or an inhibiting fear of their negative consequences, but, while we celebrate our new opportunities, we should be aware that there are some potential dark sides to progress.

---

45. *See, e.g.,* Jeffrey G. Barlow, *Historical Research and Electronic Evidence: Problems and Promises,* in WRITING, TEACHING, AND RESEARCHING HISTORY IN THE ELECTRONIC AGE: HISTORIANS AND COMPUTERS (Dennis A. Trinkle ed., 1998).

46. Robert C. Berring, *Full-Text Databases and Legal Research: Backing into the Future,* 1 HIGH TECH L. J. 27, 38–39 (1986).

Conclusion

¶41 It is clear that the impacts of new technologies on historical research and scholarship over the last twenty-five years have been widespread and overwhelmingly favorable. Although the nature of historical evidence has not changed, our access to it has certainly broadened, deepened, and been made faster. New avenues for historical research in American law have undoubtedly been opened. Whether there are, however, dramatic signs of breakthroughs or insights attributable to this new technology is unclear to me.

¶42 It may be too early to expect concrete results from most of the innovations I've described, but it has been thirty years, a whole generation, since LexisNexis and Westlaw became available to legal historians. We couldn't have expected to see visible impacts of electronic resources in the important 1970s books by Lawrence Friedman,[47] Morton Horwitz,[48] or William Nelson,[49] or in early volumes of the Holmes Devise History of the Supreme Court of the United States,[50] but it would be interesting to know whether Gerald Gunther or Andrew Kaufman used LexisNexis or Westlaw in their respective biographies of Learned Hand[51] and Benjamin Cardozo,[52] both published in the 1990s. These tools were probably not available for Kent Newmyer's biography of Supreme Court Justice Joseph Story,[53] published in 1985, but were for his work on John Marshall[54] which appeared in 2001. What about the more recent volumes of the Holmes Devise History?[55] One interesting use of new technology is David Seipp's work in producing a publicly searchable database of indexes and translations of the cases in the *Yearbooks* from their original Law French.[56] That database is getting more than eighteen-hundred hits a month—so it *is* being consulted. I have not undertaken systematic interviewing of historians to explore changes in their research methods, but that would be a worthwhile investigation for someone to pursue.

¶43 Is grander historical scholarship now in preparation as a result of these innovations? Certainly time will be saved and travel budgets reduced, but appraisal of the results will be complex and is not likely to made soon or to offer clear conclusions. That uncertainty should not diminish our gratitude for what we have now or deter full use of these improvements.

---

47. Lawrence M. Friedman, A History of American Law (1973).
48. Morton J. Horwitz, The Transformation of American Law, 1780–1860 (1977).
49. William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830 (1975).
50. *E.g.*, Carl B. Swisher, The Taney Period, 1836–64 (The History of the Supreme Court of the United States, vol. 5, 1974).
51. Gerald Gunther, Learned Hand: The Man and the Judge (1994).
52. Andrew L. Kaufman, Cardozo (1998).
53. R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1985).
54. R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court (2001).
55. *E.g.*, William M. Wiecek, The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953 (The History of the Supreme Court of the United States, vol. 12, 2006).
56. David J. Seipp, Medieval English Legal History: An Index and Paraphrase of Printed Year Book Reports, 1268–1535, http://www.bu.edu/law/seipp (last visited Dec. 8, 2006).

Appendix[57]

Full-Text Online Databases Useful for Research into General Language

Database	Coverage
Early English Books Online (http://eebo.chadwyck.com/home)	English-language books, 1473–1700
Eighteenth Century Collections Online (www.gale.com/EighteenthCentury)	English-language books, 1700–1800
Early American Imprints, Series I (www.readex.com/readex/product.cfm?product=4)	U.S. books, 1638–1800 (based on Charles Evans, American Bibliography)
Early American Imprints, Series II (www.readex.com/readex/product.cfm?product=5)	U.S. books, 1801–1819 (based on Ralph R. Shaw and Richard H. Shoemaker, American Bibliography)
America's Historical Newspapers (formerly, Early American Newspapers) (www.newsbank.com/readex/?content=96)	U.S. newspapers, 1690–1922
ProQuest Historical Newspapers (www.proquestk12.com/productinfo/pq_historical_newspapers.shtml)	*New York Times* and other major U.S. newspapers back to their original editions
ProQuest American Periodical Series (www.proquest.com/products_pq/descriptions/aps.shtml)	U.S. periodicals, 1741–1900
Times Digital Archive (www.gale.com/Times)	*Times of London*, 1785–1985
JSTOR (www.jstor.org)	Scholarly journals, 1665–

---

57. The lists in this appendix were prepared by Fred Shapiro for my seminar on research methods in American legal history and updated in November 2006.

Full-Text Databases Useful for Research into Legal Language

Database	Coverage
Making of Modern Law (www.gale.com/ModernLaw)	English-language legal treatises, 1800–1926
HeinOnline Law Journal Library (www.heinonline.org/HOL/Index? collection=journals)	English-language legal periodicals, 1804–
HeinOnline Legal Classics Library (www.heinonline.org/HOL/ Index?collection=beal)	English-language legal treatises, 1713–1979
LexisNexis and Westlaw	English-language legal cases, 1790–
Justis (www.justis.com/titles)	U.K. cases, 1220–1873 U.K. statutes, 1235– U.K. statutory instruments, 1671–