

Seeing the Elephant: 12 Western Legal History Sources

G. LeGrande Fletcher | Pioneers and settlers of the American West faced—and resolved—unique legal situations. If you are researching their legal history, you face various challenges as well. In fact, studying western United States legal history, often called “law for the elephant,”¹ sometimes seems like the old fable from India about the six blind men and the elephant.² In the story, each blind person runs into a different part of the elephant (leg, trunk, ear, tail, etc.) and then they argue vehemently over whose perception of the whole animal is correct. “Though each was partly in the right, . . . all were in the wrong” in their interpretations “about an elephant not one of them [had] seen” completely.³

Law v. History

Western and American legal history suffer from similar debates over definition and perspective.⁴ Many of these differences exist because some legal historians are history-trained and others are law-trained.

Many lawyers and judges are interested in legal history as a history of a state or region’s laws, with an emphasis on constitutional, judicial, and legislative histories. Their “history” sources are legislative debates and records, judicial and attorney general opinions, case law, and law review articles. The interest is in an intellectual history of the law and its jurisprudence.⁵

In contrast, legal historians with history graduate degrees often view legal history as a history of the state’s legal practitioners—biographies of attorneys, judges, and support staff. Often law enforcement professionals are included. The sources used are similar to those of traditional historians, such as biographies, memorials, and memoirs, as well as personal papers, newspapers, bar publications, and history journals.⁶



A third and related classification for many history-trained legal historians is legal history as a history of an area’s legal and quasilegal institutions. These include courthouses, jails, county and city governments, and state agencies. Sheriff and police departments are sometimes included, as well as vigilante actions, lynchings, and extralegal methods of keeping

the peace. The sources are archival and personal papers, as well as court and county records, legal codes and ordinances, business archives, and political/historical journals. The focus is on the interplay between law and society and law and society’s institutions. Such social and organizational legal histories are closely related to, and sometimes considered, political histories.

The varieties of sources and perspectives are multiplied across locations, historical time periods, and areas of law (water, mining, American Indian, etc.). In addition, there has not been a comprehensive legal history written for any area or state in the western United States.⁷ So, if you seem confused⁸ at where to start researching or reading western legal history, perhaps you can take some consolation from the elephant riddle “How do you eat an elephant?” Answer: “One piece at a time.”⁹

Top 12 Sources

For a little guidance as to where to start chewing, here are my top 12 sources for beginning legal history research on American western topics, in order from very useful to useful: The first four are bibliographies and guides to further research. The next two are literature reviews. Sources 7 to 10 are legal histories of various aspects of the West, and the last two are a dissertation and another bibliography. Most university and law school libraries in the western United States have these sources. All of them are available at Brigham Young University.

This article is excerpted from G. LeGrande Fletcher’s “200 Nevada Legal History References: A Selective Annotated Bibliography and Introduction,” published in the winter 1998 issue of *Nevada Law Review*, with earlier excerpt versions published in *Westpac News* 3–4 (Sept. 1994) and the *Nevada Public Lawyer* 17–18 (Spring 1995).

1

Jenni Parrish, *A Guide to American Legal History Methodology with an Example of Research in Progress*, 86 LAW LIBRARY JOURNAL 105–127 (1994).

This guide is a very useful introduction for those who want to write and research u.s. legal history. It includes examples of regional legal history (southern United States). Don't overlook this article, despite its nonwestern legal history focus.

2

Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICHIGAN LAW REVIEW 953–1011 (1987).

Considered the best western legal history bibliography, this reference does a good job of describing all of the elephant. Wilkinson has his own top-12 list on the West at 959–960.

3

John P. Reid, *The Layers of Western Legal History*, in LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 23–73 (John McLaren et al eds. 1992).

This reference complements Wilkinson's bibliography (listed above as source 2) and updates it. A fine synthesis of the many definitions of western legal history, it is part of an entire symposium on western legal history. "Law for the beaver" refers to fur companies and western Canadian legal history.

4

Articles of Related Interest, WESTERN LEGAL HISTORY.

This list of "citations to recent articles from other journals relating to western legal history" is the best way to find current articles on the subject and has been published in every issue of *Western Legal History* since its 1988 inaugural issue. The entire journal is recommended.

5

Kermit L. Hall, *The "Magic Mirror" and the Promise of Western Legal History at the Bicentennial of the Constitution*, 18 WESTERN HISTORICAL QUARTERLY 429–435 (1988).

This literature review is by a well-known writer and bibliographer of American legal history.

6

Charles F. Wilkinson, *Law and the American West: The Search for an Ethnic of Place*, 50 UNIVERSITY OF COLORADO LAW REVIEW 401–425 (1988).

This article comprises a literature review and observations by the same author as source 2.

7

David C. Frederick, RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891–1941 (1994).

One of the Ninth Judicial Circuit Historical Society's many fine contributions to western legal history, this indexed book offers an excellent history of the Ninth Circuit's first 50 years.

8

John P. Reid, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1980).

This indexed publication looks at concepts of property law among travelers in the early West.

9

Law in the West, 24 JOURNAL OF THE WEST 3–72 (JAN. 1985).

This collection of eight articles covers territorial judges, lawyers, peace officers, justices of the peace, vigilantes, women, and water in the West.

10

Gordon M. Bakken, THE DEVELOPMENT OF LAW ON THE ROCKY MOUNTAIN FRONTIER: CIVIL LAW AND SOCIETY, 1850–1912 (1983).

Common law and contract, water, labor, and corporation law in eight western states—Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming—are examined in this indexed history.

11

Raymond S. August, *Law in the American West: A History of Its Origins and Its Dissemination* (1987) (unpublished PhD dissertation, University of Idaho), microfilmed on UMI No. 87-16852 (Univ. Microfilm Int'l).

This report examines criminal, community property, mining, and water law in the American West, looking at case law, statutes, actual practice, and demographics.

12

Larry M. Boyer, FRONTIER JUSTICE (1979).

This indexed bibliography on western legal history lists 176 books and 327 articles held by the u.s. Library of Congress Law Library.

Definitions | As a final note, the term “law for the elephant” comes from the mid-19th-century expression “to see the elephant.” Although the phrase “to see the elephant” refers to “gaining experience in the world,”¹⁰ it also means going through hardships, such as crossing the Nevada desert to get to the California gold rush¹¹ or facing military battle with little training.¹² Perhaps these sources will help your western legal history research before you reach the point of “seeing the elephant.”

1. Definitions are given in this article’s last paragraph.
 2. John Godfrey Saxe, *The Blind Men and the Elephant*, in ARTHUR ASA BERGER, *BLIND MEN AND ELEPHANTS: PERSPECTIVES IN HUMOR* 7–8 (1995) (fable written as a poem).
 3. *Id.* at 8 (emphasis omitted).
 4. Source 3 in this article at 23; source II at 2–3.

5. Source I at 106.
 6. *Id.*
 7. Source 3 at 23.
 8. Source II at 2.
 9. Robert Hornstein, *Mean Things Happening in This Land: Defending Third-Party Criminal Activity Public Housing Evictions*, 23 S.U.L. REV. 257, 276 (1996) (how to handle an “elephant-sized task”). *Cf. In re* EDC,

930 F.2D 1275, 1281 (7th Cir. 1991) (“a mouse was trying to eat an elephant at one sitting”).
 10. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2055 (1968). *See also* GEORGE P. HAMMOND, WHO SAW THE ELEPHANT: AN INQUIRY BY A SCHOLAR WELL ACQUAINTED WITH THE BEAST (1964).
 11. Source 8 at vii–x. *See also* THE ELE-

PHANT AS THEY SAW IT: A COLLECTION OF CONTEMPORARY LEVY, THEY SAW THE ELEPHANT: WOMEN IN THE CALIFORNIA GOLD RUSH XV–XVI (1990); R. R. TAYLOR, *SEEING THE ELEPHANT: LETTERS OF R. R. TAYLOR, FORTY-NINER* (John Walton Caughey ed. 1951).
 12. *See* JOSEPH ALLAN FRANK & GEORGE A. REAVES, “SEEING THE ELEPHANT”: RAW RECRUITS AT THE BATTLE OF SHILOH (1989).



Regional v. National

Neither the ABA nor the American Association of Law Schools have issued guidelines defining a “national” law school. Whether a law school is considered national or regional has much to do with that school’s reputation in the legal and greater community. However, schools that have developed a national reputation do share some common characteristics, including prestigious faculties, high admissions standards, and a wide geographic distribution of graduates. If reputation and these other characteristics are taken into consideration, BYU has a national law school. In the short time it has been open, the J. Reuben Clark Law School has become one of the leaders in legal education.

Whereas charter class members remember Dean Rex E. Lee persuading them to attend the Law School, today Scott Cameron, associate dean of Admissions, must determine which of the many qualified candidates will be admitted. In fact, the class of

Vicki M. Huebner | As the assistant director of the Career Services Office, I occasionally have the opportunity to counsel prelaw students about their legal career options. Generally these students are most concerned about the type of job they will be able to find after graduation, especially if they want to practice outside the Wasatch Front.

Two years ago one student in particular caught my attention. She was a gifted young woman who had done well in school, had participated in several extracurricular activities, and was being heavily recruited by many law schools. She had been raised in Utah and had done her undergraduate work at BYU. After graduating from college she had worked as a high school teacher just outside Boston, and as we talked she expressed her desire to return there. She was particularly interested in knowing whether the Law School had any connections in Boston and whether she could find a job.

I started to answer her inquiry with my usual sales pitch: describing the outstanding legal education at BYU, the efforts the Career Services Office has made to attract an increasing number of recruiters, and the Law School’s growing reputation. Halfway through my answer she interrupted me and said, “I know that BYU has a good law school. I just want to know if I can find a job in Boston. Is this a regional or a national law school?”