

LAWYERS AND JUDGES IN EARLY KANSAS: A PROSPECTUS FOR RESEARCH

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In the early months of 1973, a book entitled *A HISTORY OF AMERICAN LAW*¹ and written by Lawrence M. Friedman of the Stanford Law School appeared in the bookstores. In the preface the author suggested that "[i]t may come as a surprise to hear that this book . . . is the first attempt to do anything remotely like a general history . . . of American law"² That there was indeed a reading public for such a book was seen clearly when both the Lawyers Literary Club and the History Book Club selected it for distribution to their members.

It is not my intent here to review Friedman's book. Rather, the purpose of this Article is to review why and to what extent American legal history has been "a rather neglected field" with "patches and pieces . . . but no fabric as a whole,"³ to note and describe the no less neglected status of Kansas legal history, and to suggest some directions of research that may enable us to understand better what law business in the early years of Kansas was about, how it functioned, and who performed it. Lastly, I would hope that this Article might encourage practitioners and judges to preserve valuable sources of information that are now often overlooked and sometimes even discarded or destroyed.

I. AMERICAN LEGAL HISTORY—A NEGLECTED FIELD

Four years ago, describing the state of American legal history, Friedman noted that "[p]robably fewer than fifty persons in law schools and history departments . . . could realistically think of American legal history as their major intellectual effort."⁴ A survey undertaken last year by Professor Joseph H. Smith of Columbia University showed that courses or seminars in American legal history were available to students in only 25 of the nation's law schools.⁵ From conversations with colleagues teaching courses I would surmise that a number of these offerings devote the major portion of the available time to the colonial period. The reason for this neglect of the years since Independence is fairly pragmatic: articles, monographs, and even books on the legal history of the colonies are fairly numerous, but the same statement cannot be made about the nineteenth century.

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¹ L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973).

² *Id.* at 9.

³ *Id.*

⁴ L. Friedman, *Some Problems and Possibilities of American Legal History*, in *THE STATE OF AMERICAN HISTORY* 3 (H. Bass ed. 1970).

⁵ J. Smith, Report on the Teaching of Legal History in American Law Schools, Part I, Nov. 20, 1973 (prepared for the Legal History Section, Association of American Law Schools).

Why this neglect of American legal history? The answer is probably two-fold. The American law school has traditionally been oriented toward vocational objectives. Students are taught the law as it is, and their predominant aim is to prepare themselves for the life-work of a practitioner. There is scarcely any room in the typical law school curriculum for matters not considered essential to the needs of the future practitioner. In Professor Smith's survey, no response is recorded from 54 of the law schools approved by the American Bar Association while 21 others responded that they were not currently offering any work in legal history (although they had either done so in the past or hoped to do so in the future).⁶

But if law schools relegate history to the role of a non-essential, surely historians have seen the need for the study of legal factors in the context of history. Intellectual history, one would assume, includes the history of legal thought. One might expect the economic historian to cover the reciprocal relationships of law and economic forces. The students of local history would find their study replete with law and lawyers. Institutional history, obviously, would need to include courts and other organizational patterns of the law. Probably, no one historian would devote himself to all these aspects of law in history; together, however, they constitute legal history.

But historians have been noticeably slow in turning toward the law. James Willard Hurst, himself a law professor rather than an historian and probably one of the two or three most influential workers in the field of legal history, has suggested that this apparent reluctance of professional historians to venture into the field of legal history may be attributable to the technical difficulties presented by legal materials and legal language: "[T]he student who has not become specially adept in squeezing out of legal sources all the juice he can will probably fall short of realizing their possibilities"⁷ Friedman, however, warns that it is possible to exaggerate the advantage that the trained lawyer may have in dealing with "the jargon, artifice, and verbosity of law." He sees a greater risk that nonlawyers, "driven away from lawyers' law by a sense of insecurity . . . may neglect legal process and take refuge in works of jurisprudence and rhetoric written by lawyers but not necessarily for a legal audience." The use of such materials, he adds, can lead to "downright misleading" results, for "[f]ormal jurisprudential literature made a slim contribution at best to American culture, and it had little impact even on the work and thought of the profession."⁸

G. Edward White has described the causes of the neglect of American legal history in these words:

The sporadic nature of intellectual contributions to the discipline can be partially explained by its peculiar methodological problems. Analyzing legal source

⁶ *Id.*

⁷ Hurst, *Legal Elements in United States History*, in *LAW IN AMERICAN HISTORY* 12 (D. Fleming & B. Bailin eds. 1971).

⁸ L. Friedman, *supra* note 4, at 13-14.

material requires the technical skills imparted by a legal education: the majority of historians are deterred from doing research in legal materials by their inability to read the relevant sources. Taking the time to acquire the necessary skills, for an historian, is in many instances far more costly than simply choosing a less formidable area of specialization. Other deterrents exist for American lawyers interested in legal history. The methodological techniques of the legal profession, perhaps because of their proven success in analyzing cases and statutes, tend to become the central focus of legal education: substance, on balance, is subordinated to methodology. But history is not so easily reduced to concrete problems of analysis: descriptions of the flow of change and synthesis of large masses of data are important in rendering it intelligible, and the standard techniques of legal analysis are less helpful in those tasks. Further, modern American legal education, with its emphasis on the contrary uses to which data can be put and the ambivalent nature of reality, may serve as a philosophical deterrent to historical scholarship, which until recently has been seen by its practitioners as an objective search for truth.⁹

But, it will be countered, there is a wealth of material on the Supreme Court, on judicial review, on constitutional crises, on individual justices of the high court; how is this to be reconciled with the assertion that legal history is a neglected field, that "[w]ork in legal history in all quarters adds up to a very limited accomplishment"?¹⁰ First, American historiography has until quite recently focused very largely on the development of the nation and of national institutions.¹¹ Secondly, by virtue of our unique tradition by which virtually every issue of policy is translated into constitutional terms and debated as a legal issue,¹² one can view the Supreme Court and its work from many perspectives. Political scientists see the Court as an institution of government; historians regard it as a moving force and also as a reflection of society; some sociologists have even studied the Court as an example of small-group activity; and lawyers view it as the capstone and crowning ingredient of the legal system.

Yet, even though the literature concerning the Supreme Court is abundant, what is notable about it is its unevenness. "[B]asic assumptions about the proper way to study the Court remain unresolved. As a consequence the Court's work was over-evaluated but seldom illuminated."¹³ Thus the fact that the Supreme Court has been so widely, if inadequately,¹⁴ studied does

⁹ White, Book Review, 59 VA. L. REV. 1130, 1131 (1973).

¹⁰ Hurst, *supra* note 7, at 13.

¹¹ On the obstacles encountered by various specialized thrusts within American historiography, see generally the symposium cited *supra* note 4.

¹² 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284 (H. Reeve transl. 1898). Note also Corwin's observation that "[m]any other countries . . . have written constitutions, but 'the constitutional lawyer' is a unique product of our system . . ." E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* xxii (1934).

¹³ White, *supra* note 9, at 1132.

¹⁴ The realization of the need for a comprehensive and consistent history of the Supreme Court led to the decision to devote the estate of Justice Holmes to underwrite the writing of such a history, projected to consist of eleven volumes. To date, two have been published: J. GOEBEL, *ANTECEDENTS AND BEGINNINGS TO 1801* (1971); and C. FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88, PART ONE* (1971). They have been described as "ponderous, . . . overfull, pedantic, technical, and (insofar as they fail to take into account broader historical and philosophical themes, or to deal with the history of the Court as an institution) incomplete." W. Hoyt, *Now and Then: The Uncertain State of Nineteenth-Century American Legal History* 10, Dec. 29, 1973 (paper presented to the Legal History Section, Association of American Law Schools).

little to offset the general proposition that American legal history is a neglected field.

One major exception, however, deserves to be noted—the work of the “Wisconsin school” of James Willard Hurst¹⁵ and his students (among whom Friedman is the most prolific). Hurst turned his attention to private law and specifically to law at the local and state level. He conceived of the law as both a tool and a product of societal, and especially economic, growth. Thus he and his students, seeing the nineteenth century primarily as an era of economic unfolding, look at Wisconsin’s lumber industry,¹⁶ railroading¹⁷ insurance regulation,¹⁸ and water supply.¹⁹ Friedman’s recent book²⁰ exemplifies the Hurst approach in its focus on the interactions of law and economic growth. What emerges from his pages is more a history of what law did to and for business and how the growing importance of business affected the law than it is a history of the law business itself.

A few years ago Professor Anton-Hermann Chroust prepared a study that specifically focused on the legal profession.²¹ For the national period²² of our history it drew heavily on Roscoe Pound’s *The Formative Era of American Law*,²³ although many of Pound’s generalizations have been drawn into question by more recent research. The limitations under which Chroust (and more recently Friedman) labored are succinctly illustrated by the fact that Chroust’s index has no entries at all for 25 of the 50 states, including Minnesota, the Dakotas, Iowa, Nebraska, Kansas, and Oklahoma. Compiling and collating, he encountered a virtual void when he reached the states of the Great Plains. It is, of course, not surprising that more research has been done and more published studies are available on the legal developments of the original states than on the law and legal institutions of states with a less extended history. Obviously, Massachusetts history spans more time than that of Montana.

But law also came to the new states in ways quite different from the deliberate manner in which it reached the colonies. To be sure, the establishment of territories and states was an identifiable event, but it does not convey with any ascertainable degree of precision how effectively the authority of government came to be translated into the administration of justice.

¹⁵ Hurst’s work is discussed by Brooks, *The Jurisprudence of Willard Hurst*, 18 J. LEGAL ED. 257 (1966); Flaherty, *An Approach to American History: Willard Hurst as Legal Historian*, 14 AM. J. LEGAL HIST. 222 (1970); Frank, *American Legal History: The Hurst Approach*, 18 J. LEGAL ED. 395 (1966); Murphy, *The Jurisprudence of Legal History: Willard Hurst as Legal Historian*, 39 N.Y.U.L. REV. 900 (1964); and Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744 (1970).

¹⁶ J. W. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964).

¹⁷ R. HUNT, *LAW AND LOCOMOTIVES* (1958).

¹⁸ S. KIMBALL, *INSURANCE AND PUBLIC POLICY* (1960).

¹⁹ E. MURPHY, *WATER PURITY* (1961).

²⁰ L. FRIEDMAN, *supra* note 1.

²¹ A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965).

²² The national period (a term commonly used by historians) refers to the period after Independence.

²³ R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938). For an effective criticism of Pound’s approach, see Katz, *Looking Backward: The Early History of American Law*, 33 U. CHI. L. REV. 867, 873 (1966).

II. KANSAS LEGAL HISTORY AS A CASE IN POINT

It is a rather common belief that frontier justice was vigilante justice, a legal system to meet the needs of the locality rather than formal standards of justice under law. However, it is also known that lawyers were often among the earliest settlers²⁴ and that in most of the new states legal institutions and legal practices quickly came to resemble those of older states.

What we know very little about is how all this happened. Did law come to Abilene as it came to Atchison? One can surmise that Abilene had law-related problems quite different from those of Atchison's early days. What was the law business like in early Kansas? Judging from the Lawrence business directory,²⁵ lawyers in that city sold real estate, acted as commission agents and rent collectors, were notaries and brokers—and, of course, held public office. But not all law business was done by lawyers: there was no requirement that county attorneys be members of the bar,²⁶ and legal training did not come to be a requirement for probate judges until the state was nearly 80 years old (and then only in the more populous counties).²⁷ One may infer from this that there were not enough lawyers to go around, but the registers of attorneys which an early statute²⁸ required the clerk of each court to maintain suggest the contrary. An alternative explanation may be that there was a suspicion that, to paraphrase Churchill's phrase about war and generals, justice was too important a business to be left to the lawyers.

It has long been maintained that lawyers and the legal profession had suffered heavily from the incursions of Jacksonian Democracy with its avowed belief in the ability of the citizenry to attend to the business of its own government. Maxwell Bloomfield has summarized this traditional view in these words:

In the folklore of American legal history the middle decades of the nineteenth century mark the nadir of professionalism in national life. While acknowledging the brilliant achievements of individual practitioners and judges during the years from 1830 to 1870, commentators from Charles Warren and Roscoe Pound to W. Raymond Blackard and Anton-Hermann Chroust have insisted upon the overall deterioration of the bar under the assaults of a militant democracy. The standard picture of professional development in the United States begins with a Golden Age of jurisprudence in the early Republic, fostered by a self-regulating fraternity of educated judges and lawyers. Then come the Barbarian Invasions, as the semi-literate masses force their way into legal practice, aided by sympathetic state legislatures. Finally, after several decades of disorder and demoralization, an elite

²⁴ Stephen H. Field, later to become Justice Field of the Supreme Court of the United States, came to Marysville, California, when it was no more than an aggregate of tents. C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 29-30 (1930). Five years after Lawrence, Kansas, was founded, the new town's business directory listed 13 lawyers. Business Directory of Lawrence, Kan. Terr., 1859 (reprint by the Kenneth E. Spencer Research Library, University of Kansas, 1973).

²⁵ *Id.*

²⁶ The requirement was set up in 1907. Ch. 163, [1907] Kan. Sess. Laws 263 (codified at KAN. STAT. ANN. § 19-701 (1964)). See *State v. Smith*, 50 Kan. 69, 31 P. 784 (1892).

²⁷ Ch. 180, [1939] Kan. Sess. Laws 302 (codified at KAN. STAT. ANN. § 59-201 (1964)).

²⁸ Ch. 11, § 4, [1855] STAT. KAN. TERR. 132.

leadership arises to purge the profession of its populist standards of recruitment and achievement, through the creation of the first modern bar associations in the eighteen-seventies. In its broad outlines this pattern of alternating light and shadow appeals strongly to the imagination, while providing at least a plausible account of the interplay between legal groups and the forces of social change.²⁹

Bloomfield himself has demonstrated that this traditional view is, at best, an over-simplification; at worst, largely in error.³⁰ The principal difficulty with the traditional, as well as the Bloomfield view, is that both extrapolate only from the record of the New England and Middle Atlantic areas, with limited allowances for the Upper Midwest (Wisconsin, Michigan, Indiana, Ohio). The belt of states that comprise the Great Plains seems to present a somewhat different picture.

Kansas may be regarded as reasonably typical. Pick up a recent history of the State,³¹ and you will discover that no chapter heading or index entry alludes to either lawyers, judges, courts, or the law. Earlier histories,³² structured largely as biographical compendia, provide a random selection of information about individual members of the Bench and Bar but little of a systematic nature about either the profession or its institutions.

III. BEGINNINGS TOWARD AN UNDERSTANDING OF KANSAS LEGAL HISTORY

But lawyers and judges, probably to a greater extent than any other profession, produce documentation of their activities. Thus the source material for a study of the law and of lawyers in early Kansas exists—or should exist.³³

It is possible, for instance, to know the names of attorneys of the territorial and statehood period because an early statute of the Territory of Kansas required the clerk of each court to maintain a roll of attorneys.³⁴ The Leavenworth County attorney roll offers a good example of the opportunities available for future research. The county history, in its chapter on the Leavenworth County Bar, follows the order in which attorneys' names appear on this roll and then devotes one paragraph, sometimes not more than one sentence, to each attorney. Some of the entries have no more than the name: "W. M. Patterson is the next name;" "J. A. Burton was next to enroll." Other notations suggest that even in territorial days not all lawyers pursued their calling: "R. H. Housley . . . devoted more of his attention to farming than to his practice;" "Samuel S. Ludlam . . . early deserted the practice of law and

²⁹ Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 AM. J. LEGAL HIST. 269 (1971).

³⁰ *Id.* His forthcoming book, *The Power Brokers: American Lawyers and Social Change, 1776-1876*, is expected to enlarge the argument of this article and of his earlier *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306 (1968).

³¹ E.g., W. ZORNOW, KANSAS: A HISTORY OF THE JAYHAWK STATE (1957).

³² E.g., F. BLACKMAR, KANSAS: A CYCLOPEDIA OF STATE HISTORY, EMBRACING EVENTS, INSTITUTIONS, INDUSTRIES, COUNTIES, CITIES, TOWNS, PROMINENT PERSONS, ETC. (1912).

³³ See the suggestions to this effect by my colleague Paul Wilson, *Country Lawyers*, 2 BOOKS AND LIBRARIES AT K.U., no. 4, at 10 (1951), and note as an example of the use that can be made of such sources his finely edited rendering of a letter by an early Lawrence attorney, *A Survey in Retrospect: A Letter of Elliott V. Banks*, 10 KAN. L. REV. 123 (1962).

³⁴ Ch. 11, § 4, [1855] Stat. Kan. Terr. 132.

entered into newspaper work;" "Fox Diefendorf came here comfortably fixed in the ways of the world's goods and devoted but little time to the practice of his profession."³⁵

That some of the early members of the Leavenworth Bar later gained national distinction did not affect the chronicler. David Brewer, to be sure, is an exception: the only Kansan to be named to the Supreme Court of the United States, the author allowed him two full paragraphs.³⁶ William Tecumseh Sherman may have been second only to Ulysses S. Grant as a Civil War hero, but he gets only eight lines in the list of Leavenworth lawyers:

Among the most famous of early day attorneys to practice law in this city was William T. Sherman of Civil War fame. Sherman came to this city in 1858 and soon engaged in the practice of law, associating himself in partnership with Hugh Ewings and Dan McCook. Sherman, while associated with a formidable firm of attorneys here, never gave a great deal of his time to the practice of law. Shortly before the outbreak of the Civil War Sherman removed to Louisiana. It was from that place that he entered the army upon the outbreak of the war.³⁷

Even more summary is this entry: "James H. Lane was never a resident of the county. His home was in Lawrence. At the time of his suicide on the military reservation north of the city he was United States Senator."³⁸

The reader who desires to know more about lawyering in early Leavenworth will learn little from this stringing together of names. One problem is that, while 153 different attorneys inscribed their names on the attorney roll in Leavenworth between 1855 and the coming of statehood, many of them, like Lane, were obviously not practitioners in the city but signed their names in connection with occasional appearances. How much of the more important law business in Leavenworth was done by lawyers from Atchison and Lawrence, St. Joseph, and Kansas City? What kind of practice did the resident attorneys have? What role did the lawyers play in the city and county? Much needs to be discovered before the picture can become more distinct.

Many of the counties in Kansas have had their histories recorded in print. These are based mostly on personal recollections or newspaper files. Often there is a section or a chapter on "The Bench and Bar,"³⁹ or recollections of an early judge or lawyer,⁴⁰ or accounts of specific controversies.⁴¹

³⁵ J. HALL & L. HAND, *HISTORY OF LEAVENWORTH COUNTY* 273, 277, 279, 280, 281 (1921).

³⁶ *Id.* at 281. No book-length biography of Justice Brewer exists. Paul, *David J. Brewer*, in 2 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 1513 (L. Friedman & F. Israel eds. 1969) has only two paragraphs on his activities as a Kansas lawyer. *Id.* at 1516.

³⁷ J. HALL & L. HAND, *supra* note 35, at 284. See R. ATHEARN, *WILLIAM TECUMSEH SHERMAN AND THE SETTLEMENT OF THE WEST* xiii, 56 (1956) and W. SHERMAN, *MEMOIRS OF GENERAL WILLIAM T. SHERMAN BY HIMSELF* 140-43 (1957).

³⁸ J. HALL & L. HAND, *supra* note 35, at 278. See W. STEPHENSON, *THE POLITICAL CAREER OF GENERAL JAMES H. LANE* 97 (1930).

³⁹ E.g., L. DUNCAN & C. SCOTT, *HISTORY OF ALLEN AND WOODSON COUNTIES, KANSAS* 37-38, 589-93 (1901); S. INGALLS, *HISTORY OF ATCHISON COUNTY, KANSAS* 293-301 (1916); G. HARRINGTON, *ANNALS OF BROWN COUNTY, KANSAS FROM THE EARLIEST RECORDS TO JANUARY 1, 1900*, 369-90 (1903); V. MOONEY, *HISTORY OF BUTLER COUNTY, KANSAS* 250-61 (1916); E. FORTER, *HISTORY OF MARSHALL COUNTY, KANSAS, ITS PEOPLE, INDUSTRIES, AND INSTITUTIONS* 398-407 (1917).

⁴⁰ E.g., Clark, *His First Fee and Other Reminiscences*, in S. Ingalls, *supra* note 39, at 47-48; Kramer,

Although lawyers and judges are often to be found among the contributors to, if not the principal authors of, local histories, the prime purpose of these accounts was, of course, to record and recall local events and local personalities. Written primarily for the residents of the respective locality, these histories typically lack documentation. Thus their value for the serious researcher is somewhat limited. Yet they contain invaluable nuggets of information; what is missing, in most instances, is the connective tissue, the threads that serve to reveal patterns and directions. Still, local histories will prove useful points of departure for anyone seeking to develop a legal history of the state.

Somewhat different, but equally short of the desirable coherence, are the miscellaneous accounts of bar association activities and events of interest to the bar traditionally carried by the *Kansas Bar Association Journal*.⁴² Obituary notices to be found here often supply information on educational backgrounds and professional associations, but they rarely reveal the extent and kind of legal activities in which the deceased engaged.

Court reports do, of course, provide some indications of legal activity, but, again, they furnish only a fragment of the whole. In Kansas, as in most states, published reports account only for the work of the supreme court, and only a small percentage of all causes litigated actually reach that level. Even if the case is considered and decided by the supreme court and the opinion reported,⁴³ what appears in print reflects the work of one court and reveals little of the activities of other lawyers, be they attorneys or judges, who had a part in the litigation.

The availability and completeness of the records of district and county courts vary greatly from court to court. An informal, preliminary survey shows that there are some courthouses where records back to the earliest days of those courts are maintained in excellent condition—but there are not many courts where this is the case. Far more common was the response that old records surely existed but were stored under conditions of virtual inaccessibility. Just as frequent appears to be the situation in which it is known that old records have been deliberately discarded or destroyed.⁴⁴

Documentation of the activities of practitioners is still more difficult to assemble. The Kansas State Historical Society has papers of a few prominent lawyers, and one of the tasks for future legal historians of Kansas is to examine their contents for material that would contribute to a clearer understanding of what lawyers did in early-day Kansas.

Experiences of a Lawyer, in V. MOONEY, *supra* note 39, at 359; 1 W. GRAVES, *HISTORY OF NEOSHO COUNTY* 275 (1949) (District Judge Stillwall).

⁴² E.g., Taylor, *Butler County Bar—Three Murder Cases*, in J. STRATFORD, *BUTLER COUNTY'S EIGHTY YEARS, 1855-1935*, 75 (1934).

⁴³ These Columns appeared under the title *Among Ourselves* from 1 J. KAN. BAR ASSN. 177 (1932) and under the caption *Hash Country Style* beginning with 7 J. KAN. BAR ASSN. 418 (1939).

⁴⁴ A written opinion was not required prior to 1869. Ch. 39, § 2, [1869] Kan. Sess. Laws 125 (codified at KAN. STAT. ANN. §§ 20-112, 60-2106 (1964)).

⁴⁵ In one instance last summer the writer's research assistant inquiring into the availability of old case files was asked by the clerk of the court to give her a hand with some boxes which the judge had directed to be thrown away: they were full of old records.

County and city archives undoubtedly contain valuable material although accessibility is often impeded by the absence of adequate finding devices. Even where archival materials have been cataloged, the task has often been entrusted to persons unfamiliar with the law and legal institutions, with the result that much of the effort involved in the examination of records will, of necessity, have to be undertaken anew.⁴⁵

Personal and family papers are often useful sources of information. One may assume that, beyond the papers known to be available in such depositories as the Kansas State Historical Society and the Kansas Collection of the Kenneth E. Spencer Research Library at the University of Kansas, there are papers in private hands and in other collections that would shed light on the role of lawyers and judges in early Kansas.

IV. POSSIBLE DIRECTIONS FOR RESEARCH IN KANSAS LEGAL HISTORY

Obviously, a great deal remains to be done if we are to develop a tapestry of legal life in nineteenth century Kansas. Initially, the availability and quality of source material needs to be determined. Some of the difficulties that attach to this first phase have been suggested in the preceding paragraphs. They invite a rather obvious question: is it worth the effort? What do we gain if we know what it was like to be a Kansas lawyer a hundred years ago?

One way to answer the question is, of course, to give the historian's response. "What is the use of history?" is a question which has been asked and the answer debated since man began probing into his past.⁴⁶ For our purposes, four statements on history may serve as guidelines. Two are by historians and deal with the need to look at history "from the bottom up." Thus Constance McLaughlin Green wrote the following:

For any true understanding of American cultural development, the writing and study of American local history is of primary importance. There lie the grassroots of American civilization. Because of our varied population stocks and their sharply differentiated cultural inheritances, the widely differing environment which the United States includes, and the rapidity of changes in our economic life, the problems confronting the social historian assume mighty proportions. American history in the past has been written from the top down, an approach feasible enough as long as scholars were content to write only political and diplomatic history. But the necessity of studying American life from the bottom up becomes obvious for the cultural historian. The story of how American people have lived as individuals and as communities must be told by details.⁴⁷

James C. Malin, a nationally known scholar and long-time member of the University of Kansas history department, stated the case for local history as follows:

⁴⁵ Thus, in one of the best-catalogued collections in the state, what was listed as records of a district court turned out to be the sheriff's file of writs of execution.

⁴⁶ For a representative collection of differing points of view see *THE VARIETIES OF HISTORY FROM VOLTAIRE TO THE PRESENT* (F. Stern ed. 1956).

⁴⁷ Green, *The Value of Local History*, in *THE CULTURAL APPROACH TO HISTORY* 275 (C. Ware ed. 1940).

[I]n local history . . . the historian can, if he will, come to grips with reality in its most elemental forms and more intimately than at any other level of space organizational. He can come nearer the ideal of dealing with his area and its materials as a whole than at any other level. In so doing, at the local level more clearly than at any other, the generalizations and frames of reference of national and world history, if not valid, are exposed as inadequate or false representations of historical reality.⁴⁸

Much of what has been written about American legal history in the national period has indeed been "from the top down."⁴⁹ This is not surprising considering the heavy stress placed on the work of appellate courts in our law schools. Holmes said that the history of law is "the history of the moral development of the race," a conclusion that follows from his postulate that "[t]he law is the witness and external deposit of our moral life."⁵⁰ But can "the moral development of the race" be gleaned from appellate opinions and the lives of appellate judges? Are we not likely to fall into distorted generalizations if we persist in looking at the "tip of the iceberg" of the legal system? If we accept the proposition that this nation's history is uniquely affected by diversity—diversity of ethnic background, diversity of religious belief, diversity of rates of economic development, diversity even in legal development—it follows that legal historians must, increasingly, focus their attention on the local scene.⁵¹

If they do so, they will do more than just add to the congestion on library shelves. Their contribution will serve

to help lawyers and legal scholars, who are essentially concerned with current problems, to be meaningfully aware of the past as a healthy check on our often overly-optimistic and unfounded hopes; to provide gentle redress in our moments of frustration and disappointment; to act as an indispensable aid in drawing the ever-difficult distinction between the "temporal" and the "eternal," the changing and the unchanging; and, above all, to provide awareness of the value and meaning of "civilization."⁵²

Kansas, I submit, presents an exceptional laboratory for the kind of work that needs to be done. Born in conflict and divided by differing patterns of settlement, the Jayhawk State defies easy generalization. Here moral development, to use Holmes' phrase, varied, often from town to town, certainly between the boisterous cattle terminals of the central and western parts of the state and the sedate, quasi-Southern atmosphere of the communities on

⁴⁸ Malin, *On the Nature of Local History*, 40 WIS. MAG. OF HIST. 227, 229 (1957).

⁴⁹ See text at note 11 *supra*.

⁵⁰ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

⁵¹ See W. Hoyt, *supra* note 14, at 20-21:

[T]he most pressing need is for more monographs on a microcosmic level. . . . We need many studies of how local government, and particularly county courts, functioned, both juridically and politically. What did people at the basic level of government perceive the function of their local courts to be? How closely was the ideal followed? What sort of skewing effect did the existence of a more or less organized professional bar have? What substitutes have various segments of society evolved for court-given justice and police-oriented law? How did law serve locally to cement such institutions as the family, or the church, or public education?

⁵² Woodward, *History, Legal History and Legal Education*, 53 VA. L. REV. 89, 105-06 (1967).

the eastern border. There is much that can be done to produce an understanding of the role of law and lawyers in these differing settings. Hopefully, within the context of the American legal history seminar now being offered regularly at the University of Kansas Law School, and with the cooperation of lawyers and historians, a beginning will soon be made. Practitioners and judges can make important contributions by identifying for the researchers records and papers relating to the work of early-day attorneys in the state.†

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