

# ESSAY

## The Origins of the *Kansas Law Review*

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This year the *Kansas Law Review* (*KLR*) celebrates its fiftieth anniversary, a not inconsiderable achievement. During those fifty years the *KLR* has published several hundred articles, student notes too numerous to count, book reviews, and essays. It has become one of the most important legal periodicals in Kansas, serving as an outlet for the scholarly works of the Kansas Bar, the faculty of the University of Kansas, and legal scholars nationwide. Its articles have touched upon almost every subject imaginable to a lawyer, from the highly theoretical to the stubbornly pragmatic. Some have had a national or international focus; others have been regionally or locally oriented. Today the *KLR* is solidly established as an important part of the American legal scene. But it was not always so.

Law reviews have been an important part of American law since the beginning of the nineteenth century.<sup>1</sup> As the American legal profession began to develop in the first generations after the Revolution, it had need for literature.<sup>2</sup> Courts in every state were producing a vast quantity

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1. See ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 188-95 (1990) (describing the early developments of American legal periodicals); Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar* (1830-1860), 12 AM. J. LEGAL HIST. 306, 309-19 (1968) (discussing the separation of law from politics in nineteenth century legal publications). See generally Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739 (1985) (examining the history and development of law reviews and their influence on the legal profession).

2. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 322-33 (2d ed. 1985) (noting that colonial lawyers had to rely on English case reports or on secondhand knowledge of English cases).

of decisions, many of first instance.<sup>3</sup> The first law schools were starting up in places like Cambridge, Litchfield, and Lexington.<sup>4</sup> A whole generation of legal scholars—men like Joseph Story, William St. George Tucker, James Kent, Hugh Swinton Legaré, and others—was beginning to produce books and articles that put American law on a firm theoretical ground.<sup>5</sup> And lawyers were always searching for the newest authority in the form of case reports and juristic writing. Thus, the stage was set for the growth of periodical literature. Initially, and indeed, throughout the nineteenth century, articles about law were considered suitable for inclusion in general literary magazines.<sup>6</sup> Thus, one finds articles by prominent jurists and judges in popular magazines such as the *North American Review*<sup>7</sup> and the *Southern Literary Messenger*.<sup>8</sup> Even so-called “ladies’ magazines” such as *Godey’s Lady’s Book* would occasionally publish an article about the law.<sup>9</sup> But case reports and professional news of the Bar were usually deemed too specialized for the general public. Thus, during the first half of the nineteenth century a number of professional legal journals were begun. For example, *The American Jurist and Law Magazine* and *Livingston’s Law Magazine* provided the American Bar with articles, case reports, news, book reviews, and other

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3. *Id.* at 323–26. The proliferation of reported cases prompted complaints of the overuse of authorities by lawyers in the nineteenth century. A. M. J. I. Dupin, *The Citing of Authorities*, AM. JURIST & L. MAG., July & Oct. 1832, at 111–17.

4. FRIEDMAN, *supra* note 2, at 318–22. See generally WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994) (evaluating the case method of teaching); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983) (linking changes in legal education to intellectual, political, and social trends); THE GLAD SOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES (Michael H. Hoeflich ed., 1988) (discussing the history of present day legal education).

5. See ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 20–28 (1984) (discussing the rise of judicial review in the nineteenth century and referring to lawyers as “natural guardians of the laws”); see also A.W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 668–674 (1981) (discussing the development and decline of legal treatises in America).

6. See generally FERGUSON, *supra* note 5 (analyzing the nineteenth century relationship between law and literature).

7. FRANK LUTHER MOTT, A HISTORY OF AMERICAN MAGAZINES 1741–1850 173–82 (Harvard Univ. Press 1939) (1930) (discussing the *North American Review* and its articles).

8. See *id.* at 629–57 (noting the impact of the *Southern Literary Messenger* on southern literature, society, and politics); BENJAMIN BLAKE MINOR, THE SOUTHERN LITERARY MESSENGER (1905) (discussing the history of the *Southern Literary Messenger* from the perspective of long-time editor Benjamin Blake Minor).

9. See MOTT, *supra* note 7, at 580–94 (relating the history of *Godey’s Lady’s Book* and its publisher, Louis A. Godey). Ms. Elizabeth Neigert, a 2001 University of Kansas School of Law graduate, is currently preparing a study of articles on legal subjects published by *Godey’s*.

material of interest to lawyers.<sup>10</sup> By the time of the Civil War there were nearly fifty such law reviews in circulation.<sup>11</sup> And so the situation remained until the latter part of the nineteenth century.

The great revolution in American legal periodicals took place in Cambridge at the Harvard Law School in April 1887 when a group of students banded together and published Volume 1, number 1 of the *Harvard Law Review (HLR)*.<sup>12</sup> This marked a turning point in American legal publishing. The *HLR* was radically different from earlier American law reviews. First, it was produced by students. Second, while it produced commentary on current cases, it did not reproduce actual case decisions.<sup>13</sup> Third, the *HLR* was envisioned by its founders as a vehicle by which the best legal scholarship then being produced could be circulated to a wide audience. There is no need to elaborate on the further history of the *HLR*. It is well known. Within a few years it had become a model for law reviews around the United States. Within a half-century everyone agreed that to be first-rate a law school needed to have its own student-edited law review.<sup>14</sup>

The history of legal publishing in Kansas followed a path somewhat similar to that described above, albeit on a different time scale. During the nineteenth century Kansas was not a publishing center. It did have a small but flourishing Bar, and by the latter part of the nineteenth century Kansas had a number of lawyers who were interested in legal scholarship.<sup>15</sup> At the same time the court system in Kansas was growing, and a

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10. *Id.* at 154–55, 451–52; see also Bloomfield, *supra* note 1, at 308–16 (discussing the increasing importance of legal periodicals in the nineteenth century). For a detailed study of *Livingston's Law Magazine*, see M.H. Hoeflich, *John Livingston: Legal Entrepreneur*, AM. J. LEGAL HIST. (forthcoming 2002) [hereinafter Hoeflich, *John Livingston*]. On the importance of early American law reviews in the transmission of European legal ideas to the United States in the nineteenth century, see M.H. Hoeflich, *Translation to the Reception of Foreign Law in the Antebellum United States*, AM. J. COMP. L. (forthcoming 2002).

11. Bloomfield, *supra* note 1, at 308–10.

12. See THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817–1917 139–43 (1918) (documenting the specific origin of the Harvard Law Review) [hereinafter CENTENNIAL HISTORY]; Swygert & Bruce, *supra* note 1, at 763–79 (documenting the origins of student-edited law reviews in general).

13. CENTENNIAL HISTORY, *supra* note 12, at 142.

14. STEVENS, *supra* note 4, at 164 n.13; see also *Symposium: Review of Articles that Shaped the Law*, 21 MICH. J. L. REFORM 509 (1988) (discussing the importance of law reviews to American scholarship). For a comparative view of law reviews and their influence in the United States, the United Kingdom, and France, see NEIL DUXBURY, *JUDGES AND JURISTS* (2001).

15. Many of these lawyers were also quite interested in literature. The best example, perhaps, is Eugene Ware, a graduate of KU Law School, author of several law books, and a noted Kansas poet under the pseudonym "Ironwill." See Charles Estabrook Cory, *Eugene Fitch Ware as a Literary*

number of notable cases were being decided.<sup>16</sup> The need to provide a vehicle for publishing the actual reports of these cases was not so great as it had been elsewhere fifty years before, because by this time commercial publishers were actively engaged in publishing volumes of case reports.<sup>17</sup> But there was some perceived need for periodicals to publish commentaries on cases, legal news, and articles of legal scholarship.

During the last quarter of the nineteenth century, this need was filled primarily by three publications. The first was the short-lived *Kansas Magazine*, which published a number of articles about law even though it was a magazine intended for a popular audience.<sup>18</sup> Nearly contemporary with this publication was a specialized law periodical, the *Kansas Law Journal*, published by Crane & Co. of Topeka for three years.<sup>19</sup> Crane & Co. was a stationer and bookseller, as well as publisher, and was the first publishing company to produce law books in Kansas for Kansas lawyers.<sup>20</sup> In the 1870s, Crane decided that there was a market for a legal magazine designed for the Kansas Bar. This magazine contained reports of unpublished Kansas cases, scholarly articles on the law, news about the Bar, and other information of use to the Kansas lawyer. It also contained advertisements for Crane's line of legal forms and for the law books published and sold by Crane.<sup>21</sup> When one reads through the issues of the *Kansas Law Journal*, one has the impression of a fairly sophisticated journal and of one whose editors felt great pride in the Kansas Bar's accomplishments. Unfortunately, it was not a financial success and soon ceased publication.

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Man, in 13 COLLECTIONS OF THE KANSAS STATE HISTORICAL SOCIETY 1913-1914 52-64 (1915) (extolling Eugene Ware's literary genius).

16. Even a quick reading of late nineteenth and early twentieth century *Kansas Reports* reveals the extent of judicial activity during this period.

17. By the 1870s and early 1880s, West Publishing had established itself nationally as the reporter of choice. See GEORGE S. GROSSMAN, LEGAL RESEARCH: HISTORICAL FOUNDATIONS OF THE ELECTRONIC AGE 39-95 (1994) (detailing the history of case reports in the United States); Jill Abramson et al., *Inside the West Empire*, 5 AM. LAW. 90 (Oct. 1983).

18. See, e.g., James M. North, *Constitutional Amendments*, 1 KAN. MAG. 220 (1872) (suggesting an amendment to the Kansas constitution regarding minority representation).

19. *The Kansas Law Journal: A Weekly Record of the Law and the Lawyers of Kansas* was edited by S. L. Seabrook and published by Crane & Co. from 1885 (vol. 1) through 1887 (vol. 5).

20. See GEO. W. CRANE & CO., BRIEF LAW CATALOGUE OF GEO. W. CRANE & CO. BLANK BOOK MANUFACTURERS, PRINTERS AND BINDERS, LAW BOOK PUBLISHERS AND DEALERS (1886). A copy of this catalogue is in the collection of the Kansas State Historical Society.

21. The publication of a legal periodical by a law bookseller and publisher as a marketing device was not unique to Crane & Co. See generally Hoeflich, *John Livingston*, *supra* note 10.

In 1895 the students at the University of Kansas School of Law began their own legal periodical, *The Kansas Lawyer*.<sup>22</sup> It is hard to characterize this publication as one modeled on the *HLR*. It was published bi-weekly, and many issues did contain scholarly articles, often written by KU faculty members and prominent members of the Kansas Bar and judiciary.<sup>23</sup> It also contained news of the KU Law School, of student activities—including parties at Dean Jimmy Green's home—and what we would now call “alumni news.”<sup>24</sup> It carried summaries of important cases decided in Kansas and elsewhere, and it carried news of other law schools.<sup>25</sup> It also carried advertisements from local Lawrence merchants designed to appeal to students and lawyers.<sup>26</sup> Issues were relatively short; and, so far as we know, student editors received no academic credit for their work on it. The students published the first issue of *The Kansas Lawyer* in 1895, and the last appeared in 1911.<sup>27</sup> It is rare today—alas, because it is a marvelous source for the early years of the KU Law School—but the Kansas Collection in KU's Spencer Research Library has a complete set.

In August of 1932 the Bar Association of the State of Kansas began publication of the *Journal of the Bar Association of the State of Kansas*. The new journal had somewhat different aims than previous legal publications in the state. First, of course, it was the purpose of the new journal to provide current legal information, including scholarly articles, to the Kansas Bar.<sup>28</sup> The Bar Association, then as now, had high aspirations for the Bar. They wanted to ensure that Kansas lawyers met the highest ethical and intellectual standards. By publishing a journal, they

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22. *The Kansas Lawyer*, vol. 1 (1895) to vol. 18 (1911), was published bi-weekly (or so it was claimed) by “the Students and Faculty of the University of Kansas and [members] of the State Bar.” A set of this periodical resides in the University of Kansas Archives in the Kenneth Spencer Research Library at the University of Kansas.

23. See, e.g., Wm. L. Burdick, *The Failure of Remedial Justice*, 17 KAN. LAW. 1 (Sept. 1910) (detailing the failures of the American justice system). On Burdick's scholarship, see M.H. Hoeflich, *William L. Burdick and the Making of the University of Kansas School of Law*, 49 U. KAN. L. REV. 1139 (2001).

24. See, e.g., *Alumni Personals* [sic], 17 KAN. LAW. 16–18 (Sept. 1910) (summarizing alumni activities).

25. See, e.g., *Syllabi of Supreme Court Decisions Handed Down Saturday, October 8*, 17 KAN. LAW. 36–38 (Oct. 1910) (listing and summarizing Kansas Supreme Court decisions).

26. See, e.g., *A Sure Cure for Tailorites . . . Peckham's*, 17 KAN. LAW. 16 (Sept. 1910) (advertising men's clothing).

27. No reasons for ceasing publication have been found in the sources.

28. The first issue of the new *Journal* included the text of several scholarly presentations, including one entitled *Legal, Social and Industrial Conditions in Russia*. J.D.M. Hamilton, 1 KAN. B. ASS'N J. 22–30 (1932).

hoped to help realize these expectations.<sup>29</sup> But the Bar Association was then, as it is today, also a political creature, and another purpose of the new journal was to further the lobbying efforts of the Association on behalf of the Bar.<sup>30</sup> Thus, one finds in the pages of the *Journal* a mix of articles, current legal news, and legislative reports. Eventually, the *Journal* also took upon itself the task of helping to train Kansas law students and included sections of student notes produced by the students at KU and Washburn.<sup>31</sup>

And so things remained until 1950. The University of Kansas School of Law in 1950 was a school in ferment. The veterans had returned *en masse* and were crowding into the classrooms. The Korean War was in its initial stages. The faculty was still relatively small, but quite distinguished. Among its members were James Barclay Smith, the great constitutionalist, and Quintin Johnstone, who later would join the faculty at the Yale Law School. Fred Moreau was dean. The students who began their legal careers at KU in the fall of 1948 were a mixed bunch of returning veterans and those who had missed the war.

Amongst their number were three who were remarkably visionary and energetic: Richard Stavely, Dan Hopson, and Donald Giffin. At the start of their second year these three conceived the idea of beginning a student-edited law review, based on the Harvard model. They sought out Dean Moreau for his approval. After receiving assurance that there would be enough enthusiasm among the students—and enough articles to fill the pages—he gave his permission.<sup>32</sup> Stavely, Hopson, and Giffin then set about transforming the Editorial Board, a student organization that had for several years contributed short case notes on recent judicial decisions to the *Kansas Bar Journal*, into the first Editorial Board of the nascent *KLR*. Stavely was elected Editor-in-Chief, but was stricken by encephalitis and hospitalized. The honor fell to Giffin. The effort of starting a new publication from scratch—one with extremely high tech-

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29. Gilbert H. Frith, *President's Comment*, 1 KAN. B. ASS'N J. 45-46 (1932).

30. See *id.* at 45 ("It is hoped that the publication of this journal will do much towards accomplishing legislative results in which the bar of the state is interested.").

31. See *Report of Committee on Tentative Plan for Kansas Law Journal*, 1 KAN. B. ASS'N J. 79, 84 (1932) (including comments of Dean Crane of the Washburn Law School and Dean Davis of the KU Law School on the involvement of the two institutions). One of the founding editors of the *Kansas Law Review* recalls that KU students at the time felt that the role of KU in the Bar Journal was not a barrier to starting a KU law review. Interview with Donald Giffin, Esq., Partner, Spencer Fane Britt & Browne, in Kansas City, MO (Apr. 5, 2001).

32. The following history is based primarily on interviews given by Donald Giffin, Esq. *supra* note 31, and Richard Stavely, Esq., to Lawrence Jenab. Transcripts of both interviews are on file with the *Kansas Law Review*.

nical and substantive standards—was tremendous. Fifty years later, members of the first Editorial Board still recall incredibly long hours of work, relieved only by sleeping a few hours a night in the *KLR*'s small office in what is now Lippincott Hall.

Initially, the format of the new review adhered quite closely to other reviews at other law schools. The idea was to have a student editorial board and to publish multiple issues. Although Harvard produced four issues per year, Kansas decided to start with three. The editors decided that they would adopt the citation style used by Harvard, now known as "Bluebook" style, but they ran into a problem. They had solicited the great Harvard Law professor, Zechariah Chafee, Jr., to give them the text of a lecture he had delivered at Columbia University as the lead article of the first issue. But when Chafee's article arrived, it was not in Bluebook style and there was not time to reformat it. Giffin decided to run the article anyway. Interestingly, the other two articles in this first issue, by Quintin Johnstone and James Barclay Smith, both of the KU Law faculty, were in Bluebook format. With this promising but patchworked first issue, the *Kansas Law Review* was off and running in November 1952. It has been in continuous publication since.

The first editors of the *KLR* faced a number of important issues. The first was the format which the new journal should take. They decided to make the *KLR* look like other law reviews in size and shape, but they chose a tan cover rather than Harvard's gray. More important, however, were questions as to the qualifications for students to be on the review. Giffin remembers that in the early days, any student who wanted to be on the review had a reasonable chance of doing so. Now, of course, there is a rigorous writing competition that factors in a candidate's grade point average. In terms of content, the first issue very much reflected the vision of the first editors. The founding editors wanted the *KLR* to attract national attention, and they understood that the best way to do this was to publish at least some authors with national stature. But they also understood the importance of appealing to their home-state readers. Thus, the first issue mixed national with local authors and topics of broad national interest with those of a more local flavor.

Volume one, number one, as already mentioned, featured articles by Zechariah Chafee, Jr., Quintin Johnstone, and James Barclay Smith. Volume one, number two had articles by John Scurlock, James Barclay Smith, Quintin Johnstone, and Newell A. George. Scurlock was a professor at the University of Kansas City Law School and a leading expert

on water law. George was a government attorney based in Kansas City. Volume one, number three had articles by Johnstone, Nick N.K. Kittrie, Leonard O. Thomas, and Charles H. Oldfather, Jr. Oldfather, of course, was a KU Law professor; Thomas was a Kansas City lawyer; and Kittrie worked at the KU Governmental Research Center. The subjects of the articles in these issues ranged from divorce law to child custody to the Kansas Supreme Court. There were also student notes, on topics mainly of interest to Kansas lawyers, and case comments on Kansas and other cases. There were also a number of book reviews, including a review of Justice Douglas' *Beyond the High Himalayas*.

It is obvious that the founding editors of the *KLR* did their job well. The journal quickly achieved a substantial circulation and became a mainstay of the Kansas Bar. It provided an important vehicle for the KU faculty and the Kansas Bar to publish major works of legal scholarship, achieving a balance between local and national interests from the start. Contemporary editors still strive to balance coverage of issues of practical, local importance with coverage of national and international concerns.

Of course, the story of the *KLR* does not end with the publication of the first volume. Indeed, this was only the beginning. There have been many changes over the years in the standards for student editors, the nature of the material published, and even the cover design. The first Editorial Board consisted of five titled editors, assisted by between fifteen and nineteen Staff members per issue. Today's Board has sixteen members, assisted by twenty-seven Staff members. Early editors relied heavily on solicited articles. Now that the *KLR* is established as a national forum for legal scholarship, unsolicited manuscripts flood its office. So far this year, the Articles Editors and the Editor-in-Chief have reviewed over 20,000 pages of unsolicited material.

Ten years after its founding, the *KLR* was joined in Kansas by the *Washburn Law Review*. And today, fifty years after it first appeared, the *KLR* continues to be a forum for the best legal scholarship about Kansas, national, and international law.