

Why the History of Kansas Law Has Not Been Written

by Michael H. Hoeflich

In 1888 Frederick William Maitland, the greatest modern historian of English law, delivered his inaugural address as the Downing Professor of the Laws of England at Cambridge University.¹ In that address he explained to his audience why the history of English law had yet to be written. That explanation, asserting that the sources for writing English legal history had not yet been collected and edited, led to the formation of the Selden Society and, eventually, to more than one hundred years of annual publications designed to bring those sources to light and make them available to historians and the general public. I come to you today, as the outgoing president of the Kansas State Historical Society, with a similar dilemma and a similar plea.

Kansas legal history, like local history everywhere, has been little explored. The work that has been produced primarily has been by lawyers writing for other lawyers. I do not mean to

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1. F. W. Maitland, *Why the History of English Law is Not Written* (London: 1888)



Because many of the historic documents and records of lawyers and their practices are becoming lost or destroyed, it is important to preserve the rich legal history of Kansas. This 1920s photograph depicts the law office of D. R. Beckstrom, Tribune.

belittle this work—some is of the highest quality—but it is neither comprehensive nor uniform. More to the point, Kansas has a rich and important legal history that needs to be brought to light. The time is fast approaching when it will become impossible to write a history of Kansas law or of the legal profession. It will become impossible to do so precisely because the sources for writing such history will have been destroyed or lost in the maw of that vast amount of paper that disappears from our law offices and judicial chambers each day.

I do not want to suggest that there have not been some fine works produced about Kansas law. There have been. We have, for instance, Virgil Dean's collection of essays *The Law and Lawyers in Kansas History*, published by the Kansas State Historical Society in 1991.² That collection contains a number of important articles: the federal courts in Kansas by Judge James K. Logan, the history of women lawyers in Kansas by Linda Elrod, and Justice David Prager's history of the Kansas judiciary, among others. There is also Robert Richmond's collection of essays published by the Kansas Bar Association, *Requisite Learning and Good Moral Character*, with articles by Justice Robert H. Kaul, Bill Kelly, Paul Wilson, and Elmer Jackson, among others.³ And,

2. Virgil W. Dean, ed., *The Law and Lawyers in Kansas: A Collection of Papers Presented at the 116th Annual Meeting of the Kansas State Historical Society, October 4 & 5, 1991* (Topeka: Kansas State Historical Society, 1991).

3. Robert Richmond, ed., *Requisite Learning and Good Moral Character: A History of the Kansas Bench and Bar* (Topeka: Kansas Bar Association, 1982).

of course, we have the late Paul Wilson's collected essays, *Musings of a Smiling Bull*, published by the University of Kansas School of Law in 2000.⁴ Further, a number of important legal historical articles have been published in various scholarly journals, including the journal of the



At the end of the nineteenth century some law schools were closed to blacks, and African Americans wanting a legal education turned to Kansas, where they were welcome. Two black students (top row) appear in this photo of an 1890s law school class at the University of Kansas.

Kansas State Historical Society. One excellent study, which I assign to my students when I teach my seminar on Kansas legal history, is Lyn Ellen Bennett's "Reassessing Western Liberality: Divorce in Douglas County, Kansas, 1867–1876."⁵ But such articles only scratch the surface of our rich history. We have no monographic history of the law or lawyers in our state. Most histories of the state do little with this subject, and even the standard bibliographies devote it little space or attention.

Tonight I want to do three things very briefly. First, I want to illustrate for you just how rich and how important Kansas legal history is. Second, I want to tell you of the great dangers facing the materials needed for writing that history. Third, I want to suggest a possible solution.

The United States is a nation of law. Lawyers have played an immensely important role in shaping our culture and our society. This is as true on the local level as it is on the national level. Yet, when looking at the standard histories of most states, including, as I have mentioned, Kansas, one finds very little discussion of laws and lawyers. In the case of Kansas, it is as if its legal history consisted of only two important moments: drafting the Wyandotte Constitution

4. Paul E. Wilson, *Musings of a Smiling Bull: Selected Essays, Articles and Speeches* (Lawrence: University of Kansas School of Law, 2000).

5. Lyn Ellen Bennett, "Reassessing Western Liberality: Divorce in Douglas County, Kansas, 1867–1876," *Kansas History: A Journal of the Central Plains* 17 (Winter 1994–1995): 274–86.

and the litigation in *Brown v Board of Education*. Of course, this is not true. In fact, Kansas has a great deal of history concerning the law and lawyers.

As one example, non-Kansans often misunderstand the legal history of race in our state. They understand that Kansas was born in a battle over slavery, and often they are confused as to how the free state also became a battleground over school segregation. In fact, the legal history of race relations in Kansas is far more complex than it first appears. As we now know through the work of many historians, many freestaters of the territorial period were neither abolitionists nor in favor of granting extensive legal rights to African Americans. Instead, they simply wanted to keep Kansas from becoming a slave state. Indeed, the Wyandotte Constitution explicitly rejected giving African Americans the right to vote.⁶ On the other hand, throughout much of the nineteenth century the Kansas black population was legally entitled to equal access to education. The 1954 decision in *Brown v Board of Education* was preceded by a very similar case, unreported and now long forgotten: *Daniels v South Topeka Board of Education*.⁷ In the *Daniels* case, a young black woman wanting to attend South Topeka High School in 1886 was rejected and told to attend a segregated, black high school nearby. Daniels sued the South Topeka Board in the District Court of Shawnee County. She won her case, and the court held that the Board of Education could not bar her, on the basis of race, from attending South Topeka High. Nearly a century before *Brown*, the District Court of Shawnee County got it right!

A second example is equally enlightening. For more than a century Kansas has had two excellent law schools: Washburn University and the University of Kansas. At the University of Kansas School of Law our classrooms are decorated with pictures of graduating classes. It is fascinating to trace the history of the racial mix of law school classes through these photographs. Before the First World War a number of black faces can be seen in most classes. The reason for this is quite interesting. At the end of the nineteenth century some law schools in nearby states



The Kansas Bar Association was one of the first in the nation to admit a woman as a full member. Maria Elizabeth DeGeer, pictured here, holds that honor. DeGeer was admitted to the state bar in 1886 and to the bar association the following year.

6. *Kansas Constitutional Convention: A Reprint of the Proceedings and Debates of the Convention which Framed the Constitution of Kansas at Wyandotte in July, 1859* (Topeka: Kansas State Printing Plant, 1920), 296–305. See also the author's chapter on Kansas, 1854–1861, in *The Uniting States* (forthcoming, 2004).

7. A note of this case with few details appears in the *Kansas Law Journal* 4 (January 1, 1887): 329. The laws permitting segregated schools in some Kansas cities had been changed just a few years prior. See James C. Carper, "The Popular Ideology of Segregated Schooling: Attitudes Toward the Education of Blacks in Kansas, 1854–1900," in *Kansas History: A Journal of the Central Plains* 1 (Winter 1978): 254–65.

were closed to blacks. African Americans who wanted to have a legal education came to Kansas, where they were welcomed. I do not wish to suggest, however, that the history of the legal profession in Kansas is one of unmitigated racial enlightenment and support for civil

Attest by the Clerk **TRIAL DOCKET "G,"**

ACTION	No.	TITLE OF CAUSE <i>Settlement</i>	PLAINTIFF'S ATTORNEY <i>Plaintiff</i>	DEFENDANT'S ATTORNEY <i>Defendant</i>
65931	142	George Tompsett	A. M. Worthington	Wm. A. Seiberg
66020	143	Richard Brown	A. M. Worthington	W. L. Baysess
66056	144	Reynold Kromminger	O. V. Gattshall	Wm. A. Seiberg
66062	150	John D. Dickhaut	O. V. Gattshall	Earl L. Gibson
66230	159	Leahard Brown	Alva Dickhaut	Alva Dickhaut
66320	160	Peter Hoffmann	J. J. Worthington	W. J. Campbell
67000	165	Joseph Guff	A. M. Worthington	J. C. Kippin
67000	166	Peter Hignel	A. M. Worthington	J. C. Kippin
67000	167	Joseph Dickhaut	Harmon J. Bellini	Wm. J. Hignel

Many legal documents are scattered across the state, uncataloged and not preserved for researchers. Fortunately, some records, such as the one depicted here, have been copied and deposited in a research library. This 1916 document, from the Ellis County District Court, is on microfilm at the Kansas State Historical Society.

rights. But we have often been ahead of the curve. A number of years ago I was privileged to have a long interview with an African American graduate of the University of Kansas School of Law. At that time he had already reached his senior years as a successful and distinguished member of the bar. But he remembered clearly his student days during the Great Depression. Attending law school was not easy for a poor black man. He worked at a sorority shoveling coal, among other tasks, to earn his keep. Much of Lawrence, as we know from Langston Hughes's writings, also was segregated during this time.⁸ But this graduate of KU had one memory that he cherished and that I now cherish. He told of a celebration dinner held by the law school at a local hotel. When he attempted to take his place in the dining room, he was told by hotel staff that he would have to eat in the kitchen, for blacks were not allowed to eat in the main dining area. When the dean and fellow students overheard this, they informed the hotel staff that the entire group would adjourn to have their dinners in the kitchen, for no law student, regardless of race, would be allowed to suffer from such segregation.

It is possible to fill an entire volume with anecdotes illustrating the rich history of the law and lawyers in Kansas. The Kansas Bar has numbered among its members such illustrious men as William T. Sherman and David J. Brewer and such scoundrels as Theodosius Botkin.⁹ In its

8. Langston Hughes, *Not Without Laughter* (1930; reprint, New York: Scribner Paperback Fiction, 1995).

9. Sherman's legal career was both undistinguished and of short duration, although he was an early member of the Leavenworth Bar. Not much has been written on Brewer, a state and U.S. Supreme Court justice, but noteworthy studies are Michael J. Broadhead, "Visions of a Better World. Comparisons of Kansas Jurists David J. Brewer and Frank Doster," *Kansas History*:

early years Kansas was one of the most progressive states in matters such as slavery and civil rights. It was the center of the temperance movement. It was an early model for extension of rights to women. While the framers of the Wyandotte Constitution refused to grant complete suffrage to women, many favored doing so, and the debate and vote were close.¹⁰ In the latter part of the century the Kansas Bar Association was one of the first in the nation to admit a woman as a full member.¹¹

Despite its potential importance, Kansas legal history is not taught regularly anywhere in the state at the present time. To my knowledge no college or university professor in Kansas has made Kansas legal history his or her primary field of scholarship.¹² Even more important, no group or society is dedicated to preserving Kansas legal materials, nor is any established program cataloging, collecting, preserving, or publishing the sources from which to write Kansas legal history. And there lies the danger.

When Frederick Maitland gave his inaugural lecture in 1888 his greatest fear was that the sources for English legal history would be lost. I have a similar fear. The sources for Kansas legal history are widely distributed and many are in peril. Some are in the collections of the State Historical Society, but surprisingly few. These are safe. Others are scattered in local historical societies. Some documents are safe; others are in various states of decay. Many of the sources, the official documents of courts and counties and municipalities, are lying neglected in basements of courthouses, lost to memory and soon to be lost to posterity. A few progressive courts have transferred these documents to archives that can protect them. For instance, Douglas County's earliest court records are now preserved at Spencer Research Library at the University of Kansas, thanks to the forethought of the chief judge of the Douglas County courts.

Even more worrisome, however, is that many significant legal documents are in private hands. In the nineteenth and early-twentieth centuries, the line between private and public documents often was not clear to those with access to documents. On occasion, what we would today consider public documents were then treated as private. For example, I recently found advertised for auction on eBay, the Internet auction site, a Kansas justice of the peace case docket dating from 1885 to 1901. It belonged to an Oklahoma family whose ancestor had held a commission as a Kansas justice of the peace. When he retired he simply kept all of his docket books and these, no longer wanted by his descendants, were sold over the Web to a collector. The likelihood is that these will now be lost forever to Kansas legal historians. Much the same happens with wholly private documents. How many lawyers' diaries now sit in bureau drawers in homes throughout Kansas? A colleague of mine has the diary of his grandfather, a notable Dodge City lawyer at the turn of the twentieth century. Certainly, this should remain in his family as a treasured heirloom. On the other hand, a copy should be deposited and cataloged in a research library.

A Journal of the Central Plains 16 (Spring 1993): 42–53; Brodhead, *David J. Brewer: The Life of a Supreme Court Justice, 1837–1910* (Carbondale: Southern Illinois University Press, 1994). See also *Trial of Theodosius Botkin, judge of the 32d judicial district, before the Senate of the state of Kansas, on impeachment by the House of representatives for misdemeanors in office*, 2 vols. (Topeka: State Printer, April 1891).

10. Full suffrage finally was granted to Kansas women in 1912.

11. *Kansas Law Journal* 4 (January 15, 1887): 354.

12. Brian Moline, adjunct professor at the Washburn University School of Law, has written extensively on the subject.

One cannot write history without sources. If we are someday to write a history of Kansas law and lawyers, we must preserve the sources from which to do so. The time to begin the process of protecting those sources is at hand.

How then can we protect and preserve our legal sources? First, the sources themselves must be found, identified, and cataloged. This, in itself, is not an easy task. We will need to identify both the public and the private sources. At the very least we need to catalog existing court records from the beginnings of the Kansas court system. This means going beyond the printed reports of cases and finding such materials as docket books and unpublished cases. We also need to identify remaining administrative records of the courts and even such items as the records of courthouse constructions and modifications. On the private side, we must attempt to identify and catalog the materials produced by lawyers over the course of Kansas history. This entails finding and cataloging the private papers, correspondence, and diaries of both famous and less well-known lawyers who have lived and practiced in our state. And this will be just a beginning.

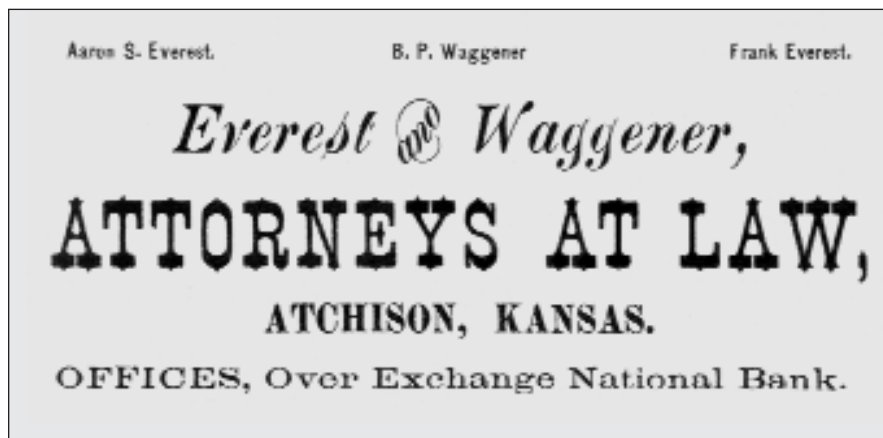
The first phase of any effort to preserve the sources for the history of Kansas law and lawyers should be initiating a project that will seek out and catalog these various documents. Such a catalog should provide basic details including author, date, and present location. The cataloging itself could be done by volunteers and students, followed by a critical examination to determine which sources should be copied or digitized and which should simply be noted. This could be accomplished by historians and legal specialists. We have a model for such an effort. Almost twenty years ago Illinois created the Lincoln Legal Papers Project, whose purpose is to identify, catalog, collect or copy, and publish all surviving legal documents written by Abraham Lincoln or affiliated with his legal practice.¹³ The project has been extremely successful. It is a model we could emulate. The Lincoln Papers Project works with the University of Illinois and its faculty and students to find documents and to catalog and interpret them. Much the same could be accomplished here in Kansas with our two law schools and our many excellent colleges and universities. Using current computer technology such a catalog could be accomplished with some speed and could be made available to the public over the Web.

As an ancillary activity of such a project, we must begin to compile a list of lawyers who have lived and worked in Kansas since territorial days. The sources to do so are readily at hand. We have, for instance, state, county, and municipal histories, which often provide lists of lawyers and short biographies. A good and well-known example is the history of Leavenworth by H. Miles Moore, one of the first lawyers in that city, which contains detailed memoirs of the early Leavenworth Bar.¹⁴ Also available are city directories and a large number of collective county biographies, widely published during the last quarter of the nineteenth century and often highlighting lawyers. And most important are the large numbers of newspapers published throughout Kansas, of which our own collection is the best. These contain articles about

13. The Lincoln Legal Papers Project, founded by former Illinois governor James Thompson, has a Web site: www.lincolnlegalpapers.org.

14. H. Miles Moore, *Early History of Leavenworth City and County* (1906; reprint, Marceline, Mo.: Walsworth Publishing Co., 1975).

lawyers and legal proceedings as well as lawyers' advertisements for their services.¹⁵ More than thirty years ago Professor Francis Heller began a project of identifying Kansas lawyers. I have continued this project and already have catalog entries for nearly one thousand lawyers prior to 1940. By compiling such a biographical catalog the search for private legal sources, particularly, becomes much more efficient. When I was a young law professor at the University of Illinois and a consultant to the Lincoln Legal Papers Project it was precisely such a bio-bibliographical catalog that a graduate student and I were able to compile for the Sixth Judicial District of Illinois, the district in which Lincoln rode circuit.



Local newspapers, city directories, and county biographies are excellent resources for locating lawyers who have practiced in Kansas. This advertisement for Everest and Waggener was published in the Atchison City Directory for 1882–1883.

We must not, however, be satisfied solely with discovering the names of Kansas lawyers and with cataloging and reproducing Kansas legal sources. Because important documents in our legal history are moldering in damp attics and basements, it is important that institutions in the state serve as a central depository for at-risk legal documents of historic importance. I would hope that the State Historical Society and the libraries of the two Kansas law schools could serve such a function.

The plan I have outlined is not one that will be easy or inexpensive to implement. Yet, time is running out. Each year documents are lost. A vital part of Kansas history continues to be ill-served. The solution to the challenge Maitland issued in 1888 was the creation of the Selden Society that numbers over one thousand members today in more than a dozen countries. We need not aim so high. But certainly the time is long past due for the Kansas Bar, the judiciary, and interested historians of the state to form a society whose purpose is to catalog, preserve, and publish our legal sources. As to funding, we must look especially to the Kansas Bar and to foundations and other sources with an interest in our legal history. This project should be undertaken in collaboration with the Kansas State Historical Society, for the aims of such a project are, of course, consonant with those of the Society. I can only hope that my brief talk tonight may help spur the formation of such a group and lead to the time in the future when another lawyer may stand here as president of the Kansas State Historical Society and speak of how the history of Kansas law *has* been written.



15. For an example of how these may be used, see Michael H. Hoeflich, "The Lawyers of Old Lecompton," in *Tallgrass Essays: Papers from the Symposium in Honor of Dr. Ramon Powers*, ed. Michael H. Hoeflich, Gayle R. Davis, and Jim Hoy (Topeka: Kansas State Historical Society, 2003), 27–36.