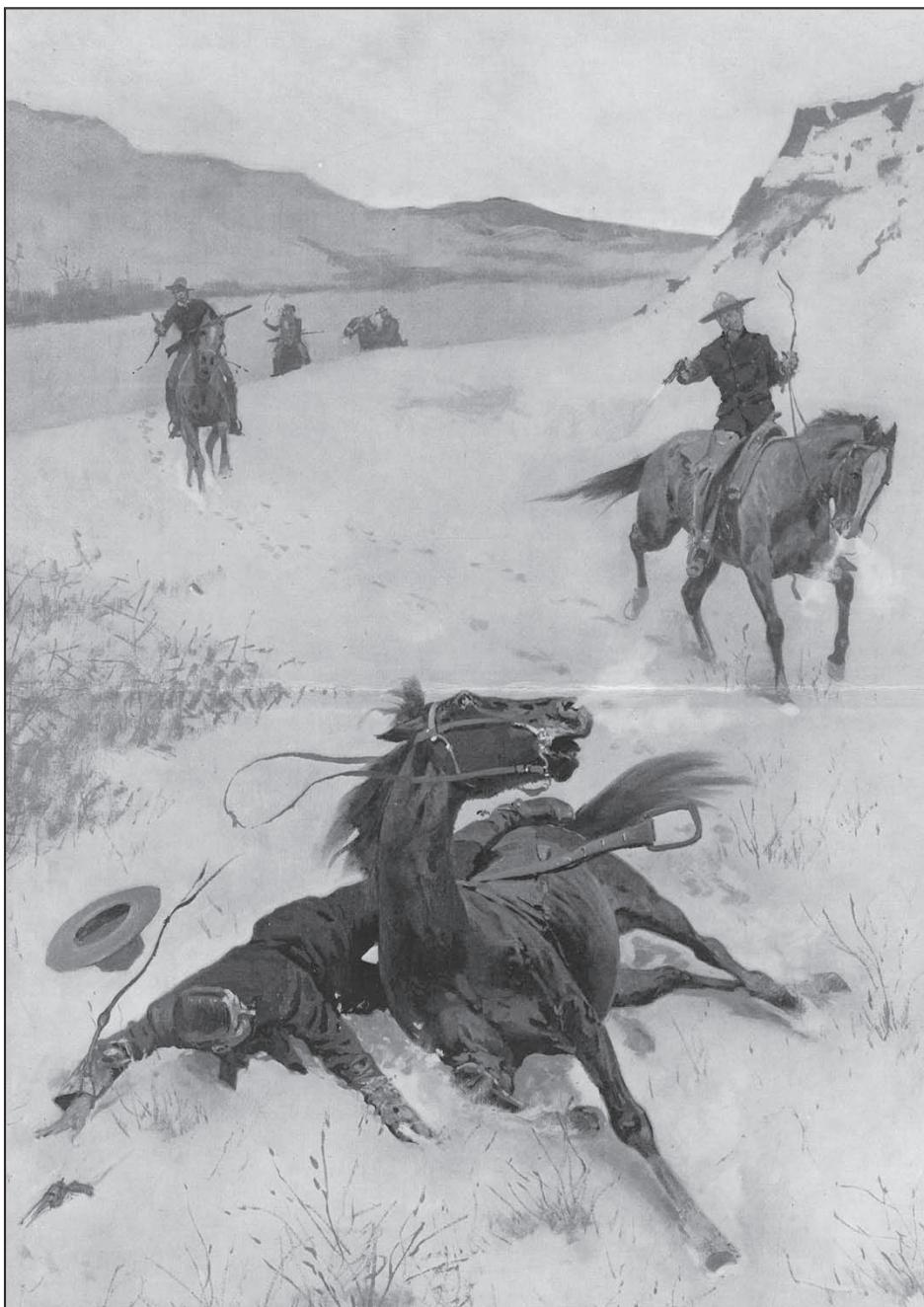


# COWBOYS AND LAWYERS



*\$5,000 REWARD, DEAD OR ALIVE!* appears in *Done in the Open: Drawings* by Frederick Remington (1902), which contained an introduction and “verses” by Owen Wister; it was included as one of the illustrations in a 1929 edition of Wister’s *The Virginian*.

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# Ambivalence and Myth in the History and Literature of the Southern Plains

by Robert A. Mead

The personas of the cowboy and the gunslinger are central characters in both the American national identity and the myth of the West. Throughout the twentieth century Hollywood and western print fiction explored a number of key American themes, such as individualism and the morality of violence, through exploration of the real and imagined history of the Great Plains and the American West. So many western films, television shows, and books have been cast in the ranches, cattle drives, and cattle towns of Kansas and the Southern Plains that names such as Bat Masterson, Charles Goodnight, and Wyatt Earp have been added to the American mythic pantheon. This element in the national identity is ingrained quite deeply, to the point that President George W. Bush, in response to the terrorist attacks of September 11, 2001, invoked the imagery of the western myth by stating, "I want justice. And there's an old poster out West, as I recall, that said, 'Wanted: Dead or Alive.'"<sup>1</sup>

The myth of the West is interwoven with historical characters and situations. In discussing the power of Westerns as mythology, Jeffrey Wallman cited the work of Joseph Campbell and Claude Levi-Strauss, noting that myth "does not mean fictitious accounts about imaginary people or things, like fables and fairy tales, but rather in the more profound sense as the spiritual and intellectual images of a culture's values—of how the citizens of a culture view themselves and view how they as a culture fit into the world."<sup>2</sup> Not surprisingly, when mythic imagery is incorporated into a nation's identity, facts and historical realities that do not correspond with the myth are often forgotten, ignored, or reinterpreted so that they fit the myth. Nonetheless, fact and myth are not diametrically opposed. Historian Gerald D. Nash argued for two Wests: "the West of reality—whether frontier, region, or urban civilization" and "the West of myth";

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1. Dan Balz, "Bush Warns of Casualties of War; President Says Bin Laden Is Wanted 'Dead or Alive,'" *Washington Post*, September 9, 2001, sec. A, p. 1.

2. Jeffrey Wallman, *The Western: Parables of the American Dream* (Lubbock: Texas Tech University Press, 1999), 16.

# GOVERNOR'S PROCLAMATION.

WHEREAS, On the 8th day of December, 1874, the eastern bound train on the Kansas Pacific Railway, when near Muncie, about five miles from the Missouri line was boarded by five desperadoes, and the express car robbed; and whereas, said desperadoes, whose names are unknown, have thus far evaded arrest:

Now, therefore, I, Thomas A. Osborn, Governor of the State of Kansas, by virtue of the authority in me vested by law do hereby offer a reward of

## FIVE HUNDRED DOLLARS

for the arrest and delivery to the Sheriff of Wyandotte County of each of the persons guilty of the above named outrage.

**SEAL.**

In testimony whereof, I have hereunto subscribed my name and caused to be affixed the Great Seal of State. Done at Topeka, Kansas, this Ninth day of December, A. D. 1874.

**THOS. A. OSBORN.**

By the Governor:

W. H. SMALLWOOD, Secretary of State.

The interwoven nature of the two Wests is evident throughout the legal history of the Southern Plains during the nineteenth century. Separating the mythic West from the multiple historical Wests is difficult, especially where history is intertwined with myth. One key distinction is that the West of myth is not necessarily rooted in a particular time or location. For purposes of the myth, Tombstone, Arizona, may as well be a hard day's ride from Dodge City, Kansas, and 1895 was more or less the same as 1875. Reality is, of course, much more complicated. Historian Kermit L. Hall noted that "more often than not, legal historians have simply swallowed up the Great Plains as part of the general legal history of the West."<sup>5</sup> This is true partially because the Great Plains, especially the Southern Plains, gave birth to many elements of the mythic West. Thus, it is tempting to paint the West with broad strokes, capturing Texas, California, Montana, and the points in between with the same historical interpretations and mythical truisms.

This essay will focus on the Southern Plains, the relatively flat, semiarid grasslands covering most of Kansas and Oklahoma, as well as west Texas, eastern New Mexico, and eastern Colorado. In the latter half of the nineteenth century this region had a common culture based on cattle, land speculation, and

he noted that the two Wests are highly interwoven, even in the scholarly work of professional historians.<sup>3</sup> Despite numerous examples of inaccuracy and plain historical error throughout western film and literature, the western folklorist and historian C. L. Sonnichsen noted that both the historical and the mythic West "can and do exist side by side in our minds, influencing each other and overlapping each other, without causing us any discomfort."<sup>4</sup>

railways that integrated the subregion into a cohesive economy. Thus, the Southern Plains, from roughly 1860 to 1900, represents one of the historical Wests, distinguishable from other times and regions as well as from the West of myth.

The coexistence and comfortable overlap between western myth and reality is fundamentally threatened by facts and stories that do not neatly fit. One challenge to the marriage of the two Wests is characters that are not in the traditional script. Historian Ferenc M. Szasz explained:

3. Gerald D. Nash, *Creating the West: Historical Interpretations 1890-1990* (Albuquerque: University of New Mexico Press, 1991), 198.

4. C. L. Sonnichsen, *From Hopalong to Hud: Thoughts on Western Fiction* (College Station: Texas A&M University Press, 1978), 4.

5. Kermit L. Hall, "The Legal Culture of the Great Plains," in *Law and the Great Plains: Essays on the Legal History of the Heartland*, ed. John R. Wunder (Westport, Conn.: Greenwood Press, 1996), 11.

Historians, novelists, and filmmakers have created or chronicled a vast array of western characters: the trapper, the outlaw, the scout, the cowboy, the trooper, the rancher, the shepherd, the buffalo soldier, the pioneer wife, the stagecoach driver, the "Indian," the prospector, the pony express rider, the madame with a heart of gold, the railroad worker, the speculator, the schoolmarm, the sod buster, the Mormon pioneer, and so on. The West has provided America with a national stage, where all the characters have been assigned heroic roles. Except one. There is one group that figured quite prominently in the reality of the American West which the mythology has totally ignored. This group is the American clergy.<sup>6</sup>

Szasz was correct in noting that the clergy is largely absent from the myth of the West. He failed to identify a similar group, however, that is also largely absent from the myth but prominent in the reality of the settlement of Kansas and the Southern Plains—lawyers and judges. Legal professionals play only cameo appearances in western film and literature, when they are present at all. Like the clergy, lawyers and judges were quite prominent in the reality of the Southern Plains in the second half of the nineteenth century, but they pose an enigma to the mythic West.

Szasz identified six reasons why the clergy is not a primary voice in the myth of the West, five of which arguably also apply to lawyers and judges. He noted that most historians of the American West since Frederick Jackson Turner have begun their analysis of the West by examining the frontier. Szasz contended that the myth is centered in one particular part of the history of the frontier, noting, "The chief locus for the myth of the West is post-Civil War in time and the Great Plains or the Rocky Mountains in location. In this mythological time zone it is always the Gilded Age, and Rutherford B. Hayes is the eternal president." Because early, and extremely influential, missionaries, such as Junipero Serra and Marcus and Narcissa Whitman, came before this locus period, Szasz suggested that the clergy is given less importance in the myth.<sup>7</sup> Likewise, key western lawyers and judges are scattered throughout the history of the West, including the history of the Southern Plains, and are not centrally located during the locus period. Those who were, such as Judges Roy Bean and Isaac Charles

Parker, have their place in the myth, but the others are long forgotten.

Szasz's second reason that the clergy has been largely excluded from the myth of the West is that Frederick Jackson Turner and his progeny, the historians of the "passing of the frontier," writing during the 1890s into the first few decades of the twentieth century, largely ignored religion. Turner's thesis that the western expansion over successive frontiers formed the basis of American individualism and democratic values and served as a safety valve for American society formed the intellectual superstructure for the myth of the West. Historians have noted that Turner also ignored the role of law in the settling of the frontier.<sup>8</sup>

**S**zasz's third point is that the clergy does not fit well in the standard mythic tale of the hero caught between wilderness and civilization; thus, it suffers a "generally awkward depiction" when introduced into stories about the West.<sup>9</sup> Likewise, lawyers and judges are fundamentally creatures of civil society. When they are portrayed on the margins of society, where the adoption of American civilization is still an open question, they are most likely to be viewed by the other characters and the reader as greenhorns who do not understand the conditions at the edge of the wilderness. Consequently, most lawyers and judges in stories about the West are outsiders, with eastern mannerisms and values, or drunks who are clearly incompetent. A strong rule of law would conflict with the theme of the tenuous grasp of civilization that is intrinsic to most plots in mythic western films and novels.

The fourth reason that Szasz advanced for the lack of the clergy in the myth of the West has no corresponding relationship to lawyers. He contended that American religious pluralism, denominationalism, and the separation of church and state have made it impossible for western authors to create ministers who speak broadly to the American people. The religious histories of the West are the histories of separate denominations competing with one another for influence.<sup>10</sup>

The fifth reason is similar but has more relevance to lawyers and judges: The myth of the West is a democratic myth consisting of the lives and experiences of ordinary citizens. Culturally, it performs an "ecumenical function,"

6. Ferenc M. Szasz, "The Clergy and the Myth of the American West," *Church History* 59 (December 1990): 497-498. For a fine analysis of the relative dearth of religious history treating Kansas, see Gary R. Entz, "Religion in Kansas. Review Essay," *Kansas History: A Journal of the Central Plains* 28 (Summer 2005): 120-145.

7. Szasz, "The Clergy and the Myth of the American West," 501.

8. Nash, *Creating the West*, 66. See also Ferenc Morton Szasz, *Religion in the Modern American West* (Tucson: University of Arizona Press, 2000).

9. Szasz, "The Clergy and the Myth of the American West," 502.

10. *Ibid.*, 503.

whereas religion has been a theme that divides in American history. Consequently, the introduction of religion into stories of the West can limit the unifying nature of the typical themes.<sup>11</sup> Law, like religion, is intrinsically conflict-ridden and unlikely to provide a unifying theme attractive to the American audience around which to write a western novel or script.

Finally, Szasz contended that the American frontier achieved mythic proportions “almost before it had ended in reality” because it represented freedom from the controls necessary in society. The western clergy, however, argued for increased social control and the end of sinful activities such as drinking, gambling, and prostitution. Szasz suggested that the “western clergy have played the role of Aunt Sally to Huck Finn, or the Sheriff of Nottingham to Robin Hood. This is not the material from which great legends are made.”<sup>12</sup> Similarly, lawyers and judges reducing conflict to technical, slow, reasoned decision-making would undermine the literary and entertainment opportunities for freedom and heroic actions. The myth of the West would be much less exciting if it were simply the story of settling land disputes through the mechanisms of quiet title decisions and actions for trespass.

Lawyers and judges are largely missing from the classic western tales of conflicts between rustlers, wild cowboys, sheriffs, and marshals. Even the term *lawman* connotes a governmental employee authorized to use deadly force to fight crime rather than an attorney or a judge who had read the law. Although centered in Wyoming rather than the Southern Plains, Owen Wister’s prototypical Western, *The Virginian*, dealt with the influence of “civilizing” professions on the frontier. As it was first published in 1902, *The Virginian* is quite useful for understanding the early beginnings of the myth of the West immediately following the “closing” of the frontier.

The Virginian, the early archetype of the cowboy hero, explains his view of “civilizing” professions, noting, “I reckon some parsons have a right to tell yu’ to be good. The bishop of this hyeh Territory has a right. But I’ll tell yu’ this: a middlin’ doctor is a pore thing, and a middlin’ lawyer is a pore thing; but keep me from a middlin’ man of God.”<sup>13</sup> The Virginian works his way up to foreman for Judge Henry, a local cattle baron and judge. He also counts the local Epis-

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*Law, like religion, is intrinsically conflict-ridden and unlikely to provide a unifying theme attractive to the American audience around which to write a western novel or script.*

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copalian bishop as his friend. Nevertheless, when he meets the rustler Trampas in the final gun battle, he resorts to neither law nor religion to avoid the fight, despite the fact that he is to be married the next day.

The law is unreliable for the Virginian, as Trampas controlled juries and had helped elect the local sheriff. The bishop’s religion also provides no solutions for the Virginian’s impending showdown with Trampas:

The bridegroom could scarce keep his voice steady. “I want to do right to-day more than any day I have ever lived,” said he.

“Then go and tell her at once.”

“It will just do nothing but scare her.”

“Go and tell her at once.”

“I expected you was going to tell me to run away from Trampas. I can’t do that, yu’ know.”

The bishop did know. Never before in all his wilderness work had he faced such a thing. He knew that Trampas was an evil in the country, and that the Virginian was a good. He knew that the cattle thieves—the rustlers—were gaining in numbers and audacity; that they led many weak young fellows to ruin; that they elected their men to office, and controlled juries; that they were a staring menace to Wyoming. His heart was with the Virginian. But there was his Gospel.<sup>14</sup>

Both law and religion represent civilizing forces that do not necessarily square with the heroic persona of the Virginian, and his literary progeny, in the myth of the West.

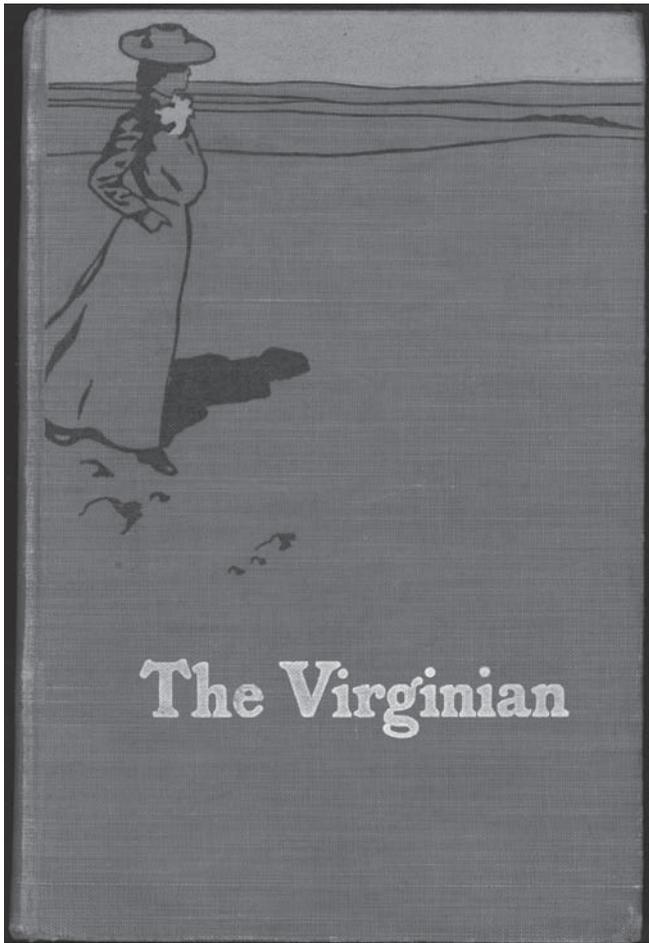
**A**mbivalence about law, especially in light of the fact that the law may be corrupted, sets the stage for paradoxical representations of lawyers and judges throughout the myth of the West. Order and justice are social goods necessary for fledg-

11. *Ibid.*, 504.

12. *Ibid.*, 506.

13. Owen Wister, *The Virginian* (New York: Penguin Books, 1988), 166.

14. *Ibid.*, 365–366; quotation from Owen Wister, *The Virginian: A Horseman of the Plains* (Lincoln: University of Nebraska Press, 1992), 403–404, is a reprint of a 1929 edition, which included illustrations by Frederic Remington and Charles M. Russell.



*Although centered in Wyoming rather than the Southern Plains, Owen Wister's prototypical Western, The Virginian, deals with the influence of "civilizing" professions on the frontier. As it was first published in 1902, The Virginian is quite useful for understanding the early beginnings of the myth of the West immediately following the "closing" of the frontier. This is a 1903 edition, the first published by Macmillan in London, England; image courtesy of the Kenneth Spencer Research Library, University of Kansas, Lawrence.*

ling towns on the frontier, but lawyers and judges, the professionals who ply justice, are fallible and may bring more harm than good or simply be irrelevant to the new frontier conditions.

Although lawyers and judges may be largely ignored or treated with ambivalence in the mythic West, the history of the Southern Plains offers a number of real examples of heroic "cowboy-lawyers" whose careers as orators, trial lawyers, and even gunslingers spanned the period from 1860 to 1900, when the Southern Plains transitioned from a chaotic, sometimes violent land grab to an ordered, lawful region. Perhaps the best example of a historic lawyer who

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also fits the mythic mold of a western hero is Temple Lea Houston, the youngest son of Sam Houston.

Houston was a Texan who studied law and philosophy at Baylor University after he had spent several years traveling the West as a young cowhand. He gained experience in criminal defense while working on the Gulf Coast. His flamboyant style and family ties earned him attention, and he was appointed in 1881, at the age of twenty-two, to be the district attorney in the new town of Mobeetie in the Texas Panhandle.<sup>15</sup> Houston was an outstanding shot with a white-handled Colt .45 that he named "Old Betsy," which he often wore on his hip during his appearances in court.

In 1893 Houston moved his family from the Texas Panhandle to Woodward, Oklahoma, where he continued to practice law. He developed a reputation as an outstanding criminal defense attorney, but he also speculated in land and represented railways. One biographer of Houston explained:

Often locators would show a quarter section over and over, and then give the homeseeker the location numbers of a worthless piece of land. Several such instances ended in gunplay. Cowboys and ranchers went fully armed, as did nearly everyone else. Feuds were common, and there were a number of killings. Community meetings were sometimes broken up by gunplay. Physical encounters between settlers usually resulted in a suit before a justice of the peace. Combatants sought lawyers to represent them, and Houston was the popular choice. More often he appeared in behalf of the Santa Fe, which suffered considerably from damage to tracks or other property, thefts from shipments, and conspiracy to defraud the company by changing the description or weight of freight stated on waybills.<sup>16</sup>

15. Glenn Shirley, *Temple Houston: Lawyer with a Gun* (Norman: University of Oklahoma Press, 1980), 166.

16. *Ibid.*, 185.

Despite his skills as a trial lawyer, Houston is best remembered for his more mythic actions in and out of the courthouse. In one murder case, when he realized that the prosecutor had managed to fill the jury with individuals who disliked the accused, Houston used a highly dramatic ploy to taint the jury. He argued that the victim had been angry and had a reputation as a quick draw. Wearing "Old Betsy" on his hip, Houston inched his way toward the jury, explaining that they would have done the same thing as his client—shot first, before the victim had a chance to draw his weapon. At the height of his argument, he yelled, "This malefactor was so adept with a six-shooter that he could place a gun in the hands of an inexperienced man, then draw and fire his own weapon before the victim could pull the trigger. Like this!"

Houston then drew his pistol, pointed it at the jury, and fired six times. The jurors joined the rest of the audience in scurrying under tables and out the door. Although Houston successfully talked his way out of a contempt-of-court citation for firing blanks in a courtroom, the angry jury found his client guilty. Nonetheless, Houston immediately filed for a new trial with a new jury because the jury had mingled with the crowd during the trial as everyone fled the courthouse, thus violating a rule of procedure. A few months later an impartial jury was impaneled, and Houston's client was acquitted.<sup>17</sup>

**I**n 1895 Houston was involved in his own gun battle, this time outside the courthouse. Houston and a close friend, Jack Love, got into a saloon fight with lawyers Ed and John Jennings the evening after Ed had called Houston a "damned liar" in court and tried to slap his face. After the four had exchanged a combined twenty bullets, Ed Jennings was dead and John Jennings had nearly lost an arm. Houston and Love were acquitted on the grounds that they had fired in self-defense. Houston died, nonviolently, in 1905 at the age of forty-five after having been blinded and partially paralyzed by an aneurysm.<sup>18</sup>

In *Cimarron*, a fictionalized composite biography of Temple Houston and several other men, Edna Ferber summarized the paradoxical foundation of frontier law in Oklahoma by noting, "Law in a lawless community not yet ten years old; a community made up, for the most part, of people whose presence there meant impatience of the old order,

defiance of all conventions."<sup>19</sup> Ferber's hero, Yancey Cravat, is based largely on Houston, although he is cast as having possible Choctaw ancestry and as being much more sympathetic to Native Americans than was Houston himself. The story of Cravat, in his role as lawyer, newspaperman, and land speculator, spans the period from the opening of Indian Territory to the Oklahoma oil boom. *Cimarron* was later filmed twice, one of the only Westerns focusing on a lawyer as the main character.

Very few lawyers in the Southern Plains had the panache of Temple Houston. More typically, they were simple businessmen who operated what would now be called small-town practices. They helped transplant the established order of business and justice to the frontier of the Southern Plains. "There were fortunes to be made," explained legal historian Lawrence Friedman.

The new states and territories were ripe for the plucking, ripe with careers for ambitious young men. The economic base was land: town land and country land. Who, if not a lawyer, could decipher titles to land? Who could master the maze of rules on land grants, on the sale and transfer of land? Government jobs were another rich plum. The territories at first were net importers of the taxpayer's money. Washington distributed judgeships and clerkships with a lavish hand. Local jobs became available by the thousands—in courts, in legislatures, and in the executive branch, in territory, state, county, and town. The lawyer, again, was peculiarly suited for these jobs. He scrambled for public office. He also collected debts for Eastern creditors; he dabbled in land speculation and townsites booming. He scrounged around for any niche that required his generalist's skill. He did whatever his nose sniffed out as promising and lucrative. In the process, many young lawyers failed, and moved on to other jobs or places. But many others stayed with it, and some became rich.<sup>20</sup>

Most lawyers had much more in common with the lawyers of today, engaged in a wide variety of practices, than they did with their legendary contemporary Temple Houston. However, despite a much more mundane practice and lifestyle, the typical lawyer of the Southern Plains during the nineteenth century did share a number of traits with Houston. In terms of courtroom style, the early lawyers

17. *Ibid.*, 5–7.

18. Bernice Tune, *Golden Heritage and Silver Tongue of Temple Lea Houston* (Burnett, Tex.: Eakin Press, 1981), 76; Shirley, *Temple Houston*, 216–218.

19. Edna Ferber, *Cimarron* (Garden City, N.Y.: Doubleday, Doran and Co., 1929), 265.

20. Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 145.

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*In terms of courtroom style, the early lawyers tended to focus ... on common sense and oratory rather than on highly technical legal analysis.*

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tended to focus, like Houston, on common sense and oratory rather than on highly technical legal analysis. Friedman noted, "In any case, frontier law was not book law in the usual sense. There were no libraries, and books were expensive. The practice put no premium on erudition. The best trial lawyers used and enjoyed good tricks, jokes, a neat technicality or two. The poverty of source materials left a vacuum, filled in by Blackstone, local statutes, and native wit."<sup>21</sup>

**H**ouston was the exception, rather than the norm, in having studied law at a university. More typically, lawyers in the Southern Plains entered the profession through an apprenticeship in the office of an established attorney or simply by applying for a license to practice law. "The requirements for admission to the bar [in Kansas] were minimal," explained Professor Paul Wilson. "It does not appear that initially there were any formal standards of governing licensing. A statute passed in 1855 required only that one be free, white and male and that he secure a license from the territorial supreme court or a district court. The statute also required a candidate to undergo a strict examination as to his qualifications but the rule apparently was not always observed."<sup>22</sup>

In 1868 these standards were altered, substituting the term "any person" for "free, white, and male" and requiring two years of reading the law, the second of which must have been in the office of a practicing attorney. The supervising attorney was required to certify that the candidate was of good character and qualified to practice law. Finally, the candidate had to pass a perfunctory oral examination. Despite the stricter standards, the number of Kansas lawyers grew exponentially through the second half of the nineteenth century. By 1882 Kansas had fifteen district courts,

and nearly seven hundred attorneys had been admitted to the Kansas Supreme Court Bar, a nearly tenfold increase over the eighty who had been admitted in 1861.<sup>23</sup>

Somewhat surprisingly, the importance of crime and violence in the day-to-day operation of the Kansas courts was much lower than the myth would suggest. Wilson pointed out that volume 27 of the *Kansas Reports*, encompassing the Kansas Supreme Court's decisions of the January 1882 term, contains 127 opinions, of which only six were criminal cases.<sup>24</sup> Although Lawrence Friedman quoted Indian Territory lawyer James M. Mathers as stating that "our practice ... was by necessity a criminal practice ... and the great bulk of cases were murder cases," he went on to argue that such a practice was exceptional, with land, collection, and money brokerage being the "real staples of practice in the more lightly settled territories."<sup>25</sup> Litigation regarding violence constitutes only a fraction of the legal history of the Southern Plains.

On the frontier the need for a forum to address questions of violence and community conflict motivated the seating of justices of the peace. Historian C. Robert Haywood noted this pattern in his study of lawyers and judges in Dodge City during the cowtown days from 1876 to 1886, observing that "violence on the streets during Dodge City's first three years after settlement, if not condoned, was not prosecuted in any orderly or consistent manner simply because the justice system was not in place."<sup>26</sup> By 1875, when a full court system with lawyers was in place, Dodge City began to transform itself and abide by the accepted national norms for violence and order. Nevertheless, the violence that permeates the myth of the West was rarely the overarching condition that it is made out to be in the mythic novels. According to historian Harold J. Weiss Jr., "evidence indicates that the unrestrained, savage lawlessness of the West, which has been popularized by the movies, radio, television, and by historical writers, newspaper reporters, and novelists with a romantic bent to their minds, is more a myth than a fact. Most pioneers in the trans-Mississippi region obviously cared more about building a new life for themselves in a hostile physical environment than about robbing or assaulting their neighbors or the strangers who happened to pass their way."<sup>27</sup> Although violence was

21. *Ibid.*

22. Paul E. Wilson, "The Early Years: The Bench and Bar Before 1882," in *Requisite Learning and Good Moral Character: A History of the Kansas Bench and Bar*, ed. Robert W. Richmond (Topeka: Kansas Bar Association, 1982), 36. See also Paul E. Wilson, "How the Law Came to Kansas," *Kansas History: A Journal of the Central Plains* 15 (Spring 1992): 18–35.

23. Wilson, "The Early Years," 39–40.

24. *Ibid.*, 41

25. Friedman, *A History of American Law*, 557–558.

26. C. Robert Haywood, *Cowtown Lawyers: Dodge City and Its Attorneys, 1876–1886* (Norman: University of Oklahoma Press, 1988), 20.

27. Harold J. Weiss Jr., "Western Lawmen: Image and Reality," *Journal of the West* 24 (January 1985): 24.

Located in the rear of the U.S. Land Office building in Garden City, Kansas, during the boom of 1885 were the law offices of Bennett & Smith, land attorneys. Typically, western lawyers were simple businessmen who operated what would now be called small-town practices. They helped transplant the established order of business and justice to the frontier of the Southern Plains. "The economic base was land: town land and country land," explained legal historian Lawrence Friedman. "Who, if not a lawyer, could decipher titles to land? Who could master the maze of rules on land grants, on the sale and transfer of land?"

certainly a significant issue in the Southern Plains, it was only one of many themes in the legal history of the region, as opposed to its status as the highly nuanced primary focus of the myth.

Structurally, it is necessary to have judges and courts before lawyers can influence society, for good or ill. Early in both the myth and legal history of the West, justices of the peace were appointed to resolve local disputes. These judges typically were not trained as lawyers; thus, they have been used by western novelists in a variety of archetypes to represent local law without necessarily dealing with the more complicated role of formally educated lawyers. Historian John Wunder concluded that justices of the peace served an important function in territorial governments by connecting the community conflict-resolution system to the larger, and more distant, federal court system.<sup>28</sup>

The most famous justice of the peace, Judge Roy Bean, is represented in fiction as both a clown and a hanging judge. There is no historical evidence of Bean actually hanging anyone, but myth and reality blur. C. L. Sonnichsen painted Bean as an enterprising character in his biography *Roy Bean: Law West of the Pecos*, noting that "he really was the Law in those parts for a few years. It was two hundred miles to the nearest justice court and naturally he had things his own way. Before long, civilization and lawyers moved in on him, but by that time his saga was started and his position assured."<sup>29</sup> Unfortu-



nately, the folklore of Judge Bean also includes accounts of the racism endemic in the American West: "They told about the Irishman who was brought into court for killing a Chinaman. Roy turned him loose, remarking that he had gone through his law book and found that it was homicide to kill a human being. 'But,' he said, 'I'll be damned if I can find a place where it says it's against the law to kill a Chinaman.'" According to Sonnichsen, this incident is true, giving horrific credence to the critique of the new western historians that both the history and myth of the West legitimized violence toward people of color and the oppressed.<sup>30</sup> Nevertheless, the historical Roy Bean has been appropriated by a number of novelists and given character traits that illuminate the ambiguity and ambivalence toward lawyers and judges that permeate the myth of the West.

28. John R. Wunder, "Justices of the Peace on the American Frontier, 1787-1853," in *Law and the Great Plains*, 33.

29. C. L. Sonnichsen, *Roy Bean: Law West of the Pecos* (1943; reprint, Albuquerque: University of New Mexico Press, 1986), 5.

30. *Ibid.*, 31.

Zane Grey's version of Roy Bean emphasized the humorous. Where judges follow local norms rather than established law, there is opportunity for institutionalized corruption. Grey explored this caricature of justice, embodied in Judge Bean, in his novel *West of the Pecos*:

Then the judge turned to Pecos. "I'll marry you, Smith. What's it worth to get spliced to this pretty girl? It cain't be done nowhere else in this country." Pecos saw through this old robber. "Wal, it's shore worth about a million dollars to me," he drawled. "But I cain't afford much—no more'n say twenty." "Fork it over," retorted the Judge, swiftly, extending one hand toward Pecos while with the other he felt for something in his desk. Pecos was in an embarrassing position. He had forgotten to segregate a twenty dollar bill from the roll he had inside his vest. There was no help for it. When the Judge's eyes came up from a search for the little Bible in his hand and espied Pecos stripping a bill off that fat roll of greenbacks, they popped right out. "Say, have you held up a bank?" he growled, snatching the bill Pecos dropped on the table. "No. I been savin' up a long time for this heah occasion." "I forgot to charge you for the certificate. That'll be ten more."<sup>31</sup>

Judge Bean then proceeds to fine Pecos for additional "infractions" until the total adds up to two hundred dollars.

The modern dean of Westerns, Larry McMurtry, portrayed a much more sinister Judge Bean in his novel *The Streets of Laredo*. In McMurtry's Texas, law is arbitrary and upheld only by force, thus encouraging scoundrels on the bench to hang men as evidence of their legal authority:

The judge had quick crafty eyes. Rumor had always placed him on the wrong side of the law. Call had not been the only one surprised when Roy Bean assumed his judgeship. To be fair, though, no one seemed to quite know what laws the new judge had broken. ... To Call, Roy Bean had more the manner of a skillful gambler. Becoming a judge, in a region where few people had much fondness for the law, was in itself a gamble. ... Roy Bean, out of a combination of boredom, greed, and vanity, had recently appointed himself judge of a vast jurisdiction—the trans-Pecos West—and nowadays hung people freely, often over differences amounting to no more than fifty cents. ... "One thing you ought to be careful of, when you're out stealing, is to stay clear of Roy Bean. He can't

abide a thief. If he catches you with money on you, he'll hang you promptly and keep the money. He's hung five men that I know about, for no better reason than that they had money in their pockets, and he wanted it."<sup>32</sup>

McMurtry's distaste for judges also applies to lawyers. His hero, Call, has an erstwhile friend and former partner named Charles Goodnight who explains, "Lawyers and bankers are like shit beetles. They'll finally carry off everything I've built up, like they carried off your ranch up above the Yellowstone."<sup>33</sup> Both violence and class conflict, as well as a strong distaste for formal justice and the lawyers and judges who profit from it, are clearly evident in the literature surrounding Judge Bean.

**A**lthough it is virtually impossible to separate fact from myth in the case of Judge Bean, there are numerous examples of justices of the peace who applied equal doses of common sense and humor to ensure justice on the edges of the frontier. John Maloy, a county attorney and newspaperman from Council Grove, Kansas, wrote a history of Council Grove, first published in local newspapers before the end of the nineteenth century. Maloy told of the judicial wisdom exhibited by William Mansfield, a justice of the peace, in 1859:

The people lived in simplicity and honesty, and there were few infractions of the law and public peace. Here is an incident that goes to show how justice was sometimes meted out to offenders in the primitive days of our community: One of our citizens had been arraigned on a charge of assault and battery before William Mansfield, a Justice of the Peace, whom many of our citizens well remember. Mansfield convened his court and opened up for business with that gravity and solemnity that is characteristic only of a Justice of the Peace who has an entire frontier to take care of. The arraignment was made in due form, the trial commenced, and the testimony and argument all finished up in the approval style of a rudimentary law factory. Everything looked so overwhelmingly plain against defendant that he concluded as a last resort to plead guilty and throw himself on the mercy of the court. Mansfield, after gravely considering the character of the plea, the merits of the case, and the nature of the offence, and after subduing the conflicting emotions that

31. Zane Grey, *West of the Pecos*, in *Five Complete Novels* (New York: Harper and Row, 1980), 784.

32. Larry McMurtry, *Streets of Laredo* (New York: Simon and Schuster, 1993), 175.

33. *Ibid.*, 101.

struggled for mastery in the heart of his judicial conscience, decided to fine the offender \$1.00, and made a further order that the defendant pay the same into court instanter, when said court would take a recess, and criminal, witnesses, court officers and the court himself, would repair to the nearest saloon and invest the fine in "coffin varnish," an article sometimes, even as early as then, denominated whiskey. The order of the court was carried out with great punctuality. After this severe and inexorable judgment was executed, the court enjoined the defendant to "go and sin no more;" and adjourned. The \$1.00 was eternally lost to our school fund, but the judicial ermine came out unscathed, and justice itself, which is said to have come from the bosom of God, was vindicated.<sup>34</sup>

Even outside the boundaries of myth, the justice of the peace played an important part in the settling of the Southern Plains. Justices of the peace provided a nonviolent, neutral forum for conflict resolution that was not constrained by the expense and lengthy duration of formalistic justice. Because they were community based, they provided a foundation of law and order without necessarily providing a forum for law as a weapon in class conflict between creditors and local farmers and ranchers.

A second category of judge that is a recurring presence in Westerns is the hanging judge, usually based loosely on "Hangin' Judge Parker," a federal territorial judge for the Western District of Arkansas and Indian Territory. Isaac Charles Parker was appointed as a judge by President Ulysses S. Grant in 1875 and served until he was forced out. Friedman noted that "before his career was over, in 1896, seventy-nine men, many of them Indians or blacks, had put on the black hood and mounted the gallows."<sup>35</sup> Parker was reversed by the U.S. Supreme Court based on what he termed "the flimsiest technicalities."<sup>36</sup>

Ostensibly, a tough judge who quickly enforced the community belief in just retribution should rank as a hero in western myths. However, this was not the case, as Maxwell Bloomfield explained:

34. John Maloy, *History of Morris County, 1820 to 1890* (Council Grove, Kans.: Morris County Historical Society, 1981), 21–22. The first installment of Maloy's history appeared in the *Kansas Cosmos* (Council Grove), February 26, 1886. Chapter 7, from which this quotation is taken, was published on April 9, 1886.

35. Friedman, *A History of American Law*, 327–328.

36. Fred Harvey Harrington, *Hanging Judge* (Norman: University of Oklahoma Press, 1951), 187. See also Michael J. Brodhead, *Isaac C. Parker: Federal Justice on the Frontier* (Norman: University of Oklahoma Press, 2003).

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*Even outside the boundaries of myth, the justice of the peace played an important part in the settling of the Southern Plains. Justices of the peace provided a nonviolent, neutral forum for conflict resolution that was not constrained by the expense and lengthy duration of formalistic justice.*

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Why should even the toughest and most dedicated judge fail to qualify as a hero in Western fiction? Perhaps because his professional role causes him to be identified too closely, in popular thinking, with the impersonal rigor of the law he administers. No such problem arises with respect to a marshal's work, which fits him easily for the part of an action hero. A judge, on the other hand, is an intellectual, an interpreter of authoritative legal rules which bind his judgment and leave no room for the exercise of personal feelings. "I never hanged a man," insisted Isaac Parker on his deathbed. "I never hanged a man. It is the law." No marshal, cowboy, or other Western hero would ever disavow his actions in that way.<sup>37</sup>

Additionally, a hanging judge interferes with the myth's identification of some villains as good scoundrels. A judge who strings up all criminals regardless of their true morality would make short work of many of the heroes of western literature and film.

The mythic division of lawyers and judges into good and evil camps is not in keeping with the reality of legal history in the West. "In the typical Western," explained Maxwell Bloomfield, "good lawyers still defend the rights of the individual, while bad lawyers plead for the rights of property. In real life the two categories are seldom divisible, and the same lawyer defends both with equal zeal."<sup>38</sup> C. Robert Haywood's exhaustive study of the attorneys of Dodge City revealed that the ambivalent treatment of lawyers in Westerns bears little resemblance to actual practice. "Wild" Dodge City had an established, functioning legal system starting the same years as the cattle drives, 1875, and "was to be the venue for twenty-seven attorneys during the decade from 1876 to 1886. Dodge was the place where juries were drawn and trials held; it was also the site of lawyers' nonlitigious businesses, their social lives, and, eventually,

37. Maxwell Bloomfield, "Western Lawyers and Judges: Image and Reality," *Journal of the West* 24 (January 1985): 21.

38. *Ibid.*, 18.

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*The mythic division of lawyers and judges into good and evil camps is not in keeping with the reality of legal history in the West. ... [And] the ambivalent treatment of lawyers in Westerns bears little resemblance to actual practice.*

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their hope for advancement, security, and family.”<sup>39</sup> Haywood highlighted the influence of lawyers in the civil society of Dodge City, noting, “To survive in Dodge City during its cowtown days, a lawyer was required to be more than a legal defender or prosecutor. The role outside the courtroom, if not of equal importance, was at least essential for his professional image and occupied many of his working hours. The community expected his presence at public affairs.”<sup>40</sup> Haywood concluded:

In the end, the cowtown lawyer’s most significant legacy was his presence and his adherence to the canons of his own profession. The twenty-seven lawyers who served Dodge City between 1876 and 1886—wayward, flawed, brilliant, likable, hated, gullible, romantic, and human as they were—contributed an essential element in the maturing of Dodge City and its environs. Through their actions as attorneys in the privacy of their offices and before the bar of justice, they performed, with varying degrees of understanding and success, an essential service in advancing an orderly, democratic way of life.<sup>41</sup>

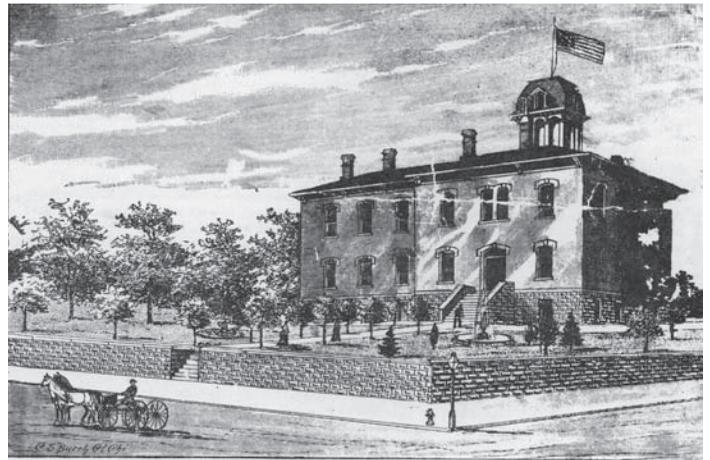
The ambivalence toward lawyers in the mythic West is not based on accurate portrayals of real lawyers on the Southern Plains, such as the lawyers of Dodge City.

Unfortunately, the legal history of the Southern Plains and the other subregions of the West—and, perhaps, the current reputation of lawyers—suffers from the impact of the myth of the West on America’s conventional wisdom. Law in the myth often is reduced to questions of the control of violence. The ambivalence toward law, judges, and lawyers in the mythology of the West is marked although not particu-

39. Haywood, *Cowtown Lawyers*, 18.

40. *Ibid.*, 51.

41. *Ibid.*, 243.



*The Ford County courthouse in Dodge City was built in 1876; locals were proud of its fine courtrooms, offices, and jail. This drawing is from the Hand-book of Ford County, Kansas (1887).*

larly well supported by the legal history of the Southern Plains. In their history of the twentieth-century West, historians Michael P. Malone and Richard W. Etulain questioned the worth of the myth itself. “In the realms of memory and mythology, the subregions of the West share a common attachment to the mystique of the ‘Wild’ frontier past, with its romanticized cowboys, Indians, and other frontiersmen fighting out their struggles of good versus evil against a larger-than-life backdrop. In fact, this mystique, more than any other factor, has hindered coming to terms with the real past and present of this large part of the United States.”<sup>42</sup>

Legal historians need to continue the groundbreaking work of John Phillip Reid, John Wunder, Kermit Hall, Maxwell Bloomfield, C. Robert Haywood, Gordon Morris Bakken, and others by analyzing the work and impact of lawyers and judges across the West, focusing on particular localities and subregions. The combined result of such work will give a much more accurate portrait of western lawyers and will allow comparison of subregions within limited periods of time. In addition, careful, ongoing research on lawyers and their role in western towns and cities is likely to clarify reality from myth and allow for a more honest appraisal of the benefits and detriments that lawyers add to the American social fabric. [KH]

42. Michael P. Malone and Richard W. Etulain, *The American West: A Twentieth-Century History* (Lincoln: University of Nebraska Press, 1989), 10.