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The Mystery of the Leavenworth Oaths

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Lawyers have sworn an oath to be admitted to the Bar since the beginnings of the Anglo-American legal profession. The oath serves several extremely important purposes. First, it is the formal act that admits an individual into the Bar and confers upon the oath taker the right to perform the duties of an attorney in the jurisdiction in which the oath is given. Second, the oath admits the new attorney to the broader world of the legal profession and signifies that the new attorney has been judged by the oath giver as worthy of the right to practice law. Third, the oath creates broad legal obligations on the part of the new attorney to uphold the promises made as the oath taker. The customary scope of these broad obligations, such as when the duty to keep promises implies a broader promise to be truthful in statements to others, could be a bit surprising in practice.

So, we should not be surprised that the precise language of the oath of admission for lawyers is of great significance and is taken seriously by those who administer and those who swear to the oath.

One of the earliest oaths of Anglo-American lawyers still extant reads:

> You shall do no falshood [sic], nor consent to any to be done in the Court, and if you know of any to be done you shall give knowledge thereof unto my Lord Chief Justice, or other his Brethren, that it may be reformed ; you shall delay no man for lucre or malice ; You shall increase no Fees, but shall be contented with the old Fees accustomed ; you shall plead no Foraign [sic] Plea, nor suffer no Foraign [sic] Suits unlawfully to hurt any man, but such as shall stand with order of the law, and your conscience ; you shall seal all such Processe [sic] as you shall sue out of the Court with the Seal thereof, and see the Kings' Majesty, and my Lord Chief Justice discharged for the same; ye shall not wittingly nor willingly sue, nor procure to be sued any false Suit, nor give aid, nor consent to the same, in pain to be expulsed [sic] from the Court forever; And furthermore, you shall use your self in the Office of an Attorny [sic], within the Court according to your Learning and discretion ; so help you

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God, &c.[1]

This oath is, in effect, a mini-code of professional responsibility. The lawyer by swearing the oath agrees to a series of restrictions he will follow in practice including that he will not lie, nor dissemble before the court, that he will not delay justice[2] nor increase fees.[3] Other promises include not bringing what today we would call frivolous lawsuits or those brought purely to harass the defendant, another perennial problem. The oath ends with the invocation of the deity so as to solemnize the oath and to invoke divine penalties—in addition to mundane punishment—for violations of the oath. It was—and remains—a most serious undertaking for the oath taker.

The practice of requiring newly admitted attorneys to swear some form of an oath of admission to the Bar carried forward to the American colonies and, after the Revolution, to the new Republic. Courts in every U.S. jurisdiction, both state and federal, required and require would-be lawyers to swear an oath. In large part, the language of these oaths in the eighteenth and nineteenth centuries was quite similar. Josiah H. Benton, in his classic *The Lawyer's Official Oath and Office*[4] reprinted many of these early oaths. By an Act of 1787, for instance, the New York Legislature required that all attorneys who would practice in the state must take the following oath:

> I ------- --------, do swear, That I will truly and honestly demean myself in the Practice of an Attorney (or of a Counsellor, Solicitor, or Proctor, or of an Advocate, as the Case may be) according to the Best of my Knowledge and Ability.[5]

In 1837, the Supreme Court of Rhode Island established that all attorneys in the state must swear the following oath:

> I ------- -------- do solemnly swear, that I will demean myself as an Attorney and Counsellor of this Court, and all other Courts and tribunals of the State before whom I may practise [sic] as an Attorney or

1. THE BOOK OF OATHS AND THE SEVERAL FORMS THEREOF, BOTH ANCIENT AND MODERN 17 (1689). For a superb history of legal oaths in general, see, Carol Rice Andrews, *The Lawyers' Oath Both Ancient and Modern*, 22 Geo. J. Leg. Ethics 3 (2009).

2. Interestingly, this promise derives from Magna Carta. *See Magna Carta,* BRIT. LIBR. (Jul. 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/9X8J-M9CQ] (Provision 40). *See generally* Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404 (1967).

3. Lawyer fees have always been a source of popular unhappiness.

4. JOSIAH HENRY BENTON, THE LAWYER'S OFFICIAL OATH AND OFFICE (1909).

5. *Id.* at 79–81.

> Counsellor, uprightly and according to law, and that I will support the Constitution and laws of this State, and the Constitution of the United States.[6]

The oath of admission for attorneys in Georgia, adopted in 1789 read:

> I, A. B. do solemnly swear [or affirm as the case may be] that I will justly and uprightly demean myself according to law, as an attorney, counsellor, and solicitor, to the best of my knowledge and ability; and that I will support and defend the constitution of the United States, and the constitution of the state of Georgia – So help me God.[7]

The oath of admission for attorneys adopted by the State of Virginia in 1776 read:

> I, A. B. , do solemnly promise and swear, that I will be faithful and true to the commonwealth of Virginia, and that I will well and truly demean myself in the office of an attorney-at-law. So help me God.[8]

As may be seen from these examples, oaths of admission to the Bar in the United States have usually been relatively simple and, generally, required that the would-be attorney swear to uphold the ethical principles of the Bar as well as the Constitution of the United States and of the state to whose Bar the lawyer was being admitted. Occasionally, an oath would track the early English oath, above, and mention ethical duties that the lawyer would be required to fulfill. Often the oath would require that the candidate for admission to swear in "the name of God." Although this clause was often the source of some controversy in deference to those opposed to oaths that invoked the deity, the requirement that the oath be "sworn to God" was often retained and generally accepted.[9] All in all, the history of lawyers' oaths, nearly everywhere in the Anglo-American world, is relatively straightforward and without much dispute.

The history and content of the earliest lawyers' oaths for admission to the Bar in Kansas, however, is far from clear. Kansas became a territory on May 30, 1854, as a result of the signing of the Kansas-Nebraska Act.[10]

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6. *Id.* at 96.

7. *Id.* at 49.

8. *Id.* at 109.

9. *See infra* notes 28–29 and accompanying text (the second and third Leavenworth oaths). Some religious groups, like the Quakers, oppose swearing to God, but, instead, are willing to "affirm" that they will follow the requirements of telling the truth, etc. *See* Jud Campbell, *Testimonial Exclusions and Religious Freedom in Early America*, 37 LAW & HIST. REV. 431, 450 (2019).

10. *See The Kansas-Nebraska Act*, U.S. SENATE,

Once it became a territory, the territorial government was obligated to establish a territorial court system, which was, in time, duly accomplished. Three judicial districts were created by the Territorial Governor in February 1855.[11] A Supreme Court consisting of three justices was created.[12] The first meeting of the district courts was held in April 1855, while the Supreme Court, under its Chief Justice, Samuel Dexter Lecompte, first convened in July 1855.[13]

Of course, courts alone do not make up a legal system. One must have lawyers as well. Among the first immigrants to the Kansas territory were a group of young lawyers, most under the age of thirty, who came from the Eastern U.S. to seek their fortunes in the newly created territory.[14]

Territorial Kansas was, in many respects, a land of opportunity for lawyers. Law practice in the eastern United States was often very difficult for young lawyers because of competition. Horace Greeley's advice to young men, generally, to "go West, young man" resonated with young lawyers seeking to establish a practice and make their fortune. By 1854, Kansas already has several growing cities: Leavenworth, Lawrence, and Topeka. Migrants to Kansas were pouring into the territory from the East, spurred on by the desire to decide whether Kansas would ultimately become a free or slave state.

There was, in fact, quite a good bit of legal work to be done in the new territory. First, of course, were land transactions including the incorporation of townships and the preparation of land grants and ownership documents for new settlers. As the cities grew, so did the need for municipal laws, and these laws inevitably led to enforcement and litigation. As the population grew, so did mercantile establishments to provide the necessities of life for the people settling in the territory. Here, again, commerce inevitably brings litigation with it over contracts and sales amongst other things. Finally, the political squabbles and violence that plagued territorial Kansas often translated into criminal cases. All of these matters would ideally require the services of lawyers.

Under the circumstances of the new territory, it is not at all surprising that the number of lawyers who were sworn into the Bar during its early

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https://www.senate.gov/artandhistory/history/minute/Kansas_Nebraska_Act.htm [https://perma.cc/PZM8-CAGR].

11. PAUL E. WILSON, *How the Law Came to Kansas*, *in* MUSINGS OF A SMILING BULL 77, 86 (2000).

12. *See id.*

13. *See id.* at 99–100.

14. *Id.* at 100–04.

years was large.[15] Lawyers poured in from Missouri and Ohio, as well as states as far East as New York and Massachusetts.[16]

Bar admission requirements in the Kansas Territory were quite lax.[17] Fundamentally, a person wanting to be a lawyer simply had to show good character and swear an oath of admission before the court.[18] No bar examination nor formal legal study was required.[19] This, too, would have been attractive to potential lawyers.

The first formal requirements— those very lax requirements—for Bar admission were set out in the oath administered to Bar applicants by Justice Lecompte in April, 1855.[20] The next set of stated requirements came in two forms: Chapter 11 of the 1855 Statutes of Kansas, passed by the first legislative assembly, generally known as the "Bogus Legislature,"[21] in July 1855 and the second form of oath administered by Justice Lecompte in Fall 1855.

For all of the reasons given above, Kansas was, indeed, a good place for a young lawyer or would-be lawyer to start a new professional life. One of these early lawyers who came to Kansas Territory to seek his professional fortune, H. Miles Moore, settled in Leavenworth, the site of the first district court meeting and admission of lawyers to the Kansas territorial Bar in April 1855.[22] Over the months before his settling full-time in Leavenworth he seems to have traveled back and forth from Missouri exploring the professional opportunities that might present themselves to him in Kansas.[23]

Moore was a complex character, as the late Professor James Malin revealed in an important article about him.[24] Moore was a successful lawyer and politician in early Leavenworth who rapidly established a prominent place for himself in the growing city.[25] He developed a

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15. *Id.* at 101–02.

16. *See id.* at 101.

17. *Id.*

18. *Id.*

19. *Id.*

20. *See* H. MILES MOORE, EARLY HISTORY OF LEAVENWORTH CITY AND COUNTY 244–45 (1906).

21. *See infra* note 61.

22. *See Henry Miles Moore – Free-State Supporter*, LEGENDS KAN., https://legendsofkansas.com/henry-miles-moore/ [https://perma.cc/XR3E-T2WP] (Feb. 2021).

23. *Id.*

24. *See* JAMES C. MALIN, *From Missouri to Kansas: The Case of H. Miles Moore 1852–1855*, *in* ON THE NATURE OF HISTORY: ESSAYS ABOUT HISTORY AND DISSIDENCE 129–96 (1954); *see also* M.H. Hoeflich & Sydney Buckley, *A Partnership Agreement from Territorial Kansas*, J. KAN. BAR ASS'N, Mar./Apr. 2021, at 46, 46.

25. *See* MALIN, *supra* note 24, at 131.

successful law practice and held several important municipal and territorial offices.[26] It is fair to say that within a year of settling in Leavenworth, Moore became a leader of the Bar. He also quickly aligned himself with the Free State Party.[27]

Moore later became the first historian of Leavenworth and published several works about the city and its early history. In addition, Moore became the unofficial historian of the early Kansas Bar. Moore's primary historical work, published in 1906, was his *Early History of Leavenworth City and County.* In a long appendix to the *Early History of Leavenworth City and County*, Moore attempted to give a historical sketch of the early Leavenworth Bar during the period before Kansas became a state.[28] There is a short biography of every lawyer admitted, including details of his life before coming to Kansas, his educational and professional attainments, and other details that Moore deemed worthy of publicizing.[29] This appendix has served as the primary source for the history of the territorial Bar in Kansas since it was published.

As part of this history, Moore included the three oaths of admission to the Territorial Bar, along with short biographical notices of the men who swore these oaths.

The first oath read:

> I .... do solemnly promise and swear (or solemnly, sincerely and truly declare and affirm,) that I will well and properly behave and demean myself in the office of Attorney of the First District Court for the First Judicial District of the territory of Kansas, in all things appertaining to the duties of such office, according to the best of my skill and judgment, and that I will support the constitution and laws of the United States and of said territory. I believe in the divinity of the Christian religion.[30]

The second oath read:

> I .... do solemnly swear that I will support and sustain the provisions of an act entitled "An Act to organize the territories of Nebraska and Kansas" and the provisions of an act commonly known as the "Fugitive Slave Law" and faithfully demean myself in the practice

26. *See* MOORE, *supra* note 20, at 267-68.
27. *Henry Miles Moore*, *supra* note 22.
28. *See* MOORE, *supra* note 20, at 239.
29. *See id.* at 239–331. The bar of the time did not yet have women members.
30. *Id.* at 244–45.

of law, so help me God.[31]

The third oath read:

> I .... do solemnly swear that I will support the Constitution of the United States and the provisions of an act, entitled, "An Act to organize the territories of Nebraska and Kansas," and that I will faithfully demean myself as an attorney-at-law of this court to the best of my skill and ability, so help me God.[32]

The last line of the first oath was strikingly unusual as compared to the traditional lawyer oaths for admission to the Bar. This was the oath, according to Moore, that was sworn by the first fifteen men admitted to practice before the Bar of the First District Court for the First Judicial District of the territory of Kansas.[33] As such, these fifteen men became the first licensed lawyers in Kansas. We have been unable to find another earlier or contemporary oath that required, as did the oath administered at the April 1855 session of the First Judicial District of the Kansas Territory, that the candidate swear that he "believe(d) in the divinity of the Christian religion." And, therein, lies the first mystery: Why was that last line included in the oath?

To unravel the "mystery" of the first oath, we must first ask: who was its author? The answer to this is clear. H. Miles Moore, in his *History* writes: "Ordinarily there being no special form of oath required by statute to be taken by attorneys, I opine the Judge would have the right and it might be his duty to prescribe the form of that oath."[34] The judge who presided over the session of the Kansas territorial courts at the time the first oath was used was, as mentioned above, none other than Samuel Dexter Lecompte. And herein, perhaps, lies the solution to the mystery of the first oath.

Before turning to the investigation of the oath itself, one must first recognize that anything that H. Miles Moore wrote about the history of the territorial period in Kansas and about the political situation, in particular, must be scrutinized. Moore was directly involved in shaping the history of Leavenworth and, as Malin suggests, would appear to have been quite opportunistic in his political affiliations.[35] By the time of the administration of the first oath, Moore was quite clearly on the Free State

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31. *Id.* at 280.
32. *Id.* at 284.
33. *See id.* at 244–57.
34. *Id.* at 243.
35. *See* MALIN, *supra* note 24, at 131–32, 193–94.

side and would have seen Lecompte as both a potential political rival and on the wrong side of the slavery question. There is no question that Moore's portrayal of Lecompte in his *History* was not entirely favorable.[36]

Justice Samuel Dexter Lecompte was born in Dorchester County, Maryland in 1814.[37] "[H]e graduated from Jefferson College in Pennsylvania in 1834."[38] Little is known about Lecompte's life before coming to Kansas in 1854. Joy Shanks, a document collector and dealer who owns several Lecompte papers, says Lecompte:

> . . . studied law in Maryland and was subsequently admitted to the bar. He later practiced law in Carroll County, Maryland, and in1840 [sic] he was elected to the state legislature. Upon leaving the legislature he practiced law in Dorchester County, until 1854, when he moved to Baltimore.[39]

Lecompte was a Democrat and, as such, would have been sympathetic to the interests of the slave-holding South[40] and a supporter of both the Kansas-Nebraska Act and the Fugitive Slave Act—sympathies confirmed by his actions once he took his seat on the Supreme Court of the Kansas Territory. Indeed, years after he had left the Bench, he proudly proclaimed his partisan views.[41]

The significance of Lecompte's membership in the Maryland Bar and service in the Legislature is that he would have been knowledgeable about the "test oath" provision of the Maryland Constitution as well as the controversy over what has become known as the "Jew Bill" that took place in Maryland in 1826.[42] The history of institutionalized anti-Semitism in Maryland during the colonial period and the early Republic is

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36. *See* MOORE, *supra* note 20, at 311.

37. Joy Shanks, *Captain Samuel Dexter Lecompte – Mexican War Maryland Militia*, GENEALOGY.COM (Apr. 25, 2005, 1:01 PM), https://www.genealogy.com/forum/surnames/topics/lecompte/253/ [https://perma.cc/C8P8-8N97].

38. *Id.*

39. *Id.*

40. *Id.*

41. *See A Defense by Samuel D. Lecompte*, *in* 8 TRANSACTIONS OF THE KANSAS STATE HISTORICAL SOCIETY, 1903–1904 389, 389–90 (Geo. W. Martin ed., 1904).

42. *See generally* Edward Eitches, *Maryland's "Jew Bill,"* 60 AM. JEWISH HIST. Q. 258 (1971). The Bill allowed an exception to Article 35 of the state Constitution, in that "[e]very citizen of this state professing the Jewish religion . . . appointed to any office of public trust [shall] make and subscribe a declaration of his belief in a future state of rewards and punishments, in the stead of the declaration now required." *Maryland General Statutes, 1824, ch. 205. § 1*, *in* CLEMENT DORSEY, THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND: FROM THE YEAR 1692 TO 1839 INCLUSIVE, WITH ANNOTATIONS THERETO, AND A COPIOUS INDEX, VOL. 141 50 (1840).

controversial.[43] What cannot be denied is that the thirty-fifth article of the Bill of Rights adopted at the Maryland Constitutional Convention in 1776 established a "test oath" which required that anyone wishing to hold any governmental office in the state must be able to declare that he was a Christian.[44] From 1776 until the passage in 1826 of the "Jew Bill" that eliminated the worst restrictions of the "test oath" for Jews, Maryland politics and the Maryland press were dominated by debates about the worthiness of Jews to hold office in a Christian nation.[45] In fact, there had been a strong anti-Semitic thread in Maryland politics and society from its founding.[46] According to Edward Eitches:

> Under the proprietary government, the Jew was without civil rights, legally denied freedom of residence and liable to punishment by death for simply confessing his faith. In 1723 a law was passed which stated: "If any person shall hereafter within this province . . . deny our Savior Jesus Christ to be the Son of God, or shall deny the Holy Trinity. . . ," he would be on the first offense, fined, and have his tongue burned; on the second offense, fined and have his hand burned; and on the third offense, burnt to death.[47]

During the years of debate on the "Jew Bill" virtually every common anti-Semitic trope about Jews found its way into Maryland political and popular discourse, including the notion that, since Jews had killed Christ, they should suffer.[48] Indeed, in the 1823 election in Maryland, one of the issues raised was whether the "rich Jews" of Baltimore (there were approximately 150 Jews residing in Maryland at the time) should be rewarded for their contributions to the prosperity of the state by abolishing the test act.[49] It was in this environment that Samuel Lecompte grew up and was educated.

In fact, the state constitutional requirement that a candidate for public

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43. *See id.* at 259–62.

44. *Id.* at 261. Article 35 of the first state constitution of Maryland provided:

> That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention or the Legislature of this State, and a declaration of a belief in the Christian religion.

Maryland Constitution, Nov. 11, 1776, *in* FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA: COMPILED AND EDITED UNDER THE ACT OF CONGRESS OF JUNE 30, 1906 (Government Printing Office, 1909).

45. *See id.* at 258, 265–66, 269–73.

46. *See id.* at 260–62.

47. *Id.* at 261.

48. *See id.* at 273.

49. *Id.* at 270, 275–78.

office was required to swear a "test oath" in order to hold office was not limited to Maryland. Free exercise of religion was an integral part of the First Amendment to the U.S. Constitution formally adopted on 15 December 1791. The adoption of the First Amendment did not, however, end debate as to the precise definition and scope of its provisions. Indeed, debates over the application of the First Amendment continue to this very day. But the adoption of the First Amendment did make certain things quite clear. One of these was that imposition of a "test oath," or any requirement that barred a citizen from participating in the political life of the Republic, was beyond the reach of the Congress and the federal government. Importantly, the protections of the First Amendment to the U.S. Constitution only extended to federal government, federal laws, and federal activities.[50] In 1791, and for decades thereafter, the First Amendment did not limit state legislatures or state actions in requiring the free exercise of religion. In terms of requiring an applicant for public office to be a believing Christian, this meant that the states could, in fact, legally limit state office-holding to Christians only. And many states, like Maryland, did so.

The 1776 Pennsylvania constitution included a similar provision to the Maryland constitution that barred non-Christians from holding state office, although this provision was eventually repealed in 1790.[51] In the colonial period, extending into the early Republic, several states had similar constitutional bars to Jewish participation in public political life. However, Maryland retained its test oath provision longer than almost all others, except for North Carolina, which retained significant limits on Jews' ability to hold state offices until 1868.[52]

The imposition of a "test oath" for Bar admission in Kansas Territory was, therefore, not shocking from a legal standpoint. The very mundanity of the religious test may explain why H. Miles Moore did not take great note of the unusual language of the first Leavenworth oath nor express any dismay at the limitation based on religion that it imposed. Moore may well have been familiar with the "test oaths" imposed in some states up to that time.

It is impossible to know whether Lecompte was personally anti-

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50. *See* Barron v. Baltimore, 32 U.S. 243 (1833).

51. *See* Jonathon Derek Awtrey, Jews and the Sources of Religious Freedom in Early Pennsylvania, 10 (Apr. 3, 2018) (Ph.D. dissertation, Louisiana State University) (on file with author).

52. *Id.* at 49–50 ("Jews, Catholics, and non-Protestants did not receive equal political rights in North Carolina's constitution of 1776, though no Jewish community arose there until much later. In 1835, North Carolina amended the constitution to include all Christians, including Catholics. Not until 1868, however, did individual Jews become full citizens in North Carolina.").

Semitic. Yet, it seems very likely that the inclusion of the requirement that a lawyer swears to be a Christian in order to be admitted to the Bar in Leavenworth in 1855 was a direct result of Justice Lecompte's beliefs. Or, perhaps, it was based merely upon his experience in Maryland during the debates over the Jew Bill and the more general debate throughout much of the antebellum period on whether to give Jews full civil rights.[53]

It is also very clear that this provision in the first Leavenworth attorney's oath was not inspired by the draft constitution that would be later adopted at Topeka by the Free State faction during October and December 1855,[54] months after the administration of the first Leavenworth attorney's oath in April 1855. In addition, to the extent that the Topeka Constitution represents the general beliefs of the territorial citizenry, it must be remembered that the Topeka Constitution was a Free State document, which likely did not reflect views on critical points held by Lecompte. Nevertheless, Article 1, Section 7 of the Topeka Constitution states:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given by law to any religious society; nor shall any interference with the rights of conscience be permitted. *No religious test shall be required as a qualification for office*, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every

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53. *See id.* at 49 ("By 1800, Rhode Island and Connecticut remained the only two states without constitutions, operating instead under their colonial charters, both of which excluded all non-Protestants from the body politic. In 1818, Connecticut disestablished the Congregational Church, but a Jewish congregation received no recognition until 1843."). Despite the famous correspondence in 1790 between Warden Moses Seixas, on behalf of the Congregation Yeshuat Israel in Newport, R.I., and President George Washington, whose response noted, "[a]ll possess alike liberty of conscience and immunities of citizenship," that statement for Jewish Rhode Islanders was true only of federal right, not state rights. *See From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-06-02-0135 [https://perma.cc/RHG3-3S8D]. In fact, it was "[n]ot until the adoption of a new constitution in 1842 did Jews receive full civil equality in Rhode Island. No professing Jew served in an elective office until the 1880s. Jews, however, made some progress, despite these limitations. In 1764, for example, Rhode Island recognized marriages other than Christian in nature. A decade later, Newport had a Jewish population about half that of New York City, and like its sister polity allowed Jews to construct a public cemetery. The revolutionary war, however, ended Jewish life in Newport, not to be revived again for another one hundred years." Jonathon Derek Awtrey, *supra* note 51, at 49.

54. *See* NICHOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 74–75 (2004); PEARL T. PONCE, TO GOVERN THE DEVIL IN HELL: THE POLITICAL CRISIS IN TERRITORIAL KANSAS 56, 74–75 (2014).

> religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[55]

There was no basis in the Topeka Constitution for a religious test for attorneys. Thus, it could not have inspired the religious test contained in the first Leavenworth oath. Even if Justice Lecompte had been aware of draft state constitution or willing to utilize ideas circulating in Free State circles, which seems quite unlikely given his political leanings, it is apparent that neither influenced his views on the attorneys' oath.

The next proposed constitution, the Lecompton Constitution, was adopted by a pro-slavery convention in 1857.[56] It has no direct analogue to Article 1, Section 7 of the earlier Topeka Constitution. However, in the "Bill of Rights" contained in the Lecompton Constitution, Section 3 reads:

> That all persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience, and no person can of right be compelled to attend, erect, or support any place of worship, or maintain any ministry, against his consent. That no human authority can in any case whatever interfere with the rights of conscience, and that *no preference shall ever be given to any religious establishment or mode of worship.*[57]

In addition, the proposed Lecompton Constitution also includes Article 15, Section 2, which lists the form of oaths all individuals were required to swear who wished to take up a territorial office in Kansas. There is no mention of religion in the required form of oath described in this provision:

> Every person chosen or appointed to any office under this State, before entering upon the discharge of its duties, shall take an oath or affirmation to support the Constitution of the United States, the Constitution of this State, and all laws made in pursuance thereof, and faithfully to demean himself in the discharge of the duties of his office.[58]

The absence of any religious restriction in the Lecompton Constitution would most likely suggest that banning non-Christians from holding

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55. TOPEKA CONST. of 1855, art. I, § 7 (emphasis added), https://www.kansasmemory.org/item/221061/text [https://perma.cc/KF6N-2Q3E] (proposed).

56. *See* LECOMPTON CONST. of 1857, art. VII, https://www.kansasmemory.org/item/207409/text [https://perma.cc/395G-5VYP] (proposed). *See also generally* ETCHESON, *supra* note 54, at 139–67 (providing background information on the Lecompton Constitution); PONCE, *supra* note 54, at 161–70 (providing background information on the Lecompton Convention).

57. LECOMPTON CONST. of 1857, Bill of Rights § 3 (emphasis added).

58. *Id.*, art. XV, § 2.

governmental office in Kansas was not a significant issue for the pro-slavery party. Thus, if there was a model for the final sentence in the first Leavenworth oath, it was not contained in either of the proposed constitutions for Kansas that were circulating at the time the oaths were being administered. Nor does a religious test for office seem to have been a major concern of either of the opposing political factions.

Even so, although the several territorial constitutions guaranteed freedom of worship to all citizens, some of the statutes that were adopted in 1855 by the "Bogus Legislature" did, in fact, prescribe specific oaths for officeholders that used language that might have been interpreted to impose some religious conditions.

In March 1855, Territorial Governor Andrew Reeder supported holding an election to choose delegates to draft a new constitution and statutes thereunder.[59] Pro-slavery Missourians and others with questionable claims to vote in Kansas dominated the polls.[60] Nevertheless, the elected delegates went ahead and met in what has subsequently been called the "Bogus Legislature."[61] This Legislature met in July 1855 and was almost exclusively focused on ensuring that the right to own slaves in the territory and in the new state would be guaranteed.[62]

Richard Rees, as chair of the judiciary committee of the "Bogus Legislature," was charged with drafting, in an impossibly short time, the remainder of the provisions of the statutes not dealing with slavery.[63] He solved this problem by incorporating provisions from the 1845 Revised Statutes of Missouri into the new Kansas Statutes, with very little change.[64] Presumably, Rees and the other delegates assumed that, since Missouri was a slave state, its statutes would generally be acceptable in a pro-slavery Kansas. The statutes Rees adopted from the Missouri statutes included provisions relating to the qualifications to practice law and the oaths required to be sworn by both elected and appointed office holders.

Chapter 117, Section 1 of the 1855 Kansas Statutes, as written by Rees, stated:

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59. Chad G. Marzen, *Law, Popular Legal Culture, and the Case of Kansas, 1854-1856*, 14 WYO. L. REV. 189, 202 (2014).

60. *See Bogus Legislature*, KAN. HIST. SOC'Y (Feb. 2013), https://www.kshs.org/kansapedia/bogus-legislature/16700 [https://perma.cc/9QMK-KX4D].

61. *Id.* On the so-called "Bogus Legislature," *see* PONCE, *supra* note 54, at 50–55; ETCHESON, *supra* note 54, at 61–68.

62. *See* WILSON, *supra* note 11, at 87.

63. *See* JOURNAL OF THE COUNCIL OF THE TERRITORY OF KANSAS AT THEIR FIRST SESSION 38 (1855); Robert A. Mead & M.H. Hoeflich, *Lawyers and Law Books in Nineteenth-Century Kansas*, 50 U. KAN. L. REV. 1051, 1062 (2002).

64. *See* WILSON, *supra* note 11, at 96.

> All officers, elected or appointed under any existing or subsequently enacted laws of this territory, shall take and subscribe the following oath of office: " I, _____, do solemnly swear *upon the holy evangelists of Almighty God*, that I will support the constitution of the United States, and that I will support and sustain the provisions of an act, entitled 'An act to organize the territories of Nebraska and Kansas,' and the provisions of the law of the United States commonly known as the 'fugitive slave law,' and faithfully and impartially and to the best of my ability demean myself in the discharge of my duties in the office of_____; so help me God."[65]

Chapter 11, Section 3 of these same 1855 Statutes prescribed a somewhat different oath for attorneys at law:

> Every person obtaining a license shall take an oath or affirmation to support the constitution of the United States, and to support and sustain the provisions of an act entitled "an act to organize the territories of Nebraska and Kansas," and the provisions of an act commonly known as "the Fugitive Slave Law," and faithfully to demean himself in his practice to the best of his knowledge and ability. A certificate of such oath shall be endorsed on the license.[66]

Section 1 of Chapter 11 of the 1855 Statutes required only that a candidate for membership in the Kansas Bar "be a free white male."[67] There was no religious qualification.[68] Further, Section 2 stated only that:

> Every applicant for license to practice law, shall produce satisfactory testimonials of good moral character, and undergo a strict examination, as to his qualifications, by one of the judges.[69]

Neither Section 1 nor 2 of Chapter 11 of the 1855 Statutes imposed any religious test at all for candidates for the Bar. Chapter 117, Section 1 of the Statutes, however, stated that the oath taker was to swear "upon the holy evangelists of Almighty God." It is this language that could be interpreted as incorporating a rather distinct religious test, at least for office holders in the Kansas Territory.

In light of the absence of any religious test in Chapter 11 of the 1855 Statutes relating to attorneys, there are two most probable explanations for the seeming difference in language between the oath prescribed for government officials in Chapter 117 and that prescribed for attorneys in

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65. KAN. TERR. STAT. 1855, ch. 117, § 1 (emphasis added).
66. *Id.* ch. 11, § 3.
67. *Id.* ch. 11, § 1.
68. *Id.*
69. *Id.* ch. 11, § 2.

Chapter 11. One possibility is that attorneys were deemed not to be office holders within the scope of Chapter 117 since they were neither "elected or appointed." The other possibility is that the requirement that an "elected or appointed" officer holder swear upon "the holy evangelists of Almighty God" was not deemed to be a religious test at all. Rather, it may have simply been a requirement that the would-be office holder swear an oath on the Bible. This, in itself, need not have been a barrier to a Jewish applicant for the Bar since Sections 4 and 5 of Chapter 117 stated:

> All oaths in this territory shall be administered by laying the hand on the holy bible and kissing the book, except where the party swearing shall have conscientious scruples of swearing in that mode, in which case they may swear with uplifted hand.[70]

And:

> Any person who may have conscientious scruples about swearing, may, instead thereof, affirm with uplifted hand, in the following manner: "I do most solemnly and sincerely affirm, in the presence of Almighty God," [etc.]. And all oaths of office, except such as may have by custom prescribed forms, shall be: "You do solemnly swear or affirm," [etc.].[71]

It would appear fair to assume that a reasonable construction of the language of Chapters 117 and 11 of the 1855 Statutes would have permitted Jews to take the attorney's oath; whereas the first oath prescribed by Justice Lecompte would have barred Jews and other non-Christians from doing so.

One of the more interesting aspects of this religious test incorporated in the first Leavenworth attorney's oath is that there were very few Jews in all of Kansas, much less Leavenworth alone, at the time the oath was first administered. A few Jewish emigrants, like August Bondi, came early to aid John Brown.[72] The first Jewish cemetery was established in Leavenworth in 1857, and the first Jewish congregation was started in 1859.[73] It would appear that several of these early Jewish settlers, besides Bondi, were anti-slavery.[74] Nevertheless, they were so few, one would be

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70. *Id.* ch. 117, § 4. The analogous passage in the 1845 Missouri Revised Statutes did not use the "holy evangelists" language. *See* MO. REV. STAT. §§ 125.1–7 (1845). Where this language originated remains uncertain.

71. KAN. TERR. STAT. 1855, ch. 117, § 5.

72. *Virtual Jewish World: Kansas, United States*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/kansas-jewish-history [https://perma.cc/3AQN-4WGU].

73. *Id.*

74. *See* Leon Hühner, *Some Jewish Associates of John Brown*, 23 AM. JEWISH HIST. SOC'Y 55, 61 (1915).

hard pressed to show that the presence of a small number of anti-slavery Jews would have provided a sufficient reason for Lecompte to include the last sentence of the first oath. Further, there is no indication in the sources that there were any Jewish lawyers who might have sought to join the Kansas Bar in April 1855; so the prohibition would most likely have been aimed at preventing future Bar admissions of Jewish candidates.[75]

Jews would not have been the only individuals potentially affected by the religious test included in the first Leavenworth attorneys' oath. In Maryland, the language of the Article 35 of the 1776 constitution effectively banned all non-Christians from holding office.[76] It was not limited to Jews. In theory, it would have applied, for instance, to Muslims and atheists as well. Again, however, there is no evidence of the presence of either Muslim or atheist candidates for admission to the Kansas Bar in 1855.

There is, however, another possibility. Unitarianism was a powerful religious movement in New England, the home of the abolitionist movement and the home, as well, of many of those who were coming to Kansas at this time in order to ensure that Kansas would eventually become a free state. At this time, some Christians regarded Unitarians as non-Christians, because they did not believe in the separate divinity of Christ.[77] It is possible that the requirement that all Bar applicants swear that they believed in the divinity of the Christian religion may also have been intended to keep Unitarian abolitionists from becoming Kansas lawyers.

A second group that might have been negatively affected by the first oath's requirement to swear to "the divinity of the Christian religion" was Native Americans who had not adopted Christianity. However, after the adoption of the 1855 Statutes, no religious test in the oath would have been necessary to prevent Native Americans from becoming lawyers in Kansas Territory.

Article 11, Section 1 of the 1855 Kansas Statutes required that all attorneys be a "white male,"[78] a phrase that would have explicitly barred

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75. *See* MOORE, *supra* note 20, at 239–331 (providing brief biographical sketches of early members of the Kansas Bar).

76. *See supra* note 45. *See also* Eitches, *supra* note 42, at 258, 261 (noting that the bill annulled the Maryland Constitution's effective requirement that state officers be Christians).

77. *See generally Unitarianism*, STAN. ENCYCLOPEDIA PHIL. (2020), https://plato.stanford.edu/entries/trinity/unitarianism.html [https://perma.cc/H3NJ-DSTT] (discussing the historical view that Unitarianism was not Christian). For the influence of Unitarians on the religious intolerance of Maryland law see generally Eric Eisner, *"Suffer Not the Evil One": Unitarianism and the 1826 Maryland Jew Bill*, 44 J. RELIGIOUS HIST. 338 (2020).

78. KAN. TERR. STAT. 1855, ch. 11, § 1.

Native Americans from becoming lawyers. Until that provision was removed from the statutes, there was no need for the oath of admission to serve as a bar to their practicing law.

Indeed, both logic and history suggest that Justice Lecompte's primary purpose in adding the last line to the first Leavenworth oath was not to exclude abolitionists, Free Staters, Native Americans, or Unitarians from practicing law in Kansas. Its likely purpose was simply to exclude Jews and other non-Christians from the Bar.

Such an exclusion might have been an echo of one side in the sectarian debates Lecompte had heard in Maryland. Or, it might have been a hedge against a category of potential abolitionists holding office, built on the assumptions that good Christians would support slavery and that Jews and non-Christians would reject slavery.

There was no guarantee that all Christians would support slavery nor that all Jews and non-Christians would oppose it. Further, nothing in the 1855 Kansas Statutes would have required applicants to the Bar to be Christians. If the purpose of the last line was to ensure that only pro-slavery candidates would be successful in becoming lawyers, it would have been far simpler for Justice Lecompte to have required all candidates for admission to the Bar to swear that they would uphold the Fugitive Slave Act. This would have been far more direct. In fact, this is precisely what Justice Lecompte did in the second Leavenworth oath.

The second mystery of the Leavenworth oaths is why the first oath was replaced by the second oath less than a year later.[79] The language of the second oath was very much different from that of the first oath. In the second oath, the candidate was required to swear that he would "sustain and support" the Kansas-Nebraska Act and the Fugitive Slave Law.[80] The requirement of swearing to his belief in the "divinity of the Christian religion" was gone. The only religious language was that the candidate be willing to swear "so help me God."[81] This requirement to swear in the name of God was common in other states' oaths of admission and would not have been problematic either to Jews or Unitarians.

There is no mystery about the requirement that the candidate swear to uphold the Kansas-Nebraska Act and the fugitive slave law. Free state supporters would not have been willing to swear this oath. H. Miles Moore remarks coyly:

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79. *See* MOORE, *supra* note 20, at 280.
80. *Id.*
81. *Id.*

> [A]n entirely different oath, at least with additional provision, was required six months after, when it was evident that perchance a class of attorneys who might entertain different views upon the question of slavery in the territory of Kansas would apply to be enrolled as members of the bar of the district, thus will be seen the partisan spirit which had already been developed in other transactions and would soon reach a culminating point and no doubt break out in open revolt, being insidiously ingrafted into even the oath required to be taken by attorneys who desired to practice law or appear before the honorable court.[82]

This second form of the attorney's oath of admission followed the requirements set by the newly adopted Kansas Statutes of 1855, which, in turn, reflected the 1845 Missouri Revised Statutes.[83] Section 3 of Chapter 11 of the 1855 Kansas Statutes, as quoted above, requires every candidate for admission to the Bar to swear or affirm that he will "support and sustain" the provisions of the Fugitive Slave Law.[84]

It is well established that Justice Lecompte, the author of the Leavenworth oaths, was supportive of the pro-slavery movement in Kansas, as well as of the "Bogus Legislature,"[85] so the addition of the new language is easily understood as an overt move by Lecompte to bar Free State attorneys from practice before the courts.

Why would Lecompte and the Territorial Legislature want to do this? Again, the answer is clear. During the early years of the Kansas Territory, the conflict between the pro-slavery forces and the Free State forces often led to lawsuits for unjust imprisonment, loss of property, etc.[86] By effectively banning Free Staters and abolitionists from the Bar, anti-slavery litigants involved in political cases were put at a distinct disadvantage, since they would have a difficult time finding an attorney to represent them.

Interestingly, the absence of the requirement to swear to uphold the Fugitive Slave Act from the first oath permitted Free State supporters to be admitted to the Bar at the April swearing in. Justice Lecompte may well have realized the mistake he had made in permitting anti-slavery attorneys to practice at the Bar, especially in light of the 1855 statutes.

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82. *Id.* at 242–43.

83. *See* MO. REV. STAT. § 13.3 (1845).

84. KAN. TERR. STAT. 1855, ch. 11, § 3.

85. *See A Defense by Samuel D. Lecompte*, *supra* note 41 (displaying Lecompte's sympathies with pro-slavery movement).

86. The best original source for assessing the nature and frequency of territorial litigation are Docket Books A and B now held in the collection of the Kansas State Historical Society. The two manuscript volumes have brief entries for each case heard by the court. It is to be noted that the contents of Docket Book A are, in fact, identical to those of Docket Book B.

Thus, he adjusted the oath at the next swearing-in ceremony both to adhere to the new Statutes and to achieve a goal with which he agreed.

There remains still one unanswered question about the second version of the oath. Why did Justice Lecompte remove the requirement that candidates for admission swear to their belief in the "divinity of the Christian religion"?

In such a short document it is unlikely that Justice Lecompte simply made a mistake. Leaving the "test oath" out of the second version of the oath of admittance must surely have been deliberate. The most likely answers as to why Justice Lecompte left out the requirement that candidates for the Bar be Christian were that he decided that the ban on Jews and other non-Christians was either unnecessary or inappropriate.

In 1855, as noted above, there was likely a very small Jewish population in Kansas, although the first Jewish cemetery was not founded until 1857 (Mt. Zion), and the first synagogue (B'nai Jeshurun) was not established until 1859.[87] There had been a small number of Jews in Kansas City since 1839.[88] During the Civil War, a Jew, Lt. Colonel Reuben E. Hershfield was the Commander at Fort Leavenworth.[89] Given the relatively small number of Jews in territorial Kansas, it is possible that Justice Lecompte simply decided that there was no need for the "test oath" and decided to focus on the more important issue of slavery, avoiding anything that might distract from that issue. It is also possible that a member or members of the small Leavenworth Jewish community spoke to Justice Lecompte and convinced him to remove the test oath from the admission oath. On the current state of the evidence, it is impossible to know the answer to this question.

The third Leavenworth oath of attorney admission was introduced at the 1857 session of the court.[90] In this oath, the requirement to adhere to the Fugitive Slave Act had been eliminated, but the requirement to swear to uphold the provisions of the Kansas-Nebraska Act remained.[91] Why did Justice Lecompte remove the language about the Fugitive Slave Act?

After the "Sack of Lawrence" on 21 May 1856 under the leadership

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87. *See History of Mt. Zion Cemetery*, KSGENWEB (July 12, 2000), http://www.ksgenweb.org/leavenwo/cemeteries/mtzionhs.html [https://perma.cc/8FNG-7ULC]; *Temple B'Nai Jeshurun*, CITY OF LEAVENWORTH, KAN., https://www.leavenworthks.org/ru/page/temple-bnai-jeshurun [https://perma.cc/S793-NVEL].

88. *See The Jewish Community of Kansas City, MO*, ANU: MUSEUM JEWISH PEOPLE, https://dbs.anumuseum.org.il/skn/en/c6/e166915/Place/Kansas_City_MO [https://perma.cc/S255-J2UQ].

89. *Id.*

90. *See* MOORE, *supra* note 20, at 284.

91. *Id.*

of Sheriff Samuel J. Jones, popular sentiment focused not only on Jones' role in those events, but, also, upon the actions of Justice Lecompte. In addition, Justice Lecompte angered President Pierce, who had appointed him to the Kansas Supreme Court in 1854, by his actions in the infamous *Hayes* case.[92] Pierce wrote the Territorial Governor, John White Geary, who would not have been fond of Lecompte's views:

> Your official dispatch to the Scy" of State in relation to Judge Le Compte and his action in the case of Hayes is before me. I regret the occasion, which preempted it, and also regret that you undertook to issue a warrant for the rearrest of Hayes. It it [sic] is too late now to remind you, that such an act was beyond the scope of your Official Power - Your proceeding in this respect Embarrasses the matter somewhat, but I shall remove Judge Le Compte on grounds of public Policy . . . .[93]

Although Justice Lecompte was aggrieved by what he perceived to be unfair criticism,[94] one may well speculate that he began to alter his behavior to avoid being removed from office. The political winds in Kansas were shifting, and it was becoming increasingly clear that the pro-slavery forces were ultimately going to lose the battle for the soul of the Territory and, eventually, the new state. However, President Pierce's attempt to replace Justice Lecompte was unsuccessful, and the Justice did not leave the Kansas Bench until 1859.[95] It seems reasonable that, by April 1857, amidst the scandals and political opposition that plagued him, Lecompte decided to abandon the inflammatory language of the second oath to avoid piling further kindling on the political bonfire that threatened to immolate him.

This tale of the "mystery" of the three Leavenworth oaths of admission to which Bar candidates had to swear may well be characterized as "micro-history."[96] However, to those who wish to understand the role of the ingrained prejudice brought by the settlers to Kansas, the hyper-partisanship that infected every aspect of life in the Territory, and the early

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92. United States v. Hayes (D. Kan. Terr., 3d D., 1859).

93. *Pierce, Franklin (1804-1869) to John W. Geary*, GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/collection/glc00375 [https://perma.cc/6T74-XMCN].

94. *See A Defense by Samuel D. Lecompte*, *supra* note 41, at 394.

95. *See id.* at 389; Ian Spurgeon, *Lecompte, Samuel Dexter*, KAN. CITY PUB. LIBR.: CIVIL WAR ON THE W. BORDER, https://civilwaronthewesternborder.org/encyclopedia/lecompte-samuel-dexter [https://perma.cc/7WZN-HYMV].

96. *See* ANTHONY GRAFTON, BRING OUT YOUR DEAD: THE PAST AS REVELATION 21–22 (2001) (describing the "micro-historical perspective," that of the "truffle hunter"); *see also* Francesca Trivellato, *Is There a Future for Italian Microhistory in the Age of Global History?*, ESCHOLARSHIP https://escholarship.org/content/qt0z94n9hq/qt0z94n9hq_noSplash_99cd35d4d81c295e72aeda0ea85abc24.pdf?t=ncvdkl [https://perma.cc/W4SC-SUBF].

development and growth of the legal system in Kansas, it is a tale worth telling.