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Minor Courts And Communities At The Frontier: The Justice Of The Peace In Early Missouri

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MINOR COURTS AND COMMUNITIES AT THE FRONTIER
THE JUSTICE OF THE PEACE IN EARLY MISSOURI

by

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CHAPTER I

INTRODUCTION

In the early nineteenth century, travelers heading for the Missouri frontier experienced poor weather, uncomfortable surroundings, lack of privacy, and fatigue. When they finally arrived at their destination or simply made the decision to stop where they were and settle, they worked hard at building new communities. In the eighteenth century, initial waves of immigrants stopped when they reached the "boot heel" or southeast region of Missouri; later pioneers made their way up through the central prairie region to the north and west. They built their own roads, educated their children privately, and socialized at home or in the company of neighbors. Writing about early Missouri life, a memoirist noted that settlers had "[a] common interest and a common sympathy [which] bound them together with the strongest ties. They were a little world to themselves. Among these pioneers there was realized such a community of interest that there existed a community of feeling."[1]

Settlers' achievements were numerous but costly. Those who settled in early Missouri battled loneliness and hunger, an intimidating terrain, unexpected obstacles to land ownership, and other frustrations. But, for the most part, they confronted and overcame these fundamental problems in order to survive and construct new lives. The landscape had to be tamed and put to good use. Vigorous and resilient economies were essential, no matter how small or large the community. Public order and a sense of neighborhood and stable institutions were equally essential, and a spirit of community would prove an immense help. In all of this, law was more clearly an ally than an

[1] *History of St. Charles County, Missouri (1765-1885)*, with an introduction by Paul R. Hollrath (n.p., 1997), 108.

impediment. The key to executing and interpreting local law were two public entities, both controlled by the justice of the peace: the local justices' court and the county court of commissioners.

Contrary to much recent scholarship, Missouri's neighborhood courts managed by justices of the peace kept alive the notion of community justice for much of the nineteenth century. Local legal cultures retained their character, resisting trends toward state superintendence of law and judicial services that would reduce residents' access to courts. Localism and continuity, then, were far more characteristic of nineteenth-century Missouri than nationalization and modernity. Changes in local judicial arrangements and law were more apparent than real.

Attachment to local ways and local judicial institutions persisted over decades—despite population growth, civil war, diversity in ethnic origins of immigrants, financial panics and other problems. Residents of villages and towns remained attached to their local justices' courts and overwhelmingly supported county courts of commissioners. By the late 1870s, economic activity in Missouri—that is, growing industrialization, technological improvement in transport of goods, and increases in non-agricultural market transactions—along with changed priorities within state government and a transformed body politic suggest a cultural sea change. Yet people continued to demand more justices of the peace.

People in early Missouri found comfort in local judicial services, which formed part of the pattern of community life. The very nature of settlement, of 'taming' the frontier for the purpose of creating a community, demanded a communal spirit and willingness to do whatever had to be done. Township justices' courts in Missouri,

worked on the basis of generally accepted notions of justice and fairness. Where a high court judge sought the precise meaning of a statute before making a ruling, the justice of the peace did not depend so heavily upon positive law that he failed to take into account common notions of what was fair and right. He could do so because he was not expected to withdraw into a separate space inhabited by 'the law' in the performance of his duties. Indeed, much of the reason for the effectiveness of Missouri's neighborhood courts was the supple nature of their practice of law. Early Missourians cherished courts of the neighborhood for their intimacy, clarity in law, and connection with daily living patterns.

This study firmly situates law within a frontier community and asks how it performed—not how lawmakers and others intended or believed it to perform. It considers legal events as active happenings, rather than as outcomes of a legal code of conduct. This project examines local justice from an institutional perspective and in addition takes account of the human voices hidden within cases. A discussion of early Missouri's courts of the neighborhood, anchored in the counties and frontier towns, necessarily addresses how these courts actually behaved within communities. In early Missouri, justices of the peace performed the duties of the office under varying circumstances. Justices' courts and county courts of commissioners were designed around local needs and interests. Communities themselves thus acquired a significant voice in the narrative.

The subject of the work, then, is neither court nor community, but the *interactions* between them. How did courts shape neighborhoods, and vice versa? Where did legal

meanings reside—in the statutes written the state capitol, in the neighborhood, or somewhere else? While appeals courts issue rulings that can touch and change people's lives sometimes in very deep ways, people do not think about the court itself, even if the effects of the ruling are life-altering. But in the tiny settlements and small towns of early Missouri, residents knew the justices who ran their local and county courts, so they knew where much of the law that affected them came from and who made it. Further, residents acted to participate in dispensation of local justice and government. Briefly, local justice possessed a vibrant life in the rural communities of nineteenth-century Missouri that grew out of attributes of the institutions themselves and of the nature of community life then. Meanings emerge from the intensely personal, human exchanges between ordinary people and the justices of Missouri's neighborhood courts.

Scholars have displayed little interest in constructing histories of the thousands of neighborhood courts that existed at one time or another in colonial and early America. This is particularly true in post-Revolutionary studies. In the absence of information regarding lower courts, law-and-society scholar Lawrence Friedman writes that, "[t]he "further down one goes in the pyramid of courts, state or federal, the thinner the trickle of research. Yet it is certain that the everyday courts, churning out thousands of decisions on questions of debt, family affairs, and title to land, were of vital importance to society . . . the role and function of lower-court judges probably changed greatly between 1790 and 1840; and there were probably great differences between East, West, and South. But little about form, function, and staff is definitely known."[2]

[2] Friedman, *A History of American Law*, (New York: Simon & Schuster, Inc., 1985), 139.

Probably a larger body of work would be in place if not for minor courts' collective poor reputation as judicial bodies and a powerful scholarly tradition to the contrary. Both legal scholars and the public dismiss lower (local) courts as literally inferior to high courts and high court judges. Even studies of lower courts use dismissive language in discussing them. One 1949 PhD dissertation on the evolution of Missouri's early trial courts asserts that circuit courts decided "[t]he most important cases" . . . small causes remained for the local courts to adjudicate."[3] A view of local courts as incompetent comes out of entrenched views regarding the competence and character of justices of the peace. Roscoe Pound opines that American probate courts were poorly regarded in part because they had amateur, lay judges,[4] and Willard Hurst believes that lower court judges were not thought to have the same high morals and professional skills as judges on the higher courts.[5] While such criticisms may have possessed merit with respect to an individual judge or court, they were taken to apply broadly to the office of justice of the peace. Unfortunately, people looked no further. Even scholars like Pound and Hurst, though they keep a distance from negative commentary, are incurious concerning the role and functions of minor courts.

Not only have courts of the neighborhood been viewed as incompetently run and engaged in trivia, as subjects of historical interest they meet competition from other fields of legal history. These include more traditional topics, such as family law, the rules

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[3] James Griffith Harris, "the Background and Development of Early Missouri Trial Courts," 108, 178.

[4] Roscoe Pound, *Organization of Courts* (Boston: Little, Brown and Company, 1940), 5, 22, 140, 156, 159.

[5] James Willard Hurst, *The Growth of American Law, The Law Makers* (Boston: Little, Brown and Company, 1950), v. 87-88, 99.

governing the market place, or questions about federalism. Public law and the role of the federal supreme court continue to be primary subjects, along with civil rights, including the history of slavery before the Civil War, and the 1960s' struggle for restoration of rights to blacks; women, American Indians, and other groups. More recently scholars have begun to explore colonial legal history and legal history as culture, in part as culture, in part as a reaction against a long history of institutional and doctrinal preoccupations. Certainly, writers of American legal history in the past few decades have emphasized social rather than institutional histories of law. Put differently, recent accounts of early American legal developments have reflected interest in local and personal questions—the law of domestic relations, custody, the law of indenture, slavery, and related private property questions.[6]

Graduate students have produced much of the literature about judicial bodies managed by justices of the peace within the British Empire. Unfortunately, because in the main their work is unpublished, it also goes unnoticed.[7] Legal historians have access

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[6] See Peter Charles Hoffer, *Law and People in Colonial America* (Baltimore: The Johns Hopkins University Press, 1992) for transformations in British law in colonial America, with references to inferior courts; Roger Thompson, *Watertown, Massachusetts 1630-1680* (Amherst: University of Massachusetts Press, 2001) for a discussion of community disagreements and their resolution; *(*David Konig, *Law & Society in Early Massachusetts: Essex County, 1629-1692* (Chapel Hill: The University of North Carolina Press, 1979), 65, 88, 108, for law as replacing religion in uniting and integrating communities as communal feeling and the churches lost their power.

[7] See, as examples Charles Austin Beard, "The Office of Justice of the Peace in England in its Origin and Development" (Ph.D. diss., Columbia University, 1904); Paul Franklin Douglass, "The Justice of the Peace Courts of Hamilton County, Ohio" (Ph.D. diss., University of Cincinnati, 1931; Sharon Jean Bice Engelman, "Patronage and Power: A Social Study of the Justice of the Peace in Late Medieval Essex" (Ph.D. diss., Brown University, 1977); William Louis Gaines, "The Justice of the Peace in England, 1835-1888: Chapters in English Local Government" (Ph.D. diss., Yale University, 1951); Egbert R. Isbell, "The English Justice of the Peace and the Central Government in the Reign of James I" (Ph.D. diss., University of Michigan, 1934); John Richard Knipe, "the Justice of the Peace in Yorkshire, 1820-1914, A Social Study" (Ph.D. diss., the University of Wisconsin-Madison, 1970); Paul R. Murray, "The Justice of the Peace in California" (Ph.D. diss., Stanford University, 1953); Isham Gregory Newton, "The Minor

to two very early works, both technical guides: George Webb's *Justice of the Peace* and Richard Burn's *The Justice of the Peace and Parish Officer* appeared in 1736 and 1764 respectively; the latter, notes Holly Brewer, was widely read by contemporaries in the American colonies.[8]

Though few works devoted exclusively to inferior courts are few, the literature does not lack references to judicial entities serving local and county jurisdictions. Scholars have viewed law and the judiciary through a variety of lenses. Some view minor courts against a backdrop of politics and sites of official power within government, while others look at judicial law in terms of culture and the relationship between inferior courts and change over time. Historians also examine the power of minor courts to influence societies. A few analyze courts of the neighborhood as institutions. The sole monograph to deal with justices of the peace of the far west discusses early local courts in Washington Territory as judicial institutions within communities. Finally, a fairly recent body of literature on the western frontier has begun to emerge, most of which examines crime and violence, with particular attention to legal conflict resolution, informal methods of controlling violence, crowds, and economic implications of crime-filled environments.

Judiciary in North Carolina, With Special Emphasis on the Justice of the Peace" (Ph.D. diss., University of Pennsylvania, 1956); Julius Long Stern, "His Brother's Keeper, the Buckinghamshire Justice of the Peace, 1678-1689" (Ph.D. diss., Princeton University, 1960); Dennis Lambert Toombs, "An Empirical Study of Texas Justices of the Peace" (Ph.D. diss., University of Houston, 1982).

[8] Holly Brewer, "Age of Reason? Children, Testimony, and Consent in Early America," in *The Many Legalities of Early America*, Christopher L. Tomlins and Bruce H. Mann, eds. (Chapel Hill: The University of North Carolina Press, 2001), 299, 311.

In colonial studies, the landscape is much more varied, with scholars discovering ways in which New England colonists coped with fundamental social and political differences between England and their new environments. Kenneth Lockridge and Sumner Chilten Powell have explored changing sites of law and the importance of such changes to community life. Lockridge has examined village life in Dedham, Massachusetts between 1636 and 1686 for signs of altered patterns of daily patterns and differences in ideas about law and governance. He observes that, in the beginning, daily living was simple, unitary, and organic. An annually-elected board of selectmen ran the town, using undifferentiated judicial, executive, and legislative functions. Though the town meeting in theory had sufficient power to exercise considerable control over the board, it did not do so in the early years of the town's existence. Town meetings exercised much more power during the late 1690s and later, as the "great men" of the town left or died, taking with them the founding values of town life; "voluntary unity" failed as the population increased and became more diverse, and calls to segment the town into more, smaller towns became urgent.[9] Sumner Chilton Powell similarly concludes that disharmony arose in Sudbury, Massachusetts, as the population increased and town officials refused to allow new town foundations.[10] Harmony, then, was the rule in these and other early communities (mainly in New England) due to homogenous populations, the essential simplicity of daily routines, and sufficient living space for all.

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[9] Sumner Chilton Powell, *Puritan Village, The Formation of a New England Town (*Middleton, Wesleyan University Press, 1963), 118-126; Kenneth Lockridge, *A New England Town, the First Hundred Years—Dedham, Massachusetts, 1636-1737* (New York: W. W. Norton and Company, Inc., 1970) 84-85, 174-175.

[10] Powell, *Puritan Village*, 100, 108, 118-126.

Problems set in, however, as populations grew and became more diverse, and social and economic relations more complex.

Other legal histories of the colonial era deal with law as a depository of custom and tradition. These works argue that tradition drove early law in the sense of representing early settlers' moral values and customary practices. They point out that, over time, communities moved away from custom toward formal, written law. David Allen compares regional variations in English life with American New England experiences and finds that early New England communities imitated those of the mother country in making local law that consisted mostly of remembered custom. Towns later developed "diverse local institutions," but these lost ground, as acts of county courts, which represented the colony, linked local communities more closely with central authority.[11] According to Bruce Mann, both customary values and conceptions of community shaped legal environments. There, "law [became] less identified with community and more with society," as townspeople came to prefer a formal written legal system to replace the former law based on custom. Mann sees critical links between changes in law and the dynamics of social relations, functions of community, and the tendency of legal disputes to send "tremors throughout the spectrum of the parties' relations."[12]

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[11] David Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century*, xv, 209.

[12] Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut*, Studies in Legal History, White, G. Edward, ed., 4.

None of the colonial studies cited above elaborate to any significant degree on distinctions between neighborhood courts and higher courts. The crucial difference lies, rather, between informal and formal law, with the latter eventually forcing out the former. Those historians thus emphasize change over preservation. Peter Hoffer, Ralph Wooster, and Timothy Breen, however, argue that continuity, not change, characterized delivery of justice in early communities. In his introductory essay to a collection of primary documents taken from colonial judicial records of Richmond County, Virginia, [13] Peter Hoffer notes that courts of justices of the peace acted as effective instruments for the delivery of justice, earning strong local support which enabled them to operate in highly independent fashion and maintain local control of judicial law. Wooster has contributed an important study of antebellum judicial systems in states of the lower south in which he concludes that inferior courts in Florida, Texas, and other southern states held substantial authority. Local judicial entities were extremely popular, with the "number of justices of the peace per county . . . steadily increasing in the nineteenth century, especially in Alabama."[14] Breen argues that "colonial historians have over estimated the importance of change in pre-Revolutionary America. They are often too eager to hustle the colonists down the road toward modernization. As cultural anthropologists have shown, institutional forms can change in traditional societies, often

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[13] Ed. with an introduction, William B. Scott, trans., *Criminal Proceedings in Colonial Virginia, Records of Fines, Examination of Criminals, Trails of Slaves, etc. from March 1710 [1711] to 1754*, American Legal Records vol. 10 (Athens, GA: the University of Georgia Press, 1984).

[14] Ralph Wooster, *The People in Power, Courthouse and Statehouse in the Lower South 1850-1860* (Knoxville: the University of Tennessee Press, 1969), 67, 81.

quite dramatically, without altering the value system upon which these institutions are based." Says Breen,

> migrants succeeded in constructing a physical embodiment of their commitment to localism. Each community built a meetinghouse that served both civil and ecclesiastical functions. It provided a central place where men and women regularly assembled . . . the very act of meeting together became in itself a ritual act that reinforced the sense of community. The buildings took on a symbolic significance . . . that is difficult for us to appreciate fully today. In early Virginia, where buildings often collapsed from neglect within a generation and where the planters dispersed along the rivers, there was no visible symbol of community analogous to the New England meetinghouse. In the eighteenth century, however, county courthouses began to serve some of the same functions. [15]

Rather than viewing courts as agents or recipients of change, historians such as Hendrik Hartog and Robert Ireland have dealt with justices of the peace courts as institutions. In his monograph on eighteenth century county courts in Massachusetts, Hartog faults studies that scrutinize their powers and attributes but ignore their institutional identity. None, he claims "exhibit much concern for the integrity of an institution." Hartog believes that what is needed is a body of work on local legal entities as sites of official authority and power. "[W]e need to look to the business of such a court as a whole, to the interrelationships of the issues that came before it, and to the functional integration of its responses to those issues. We need, in effect, to think of a sessions court as a distinct institution located in a particular community.[16] John Wunder has approached Hartog's view in his study of local justice in Washington Territory in

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[15] T. H. Breen, *Puritans and Adventurers: Change and Persistence in Early America* (New York: Oxford University Press, 1980), xvi, 79.

[16] Hendrik Hartog, "The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts," in *American Journal of Legal History* vol. 20, no. 4 (October 1976): 282-329.

which he discusses jurisdictional powers and practices of Washington's early courts. Wunder concludes that justices of the peace in the American northwest played a critical role "in the creation and development of a new American society . . . [i]f a justice wanted to influence community behavior or restrict some activity, he had the legal power to achieve this end."[17] Robert Ireland provided an institutional study of the county courts of antebellum Kentucky; however, while other scholars claim popular support for courts run by justices of the peace, Ireland finds that constituents were highly dissatisfied with the county courts of antebellum Kentucky, to the point where they petitioned the state legislature with complaints about them. Courts decided cases in "inconsistent" fashion and mishandled their responsibilities in internal improvements and taxation. Moreover, they were overly involved in partisan politics, to the point where "[e]ntrenched factions in county courts seemed to stress loyalty over performance."[18]

Works dealing with inferior courts in western places focus their peacekeeping function. A new work by Mark Ellis on developments in the legal culture of the Great Plains takes account of the role of justices of the peace between 1867 and 1910. He finds an important role for justices' courts, which delivered "community-based justice" when neighbors quarreled. Ellis comments that, despite their limited civil and criminal authority, they effectively resolved everyday cases and were both accessible and familiar to settlers.[19] Robert Dykstra has little to say directly concerning minor courts in his 1968

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[17] John Wunder, *Inferior Courts, Superior Justice: A History of Justices of the Peace on the Northwest Frontier, 1853-1889* (Westport: Greenwood Press, 1979), 121, 175-176.

[18] John Ireland, *The County Courts in Antebellum Kentucky* (Lexington: University of Kentucky Press, 1972), 34, 61, 76-77, 158.

[19] Mark Ellis, *Law and Order in Buffalo Bill's Country: Legal Culture and Community on the Great Plains, 1867-1910*, Law in the American West, ed. John R. Wunder (Lincoln: University of Nevada Press, 2007), 148.

monograph on frontier cattle towns, but his arguments bear on colonialists' perceptions of links between harmonious relations and homogeneity in communities. In the five cattle towns that Dykstra studied, the appearance of harmony applied only to agreement on major issues. These towns, he maintains, were not "simple social unit[s]," despite appearances. Agreement on important issues masked conflict on other subjects. Indeed, "each community was a truly pluralistic society." Dykstra cautions the local historian not to fall into the trap that sees local communities as "cohesive, sociologically simple communities swept forward by the dynamics of growth."[20]

Inferior courts in the eighteenth and nineteenth centuries utilized the neighborhood's ideas about fairness and justice. Accordingly, the scholar accustomed to thinking of law as a formal, technical enterprise sponsored by the state, may not approach America's minor courts because their study does not seem to promise the traditional rewards earned in researching state and federal appeals courts, bodies more likely than local institutions to rely upon formal legal pronouncements. While there remains much to be gained through investigation of important cases issued by the appeals courts, their histories and the personalities associated with them, appeals courts supply but a portion of the narrative. Legal history that takes on the huge number of an earlier America's minor courts can offer us glimpses into the ways in which law works with the imagination to produce ways of living, of getting along together, of advancing social and economic relationships on the ground. For American legal history to be complete, we need to produce the histories of local courts that once served thousands of communities in the United States.

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[20] Robert Dykstra, *The Cattle Towns* (Lincoln: University of Nebraska Press, 1968), 364-365.

A concept of law that is organic, changing, and culture-filled, is difficult to maintain in the face of an account of law that defines it strictly as a technical discipline which is properly managed by lawyers and legal specialists writing in the field. The law that operates in everyday life draws from beliefs; customs; individual and collective moral judgments; social practices; patterns in domestic life; written rules; and unwritten rules, which may be so deeply embedded in common experience as to go unperceived as rules. One of the assumptions of this study is that law from below can engage legal systems; in other words, a law is not real in one critical sense until it works its way somehow into a human life. This ought to suggest the wisdom of examining linkages between laws on the books and how people relate to each other in daily life if we wish to better understand the sources of law.

Certain ancient traditions, such as obedience to one's parents or protection of those who cannot care for themselves, may appear less like law and more like unthinking habits. Yet obedience to parents belongs to very old ideas of family governance, and most societies have considered care of the weak and dependent a communal responsibility. One may refuse to obey the rules parents establish at peril, and a society that behaves callously toward its dependent members is thought to be uncivilized.

Laura Nader notes that "research problems of law *in* society [are hampered by the fact that] law is conceived of . . . being a system independent of society and culture . . . [I]n the case of legal scholars in particular, their 'professionalism' seems to encourage such a position." So hostile is the environment that, at a recent meeting of the Law and

Society Association, a suggestion that the Association's name "be changed to "Law *in* Society" was met by a sharp retort: 'It *is* law *and* society, and *not* law *in* society.' "[21]

Nader's argument that legal research is hampered by a technical view of law touches upon a major difficulty in studying law's operations in earlier societies. Legal records invariably connect law with human beings; in fact, law makes no sense *without* human beings. Animosity toward a culture-filled idea of law is more understandable if once considers its possible roots. While they may not say so, some scholars who reject the study of law as lived by human beings may fear that removing the state from law threatens a view of the state as the giver and embodiment of law. If the state is not the rightful, unique maker of law, its sovereignty, not to mention its *raison d'être*, is called into question. Further, where does one go to affirm the legitimacy of law? The state may suffer serious damage or even collapse if its authority as the only legitimate source of law is undercut by a competing view. The state, however, is bolstered, not weakened, by a claim that law is culture-filled. Rather than silencing the voice of the state, comprehension of the interactive and constitutive qualities of law allows for fullness and flexibility. Missouri's neighborhood courts were effective over course of the nineteenth century for many reasons, one being the supple nature of law as employed by them.

The movement known as law and society has spawned a literature and methodology of its own, based partially on anthropological practices.

> Legal anthropology emerged in the first decades of the twentieth century, as scholars in Europe, Great Britain, and the United Stats turned to the customary law of the indigenous societies of Africa . . . [and]a research emphasis on local jurisdictions, customary law, the role of the chief and counselors in mediation and adjudication,

[21] Laura Nader, *Law in Culture and Society* (Berkeley: University of California Press, 1969), 8.

> disputes and their outcomes, and the relationship of dispute settlement to the broader fabric of village life.[22]

A law project under Laura Nader's leadership "sought new possibilities close to the ground, among the actual disputes and dispute-resolution practices at the grassroots. The empirical emphasis of these and other studies enabled scholars to appreciate the relationship between local "legal" practices (that might or might not have had the status of official law), local social structures, and the dynamics of local political interests."[23]

Legal theorists and historians have depicted law's cultural content in various ways. For Paul Kahn, "the rule of law is neither a matter of revealed truth nor of natural order. It is a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of its individual members. It is a way of understanding the unity of the community through time and self."[24] Kahn argues for "Law's power . . . to present the world one way rather than another."[25] Larry Kramer claims that justifications of state power, such as the divine right of kings, "or telling themselves that 'the people' have a voice . . . are interpretations: strategies to explain the world; ways to make sense of our traditions and customs, our practices, and our day-to-day experience."[26] Oliver Wendell Holmes is famous for the argument that law and morality are not the same; law and *acceptance* is more like it. "I once heard the late Professor Agassiz say that a

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22 Carol J. Greenhouse, Barbara Yngvesson, and David M. Engel, *Law and Community in Three American Towns* (Ithaca: Cornell University Press, 1994), 5-6.

23 Ibid.

24 Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: The University of Chicago Press, 1999), 6.

25 Ibid., 135.

26 Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), 205.

German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced."[27] Holmes believed, too, that law was shaped by more than bare logic; he urged scholars to look to tradition to find the content of particular rules of law, to seek the "social end" that a rule of law pursues.[28] Law-and-society scholar Kermit Hall once argued that the critical legal scholar (Horwitz) considered law to be nothing but politics, the chosen tool of the capitalist class.[29] And in a review of Morton Horwitz' *The Transformation of American Law: 1870-1960: The Crisis of Legal Orthodoxy*, Daniel Ernst refers to John Commons' understanding of law as an "organic product of social exchanges" that result in customs that "even the most powerful state cannot override."[30] Taken collectively, these opinions understand law as influencing and emerging out of human interactions.

But a culture-oriented concept of law and legal 'doings' runs the danger of drowning in vagueness.[31] Karl Llewellyn begs scholars to keep human beings in mind when writing about law, noting that " 'Law' without effect approaches zero in its

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[27] Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* vol. x, no.8 (March 25, 1897): 457-478.

[28] Ibid.

[29] Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 7.

[30] Daniel Ernst, "The Critical Tradition in the Writing of American Legal History," *Yale Law Journal* vol. 102, no. 4 (January 1993): 1019-1076.

[31] This study defines culture more or less in the terms articulated in *Law and Community*, cited earlier. In its introduction, the book's authors discuss legal anthropology's concern for the "relationship of legal processes to cultural norms and, in particular, the multiple sources of order in society—law, custom, religion, myth, and so forth." They point to a conviction among anthropologists during the 1970s and 1980s that the "reality of law is profoundly local." Finally, they address their research to "ways in which law engages systems of local meaning." Greenhouse, Yngvesson, and Engel, *Law and Community*, 3, 9-10.

meaning . . . there can be no broad talk of 'law' or of 'the community'; . . . it is a question of reaching the particular part of the community relevant to some particular part of law." Though the public spaces where law often resides are real enough, the particularity of law and community Llewellyn points to is located in life's smaller spaces where individuals and families live, work, form institutions, and experience human life in all of its immense detail. Indeed, law's genius lies in specificity, in the relation between the rule and the human being who must live with it.

A view that divorces law from its practice and sources carries negative implications for the study of America's neighborhood courts. Equal damage may be produced by doubts that states' judicial systems have historical relevance. Lawyer-historian Stuart Banner argues that no one writes state legal histories because there is not much to write about—states' judicial systems were more or less alike. In Banner's words, "[a]n American state in the nineteenth century was simply not a meaningful unit in the development of the law. . . . Individual states bore very few state-specific legal characteristics." [32] To judge from the availability of information on state systems, Banner's opinion is shared by others.

Judicial arrangements established by American state legislatures situate lower courts structurally with respect to other judicial bodies, while powers held by lower courts describe their legal obligations to nineteenth-century communities. These data vary from state to state and over time. Kermit Hall has argued that states copied from each other far less than is assumed; further, that data on states' courts has been "largely

[32] *Legal Systems in Conflict: Property and Sovereignty in Missouri, 1750-1860*, Legal History of North America, gen. ed. Gordon Morris Bakken (Norman: University of Oklahoma Press, 2000), 133.

ignored" by scholars. [33] If state judicial systems appear alike, it is because only the broad outline is examined and because alterations mandated by state legislatures over time are ignored.

Michigan's 1835 constitutional convention established a high court, court of chancery,[34] county probate courts, and justice of the peace courts in townships. The elective justice of the peace was a powerful individual, with authority to hear civil actions of less then one hundred dollars, shut down illegal gambling dens, hear cases of trespass and traffic violations, register stray animals, and more. The constitution referred to "associate judges of circuit courts," but did not explicitly create them.[35]

Ohio's system, created in 1802, initially included a state supreme court, county courts of common pleas with exclusive probate jurisdiction, and justices of the peace. Common pleas judges held original equity jurisdiction where the sum did not exceed $500 as well as original jurisdiction over litigation dealing with land title and other civil disputes involving sums no greater than $100. The state was divided into three circuits, to be operated by judges of the common pleas courts.[36]

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[33] See Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860," in *The Historian*, vol. 45, no. 3 (May 1983): 337-354. "Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920," in *American Bar Foundation Research Journal*, vol. 1984, no. 2 (Spring 1984): 345-369.

It is true that states of the nineteenth century established legal systems with common features, including adoption of the common law and notion regarding politics and rights. When Missouri joined the Union in 1821, it created a judicial system comparable to those of other states. Even following major reworking of original systems, Missouri and other nineteenth-century states maintained systems that shared important elements. However, real distinctions also appear.

[34] Only nine states created separate equity courts, and among states taken from the Northwest Territory, Michigan alone established a court of chancery. Bonnie A. Speck, unpublished paper, 2002.

. [35] Michigan Constitution (1835), art. vi, Michigan, *Revised Statutes* (1838), part 3, title 1, c. 5.

[36] Ohio Constitution (1802); Ohio, *An act, directing the mode of proceeding in the courts of chancery*, Acts (1804), sec. 1.

Judicial systems in Ohio and Michigan shared specific characteristics. First, courts were arranged hierarchically, with jurisdictional authority linked to a court's structural positioning. Jurisdictional awards reflected differences in categories of subject matter and relative weights. Second, Ohio, Michigan, and Missouri created powerful local structures that resolved a huge volume and variety of disputes throughout the nineteenth century. Also, the justice of the peace not only served as a judge but acted as an investigative officer, a function now served by police officers and detectives. Third, not one of these judicial systems escaped aggressive remodeling by state legislators. In each instance, courts endured legislative renovations to an almost obscene degree.

Michigan remade its judicial system within ten years, "render[ing] the 1835 system virtually unrecognizable." Between 1835 and 1846, the sole substantive change was to add a criminal court for Wayne County. But 1846 revisions went much further. In a March 1846 speech, one Michigan lawmaker declared "that the people require a liberal reform—that they shall have a court at home which shall be their own court, and that they may elect their own judges."[37] By year's end, Michigan lawmakers had dismantled the court of chancery, with equity jurisdiction transferred to the four new circuit courts run by judges of the supreme court. Michigan at the same time created county courts, which effectively replaced circuit courts in civil actions at law. These were courts of record with jurisdiction over civil matters not exceeding $500, except for ejectments, probate, and causes under the exclusive jurisdiction of the justice of the peace. In addition, county courts were empowered to hear appeals in civil actions from justices' courts and to conduct proceedings in mortgage foreclosures. The revised

[37] *Detroit Free Press*, 16 March 1846.

judicial code extended the authority of the justice of the peace to sums not exceeding $250 in civil matters; in criminal matters, justices received authority to hear larceny charges not to exceed $25; assault and battery of a private nature and not in connection with another offense; damaging or destroying road signage; injuring or killing farm animals where damages did not exceed $25; and willful trespass with intent to remove property. These were in addition to already-existing powers of justices of the peace.[38]

In Ohio, the state court system was left untouched between courts 1802 and 1851. However, the constitutional convention of 1850-1851 resulted in a number of changes. The new plan featured district courts under the authority of judges of the state's high court and common pleas courts. Common pleas courts, meanwhile, were organized into a system of nine districts. Common pleas lost probate jurisdiction to new probate courts, each of which was headed by a single judge, who was to be elected. Common pleas judges and justices of the peace also became elective offices. Judicial authority was further flattened in 1853 in a measure that permitted county probate judges to issue the writ of *habeas corpus.*[39]

In Ohio, Michigan, and Missouri, hierarchy, categorization in law, and the traditional offices of judge, clerk and other offices of the court were common, as was statutory assignment of jurisdiction, election of lower court judges, and adherence to the ancient heritage of English common law and practices of Anglo-American judges. It was common for states to multiply courts in newly-created systems and to leave jurisdiction

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[38] Michigan, Revised Statutes (1846), ch. 89, sec. 9, ch. 92, sections 1,3; ch. 94, sections 1-8.

[39] Ohio, Defining the Jurisdiction and regulating the Practice of Probate Courts, Statutes (1853), ch. 1, sec. 3, art. 3.

muddied, with probate and review powers particularly "unsystematic and confused," according to Pound.[40] In fact, states were prepared to take aggressive action to alter nineteenth-century judicial systems. States' practices may, indeed, have been unsystematic, but we might understand them alternatively as experiments—experiments meant to deal with population growth and diversity of interests. Lop-sided court systems may be viewed as attempts to try new institutions and institutional arrangements, and at the same time manage nineteenth-century state budgets, some of which foundered severely at one time or another. Variations between judicial systems described are clear, did not occur in a vacuum, and therefore were not byproducts of a common or shared professional legal culture, assuming one existed. In Missouri, changes to the state's judicial system were made frequently.

Though the evolution of Missouri's judicial arrangements is not the subject of this study, it should be noted that most structural change bypassed the lower courts until late in the nineteenth century. Even then, superficial change shielded from view the persistence of tradition in the neighborhood.

Despite strikes against the view binding law to culture and indifference to states' experiments with judicial structures, it remains possible to write legal histories that incorporate larger notions of law existing within formal systems. Morris Arnold has published a major judicial history concerning his home state's judiciary, with attention to the role of informal understandings of law, showing that more nuanced legal histories are

[40] Roscoe Pound, *Organization of Courts*, 5, 22. States generally granted probate courts the jurisdictional authority that had been divided in England between courts of law and equity, and church courts. For example, probate courts often handled petty criminal and civil cases, although "this meant an unfortunate loss in dignity," and tended to result in appeals to higher courts. Willard Hurst, *The Growth of American Law*, 96.

possible. *Unequal Laws unto a Savage Race: European Legal Traditions in Arkansas, 1686-1836* deals with Upper Louisiana's legal culture during the period between European occupation and to U.S. statehood, concluding that American common law and custom triumphed over French and Spanish civil law partially because the clientele for the European legal regimes disappeared following American acquisition of the region and new immigrants' reliance on "simply regulat[ing] their lives by whatever light nature could provide them."[41]

Local justice in this country possesses an exceedingly personal and individual nature. In acknowledging custom as historically legitimate in the American settlement of Upper Louisiana (Missouri), Arnold explains how, in the absence of any formal system of law, Missouri pioneers made custom and tradition work in early neighborhoods.

The bulk of subject matter in this study is concentrated in the period between Missouri statehood and the end of the Civil War in 1865. The discussion includes some post-war history in order to convey a sense of the Missouri that evolved out of the war and unavoidable change and to suggest how extra-legal events challenged neighborhood justice and governance.

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[41] Morris Arnold, *Unequal Laws unto a Savage Race: European Legal Traditions in Arkansas, 1636-1836* (Fayetteville, Arkansas: University of Arkansas Press, 1985), 112. Stuart Banner discusses custom and common sense as regulating daily life in early Missouri but dismisses them on the ground that they are not 'real' law and in any event fell before the imposition of a formal system of law with which they could not compete following the Louisiana Purchase. Banner further presses a view that the Missouri legal system itself was produced by lawyers and reflected a national professional 'lawyerly' culture biased in favor of written law. In other words, Missouri law was a formal technical expression of the will of the state. The informal law utilized by people during Spanish rule came from "tradition . . . norms derived from unwritten sources . . . a . . . general sense of justice . . . [and] custom and a generally shared sense of fairness as well as the written law." However, "our legal vocabulary lacked, and still lacks . . . a word that accurately describes these norms. One can call them 'customs' or 'traditions' but because custom and tradition in our legal system are elevated to the status of law only in narrow, well-defined situations, those names do not adequately describe their role in Upper Louisiana." When American judges appeared after 1803, they spoke of the earlier system of unrecorded law as lacking in law "altogether." Stuart Banner, *Legal Systems in Conflict: Property and Sovereignty in Missouri, 1750-1860,* 37, 52, 93.

Chapter II, “Stuctures of Local Justice,” deals with local structures of justice against a backdrop of relationships with other public entities within Missouri state government. It discusses independence and autonomy as characteristic of both justices’ and county courts and the role of local support generated within Missouri communities as an important factor in producing the relative freedom with which those courts operated. In addition, it deals with statutory powers, operating methods and structures of justices’ and county courts in terms of how the local judiciary maintained its influence. The chapter describes other bodies within the state judicial system, problems with special local courts, and a brief history of the justice of the peace as an English institution. Special difficulties created by legislative interference with local judicial structures receive particular emphasis.

Chapter III, “An Ordered Society,” explores how justices’ courts and county courts of commissioners in Missouri helped to preserve social arrangements and understandings necessary to antebellum Missouri society. It pays attention as well to some post-war state policies that contained racist content. Local perceptions of some people as ‘insiders’ and others as ‘outsiders’ found support in provisions in state law that awarded enforcement to local judicial bodies. The chapter points out similarities between black law and more general laws of dependency in Missouri, and discusses ways in which social values were protected by county courts of commissioners in regulation of economic activity. There is some discussion of the importance of the relationship between court and community in legal practices.

Chapter IV, "The Economic Order," explores the separate roles of township justices' courts and county courts in economic transactions and relationships. Justices' courts civil dockets were overwhelmingly dominated by money disputes; debt litigation is discussed within the context of debt as a feature of Missouri life. Significant attention is paid to problems with availability of currency, circulation of assets, and idiosyncratic practices of justices' courts with relation to execution of judgments. The chapter explains how county courts of commissioners functioned in the management and promotion of county and local economies, with attention to jurisdictional in licensing and regulation of business. Considerable discussion is devoted to internal improvements with respect to how they were accomplished by county governments and affected local economies.

Chapter V, "Public Disorder and Violence," emphasizes the primary role of the justice of the peace in containing violence in early Missouri. It discusses the wide variety in disorderly acts; causes of violence, criminal investigations, and the trying of criminal misdemeanors. In addition, the chapter discusses the examining, or investigatory role of justices' courts in rural Missouri, a little-known and understood task of justices of the peace and one which involved justices in the trying of felony offenses. The chapter emphasizes the justice of the peace as primary conservator of peace within townships and explores the relative incapacity of justices to deal with mob and gang violence, as well as how justices themselves in several well-known instances contributed to violent outcomes.

Chapter VI, "Conclusion," summarizes the dissertation's arguments. It also discusses post-war conditions in Missouri, with emphasis on economic and social changes in daily living patterns and the physical restoration of war-damaged lands. The

chapter presents questions for further study by scholars of local legal and judicial history, including the role of lawyers in western places. It concludes that continuity and localism were far more characteristic of places in nineteenth-century Missouri than change and modernity.

CHAPTER II

A FRAMEWORK FOR JUSTICE

"It is obviously beyond the scope of this work to digest and explain the statutes conferring powers and obligations upon the justices of the peace, for to do this would be to write the social and economic history of the period."[42]

Missouri's constitution of 1820 established a supreme court, courts of chancery, circuit courts, justices of the peace, and "such inferior tribunals as the general assembly may, from time to time, ordain and establish." The supreme court possessed a "general superintending power" over all inferior courts of law, the circuit courts "a superintending control" over the lower courts "and over justices of the peace in each county, in their respective circuits." The constitution also ordered the creation of "inferior" courts to govern the counties and handle probate functions.[43] Under its constitutional power to establish inferior courts, the state legislature periodically turned to special local legislation to create minor courts in local jurisdictions. The most prominent of these were probate courts; however, probate administration caused ongoing disagreements among lawmakers, who appeared unwilling to settle on any single jurisdictional site for very long. The constitution failed to mention lawyers, but a statute of 1873 provided for the election of prosecuting attorneys for the county courts.[44] Private attorneys

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[42] Charles Austin Beard, *The Office of the Justice of the Peace in England in its Origin and Development*, Studies in History, Economics, and Public Law, eds. Faculty of Political Science of Columbia University, vol. 20, no. 1(Union, NJ: The Lawbook Exchange, Ltd., 2001), 59.

[43] Missouri, Constitution (1820), art. 5, sec. 1.

[44] Missouri, AN ACT to amend an act entitled "An act to abolish the offices of circuit and county attorneys, and provide for the election of prosecuting attorney," approved March 9, 1872, by adding a new section thereto, to be denominated section five, Laws (1873).

represented clients in civil and criminal cases. Practicing lawyers began to immigrate to Missouri very early in the nineteenth century but were not represented in great numbers for a considerable period; meanwhile, other young men studied law and joined the bar in jurisdictions within the state.

The lynchpin of the administration of justice throughout Missouri was the justice of the peace. This study concerns township justices' courts, county courts of commissioners, and, to a lesser degree, special local courts. Justices' courts and county courts were permanent judicial bodies; indeed, justices of the peace were active in Missouri during the territorial period.[45] Special local courts also provided important judicial services but differed in basic ways. First, they were not, and were not intended to be permanent components of the state system; every special local court was created by an act of the legislature, to suit a particular jurisdiction. Second, each special local court enjoyed jurisdictional powers that were custom-fitted to it. Third, special local courts did not cover the state but existed only where they had been fashioned by statute.

It is unlikely that very many justices of the peace practiced law, particularly during early pioneering times. Local historical accounts take great care to identify professional men in the community, presumably because a profession identified a member of the elite. An early record of the first meeting of the Saline County Circuit Court supplies names of the judge, prosecuting attorney, clerk, sheriff, and attorneys "in attendance." Members of the grand jury empanelled on that day were indicated separately. They included Jacob Ish, who was appointed justice of the peace for

[45] "The judicial power of the territory was vested in a superior court, inferior courts, and justices of the peace." Missouri, Preface, Revised Laws (1845), v.

Jefferson Township.[46] Daniel Colgin provides another example of a non-lawyer who became a justice of the peace. Colgin was a tailor who opened a tailor shop in the town of St. Charles in 1812; from his shop he fashioned trousers and shirts from deer skins. Colgin was elected a justice of the peace in 1814.[47] William E. Alexander was a farmer and stockman in Saline County. When he married Ann Short of Cape Girardeau County, he settled there and was elected a justice of the peace.[48] Thomas Shackelford, a bricklayer, served as one of the first group of county justices for Saline County.[49]

These men were typical of holders of the office throughout Missouri's counties. The important qualities in a justice of the peace were knowledge of the neighborhood, a reputation for sound personal character, swift response when called to act, and commitment to law. They drew support not from an expert knowledge of the mysteries of law, but from a belief that they could be trusted to rule fairly. Unlike the higher courts, Missouri's neighborhood courts did not deal with constitutional law, appeals, or civil actions above a specific monetary limit. While township justices bore a significant responsibility to rule on whether specific violations were felonies, they did not try them. Local courts supplied practical, day-to-day judicial and administrative services. Justices' courts tried 'minor' civil and criminal matters and investigated suspicious incidents. County courts of commissioners governed counties, administered probate matters, and tried cases of alleged insanity, money disputes that grew out of administration of an

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46 N.a., *History of Saline County, Missouri* (St. Louis: Missouri Historical Society, 1881), chap. 6, "Early Historical Events," no page no., 194.

47 St. Charles Families, http://homepages.rootsweb.com/~schmblss/home/History/PioneerFamilies/StCharles/Fami

48 *Collage of Cape County*, vol. 18, no. 4 (March 1999), 52.

49 Assoc. eds. John R. Hall, Mrs. J. C. Egan, Mr. and Mrs. William Elder, *Saline County History* (n.p., Saline County Historical Society, n.d.), 368.

estate, and violations of county ordinances respecting required private donations of labor by residents. Both justices' courts and county courts were led by justices of the peace.

The office of justice of the peace in the United States originated in England in the late thirteenth century.[50] The primary reason for creating the office was to control massive social disorder in England and encourage political and religious conformity. The justice was commissioned to "hear and determine felonies and trespasses done against the peace . . . and to inflict punishment reasonably according to law and reason and the manner of the deed "[51]

When English justices met as a group, they formed the county court, whose governing responsibilities including enforcing commercial regulations and otherwise supervising businesses; trying misdemeanor offenses; directing internal improvements; overseeing care of the poor, children, and other dependent persons; enforcing sumptuary laws and other class regulation; and policing religious practices. English justices punished parties who violated commercial regulations, but they also implemented policies intended to facilitate commercial activity. As Beard explained, "a great number" of laws were intended not only to "control the processes of industry . . . . [but to] encourage it." Many measures were part of a general overhaul of trade and poor laws. Indeed, "the whole industrial system was under the supervision of the justices of the peace."[52] Justices supervised road construction and maintenance of bridges and public buildings, including jails (which they also governed, utilizing rules that they had

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50 Perhaps the best known is Charles Beard's *The Office of the Justice of the Peace in England*. Studies in History, Economics, and Public Law, ed. by Faculty of Political Science of Columbia University, vol. xx, no. 1 (Union, New Jersey: The Lawbook Exchange, Ltd., 2001).

51 Source, quoted in Beard, *Office*, 40.

52 Ibid., 93-95, 98, 102, n. 1.

written).[53] Justices not only controlled criminal offenses, but, under Henry VII, replaced grand juries, which were thought to be corrupt; that law, however, was repealed Henry VIII for reasons that are not clear; however, Beard conjectured that the original reason for replacing the grand jury with the local justice may have had less to do with jury corruption than with a royal desire to create "dependable royal servants."[54]

General duties were laid out in a general commission, the most recent of which appeared in 1590. This instrument authorized the justice to punish law breakers, supplied instructions for the holding of sessions and ordered justices "to hear and determine in cases of indictment, and commanded that an acting or "ancient justice of the peace" administer the oath of office to the new office-holder. By his oath, the justice swore to deliver equal justice to rich and poor, to enforce the laws without prejudice, to make honest return of fines, and to exact no illegal fees.[55]

Core duties of the office of the English justice of the peace closely resembled those of the justice in Missouri. In both England and the United States, justices of the peace were generalists, each a jack-of-all-trades. Both were lay persons rather than legal professionals (as we now use that term) and performed public service on a part-time basis, not as a primary occupation. English and American justices worked within similar market environments, according to Lewis Atherton, who notes that the "business structures of Missouri's towns in 1821 more nearly resembled that of medieval European cities than of twentieth-century America. . . . As in the Middle Ages, regulations as to

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53 Ibid., 9, 81, 83-85.

54 Ibid., 101-102.

55 Ibid., 141-143.

quality of workmanship and prices still applied in some fields of production." Hendrik Hartog confirms such similarities in a reference to Jon Teaford's view of "the early American city as a reflection of the regulatory traditions and practices of the medieval English borough."[56]

Justices of the peace at one time commonly operated thousands of local and county courts in the United States. The office was more flexible than any other judicial office associated with state judicial systems. In Tennessee, for example, "[t]he single justice of the peace assumed constantly increasing jurisdiction in civil cases." Duties included administrative tasks and peacekeeping; in addition justices were authorized to hear cases involving slave crimes, vagrancy and dueling ("unless the consequence of a duel was murder").[57] John Wunder notes that the justice of the peace in the old Northwest Territory "personally investigated disputes to obtain the truth" and played a critical role "in the creation and development of a new American society . . . If a justice wanted to influence community behavior or restrict some activity, he had the legal power to achieve this end."[58]

The first duty of the justice of the peace was conservation of peace in the neighborhood. As primary peacemaker, he attempted to mend quarrels between

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[56] Lewis E. Atherton, "Missouri's Society and Economy in 1821"; Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Ithaca, NY: Cornell University Press, 1983), 35.

[57] James Griffith Harris, "The Background and Development of Early Missouri Trial Courts,"110, 116. Griffith traces court systems in England and its North American colonies, courts of the Northwest Territory and those of the Southern frontier. He describes popular attitudes toward judges, courts, and the law, including the common law.

[58] John Wunder, *Inferior Courts 1853-1889,* 121.

neighbors before they could escalate into violence, which was possible, particularly if the dispute lasted long enough for friends and family to become affected by it.[59] But the justice also acted as an early policeman. In order to determine the seriousness of an assault, he might conduct a formal inquiry, and perhaps call upon witnesses or others, members of the neighborhood. In the new settlements of the western frontier, no other law enforcement official possessed equal authority to investigate and examine. Finally, though justices' courts shared certain jurisdictional powers with the circuit court, in practice the former was usually the court of choice for filing smaller civil actions and trying assaults that did not maim or kill. Not insignificantly, the justice of the peace was also the highest ranking representative of government in the township.

Statutes described the duties and jurisdictional authority of the office of justice of the peace in Missouri. Most major legislation concerning justices' courts (those operated by township justices of the peace) appeared in the 1820s, 1830s, and 1840s. A territorial law of 1818, enacted during a period of heavy immigration and organization of new counties,[60] granted justices' courts jurisdiction in property actions, including cases of trespass and actions to recover damages to a person or to property of up to fifty dollars. The law excluded cases which involved land titles, as the federal courts resolved all legal disputes in which ownership of land and title formed a primary element in the litigation. The measure also granted justices the right to subpoena witnesses anywhere within the county. Either plaintiff or defendant could request a jury trial with a jury of twelve (if

59 Hattie Mabel Anderson, *A Study in Frontier Democracy: The Social and Economic Basis of the Rise of the Jackson Group in Missouri, 1815-1828, Part II, The Evolution of a Frontier Society in Missouri, 1815-1828* (Columbia, MO: University of Missouri Press, 1935), Reprinted from the *Missouri Historical Review* (April 1938 to April 1940), 18.

60 Missouri, Preface, *Revised Statutes of the State of Missouri* (1845), vi.

either objected to a jury of six) when claims exceeded twenty dollars in damages or debt. Upon judgment, the constable was to gather "six good and lawful men, householders of his township" for the purpose of "try[ing] the right of property" named in the execution. If the losing litigant appealed the ruling to the circuit court and that court affirmed it, the loser paid additional fees in the form of "security or securities in the appeal bond or bonds."[61] One clear purpose of the statute was to prevent frivolous appeals to circuit courts; another, by implication, was to uphold the legitimacy of decisions of justices' courts. The relationship between residents of the township and the local court was reciprocal. When residents took part in the work of the justices' court, they acknowledged its authenticity and worth as a community institution. At the same time, trials and examinations conducted by the local court put a stamp of dignity on human relations. In cases where a litigant won a money judgment, the court relied upon the judgment of local householders, all respectable members of the community, to lend legitimacy to court-ordered executions.

In 1820, the first General Assembly of the new state of Missouri enacted new law for the direction of justices of the peace. A general statute of 1820 described the appointment of justices and how they were to be commissioned. It also instructed new justices on taking the required oath, supplied tenure of office and reasons why a justice might be removed, and articulated the "powers and duties of justices." The right to issue the writ of *habeas corpus* was not included among those powers, nor was it named in

[61] Missouri, *AN ACT supplementary to the several laws of this territory defining the powers and duties of justices of the peace in matters of a civil nature and for other purposes, Acts,* (1818), sections 1, 2, 5.

other law concerning the office of the justice of the peace enacted during that session.[62] Indeed, during early statehood, Missouri legislators passed laws concerning jurisdictional powers, only to repair them later as they learned of gaps and ambiguities. In the absence of laws that addressed specific circumstances, justices called upon common sense and their personal understanding of their duties.

The writ of *habeas corpus* was considered fundamental among the inhabitants of England and the early United States. According to Article Two of the Laws of the Northwest Territory, "The inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus."[63] Yet nothing in the Law appears to grant justices of the courts of quarter sessions, either in term or acting individually, authority to issue the writ. This puzzling lapse in territorial law came home to roost shortly after Missouri became a state.

The situation itself was not particularly novel.[64] Edward Cassady, a resident of Cape Girardeau, was imprisoned for a contempt of court of an unspecified nature in the Cape Girardeau County Jail on April 13, 1823, for a period of forty-eight hours. The order was delivered orally by Judge Thomas of the fourth judicial circuit. Cassady, understandably distressed to find himself in jail, and ill with a high fever, contacted his regular attorney, one G. Bird, who had been able to appear with him at court due to an illness of his own, and asked what could be done to get him released. Bird saw his client

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62 Missouri, An Act prescribing the powers and duties of Justices of the Peace, and the manner of their appointment (Acts) 1820.

63 Ed. with introduction, Theodore Calvin Pease, *The Laws of the Northwest Territory, 1788-1800*, Law Series, vol. 1 (n. p., Illinois State Historical Library, 1925).

64 All material concerning the case from this point on is taken from the *Independent Patriot* of December 4, 1824. Bird's first name is unknown and could not be supplied by the Missouri Bar Association.

and agreed to act. He first consulted with the Clerk of the Court regarding a written order of commitment and was told that the only record would appear in the minutes, as soon as the order was entered. The sheriff informed Bird had jailed Cassady on the judge's verbal instructions. The *Independent Patriot* printed Mr. Bird's account:

> After having taken this trouble to satisfy myself what corse I ought to pursue, I formed the opinion that Mr. Cassady was illegally deprived of his liberty, and that my feelings as a man, and the duties of my profession required that I should lend him my aid." I thought the sheriff had no authority to detain Mr. Cassady without a Warrant of commitment, or at least a copy of the order by which he was committed.

It was not at all clear that a contempt of court had been committed in the presence of the judges, and the minutes stated no reason for the charge. Bird knew that the sheriff had jailed Cassady on a verbal order. Unsure whether a justice of the peace possessed legal authority to issue a writ of habeas corpus, he consulted a man who he called Mr. Ranney (probably William Ranney, an attorney and first judge of the Cape Girardeau Common Pleas Court),[65] who thought that probably a justice did have the power and encouraged him to see David Armour and Peter R. Garrett, both justices of the peace, to serve the writ.

Bird applied for the writ to both of the justices and to Judge Thomas. Armour and Garrett issued the requested writ. However, the circuit judge refused, put the justices under recognizance for a seven day period before discharging them "on the ground of ignorance of the Law;" found two other attorneys who had become involved in the case guilty of contempt, and fined Bird fifty dollars.

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[65] Ellis and Ranney Family Papers, 1787-1948, R251, Western Historical Manuscript Collection, University of Missouri-Rolla. Hereafter WHMC-UMR. Spellings as in original.

Cassady's lawyer was adamant in his view that. "by this statute," it was "clearly to be inferred, that every citizen of this state is entitled to the Writ of Habeas Corpus as a matter of right, where he is not detained by a good and sufficient warrant of commitment." Speaking of the 'contempt' which had earned him a fifty dollar fine, Bird declared, "But my crime is for applying for that great writ of liberty (which is guaranteed to every citizen of the state) for a man who was, in my opinion, entitled to it by the Laws of the Land."[66]

According to the newspaper, it had received news of the business in correspondence from an unnamed member of the public, who urged that something be done to correct the inadequacies in the law of contempts. The correspondent especially resented what he regarded as high-handedness by the circuit judge.[67] Beyond that, the incident showcased the sheer ambiguity of portions of early Missouri law; even the lawyers in the case were not confident that the law on *habeas corpus* allowed justices of the peace to issue it. A justice of the peace might appear empowered to issue the writ, if the alternative were to turn for relief to the high court that issued the order to jail the defendant in the first place. Bird himself expressed no uncertainty in the matter, saying "I believe also that however unwise it might be by Law to give the power to Justices of the peace; yet that it was better that they should exercise it, than that any citizen of this State should be deprived of his liberty without a particular specification of his offense."[68] The passive conduct displayed by the justices of the peace in the Cassady case seems to

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66 *Independent Patriot*, December 4, 1824.

67 Ibid.

68 Ibid.

remove them as interested participants, but their role really was a central one, for their lack of capacity to act produced the results.

One of the lessons of the Cassady case was that judicial powers needed to be clearly articulated. A supplementary measure enacted in 1820 permitted justices of the peace to question litigants and their witnesses under oath in debt actions based on note, book account or bill assumpsit, and to "enter up judgment and issue executions." However, it limited justices' jurisdiction to the boundaries of the township where the justice resided.[69] Where the measure of 1818 had permitted justices to subpoena witnesses, the new law allowed the justice to obtain sworn testimony and designated the categories of debt actions that might be tried in justices' courts.

Additional law, passed in 1822, dealt with criminal jurisdiction. The law denoted the right of justices' courts to try defendants charged with misdemeanor crime—a right without which justices would have been prevented from performing their sworn duty to keep the peace. Justices were permitted to arrest and imprison persons who committed "an affray, or shall unlawfully assault or threaten another in a menacing manner, or shall strike another, within this state," providing the assault did not "[extend] to life or limb." The defendant was entitled to a jury trial (with twelve jurors), and, if found guilty, could be fined up to eighty dollars. If the defendant evaded arrest, the justice was to "diligently enquire, "whether such breach of the peace [had] been made or committed, and thereof shall hear and determine according to law." A defendant could choose to be tried in circuit court, but in that event the defendant was required to post bond or, alternatively, wait in the county jail for the next term of the circuit court. Where a justice did not

[69] Missouri, *An Act supplementary to an act supplemental to the several laws defining the powers and duties of Justices of the Peace, in matters of a civil nature, Acts* (1820), sec. 1.

observe a breach of the peace himself, but received information on oath or affidavit attesting that one had been committed and yet did not prosecute, he and other officials involved would "be found in default of the due execution of this act."[70]

The 1822 measure provided important information to be utilized justices. First, it defined what constituted a criminal breach of the peace: striking another person or showing a "menacing" manner. Second, it clarified procedure. The text essentially removed practical barriers to prosecution of disorderly behavior. Finally, the measure meant to support the justice of the peace. While it warned him of penalties for failing to investigate suspicious incidents, it also supported his authority should he find himself obligated to undertake an unpopular prosecution.

In other statutes of the 1822 session, justices were granted permission to try civil actions "in final process, subpoenas for witnesses, and also in trials for forcible entry and detainer only; but in mesne process, to wit: (summons, attachments and warrants)", jurisdiction was restricted to the *township* where the justice resided. The same law permitted justices to marry people and to "receive and certify acknowledgements of deeds and relinquishments of dower any where [sic] within their respective counties.[71]

Distinction between final and mesne process implicitly recognized an important element of neighborhood law. Authority in final process was uncontroversial: a ruling had been made; therefore, no harm could come from allowing any justice of the peace within the county to exercise final powers. But intermediate process presented a risk in that the outcome of the trial was as yet undetermined. In such situations, the measure

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[70] Missouri, *AN ACT to allow Justices of the peace jurisdiction in cases of breaches of the peace, upon certain conditions, Acts* (1822), sections 1, 2, 3, 5.

[71] Missouri, *AN ACT to define the jurisdiction of justices of the peace in civil proceedings, Acts* (1822), sec. 1.

ensured that the justice who issued a search warrant or summons to appear would be the *township* justice, who was assumed to possess both discretion and familiarity with the neighborhood. Where a justice resided in a township other than where the case was being tried, he might not have as much familiarity of relevant personal relationships or physical ability of a potential witness to answer a summons, for example, as a justice of the township—who, when he issued a search warrant or summons to appear would be naming his neighbors.

In acknowledging deeds and relinquishments of dower, the justice of the peace officially declared that the terms of the document were legally binding on the parties. This "signing off" duty is regarded today as no more than a matter of form, probably because it is performed in the United States by a notary public, whose office has far less status than it carries in Europe and other parts of the world. In Missouri, justices went to some trouble to ensure that, when a woman signed the relinquishment of dower, she had not been pressured or threatened into the act.[72] The statute performed an important service for women in protecting an ancient property right of wives. At the same time it acknowledged the justice's intimate knowledge of persons, places, and events in the neighborhood. The procedure employed by the Saline County Court in June, 1839 is typical of the process. Samuel Batterton and his wife Susan Batterton appeared before the justices on that day, and Mrs. Batterton's identity was sworn to by two "credible persons personally known to the court."

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[72] Maryland, Virginia, and South Carolina employed similar procedures. In colonial times, all three colonies passed laws that required married women to be examined privately. In South Carolina, in fact, a wife was examined by the chief justice of the province. Marylynn Salmon, *Women and the Law of Property in Early America*, Studies in Legal History, ed. G. Edward White (Chapel Hill, NC: University of North Carolina Press, 1986), 18-19.

> [Susan Batterton] being by the court first made fully acquainted with the contents thereof on an examination separate & apart from her said husband acknowledged & declared that she executed the said Deed & Relinqished her Dower in the lands & tenements therein mentioned voluntarily freely & without compulsion or undue influence of her said husband.[73]

Procedure was a major concern in justices' courts. Legislators gathering for the Sixth General Assembly in Jefferson City in 1830 made few statutory changes in state law that year, but they took steps to hasten executions on judgments in debt actions tried in justices' courts. The law did away with uncertainty over what constituted correct procedure in justices' courts, upholding informal practices; enforced the legitimacy of orders issued by justices' courts; and facilitated the search and attachment of property in satisfaction of judgments.

> [N]o writ of attachment, hereafter to be issued, either by a circuit court or a justice of the peace, shall be dissolved, nor the property taken thereon be restored, nor any garnishee discharged, nor any bond by him given be cancelled, nor any rule entered against the sheriff discharged, on account of any insufficiency of the original affidavit, if the plaintiff, or some credible person for him, shall file a legal and sufficient affidavit, in such time and manner, as the courts or justices, respectively, shall in their discretion, direct; and in that event, the cause shall proceed as if the original affidavit had been sufficient.[74]

The measure blocked a strategy that might be used to obtain relief from justices' courts' rulings, in effect hobbling debtors' efforts to prolong litigation and thus avoid paying.[75] In separate legislation, lawmakers ordered that, "when an appeal shall be taken

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[73] Minutes, Saline County Court, 1839-1846, 1862-1865, C18976, microfilm, Missouri State Archives, Jefferson City, MO. Though in this case, the entire county court was involved, a single justice of the peace could have approved the document.

[74] Missouri, AN ACT supplementary to an act to provide a method of proceeding against absent and absconding debtors, approved February 6, 1825, Laws (1830).

[75] This did not prevent litigators from trying. In a case heard by a Ray County justice of the peace in 1844, the defendant requested an appeal based on claims that the summons "was not executed in due form

from the judgment of a justice of the peace in the circuit court, no objection as to the proceedings of such justice, shall be valid, but the circuit court shall proceed to try the cause upon its merits."[76] Eliminating procedural failings as a basis for requesting an appeal helped to buttress the ability of justices' courts to maintain their reputation for swift resolution of disputes.[77] The General Assembly ordered that "hereafter it shall and may be lawful for any justice of the peace . . . to hear and determine all such actions, according to equity and good conscience, in a summary way, without the form of pleading; and it is hereby declared to be the duty of such justice of the peace to give judgment in all things, according to right and justice between the parties litigant before him."[78] The law thus affirmed justices' discretionary powers; beyond that, it affirmed the authentic nature of commonly understood notions of justice in deciding actions at law.

In addition to trying misdemeanor offenses, justices of the peace investigated suspicious incidents in the neighborhood. Earlier law penalized justices and other officials for failing to look into disorder in the neighborhood. In 1831, the legislature empowered justices to investigate assaults in order to determine whether an offense represented a misdemeanor or a felony. According to the revised statute, "no assault, battery, affray, riot, rout or unlawful assembly, shall be held or considered an indictable

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& not in time" and that the judge had a personal relationship with the plaintiff. The appeal was granted, but probably on the basis of possible bias rather than errors in process. Ray County Justices of the Peace Docket Book, 1836-1851, C1215, WHMC-UMC.

[76] Missouri, AN ACT supplementary to an act establishing Justices Courts and regulating the collection of small debt, approved the twenty-first day of February eighteen hundred and twenty-five; and to regulate the issuing of executions in certain cases, Laws (1830), sec. 3.

[77] James Harris Griffith, "The Background and Development of Early Missouri Trial Courts," 260.

[78] Missouri, *AN ACT supplementary to an Act establishing justices' courts, and regulating the collection of small debts, Laws* (1830), sec. 1.

offence, but that the same shall be prosecuted and punishable in a summary mode, before justices of the peace." Exceptions, which would automatically require the act to be treated as a felony, included assault with intent to maim, wound, kill, or commit a rape or a robbery, and any assault involving shooting or stabbing. Justices were instructed to determine whether "menacing" words, attitudes, or actions, may have justified the assault; in such a case, the defendant might receive more lenient treatment.[79]

By 1841, further expansion of Missouri's population into places north and south of earlier settlements along the Missouri River encouraged the legislature to increase civil jurisdiction of justices of the peace so that township courts could handle a greater number of disputes.[80] New law granted justices' courts concurrent jurisdiction with circuit courts in civil actions involving sums between $50 and $150, further protected justices' courts' rulings from appeals based on procedural grounds, and ordered the election of justices of the peace "at the next general election after the vacancy in the office occurred."[81] As the Civil War commenced, lawmakers acknowledged the impact of new transportation technology in a measure that recognized property loss caused by railroads. In concurrent jurisdiction with circuit courts, justices' courts received permission to try law suits filed against railroads "to recover damages for the killing, crippling, or injuring of horses, mules, cattle, or other animals, by the officers, agents, servants, or other employees of

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79 Missouri *AN ACT declaring assaults, batteries, riots, routs and unlawful assembles,* [sic] *not indictable offenses, Laws* (1830), sections, 1, 2, 3.

80 Dorothy B. Dorsey, "The Panic and Depression of 1837-43 in Missouri," *Missouri Historical Review*, vol. 30, no. 2 (January 1936), 132-161.

81 Missouri, *AN ACT to amend an act entitled "An act to establish justices' courts, and to regulate proceedings therein, Laws* (1841), sections 4, 6, 7, 8. 10.

such companies, without regard to the value of such animals or the amount of the damages claimed for killing, crippling or injuring the same."[82]

Justices' courts flourished, then, because they supplied local residents with convenient access to reliable judicial resolution of commonplace altercations and disputes. But they were designed as well to function as trial courts in civil and criminal causes and to act as investigative bodies. Early Missourians in developing regions also needed rule-making institutions with the power to determine the neighborhood's sentiments and to administer fundamental services, for which purposes county courts of commissioners were established. Like justices' courts, county courts were staffed by justices of the peace.

County courts were ubiquitous from colonial times forward. A number of scholars have commented on their roles in early American legal systems. Unlike Missouri, other colonies and states often combined the functions of justices' courts and county courts of commissioners to form a single entity. According to Peter Hoffer, "[i]n almost every colony, the county court was the workhorse of justice." Such bodies heard civil suits, including litigation between planters, servants, and yeomen, and resolved testamentary matters, "performed the regulatory tasks of the English quarter sessions courts and disposed of serious misdemeanors."[83] David Konig emphasizes the community-building work performed by Massachusetts' county courts, which helped to settle intramural town land disputes and integrated subgroups and outsiders into the

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82 Missouri, AN ACT to extend the Jurisdiction of Justices' Courts, Laws (1861).

83 Peter Charles Hoffer, *Law and People in Colonial America*, 26.

community.[84] In colonial Virginia, county courts provided government services and shared political authority with the colony's legislature. Like their English counterparts, Virginia's counties "enforced the law and saw to the needs of their respective communities," and enjoyed jurisdiction in both civil and criminal matters, admiralty, ecclesiastical subjects, and administration of county government. Virginia's county courts were created by and derived many of their powers from legislative acts; by 1661 or 1662, they possessed a "nearly absolute" power which encompassed "a wide arc of colonial life."[85] In early national Kentucky, duties were much the same as those of other county justices, with one exception: in an unusual grant of authority, Kentucky's early county courts heard appeals from rulings of individual justices of the peace. Kentucky's county justices did not enjoy reputations for competence or professionalism; they were better known, according to John Ireland, for failure to keep order in court, general ineptitude, and domination of "almost all local patronage." But, though few were alleged to be lawyers (most Kentucky justices in the 1850s were farmers), it is clear from the careful drafting of "a few" official papers that some justices were well-educated men who probably knew sufficient law to perform their duties capably.[86] County courts in North Carolina exercised administrative and judicial powers.[87] In Illinois, they presided over all

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84 David Thomas Konig, *Puritan Massachusetts*, 5, 7-9, 46, 65, 88, 148.

85 Warren M. Billings, John Selby, Thad W. Tate, *Colonial Virginia: A History,* Milton M. Klein and Jacob E. Cooke, eds., *A History of the American Colonies in Thirteen Volumes* (White Plains: KTO Press, 1986), 72-73.

86 Robert M. Ireland, *The County Courts of Kentucky* (n.p., The University Press of Kentucky, 1972), 14, 3, 62, 148, 150, 152.

87 Isham Gregory Newton, "The Minor Judiciary in North Carolina, With Special Emphasis on the Justice of the Peace," Ph.D., diss., University of Pennsylvania, 1956, 40.

probate matters and held criminal and civil jurisdiction.[88] Lawrence Friedman notes that county courts were agents of "social control," managing a community's morals, commercial activity, inheritance, internal improvements, and similar matters.[89]

The most helpful source of information concerning the background of the Missouri county court remains William Bradshaw's old "History of the Missouri County Court."[90] According to Bradshaw, Missouri's county governments existed in territorial times. Their functions initially were performed by a court of quarter sessions composed of justices of the peace and established in 1804; the court administered the districts into which the Louisiana Territory had been divided. It also heard civil and criminal common law cases and equity matters. In 1806, a board of commissioners assumed the governing powers of the court of quarter sessions. The board of commissioners was dismantled in 1813 and the administrative and probate work transferred to a newly-established common pleas court, composed of three judges named by the territorial governor. In 1815, those tasks were transferred once again, this time to a county court consisting of three local justices of the peace. One year later, in 1816, the county court was abolished and replaced by a circuit court. The circuit courts retained their administrative and probate powers until 1820, when those matters were transferred to newly re-invented county courts. With the exception of two years between 1825 and 1827, when they did not handle probate matters, their powers have remained more or less intact. Though its managerial functions clearly overshadow its trial work, it would be wrong "to assume that the county court is

88 Illinois Constitution (1848), art. 5, sections 16, 19.

89 *A History of American Law* (NY: Simon & Schuster, 1985), 40.

90 William Bradshaw, "History of the Missouri Court," *Missouri Historical Review*, vol. 25, no. 3 (April 1931): 387-403. All material in this section is taken from Bradshaw's account.

purely an administrative body, for it still possesses a few minor judicial and quasi judicial powers and privileges.[91]

The remodeled county courts of 1820 varied in structure and mode of operation. Most, but not all, consisted of three justices. Terms of office varied. Some county justices were elected at large, some on a district basis. [92] At the time, Missouri was a new state, and public officials were preoccupied with organizing a state government and ensuring their state's financial health and political credibility. They obviously relied on local institutions to establish and maintain order during this unstable period. The terms of the statute that created the county courts charged them—in theory, at least—with literally unlimited governing duties within county boundaries. It is not surprising that sitting justices read their duties broadly:

> *Be it further enacted*, That there shall be, in each and every county of this state, a judicial tribunal, to be styled the County Court, which court shall have original jurisdiction over all matters of county concern, shall appoint guardians, and shall have full power to grant letters, testamentary and of administration, and settle the accounts of executors, administrators and guardians, and shall have all the jurisdiction and power heretofore vested in the circuit courts; in all matters relating to constables, county lines, elections, ferries, idiots, lunatics and persons of unsound mind, the poor, minor and orphans, prison and prison bounds, probate of wills, county revenue, bridges, roads and highways, taverns and tavern keepers, townships, vagrants, weights and measures; and shall in general have all the powers and exercise all of the duties which by the existing laws are given to, or required of the circuit courts in those cases.[93]

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91 Ibid.

92 Ibid.

93 Missouri, *An Act Establishing Circuit and County Courts, Acts* (1820), chap. 25, sec. 10.

The overall effect of the 1820 statute was to transfer administrative powers from circuit courts to the reinvented county courts, whose statutory powers, like those of the township justice of the peace, increased over time. The scope of county courts' powers may be sensed in the 1820 statute. Responding to demands for democracy, the legislature in 1830 transformed county courts from appointive bodies to elective ones. County justices were elected to terms of four years, constables to terms of two years. If a justice should move to a different county or otherwise be unable to finish out his term, a sitting justice or justices had the power to offer to the governor the name of some suitable person to take his place on the bench.[94]

In 1839 court courts of commissioners received authority to appoint an attorney, who would work at county expense. The county attorney would "prosecute and defend, in behalf of each county," with compensation to be determined by the county court. [95] No county was *ordered* to hire an attorney, which suggests indecision on the question or perhaps legislative sensitivity to differences between the size of one county's purse and another's. In 1845, counties were granted rights to own and sell real property on behalf of the county and "to audit and settle all demands against the county."[96] In 1843, lawmakers authorized each county court to appoint an attorney in instances where a pending case made it appropriate; in addition, county courts were ordered to appoint an attorney "to prosecute and defend on behalf of the county" all cases "in which the county

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[94] Missouri, ACT to provide for the election and appointment of county Court Justices and Constables, Laws (1830), sections 1, 3.

[95] Missouri, *AN ACT to provide for the appointment of county Attorneys,* Laws (1843).

[96] Missouri, *An Act to enable counties to make contracts, and hold and convey real estate, Revised Laws* (1845), sections 1, 2; Missouri, *An Act to establish courts of record, and prescribe their powers and duties, Revised Laws* (1845), sec. 15.

may be interested." Appointments were limited to twelve months, though the court could remove the appointee before his term ended, without providing a reason, apparently. Grounds for removal are not stated in the law; the county attorney served, then, at the county's pleasure.[97] County courts' fiduciary powers were strengthened ten years later in a measure creating treasuries within county courts.[98]

At their debut legislative session in 1820, Missouri lawmakers enacted a statute intended to create a firm tax base. The law authorized county courts to collect state and county taxes. Taxable goods included land and buildings, slaves, farm animals, pleasure carriages, furniture and watches and chains. Bounty lands and all lands belonging to the state and federal governments were excluded from taxation. Each county court was to appoint an assessor and collector "who shall be respectable householders and reside within the same [county]" to one-year terms. The text failed to provide a method for division of taxes between the state and the county.[99]

Missouri's county courts, like the early English courts, were heavily involved in market oversight. In the same 1820 session that produced a state tax law, justices of county courts were authorized to license billiard tables and regulate ferries; license liquor and wine retailers, peddlers and retail merchants; and license and tax auctioneers. In a typical arrangement, the statute dealing with peddlers and retail merchants imposed a tax

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97 Missouri, *AN ACT to provide for the appointment of county Attorneys*, Laws (1843).

98 Missouri, County Treasuries, An Act to establish and regulate county treasuries, Laws (1855), article III, section 1.

99 Missouri, An Act to provide for Levying, Assessing and Collecting, State and County Taxes, Acts (1820).

of between fifteen and two hundred dollars per license in every six month period, the amount to "be fixed in the discretion of the court or clerk in vacation, due regard being had to the value of the stand and amount of business done by such retailer or peddler." [100] Auctioneers paid taxes in amounts that depended on the cost of the item sold. The most stringent terms were applied to wine and liquor retailers, perhaps due to a concern that such businesses might sell alcohol to slaves; it was the sole commercial licensing measure to require a grand jury to investigate possible violations.[101]

Temperance reform does not appear to have motivated passage of the law, though it made many women into activists and influenced public policy elsewhere. Alcohol consumption was said to drive men from their families, and from God, "who never made alcohol." Morton Keller has commented that the party system became a vehicle for a number of causes, including temperance and prohibition. Temperance laws, by the 1850s, illustrated a governmental interest in molding personal behavior to conform to a standard. In Missouri, however, reformers made little headway. Only in Greene County did residents put heavy pressure on the county court to prohibit alcohol sales. In August, 1851, the county responded to a public petition and agreed to stop issuing dramshop licenses. It reversed itself shortly thereafter on receiving a petition from the opposing side. In January, 1851 the county rescinded that order, and in April it rescinded the

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[100] Missouri, An Act taxing Billiard Tables and regulating Ferries, Acts (1820); Missouri, An Act imposing a Tax on licences to retailers of Merchandize and Pedlers, Acts (1820); Missouri, An Act to license Auctioneers, and impose a tax on Auction Licences and Sales at Auction, Acts (1820); Missouri, An Act to license and regulate Retailers of Wines and Spirituous Liquors, Acts (1820). Grocers were the subject of a separate law of 1829, probably because grocers sold hard liquor in addition to sugar, flour, and the like. This measure included language which reserved for the county a portion of tax paid on the license. Missouri, An Act, to License Grocers, Laws (1829).

[101] Missouri, An Act to license and regulate Retailers of Wines and Spirituous Liquors, Acts (1820).

January order. The Sons of Temperance, formed in 1849, provided much of the feeling against alcohol sales, but the group gave up in the end and put their hopes into changing public attitudes.[102]

County courts and the earlier district courts apparently oversaw internal improvements in Missouri from very early times. In initial legislation adopted in 1820, counties were made responsible for highways, bridges, swamp removal, and other internal improvements. In 1839, the Missouri legislature responded to the near-impossibility of getting from one place to another within the state by granting county courts the authority to incorporate private entities and hire them for road construction and other improvements.[103] Previously, white male residents of counties had been responsible for surveying, construction, and maintenance.

In addition to providing governance, and regulation of business practices, the levying and collecting of taxes, and supervision of internal improvement projects, county courts of commissioners held responsibility for probate matters and subjects affecting the social order. Local control of social practices supported the economic and political goals

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[102] Laura F. Edwards, *Considered Strife and Confusion, the Political Culture of Reconstruction* (Urbana, IL: University of Illinois Press, 1997), 126; Joel H. Silbey, *The American Political Nation, 1838-1893* (Stanford, CA: Stanford University Press, 1991), 180; Jonathan Fairbanks and Clyde Tuck, *Past and Present of Greene County, Missouri, Early and Recent History and Genealogical records of Many of the Representative Citizen*, ch. 10, p.9. Http://thelibrary.springfield.missouri.org/lochist/history/paspres/ch10.html Accessed March 10, 2010; *History of Greene County, Missouri, Written and Compiled From the Most Authentic and Official and Private Sources, Including a History of the Townships, Towns and Villages, Together with Condensed History of Missouri: the City of St. Louis; a Reliable and Detailed History of Greene County—Its Pioneer Record, War History, Resources, Biographical Sketches and Portraits of Prominent Citizens; General and Local Statistics of Great Value, and a Large Amount of Legal and Miscellaneous Matter; Incidents and Reminiscences, Grave, Tragic and Humorous* (St. Louis: Western Historical Company, 1883), 222-223.

[103] Missouri, *An Act giving the County Courts authority to incorporate and grant charters to individuals and companies, for the purpose of bridging streams, and to encourage the improvements of roads, Laws* (1839), sections 1, 5.

of the state and rendered the county courts essential in preserving ideal racial and class relations.

For all practical purposes, justices' courts and county courts of commissioners together occupied a distinct political space in which they held little in common with other entities in the state's judicial system. Put differently, they functioned as more or less independent units rather than as fully integrated members of a state system of courts. Official contacts between neighborhood courts and the higher courts consisted mostly of routine business transactions when a case was appealed to the circuit court or when a justice of the peace forwarded a felony to the circuit court for trial. The independent nature of county governance can be seen in a county ordinance passed by the Greene County Court in 1839, in which the court removed itself from enforcement of an act of the state legislature: "*Ordered by the Court*—That the act concerning groceries, . . . approved February 1839, be and the same is hereby repealed and of no effect in the county of Greene." The law on groceries had to do with regulating the sale of "ardent spirits." The county based its repeal of the law on a statute providing that that "county courts may, at any term of their court, preempt their county from the operation of this act by an order directing that the same shall not extend to or be in force in their county."[104]

The 1820 constitution had made the circuit courts responsible for supervision of the lower courts but did not supply instructions on how to proceed with the task, either at that time or later—despite an initially thin body of statutory law and possession of discretionary powers which gave neighborhood judges wide latitude in using their personal judgment. Justices' and county courts operated virtually without oversight

[104] *History of Greene County*, 190.

during the early and mid-nineteenth century. Their independence is especially notable in view of the fact that few justices of the peace were practicing lawyers.[105] True, Missouri law did not require that holders of the officers be trained in the law, but judges of the higher courts were expected to have a legal education,[106] and the layman status of most justices probably contributed to the comparatively low status of the office. Justices' courts received solid local support, not because they demonstrated the formality and precision characteristic of the circuit courts, but rather because the justice "could usually be trusted to judge equitably."[107]

Scholars investigating judicial power and authority in colonial and nineteenth-century America have found that powerful neighborhood courts were the rule, not the exception, and have linked their power to local networks of supports. In *The People in Power, Courthouse and Statehouse in the Lower South 1850-1860*, Ralph Wooster concludes that most nineteenth-century southerners considered the county government to be their *local* government and felt a greater attachment to county government than to the central colonial or state government.[108] Not only did county government possess the virtue of the known and familiar, local elites often were attracted to a place on its bench. "By the close of the Colonial era the idea of county government was so firmly established in most areas of the South that positions of responsibility on the county level were sought

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[105] Occasionally a justice of the peace who was also a lawyer advertised the fact in a newspaper advertisement. James Glasscock, a justice of the peace in Pettis County, offered his services as a lawyer in the May 7, 1858 edition of the *Marshall Democrat*. The same newspaper on March 14, 1860 printed an ad placed by W. T. Williams, a notary public, attorney, and justice of the peace in Miami, Missouri.

[106] Circuit judges were to be "learned in the law." Doubtless the same applied to judges of the state supreme court. Missouri, An Act establishing Circuit and County Courts, Acts (1820), sect. 1.

[107] James Griffith Harris, "Background and Development of Early Missouri Trial Courts," 261.

[108] Ralph Wooster, *The People in Power, Courthouse and Statehouse in the Lower South 1850-1860* (Knoxville: The University of Tennessee Press, 1969), 81.

and secured by the most important social and economic leaders of the colonies." The presence of members of the ruling class on the county bench added to the county's prestige; at the same time, the relatively high socio-economic status of county officials reduced possibly negative impact of judges' lack of a legal education. As in Missouri, most justices of the peace and county judges who served in the lower south do not seem to have been practicing lawyers.[109]

Peter Hoffer's introduction to *Criminal Proceedings in Colonial Virginia* deals with the administration of criminal justice in Richmond County, Virginia. Like Wooster, Hoffer notes that county institutions were held in high regard. While "[i]n theory, the local courts were subordinate to the central courts of the state," in actuality they functioned in remarkably independent fashion.[110] Justices of Virginia's colonial county courts were appointed by the governor and heard both civil and criminal matters. The judicial system of colonial Virginia included a General Court, which heard capital offenses, and courts of oyer and terminer. Both were served by grand juries and some petit juries, with the governor and his councilors as judges. Serious crimes were tried, not by courts on circuit, but by a criminal court that remained in the capitol.[111]

Of county justices in Virginia, Hoffer writes that "the ultimate impact and effectiveness of local justice derived from its responsiveness to the realities of local status and class distinctions."[112] Local criminal justice relied on both formal law and customary

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109 Ibid., 69, 81-82, 97. Wooster attributes the absence of legal professionals to the practice of rotation in office.

110 Hoffer, *Criminal Proceedings in Colonial Virginia, Records of Fines, Examination of Criminals, Trials of Slaves, etc., from March 1710 [1711] to 1754,* xvii.

111 Ibid., xvi-xvii.

112 Ibid., xx-xxi.

values. Put differently, local criminal justice was communal justice. Virginia's judges followed in the footsteps of English justices of the peace, who always inquired into "family connections" in the course of their duties.[113] Hoffer connects the potency of Virginia's local courts to the social aspects of neighborhood law and the judge as a fixture of local justice. First, most criminal cases were minor and originated within the county, and because a minor criminal violation was not subject to appeal, petty crimes tended to stay within the county: only felonies were tried in Williamsburg. Thus, the minor offender could not avoid the physical proximity of neighbors and members of the bench. Further, regular attendance by the county justice "gave local justice legitimacy and continuity," as a "core" of justices attended court days every year, and sometimes every session. Familiarity with persons came with service with the court over long periods; accordingly, they knew parties in criminal cases, just as the accused came to know the justices and their families. Justices enjoyed enhanced status when they held offices in addition to the county judgeship, such as sheriff, coroner, or juryman, giving local residents opportunities to view them in multiple positions of authority. Finally, justices tended to be wealthy and close to powerful persons; importantly, they were not obliged to perform their duties against the backdrop of an educated, professional cadre of higher court judges, as "[t]he highest court in the colony was not composed of professional judges." [114]

County courts in early national Missouri differed in some respects from those of colonial Virginia and other southern places. However, their independence flowed from

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[113] Ibid., xxi.

[114] Ibid., xvii-xix.

some of the same elements identified by Hoffer and Wooster: the nature of their tasks, almost total absence of supervision by the court assigned the duty, and strong support within communities. Like local courts in other places, Missouri's justices' courts and county courts owed much of their power to networks of trust and loyalty within the community and rightfully so. In regular sessions of the county court, justices conducted the county's business, determining locations for new road construction, scheduling male residents for community service, approving county expenditures, and accepting or rejecting bids for government services and goods—with county residents' interests and needs in mind. For example, county justices often allowed interim payments to survivors in instances where settlement of an estate was protracted. Similarly, when county justices ruled from the bench debt litigation associated with estate settlement, refusal-to-work cases and other violations of county ordinances, they decided conscientiously in almost all instances. Nor did county justices ignore residents' preferences in conduct of the public business, which often required approval from a majority of the county's population. County courts normally treated property sales as a matter of routine but treated challenges seriously. For example, in a session of the Saline County Court held on May 13, 1839, resident Ransom Wells was joined by a few of his neighbors in objecting to a sale of public property planned by the court, on the ground that fewer than a majority of inhabitants had approved the sale, "Upon which showing the Court doth order that the sale thereof be suspended.[115]

[115] Saline County Court, Minutes, 1839-1846, C18976, microfilm, Missouri State Archives, Jefferson City, MO.

Faithful attendance at sessions of the county court and continuity in office, factors common among Virginia's county justices, marked county service in Missouri as well. Attention to official duties was encouraged by Missouri state law, and regular attendance reinforced by a provision in state law that required the county clerk to record "the times . . . and the number of days" each attended. As their salaries depended upon it and were not extravagant, it is likely that most justices were present for regular court sessions.[116]

The great bulk of county business was crushingly monotonous, but even the most tedious transactions mattered within the neighborhood. In 1870, the Saline County Court voted to review requests for structural changes to existing roads; rejected a petition for a dram shop license on the basis that it lacked the signatures of a majority of the taxpayers and citizens of Marshall; paid "Mrs. Mary Mead . . . $25 for the support of Mrs. Castor;" approved the purchase of a ferry operator's license to Alphonzo Bowler; and appointed Henry B. Lewis to serve as constable for Elm Wood towns.[117] The cumulative effects of such routine decision-making over time may help explain the Missouri tradition that no one should have to ride for more than a day to reach the county seat.[118]

Township justices' courts and county courts of commissioners were created directly and by implication in the state constitution. The 1820 constitution granted civil jurisdiction to circuit courts in all cases "which shall not be cognizable before justices of the peace." The existence of county courts was implied in the constitution's creation of a

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116 Missouri, An Act establishing Circuit and County Courts, Acts (1820), sec. 17.

117 *Saline County Progress*, report of County Court of Commissioners meetings, April 4, 1870, May 4, 1870.

118 Marian M. Ohman, "Missouri County Organization, 1812-1876," *Missouri Historical Review* vol. 76, no. 3 (April 1982): 253-281. Paul Kahn also pressed for study into "the multitude of ordinary decisions at the microlevel of everyday transactions." Paul W. Kahn, *the Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: the University of Chicago Press, 1999), 135.

supreme court, a chancellor, circuit courts, and "such inferior tribunals as the general assembly may . . . ordain and establish."[119]

However, Missouri lawmakers from time to time created other judicial bodies, known as special local courts, particularly during the last quarter of the nineteenth century. Two types of special courts were established. The first appeared when town governments were remodeled. These included permanent mayors courts, police courts, and recorders courts. Other special courts not associated with municipal bodies were established by lawmakers for specific purposes. These included common pleas, probate, common pleas and probate, law and equity, and other judicial categories. The latter category of special courts should not be understood to supply judicial authority where none had been previously established—probate, for example—but rather to correct what lawmakers perceived as deficiencies in delivery of justice. A law and equity court for Jackson County, created in 1873, probably was intended to ease pressure on the existing circuit court for the county. The judge for the law and equity court possessed the same qualifications as the circuit judge, and rules for the new court were taken from circuit procedure. The two courts enjoyed concurrent original jurisdiction in civil matters "of law and equity" except where land titling was concerned, where authority remained solely with the circuit court. The law and equity court in addition received sole jurisdiction to hear appeals from rulings of inferior courts of the county (probate exempted) and had oversight of them. From the nature of its jurisdictional powers and qualifications of the judge, it is clear that the new court would function to relieve the circuit court's civil docket and administrative responsibilities with respect to inferior

[119] Missouri, constitution (1820), art. 5, sections 1, 6.

courts. It follows that the new court was not necessarily meant to be a permanent judicial fixture.[120]

Government in early Missouri was intensely local. While legislators did not neglect large interests of the state in adopting new laws, the sheer number of statutes of a special local nature is staggering. At times the general assembly passed three or four times as many special local acts as general ones. In the session of 1862-1863, legislators enacted fifty pages of general laws and two hundred eight pages of special local laws, for example.[121] An 1849 statute that created a probate court to serve Hickory County explicitly allowed its judge to perform marriages, issue *habeas corpus*, and practice as an attorney. In the same session, a bill to establish probate courts in Schuyler, Ripley, Mercer, Shannon, and Know counties said nothing of the power to solemnize marriages, issue the writ of *habeas corpus*, or practice as an attorney. Finally, legislators used a single statute to except the probate court for Polk County from repeal of earlier law that had established probate courts in Greene, Barry, Newton, and Cedar counties.[122] A probate court was created in 1861 for Dunklin County and abolished in 1866.[123]

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120 Missouri, AN ACT to establish a law and equity court for Jackson county, Laws (1873), sections 1, 2, 3, 5. Equity jurisdiction resided with a superior court of chancery created in 1820 and with the state's circuit courts. The superior court of chancery heard appeals in equity matters heard by circuit courts and all litigation against the state. Missouri, An Act establishing a Court of Chancery, Acts (1820), sections 8, 13; Missouri, An Act establishing Circuit and County Courts, Acts (1820).

121 William L. Bradshaw, "History of the Missouri County Court," 392.

122 Missouri, AN ACT to establish a probate court in the county of Hickory, Laws (1849), sections 1, 15, 19; Missouri, AN ACT to establish Probate Courts in the Counties of Schuyler, Ripley, Mercer, Shannon, and Knox, Laws (1849), Missouri, AN ACT relative to the probate court in Polk County, Laws (1849).

123 AN ACT repealing an act entitled "an act establishing a Probate Court in the county of Dunklin," Laws (1865).

Lawmakers enacted many statutes that created local, repealed their creation or amended their jurisdiction, at times within a very few years.

Special local law was a subject of heated argument. William Bradshaw writes of special legislation that

> [t]he encouragement of frequent changes was the worst defect of special legislation. It also allowed the legislature to meddle in local affairs for purely political reasons to aid one party or faction in a county at the expense of another. Perhaps an abundance of interesting and valuable information could be unearthed by investigating and analyzing the underlying motives for the special laws of this period.[124]

Bradshaw may well be correct in his analysis, but at times lawmakers obviously made special local courts in order to relieve burdens on existing bodies. Judicial business pressed the bench; according to the *Marshall Democrat* of December 12, 1869, the docket of Saline County's Court of Common Pleas scheduled twenty-seven cases for the *first day* of the December Term of 1869, eight cases for the second day, ten for the third, and nine for the fourth.

Local courts that functioned as *de facto* justices' courts (police, recorders, and mayors courts) were established as components of remodeled municipal government. A major advantage was that they offered the face-to-face delivery of justice offered in township justices' courts. They clearly were intended to improve public services to residents; at the same time, they reflected population growth and movement toward more complex municipal government.

John Wunder describes local institutional arrangements in Washington Territory as demonstrating "complexity and diversity . . . Several different types of urban justices

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[124] Ibid., 388.

of the peace were created by the legislature; these justices were called a variety of names, were selected by numerous devices, and performed different functions."[125] Incorporation of a municipality acted as one means of creating an urban court on the model of the township justices' court. Population centers, when incorporated as towns, boasted a judicial officer designated as a "committing magistrate." Recorders' courts existed in Vancouver, Seattle, and other places. Wunder believes that recorders courts were modeled on mayors courts, which were created during a time when Washington was part of Oregon Territory, between 1848 and 1853. Four Washington cities had an official designated simply as a "judicial officer," an appointed position; one of the qualifications was that the officer holder had been a justice of the peace prior to appointment to office. In Seattle, the police justice enjoyed "exclusive original jurisdiction over all violations of city ordinances."[126]

The mayors court of Boonville, Missouri, provides an example of the versatile nature of these bodies. The mayor of Boonville assumed the role of the justice, and city hall (or some other official building) replaced the front parlor or town meeting place on the prairie where the justice of the peace kept office hours. The jurisdictional authority of the mayors court of Boonville embraced matters that normally would be under the control of a rural justice of the peace; in addition, the mayor held jurisdiction in city ordinances. As an example, Boonville passed an ordinance in June of 1839 that forced owners of slaughter houses to clean up animal hides and other remains. Failing to do so was a minor offense punishable in the mayors court, which lists two convictions in 1840 and

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125 John Wunder, *Inferior Courts*, 87.

126 Ibid., 80-91.

another in 1841. The Boonville Court also had the power to control market practices, such as when and where sellers might set up shop, and in 1845 charged an individual with selling on the street during hours that the city market operated. [127]

Mayors courts were rare, but Missouri established several police and recorders courts. These were not unique to Missouri but existed as well in Washington Territory and in Nebraska. Nebraska's nineteenth-century police courts were similar to justice of the peace courts. They were created when cities with populations greater than 15,000 elected a police judge, who heard misdemeanors and forwarded serious cases to the state's district courts. Mark Ellis has characterized the Nebraska police courts as keepers of "public order and community standards." Persons charged with drunkenness, prostitution, gambling, or disorderly conduct, were tried in the police court. According to Ellis, such offenses offended families and hurt business.[128]

Police and other such municipal courts were extremely useful to municipalities. They enforced matters normally placed under the jurisdiction of the rural justice of the peace, and they were able to deal with town ordinances. The result was reduced cost for the town and greater convenience for residents. In Missouri, when special local courts assumed jurisdictional powers normally exercised by the rural justice *in that location*, terms of the statute explicitly stated the physical boundaries affected. For example, the charter for the city of Canton was amended in the 1873 session to include a recorders' court with sole jurisdiction over violations of the town charter and town ordinances; the

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127 Missouri, Boonville, Mayors Court Records, 1840-1848, microfilm, C2980, WHMC-UMC. Mayors courts were not common in nineteenth-century Missouri, and in fact, staff at the Missouri State Archives did not locate any other records.

128 Mark Ellis, *Law and Order*, 134-135.

recorder shared jurisdiction "with all justices of the peace in all civil and criminal cases within the town limits, arising under the laws of the state."[129] In the same legislative session, both the mayor and recorder of Sedalia held jurisdiction over breaches of the peace, misdemeanors, and violations of town ordinances "occurring in the city, and all that tract of country extending one-half mile outside of the city limits."[130]

When a special local court was inserted into a local system, it could not have helped but create turmoil—not once, but twice: first when a court was created, and later, when it was abolished. The presence of a special local court required the legal community to operate with a new member and made for systemic strains. In cases where litigation already had been introduced, or litigants had made arrangements to sue in a court that was affected, the introduction of a special court could cause delays and distress. Local residents were not unaware of a potential for problems. A group of citizens who wrote to Senator Benecke in February of 1873 concerning jurisdictional modifications assured him that "This is an independent Move not intended to interfere or effect any other court interest in our County."[131]

Special judicial bodies were vulnerable to changes in local conditions as well as to shifting political alliances and individual ambitions. One extreme illustrates problems that might occur with establishing a special local court. In 1849, the Missouri legislature established a probate court for Hickory County, Missouri that not only assumed

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129 Missouri, AN ACT to amend an act entitled "An act to amend the charter of the town of Canton, and consolidate the several acts relative thereto," approved March 20, 1871, Laws (1873), art. 4, sections 1, 3.

130 Missouri, AN ACT to revise the charter of the city of Sedalia, in Pettis county, Laws (1873), sec. 26.

131 Benecke Family Papers, folder 1506, C3825, WHMC-UMC.

jurisdiction in probate, but it also effectively dismantled the existing county court by forcing its judges out of office. It then replaced them with other justices of the peace for the county.[132] The act granted the new probate court original and exclusive jurisdiction in probate matters: appointment of guardians, administration of estates, supervision of contracts of indenture, and the like. The new probate judge was authorized to design a seal for official documents (until it was ready, he could use "a scrawl"). Though the statute did not require him to take the oath of a justice of the peace, the probate judge was to be a conservator of the peace. He also could marry couples, issue the writ of *habeas corpus*, and acknowledge deeds and conveyances.[133]

Provisions of the Hickory County bill recognized the status of the probate judge and granted him the usual trappings of office, including the seal. The judge's position was salaried, but he also received "the same fees that are now allowed to the clerks of the courts for similar services." In addition, "[t]he probate judge . . . shall discharge the same duties and receive the like compensation as now provided by law in relation to clerks of county courts." He possessed authority "in vacation" to "do all things in relation to granting letters testamentary and of administration which may now be done of the clerks of the several county courts in this State." Finally, the measure made clerks of the county and circuit courts eligible for the office.[134]

In point of fact, qualifications for the office were sufficiently broad (the probate judge was to be at least twenty-five years old, a resident of the county, and certified by

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132 Missouri, AN ACT to establish a probate court in the county of Hickory, Laws (1849).

133 Ibid., sections 2, 9-11, 15,18.

134 Ibid., sections 8, 15, 30.

the governor following his election win) to extend eligibility to most of the adult white males of Hickory County. The measure seems tailored to facilitate election of the county clerk to the position of probate judge, possibly because the county could be assured that the newly-elected probate judge had experience in probate matters.

The law removed Hickory County's then-existing county court of commissioners from their places on the bench and replaced them with the justices of the peace of the county "or any three of them." Specifically, "every justice of the peace in each municipal township in the county shall be allotted to attend at least one term of said court for the next ensuing year."[135] The upshot was that the county's justices of the peace operated their own justices' courts and also served on the county court of commissioners, although not at the same time. The statute thus increased both the number of each justice's contacts within the county and his familiarity with its affairs and people, a result which would increase the chance that local justice would reflect neighborhood values and ways.

The plan was peculiar. The language of the statute did not reveal why sitting members of Hickory County's county court were being removed from office. The county had been organized in 1845, which meant that county commissioners had been in office for barely four years when the measure passed. They could hardly have had time to acquire poor reputations based upon incompetence, so it remains unclear why such sweeping law was enacted.

The Hickory County law is closely described because it furnishes an example of the Missouri's legislature's willingness, for better or for worse, to intervene in local government. Commentators such as Bradford probably would have considered the Hickory County law an ill-advised legislative manipulation of institutional structures.

135 Ibid., sections 22, 23.

Others might view it as a legitimate response by state lawmakers to changing "local needs" of an institutional nature. Some special courts created by legislative fiat were deeply resented at heart by a few citizens. In a letter to Missouri legislator Henry Newman, a constituent wrote that a newly-elected member of the state legislature owed his victory to a promise do away with the Brunswick County Court of Common Pleas once in office—a promise he disregarded once elected, despite an overwhelming mandate by the county's electorate. "The feeling in the County here against this action of the Legislature is intense and Old Man Lay is looked upon now by Many as one of the Most vile things that walks the earth and in some localities he would not be safe from violence until the people quiet down a little."[136] If the correspondent is to be believed, Brunswick County's residents clearly felt that their trust had been violated, which was one of the inherent problems associated with special courts. Very often, they were suspected of serving purposes that were not wholly legitimate.

Favor for one local court over another often was expressed in correspondence between local jurisdictions and officials in Jefferson City, the capitol of Missouri. At times, citizens were disturbed by the expenses of government. Jack W. Price wrote from a small town in Chariton County in January of 1873 that, with regard to township organization,

> the law should be so amended as to give the County Court the liberty to redistrict the County in not more than six Townships, and only for the purpose of assessing, collecting taxes, and to manage roads in each Township. This arrangement will save a great deal of expense and this is what the tax payers want. The probate court act, ought to be repealed and let the County Court do all probate

136 Benecke Family Papers, folder 1504., C3825, WHMC-UMC.

> business which will save several thousand dollars to our County and benefit tax payers materially.[137]

Special local courts often assumed control of probate matters previously within the jurisdiction of county courts of commissioners. Indeed, county courts had enjoyed probate jurisdiction since the beginning of statehood. But between 1845 and 1875, the state passed 200 special laws regarding probate jurisdiction alone. Transfer of probate matters to a special court could serve to relieve a crowded county docket or promote entrenched interests (such as property development). What made probate matters useful was the very nature of probate as a set of interrelated tasks which, furthermore, seldom were changed by new rules of great significance. The "chief question [between 1827 and 1877] was whether probate functions should be handled by the county court as provided by the general laws or vested in a separate probate court."[138] Often, lawmakers awarded probate jurisdiction to special courts of common pleas. In other instances, courts might share control of probate matters. In Cape Girardeau County, probate matters were controlled *concurrently* in an arrangement passed in 1851 between the county court and a special court of common pleas.

Officials in 1865 considered an idea to create permanent probate courts with civil and criminal jurisdiction, and another to establish a probate court for every senate district; one proposal would have made the judge of probate an *ex officio* president of the county court.[139] None succeeded. The legislature preferred to treat probate as itinerant jurisdiction. In 1865, special courts of probate were fashioned for twenty-seven of

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137 Ibid.

138 Bradshaw, "History of the Missouri County Court," 395.

139 Ibid.

Missouri's 114 counties. The law specified that the new courts would be separate from the county court; however, it allowed the new probate judges *per diem* pay when serving as president of the county court. In addition, he earned fees like those paid the clerk of the county court, and "such other compensation as the County Court" thought suitable.[140] The pay provisions for those probate judge arose their doing two jobs as judicial officers. A separate statute passed in the same session made those probate judges members of their county courts. The law saved taxpayers' monies and consolidated offices; also, it represented fair treatment of an official with dual responsibilities to the electorate. In April of 1872, the legislature created probate courts in eight more counties. Unlike the judges of 1865, the new justices of probate were to receive no compensation other than fees for services; in addition they served as their own clerks.[141]

A comparison between the 1865 and 1872 statutes demonstrates that one of the more serious deficiencies of special legislation was lack of consistency. The functions of a probate court are simple enough: the administrative tasks do not change in a fundamental manner regardless of the size or character of an estate. There is no superficial explanation for paying the probate judge of one county a salary, to be determined at the pleasure of the county court, plus fees, while the pay of a probate judge of a different county was restricted to fees. That is precisely what happened between the

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[140] The statute contained racially-charged language that reflected tensions of the late war. It required that the judge of the probate court in each of the Missouri counties affected be a "white man." The measure is notable not only for its racial hostility but also because it constituted an attempt to openly politicize the judiciary. Legislators may have felt that enactment of so many courts of probate at once presented a political opportunity to assert white control that they could not let pass. AN ACT to establish Courts of Probate in the counties of Ralls, Jasper, Livingston, Barton, Lawrence, Wright, Nodaway, Chariton, Mississippi, New Madrid, Pemiscot, Christian, Johnson, Buchanan, DeKalb, Butler, Howell, Stoddard, Webster, Sullivan, Warren, Linn, Phelps, Carter, Grundy, Scott and Oregon, define their jurisdiction, and provide for the election of Judges of Probate, Laws (1865).

[141] Missouri, AN ACT to establish probate courts in the counties of Randolph, Adair, Maries, Jefferson, Audrain, Boone, Cape Girardeau and Bollinger, Laws (1872).

1865 law and the 1872 enactment. It is possible that the 1865 statute, which would permit only white men to run for election to the office, was intended to favor the interests of the white office-holder, but evidence is sparse.

Special local judicial bodies were a standard feature of nineteenth-century Missouri justice, but by the 1830s, lawyers were not. In 1837, Edward Partridge, a new arrival in Caldwell County, Missouri, wrote to his brother, James, to encourage him to emigrate. "If you study Law," he wrote, "we want you here as a counselor we have no lawyer here, by coming here to study, you could get admitted at the bar, much sooner than you can there."[142] According to one source, of all of the counties comprising the 13th judicial circuit of the state in 1855, the only one with a resident lawyer was the county of Greene.[143]

American lawyers arrived in Missouri in large numbers following the Louisiana Purchase. Federal plans for a court and a board of land commissioners, along with the prospect of lower courts, acted "like a vacuum that sucked lawyers west." [144] They tended to cluster in St. Louis, the largest city, where the land commission was located. In St. Louis in 1821, there were 6.6 lawyers per 1,000 residents, "astonishingly high for the period."[145] By 1845, the St. Louis business directory listed 131 attorneys. Many lawyers entered local and state politics and, like others, were deeply interested in making

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142 Edward Partridge to James Partridge, 1827, Edward Partridge collection, C1622, WHMC-UMC.

143 James R. Cox, "History of the Springfield Metropolitan Bar Association," *Springfield Metropolitan Bar Association online*, http://www.smba.cc/SMBAHistory.cfm

144 Banner, *Legal Systems in Conflict*, 101.

145 Ibid., 104.

money from land speculation (some who bought land eventually became farmers as well).[146]

A man who was already a practicing lawyer could enter the Missouri bar without much difficulty. Provided his credentials appeared sound, he had only to pass a local bar examination upon arriving in a Missouri community. The bar examination could be improvised on the spot and may not have been the same for any two or three candidates. Due to the fact that admission to the bar was a local matter, anytime a lawyer wished to practice in a different court, he was obligated to seek admission to the bar of that court.[147] As in other jurisdictions, newcomers studied with a local judge or respected attorney prior to admission to the bar, and, like practicing attorneys who had immigrated to Missouri, took the local bar examination in order to be licensed.

William Francis English has published widely on Missouri subjects and finds that many lawyers in early Missouri started their careers in township justices' courts.[148] If a lawyer could not get trial work, private debt collection was a common sideline. Even the

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[146] Ratios of lawyers to the general population in early Missouri are extremely difficult to know. Bar associations in Missouri did not exist in the nineteenth century. While the Springfield Bar Association's comment suggests scarcity, Banner finds lawyers almost rushing into Missouri following the Louisiana Purchase. Wunder notes that "many" lawyers dame to Washington Territory without indicating anything more precise about numbers. John Wunder, *Inferior Courts, Superior Justice*, 122. Mark Fernandez, in his book on the early judicial system in Louisiana, presents no information on the prevalence of lawyers. Mark F. Fernandez, *From Chaos to Continuity, the Evolution of Louisiana's Judicial System 1712-1862* (Baton Rouge: Louisiana State University Press, 2001). Local histories also offer little help.

[147] Ibid.,, 108.

[148] *The Pioneer Lawyer and Jurist in Missouri*, vol. 21, no. 2, in *University of Missouri Studies* (Columbia: University of Missouri, 1947), 74.

most highly-paid attorneys engaged in the practice; Abiel Leonard, who went to become a governor of Missouri, collected debts for private clients.[149]

That state lawmakers experimented with many neighborhood courts was not unusual for the time, and though litigants may have felt inconvenienced at times by the timing of law that altered jurisdictional authority, the parties to suits managed well enough. Lawyers were not always available, though it is clear that they worked in early Missouri, albeit in uncertain numbers. The constant in early Missouri's judicial system was its system of justices' courts and county courts of commissioners. Together, they introduced order on the ground and brought essential governmental services to early settlers. Without their presence, communities would have had short lives. With their contributions, communities had sufficient structure and protection from forces of disorder to plan for future growth and prosperity.

[149] E. M. Samuel to Abiel Leonard, October 11, 1841, folder 159, John Sappington to Abiel Leonard, June 20, 1828, folder 45; Adam McKee to Abiel Leonard, November 30, 1839, folder 137; all Abiel Leonard papers, C1013, WHMC-UMC.

CHAPTER III

AN ORDERED SOCIETY

In early Missouri, social practices and custom combined with positive law to provide the underpinnings of an orderly society. Commonly accepted social statuses supplied core building blocks for state policy aimed at producing a harmonious society. Individual acceptance of an assigned status and the appropriate conduct provided the key to peace in the community. Missouri's county courts of commissioners shaped communities through regulation of economic practices, provisions for the poor and other dependent persons, probate administration and other powers. Justices' courts in Missouri held broad powers in civil jurisdiction, and while the bulk of civil suits concerned money, fair application of law eased litigants' hard feelings and promoted harmony in the community. Though the politics of gender always affects status, the state did not reduce women's rights and privileges under law to a degree that would have distinguished Missouri from other states. Neighborhood courts, however, were charged with enforcement of Missouri's racial culture, both before the Civil War and afterward. In Missouri, social patterns proved their resiliency through war, privation, and growing diversity within the population. The earliest immigrants carried with them traditional practices that had applied to daily living arrangements from home.

Aside from St. Louis and a few small commercial outposts south of the city on the eastern border, frontier Missouri was a land of immense forests, swamplands, and prairies where the grass grew as tall as a man. White Americans found themselves in the company of Indian tribes, as well as French and Spanish residents. The French had claimed Louisiana earlier in the century but relinquished control to Spain in 1762. Spain,

however, delayed taking command until 1769, and then returned it to France in 1800. The French population labored to replicate French-style domesticity in communities beside the Mississippi River between St. Louis and Ste. Genevieve; indeed, the village of Ste. Genevieve around 1800 is said to have been "the most typical French settlement in all Upper Louisiana."[150] Following the Louisiana Purchase, many of the French remained in Missouri; Indians, too, remained on the land and resisted efforts to force them out. Germans were drawn to Missouri throughout the nineteenth century, as well as Americans from Virginia, Tennessee, Ohio, New York, and Massachusetts.[151]

Many immigrants brought slaves with them. According to a complier of the history of Greene County, William Fulbright, his brothers Levi and John, and brother-in-law A. J. Burnett emigrated to Greene County in 1829 and "pitched their tents in the wilderness. They brought with them their families, and a number of negroes, among whom was Aunt Hannah, so well known to all citizens of Springfield, claiming to be over a hundred years old, and to have assisted in the construction of that first little pole cabin."[152]

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150 Atherton, "Missouri's Society and Economy in 1821," *Missouri Historical Review* vol. 93, no. 1 (October 1988): 2-25; Dr. J. Viles, "Population and Extent of Settlement in Missouri Before 1804," *Missouri Historical Review*, vol. 5, no. 4 (July 1911), 187-213.

151 According to Steve Aron, two-thirds of Missourians claim to descend from residents of Virginia, North Carolina, Kentucky, and Tennessee." *American Confluence: the Missouri Frontier from Borderland to Border State*, A History of the Trans-Appalachian Frontier, Walter Nugent and Malcolm Rohrbough, eds, (Bloomington: Indiana University Press, 2006), 236.

152 Fulbright's family came from North Caroline. His mother was thought to be German or Dutch in origin. *History of Greene County, Missouri, Written and Compiled From the Most Authentic and Official and Private Sources, Including a History of the Townships, Towns and Villages, Together with Condensed History of Missouri: the City of St. Louis; a Reliable and Detailed History of Greene County—Its Pioneer Record, War History, Resources, Biographical Sketches and Portraits of Prominent Citizens; General and Local Statistics of Great Value, and a Large Amount of Legal and Miscellaneous Matter; Incidents and Reminiscences, Grave, Tragic and Humorous* (St. Louis: Western Historical Company, 1883), 141.

While the family servants are mentioned with affection, the presence of slavery initially was downplayed. Before the 1820s, when newspapers treated the subject, they assumed a descriptive tone. The *Missouri Gazette* in June, 1819, for example, recorded "an influx of people . . . with their maid servants and men servants . . . the white-headed children, and curly-headed Africans." In January, 1826, the *Gazette* noted that "[o]ur population is daily more heterogenious ."[153] By the early 1820s, a tone of alarm appeared as whites noticed an increase in the number of slaves. Situated in what is known as the Little Dixie region, so called because of the many settlers from the South, Saline County was said to have "a considerable slave population, which was constantly being increased;" in 1824, the county court began to appoint regular slave patrols.[154] But racial tensions were not as marked elsewhere in Missouri, if the calling out of slave patrols is any indication. In places where slavery did not form a significant part of the economy, relationships between blacks and whites appear to have been less remarkable.

Daily life on the frontier offered pleasure as well as work and hardship. Though everyone worked, fatigue never seemed to keep them from socializing at the end of the day. One scholar noted in 1970 that "whole families would ride twenty miles or more to a dance, even with babies on the saddle in front of them." People visited, especially on Sunday. There were fiddlers' contests, wrestling and weight-lifting for the men. These competitions sometimes ended in violence. Dancing was popular among the young people, and work joined pleasure in house-raisings, sap-collecting, corn-shucking, and

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153 As quoted in Harrison A. Trexler, "Slavery in Missouri Territory," *Missouri Historical Review* vol. 3, no. 3 (April 1909): 79-198. Spelling as in original.

154 N.a., *History of Saline County, Missouri* (St. Louis: Missouri Historical Society, 1881), 196.

other group tasks.[155] A Missouri custom known as bonnet day originated around 1826, at the Big Shoal Meeting House in Clay County; there, on the second Sunday in May each year, the local women attended religious service wearing their finest millinery.[156] Settlers took pride in extending hospitality, especially to the occasional traveler who happened by in hope of rest and refreshment. The visitor was fed, and after supper, the men passed the jug while the beds were prepared. At bedtime, the traveler was led to his special bed—special because it had a bit of stuffing, unlike the flat family pallets laid out on the floor in front of the fireplace.[157]

Immigrants enjoyed some degree of religious life, but it was difficult for a vey small congregation to support a minister, so services tended to be irregular and sometimes took the form of a camp meeting. The degree to which religion acted as a fixture in the community depended partly on settlement patterns. For example, Cape Girardeau, one of the oldest counties in the state, boasted a bible society by 1824. A newspaper article described a "numerous and respectable meeting held in the Town of Jackson" on the subject of forming such an organization.[158] Roman Catholic missionaries were sent by the St. Louis bishop to central Missouri, where German immigrants had settled. Father Ferdinand Helias traveled to Osage County in May, 1838; a year later, a settler wrote that he had formed a congregation of 400 people. He annoyed residents, however, by refusing to allow Catholics to read certain newspapers and getting

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155 Mary Alicia Owen, "Social Customs and Usages in Missouri during the Last Century," *Missouri Historical Review* vol. xv, no. 1 (October 1920): 176-190.

156 Ibid.

157 Ibid.

158 *Independent Patriot*, June 19, 1824.

involved in politics. Eventually, he was sent home. Other Germans in early Missouri were Evangelicals, Methodists, and Lutherans.[159] In 1835 Arrow Rock Township in Saline County hosted the Methodist Conference "with over 100 preachers in attendance."[160]

Missourians in frontier communities recognized social practices that conferred distinctions in personal status, some of which were formally recognized in state law. Privileges and restrictions reflected notions that molded relations between classes in Missouri: hierarchy, mutual obligation, the crucial importance of property, and the use of formal law to conserve cherished ways. Thus, white persons who paid taxes supported the care of old, sick, and poor persons; at the same time, dependent individuals had limited freedom to move about, choose their companions, and the like. Slaves could not determine their place of residence, sell their own labor, or marry, but received food, clothing, and medical care[161] and at least in theory were protected from deliberate injury to life and limb inflicted by owners. Throughout the nineteenth century, the state relied

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159 Robyn Burnett and Ken Luebbering, *German Settlement in Missouri New Land Old Ways*, 44-45, 47.

160 Frank Clinton Barnhill, *History of Freemasonry in Saline County* (n.p., Missouri Lodge of Research, 1956), 7.

161 In Greene County, doctors G. P. and W. L. Shackelford charged $3.50 for seeing a "Back Boy" in 1838, Jane M. Adams received $150 for "taking care of old negro woman" in 1860, Mrs. Blackman was paid $3 for midwife services for "negro Girl, Louisa" on February 1, 1850, and H. M. Parrish was paid a total $7.50 for "Visit & Med. Two Negro Women" on February 23, 24, and 25, 1849. Probate records for the county show payment of $1 for "sewing furnished Negro man" in 1848, "thirty cts for cutting coat for Negro man Richard" in 1854, 75 cents for "One Rounabout Coat for a Negro Man" in 1842, and $2.50 for "7 ½ lbs. of wool roles . . . clothing for old mareah children" in 1853. One particularly striking entry written by William Dye records the death of a "Negro girl" on December 17, 1834; she was "furnished with a dress and a sheet . . . and was decently buried in a coffin made by myself." N. c. *Slave and Medical and Funeral Expenses* (n. p., n. p., n. d.), 29,30, 33; *Clothing and Related Expenses for Slaves* (n. p., n. p., n. d.), 34-35. http://thelibrary.springfield.missouri.org/lochist/blfamilies/BF%20Pages%20121-168.htm Accessed May 17, 2005.

upon county and local judicial officials to uphold traditional order through statutory law and custom.

Race was the most significant indicator of status in Missouri. It was not the only one, nor did effects of racial policies apply uniquely to blacks. In the counties that comprised Little Dixie, for example, a white person would have been imprudent to openly befriend a free black in front of neighbors, and sexual intimacy between black men and white women was a crime. But as all blacks and mulattos were deemed inferior to whites, perceptions of the common good suggested the propriety of maintaining them in dependent and subordinate situations under the control of whites. Members of other dependent groups were affected by statutory law that affirmed political powerlessness and loss of personal autonomy. Missouri law concerning vagrants, paupers, orphans, the mentally ill and other classes of dependent persons was not as stringent as the state's black code, however, as the poor and disabled did not pose similar threats to white survival and dominance.

Slave law was articulated in Spanish law first issued in 1769; in addition, the Catholic church published a "sort of canon law" known as "the Laws of Las Seite Partidas," which were enforced "as late as 1820."[162] Slave traditions were carried into state law when Missouri entered the Union in 1821. But, even in territorial times, it had an ambiguous character. Under the 1724 code a slave could sue his master for failing to feed and clothe him adequately, although he could not testify against him. On the other hand, he could testify against whites other than his master. A magistrate was deemed

[162] Harrison A. Trexler, "Slavery in Missouri Territory," *Missouri Historical Review*, vol. 3, no. 3 (April 1909): 179-198.

guilty of extortion if he accepted money from a slave accused of a crime. The 1804 code prohibited blacks from bearing witness except in cases where the United States sued as plaintiff against a black or mulatto "or in a civil suit where blacks were alone parties." Trexler find several cases during that period in which masters had been accused of assault and battery after slaves had been declared illegally held in bondage. In two 1818 cases, a slave accused of trying to poison the family received a new trial as requested by his three attorneys, and two lawyers represented a black girl accused of murder. In general, the slave in territorial Missouri exhibited greater liberality than did the codes enacted later.[163]

Freedom suits were an old form of litigation in Missouri. Territorial law of 1807 allowed slaves to sue for freedom, and some won.[164] The law governing freedom suits allowed a slave to petition to sue for freedom as a poor person; if granted standing, the slave claimed a number of protections. These prevented others from doing harm to the slave, e. g., preventing him from attending court, or taking him out of the court's jurisdiction. But the law also disallowed damages to the slave should he win his suit for freedom. Either party was permitted to take the suit to the state supreme court.[165] Unlike some law affecting slaves, the freedom suit bill looked remarkably even-handed, even fair.

As Missouri's slave code developed, it was accompanied by laws designed to control free blacks and mulattos. Later on, it was joined by an emerging body of

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163 Ibid.

164 George R. Lee, "Slavery and Emancipation in Lewis County, Missouri," *Missouri Historical Review*, vol. 65, no. 3 (April 1971): 294-317..

165 Missouri, Revised Statutes (1845), Ch. 69.

dependency-related law. Race and dependency were subjects of legislation throughout the nineteenth century but began to appear more frequently during the 1830's and 1840's. In virtually all cases, statutes became increasingly restrictive.

Before the Civil War, slaves accounted for an increasing portion of Missouri's population. As shown below, the percentage of slaves in the general population of the state did not change dramatically with time. But, in absolute terms, increases were significant; and certain places showed high concentrations of slaves. The three counties whose populations are shown below were established early. All figured importantly into Missouri's economy and culture during the nineteenth century. Cape Girardeau and Saline were among the very oldest counties in the state. Greene County was organized in 1833, about thirty years later than the other two, and took its first census in 1840. In Cape Girardeau County the ratio of whites to slaves actually rose between 1830 and 1860, while it remained virtually at a standstill in Greene County. But Saline County exhibited a radically different pattern of race distribution: the percentage of slaves rose from thirty-three percent to just under fifty percent between 1830 and 1860. The explanation for the increase in numbers of slaves is that farmers in Saline depended very heavily on slave labor for crop production,[166] while those in the other two counties did

[166] Initially Little Dixie farmers tried to duplicate the agriculture of the upper south, according to Douglas Hurt. Cotton was tried but did not work out because the climate was too cold. Wheat and corn did better, and, with hemp, enhanced the region's reputation for agriculture Hemp became a spectacular success for a time, but profits fell before problems associated with preparation of the hemp for market, grading, and falling prices as the Panic of 1857 approached. However, prior to the war, before immigration shifted to the west, and while traffic on the Missouri River remained heavy, hemp produced good profits for the region; "[i]ndeed, without slavery, hemp production would not have been economically viable." Nonetheless, farmers in the region continued to use slaves for tobacco and cereal crops and as domestic servants and manual laborers in towns. R. Douglas Hurt, *Agriculture and Slavery in Missouri's Little Dixie* (Columbia: University of Missouri Press, 1992), 65, 69, 121, 123; Authorene Wilson Phillips, *Arrow Rock, The Story of a Missouri Village (Columbia, Missouri: University of Missouri Press, 2005), 109*.

not. These increases help explain why Missouri law increasingly surrounded slaves' conduct with restrictions and harsher punishments in the years before the Civil War.

	1830	1840	1860	1870[167]
STATE				
General	149,455		1,182,012	1,721,295
White			1,063,489	1,603,146
Slave	25,096		114,931	
CAPE GIRARDEAU				
White	6398		13,961	
Slave	1026		1533	
GREENE				
White		8,020	11,509	
Slave		677	1,668	
SALINE				
White	2,141		9,800	
Slave	706		4,876	

Connections between social arrangements, protection of slavery, and controlling black violence were close ones in the minds of antebellum Missourians. Black laws may be discussed from the perspective of the deed or of the perpetrator. Missouri's black code was not a criminal code or civil code in an ordinary sense of the word. Laws

[167] (2004), Historical Census Browser Retrieved March 10, 2010, from the University of Virginia, Geospatial and Statistical Data Center: http://fisher.lib.virginia.edu/collections/stats/histcensus/index.html

addressing the status and control of blacks, both free and bonded, are of a different nature. Some laws aimed at maintaining a slave regime by prohibiting specific conduct by whites and penalizing it. Some of these laws were aimed at all white Missourians, who were thus expected to uphold social policies. Other laws were created with the commercial sector in mind: steamboat operators or tavern keepers offered blacks something they might want, such as liquor, or escape over water. Whites were determined to prevent business operators from succeeding. Still other statutes named acts which, if committed by slaves, were subject to corporal punishment, but did not apply to whites; slaves needed a pass outside the plantation, for instance. Finally, some measures dealing with minor slave offenses appear to form part of a criminal code. The minor 1830 statute on slave misdemeanors, described below, serves as an example—but surround misdemeanors with weirdly constructed procedures and penalties that clearly set them apart from ordinary criminal law. The only statutes that identify slave acts as legal violations in a manner that seems more or less usual are those concerning serious crimes, most of them violent. Accordingly, the slave code set forth procedures for trying and punishing slaves accused of murder and rape, acts that would be criminal whether committed by blacks or whites. Even then, some qualities in the statute make it *not* seem to be about the offense itself but about the offender.

The Missouri slave code represented the harshest treatment that the law imposed on persons possessing no visible support. Significantly, an important statute of 1830 granted jurisdiction over most slave offenses to township justices of the peace—that is, to a local justices' court. According to the law, a slave who committed "any . . . thing properly known or recognized by existing law as a misdemeanor . . . shall be taken before

any Justice of the peace in the township where the offence is committed." The judge was instructed to "maturely and impartially [consider] all the evidence adduced in the case" before ruling; if found guilty, the slave could receive up to thirty-nine lashes of the whip. If the owner of the slave requested a jury trial, the judge was obligated to grant it; in that case, the jury would determine the outcome. Justices also held jurisdiction where a slave stood accused of property theft of less than $20, with the same penalty. The measure explicated the slave's right to trial by jury, declaring that "this section shall not be so construed in any case, as to deprive the slave or slaves accused of the offence in this section mentioned, of an impartial trial by jury."[168] The issuance of a slave's grant of a trial did not appear in subsequent slave measures.

Other laws aimed to control or forbid conduct that would not be considered a violation of law in the case of a white. All measures either explicitly assigned jurisdiction to the justice of the peace or understood it to rest there. In 1832, the legislature combined two objectives in a statute that prohibited blacks' access to liquor and aimed to keep slaves away from white churches, with special emphasis on Sunday as a day of worship. It forbade tavern keepers to allow slaves and free blacks to gather at taverns and drink alcohol, "especially on the Sabbath Day," and also prohibited slaves from disturbing church services. The tavern provision punished the owner or keeper of the business, fining him or her between five and fifteen dollars per offense. An exception provided that a slave sent by a master to purchase alcohol could go onto the premises, as long as the slave had a note from the owner to show that the errand was legitimate. In a

[168] Missouri, AN ACT to change the manner of trying Slaves for misdemeanors and certain Crimes, Laws (1830).

second provision, a slave caught disrupting white religious services could be tried before a justice of the peace and given up to twenty lashes of the whip.[169]

By the late 1830's and early 1840's, legislators increased their use of law in order to advance race-based policies and discourage opposition to them. Two such laws spoke directly to whites. The first, enacted in 1837, aimed to protect legal slavery in Missouri by reducing public discussion of its merits. Violations were not controlled by the justice of the peace, but the statute conveys the sense of a political and racial climate focused on safeguarding legal slavery, and, along with it, the legal apparatus that supported slavery, which was under the control of justices. The statute criminalized speech that promoted the anti-slavery cause and opposed slavery, whether delivered through "writing, speaking, or printing." The first offense carried a $1000 fine; a third offense was punishable by life in the state penitentiary.[170] The statute failed to identify jurisdiction, but the nature of the violation and severity of the penalties suggests that cases would go to a circuit court.

The second statute authorized county courts to appoint neighborhood patrols. The act did not specify the patrols' purpose or purposes, but the object clearly was to police the movements of slaves, identify those who were away from their owners' property without written permission, and punish them accordingly.[171] Actually, counties had been appointing patrols for years without state-enabling legislation. According to the author of a Clay County history, "County courts usually named patrols for each neighborhood in

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169 Missouri, *AN ACT to prevent mischief and dishonesty among Slaves and Negroes, and for other purposes,* Laws (1832).

170 Missouri *AN ACT to prohibit the publication, circulation or promulgation of the abolition doctrines,* Laws (1837).

171 Missouri, *AN ACT supplementary to "An act concerning Patrols,* Laws (1837).

the county, and where they failed to name the patrols, the citizens of a neighborhood would name them. It was the duty of patrols to watch . . . where negroes were likely to be or congregate and when found after nine o'clock without a written pass . . . that negro or negroes were punished by the patrols then and there, administering a sound thrashing. White male residents acted as policemen when they performed as members of slave patrols in their townships. The statute authorizing appointment of patrols clothed them with collective authority as they searched for slaves and covered their subsequent acts with legitimacy. Slave patrols supply a very strong example of construction and enforcement of law by neighborhoods. Legislative enactments defined where slaves were supposed to be at all times, explained the required pass, and indicated forbidden behaviors and relationships; they supplied the formal law, in other words. But the community itself, in the appearance of the slave patrol, decided itself how it would proceed on encountering a slave in specific circumstances. No wonder it was said that that "ghosts [and] hobgoblins held no greater terror to the average negro than patrols."[172]

Elsewhere, the state attempted to rid itself of slaves most likely to present a danger to the white community. Though on its face it dealt with punishment for a felony conviction, the truly significance of the bill was located in the provision for expelling a slave. It first provided a severe penalty for a felony conviction: any slave convicted of a felony was to receive "on his bare back any number of lashes, not exceeding thirty-nine." The more significant portion of the bill gave the appropriate court discretion to expel slaves from the state at his or her owner's expense. Such a slave could not return to

[172] W. H. Woodson, *A History of Clay County, Missouri* (Topeka: Historical Pub.Co.,1920), 88.

Missouri for twenty years, "without lawful permission."[173] It was unlikely that a slave would receive such permission, and legislators no doubt felt that a twenty-year period spent out of Missouri would significantly reduce the possibility of a return.

Another cluster of measures dealing with slavery passed in 1841. Two punished whites. One had the effect of penalizing steamboat operators, who were known to facilitate slave escapes. Under the measure, slave owners would sue steamboat operators who transported a slave on a steamboat without obtaining the owner's permission "by action of debt" for the value of the lost slave.[174] The law seemed more concerned with the monetary loss of a slave than with stopping escapes, though legislators may have reasoned that a threat to steamboat operators' pocketbooks would discourage them from assisting would-be escapees.[175]

A second enactment applicable to whites punished an owner whose slave had hired out his own labor without permission by a fine of up to $100. It was undesirable for a slave to act independently; moreover, a slave who hired himself out undoubtedly would keep his wages, and the object was to maintain slaves in a penniless state, to ensure feelings of dependency on the master and, by extension, on all whites. Finally, in essentially running a private business venture that their owners knew nothing about, slaves who made deals away from owners' property would more likely succeed, and Missourians did all they could to prevent slaves wandering about where their movements could not be observed

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173 Missouri, *AN ACT amendatory to an act concerning crimes and punishments*, Laws (1837).

174 Missouri, *AN ACT supplementary to an act, entitled "An act concerning Slaves"* Laws (1841).

175 Sometimes escape attempts drew the sympathy of whites. John S. Doak of Greene County was a slave trader known for his brutality as a master, "[so] that it was not strange his slaves should run away." The escapees commonly had "crooked and stiff fingers, "frost-bitten toes," and bodily scars. *History of Greene County*, 246.

A third statute in 1841 dealt with freedom suits. A county sheriff who hired out a slave who was suing for freedom could retain any wages earned by the slave and loan them out at interest. The earnings would remain in with the county, regardless of whether the slave won the litigation.[176]

Missouri revised the state code in 1845. The new code included many measures meant to fill what legislators perceived as gaps in previous slave law. Goals included controlling slaves' movements, reducing contacts between slaves and whites, and making it more difficult for slaves to escape successfully. Justices of the peace received power to arrest any slave wandering about without permission or a pass and order stripes at his discretion. A slave suspected of "riots, routs, and assemblies, and seditious speeches . . . and insolent and insulting language of slaves to white persons" would be tried, and, if found guilty, would be "punished with stripes, at the discretion of a justice of the peace." A slave suspected of having harbored an escaped slave might be tried before a justice of the peace, and, if found guilty, whipped. No more than five slaves could meet at any one time on the plantation of any person other than their owner's unless they met for worship or "some other lawful purposes." Any white person or free black or mulatto found at an illegal gathering would be penalized as well. The white would pay a ten dollar fine, while a black or mulatto could receive up to thirty lashes ordered by a justice of the peace. Any justice of the peace could try slaves who stood accused of disrupting a religious service and punish them with thirty lashes he found them guilty (up from twenty

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[176] Missouri, *AN ACT amendatory of an act, entitled "An act concerning Slaves," approved 19th March, 183*, Laws (1841); Missouri, *AN ACT amendatory of an act, entitled "An act to enable persons held in slavery to sue for their freedom," approved 27th January, 1835* Laws (1841).

lashes as specified in 1832).[177] Some offenses did not specify jurisdictional authority, including permitting a slave to trade in alcohol; however, on the suspicion of any of the violations in the article, a grand jury was supposed to be empanelled, and, if appropriate issue a presentment. This would authorize the township justice of the township to "proceed thereon" in causes "cognizable" in a justices' court. Similarly, any person who engaged in an economic transaction with a slave without first gaining the owner's permission was liable to indictment by a grand jury. The revised code devoted several paragraphs to preventing whites from bringing into Missouri "any slave belonging to any person, not a resident of, or bona fide emigrant to, this state, shall be punished by fine, not exceeding two hundred and fifty dollars, to be recovered by indictment." The measure made exceptions for whites who traveled through the state with slaves, or who inherited slaves from persons who died while residing in other states. If a county peace officer or any white person discovered a slave wandering about, or working for someone without proof of having an owner in-state, he was to take the slave before a justice of the peace for commitment to the county jail.[178]

Such provisions served as public warnings to whites who might sympathize with slaves, but they had particular meaning for slave owners, who tended to resist what they considered to be nothing more than interference with their rights as household governors.

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177 Missouri, An Act concerning slaves, Revised Statutes (1845), art. 1, sections 3-4, 8- 9, 17-22, 25-26, 29, 33. Harriet Frazier describes an 1849 case in Cape Girardeau brought under the insulting language provision. The slave requested and received a jury trial and was found guilty; however, the ruling was appealed to the circuit court. Frazier believes that courts bothered with "such trivia" as a means of keeping slaves in their places. *Slavery and Crime in Missouri, 1773-1865* (Jefferson, NC: McFarland & Company, Inc., Publishers, 2001), 151.

178 Missouri, An Act concerning slaves, Revised Statutes, (1845), art 1, sections 3-4, 8-9.

Whites feared and abhorred sexual relations between white women and black men. Under 1845 Missouri law, sexual intercourse between black men and white women was punished with castration, "to be performed under the direction of the sheriff, by some skilful person." Castration was applied in cases where a black or mulatto attempted to rape or had raped a white woman, married or had sexual intercourse with a white woman, or escaped with a white woman less than eighteen years of age. The law says nothing concerning the legal status of the black or mulatto, leaving it to apply, at least in theory, to either a bonded or free individual. However, Missouri law usually used the word 'slave' when in references to slave conduct. A white person who had "assisted" a black or mulatto in the commission of such crimes was equally subject to castration.[179] By contrast, penalties levied against whites found guilty of the same crimes were between three and five years in the state penitentiary.[180]

Missourians were well aware of the potential danger of free blacks joining forces with slaves to commit violence against whites. Statutes sought to reduce opportunities and modify the legal status of free blacks to more closely resemble that of slaves. Mechanisms included laws to discourage residency and the right to own a weapon. Other law aimed to prevent transport of free blacks into the state. Justices of the peace held jurisdiction. In most instances, that meant that the offending black would be brought before a justice of the peace to be examined and tried, and, if found guilty, be thrust into jail.

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179 Ibid., CRIMES AND PUNISHMENTS, ch. 47, sections 31-32. Regarding free blacks' freedom to marry, I have not located a Missouri statute on that subject.

180 Ibid., sections 26-30.

In order to encourage free blacks to emigrate from the state, Missouri required free blacks and mulattoes to "obtain a license, or otherwise acquire a right to reside within the state." The license originated with the county court. The black had to pay a one thousand dollar bond and supply "satisfactory evidence" that he or she was qualified to receive a residency license. Once the license had been purchased, it did not remain with its owner but was left with the county court "for safe keeping." Any black who refused to surrender the license on being requested by a township or county official ran the risk of receiving up to thirty lashes, on the order of "any justice of the peace of the county."[181] Because the measure maintained silence on what it meant by satisfactory evidence of fitness to receive a license, county officials could exercise discretion in individual cases. Justices could refuse to allow a license for any reason, and, as the statute did not provide a mechanism for appeals, the applicant could not mount a legal challenge. The language of the law allowed county courts to act liberally or not; if feeling in the neighborhood ran high against the presence of free blacks, the county court had the capacity to respond accordingly. Statutes with the flexibility to allow justices of the peace to act with discretion worked in favor of local custom.

A license was issued on the recommendation of a respected white person. Without the reference (or some equivalent), there was virtually no chance for a free black to acquire a residency license to allow him or her to stay in the state. The language of the state law permitted local communities to determine, alone, what they would accept as satisfactory evidence of qualification for the license. The terms of state law, then, allowed justices of the county court and local residents to act in concert in interpreting

[181] Missouri, FREEDOM, Revised Statutes (1845), sections 7-11, 14-16, 18, 19, 22-29.

and enforcing the residency law. Recommendations followed no particular format and could be of any length. Sometimes a recommendation showed genuine compassion toward the petitioner. A. O. Nash wrote to the Marion County Court in February of 1852 regarding a black woman who wished to reside within the state.

> At the request of Peter Campbell (a fine man of colour) I make the following statement. His wife Peggy was born a Slave in Virginia co. and the property of my father Abner Nash. After the death of my father My Mother Emigrated to this State in the year 1832 and brought with her the Said Slave Peggy where the said slave has lived ever since and was sold in the year 1851 to Peter Campbell her husband. Peggy's character I can safety say to the Court is without reproach, she is Honest, Correct in Morals, and her disposition naturally mild & in every respect worthy under the Law to receive her final Papers & by complying with the Law to remain in the state.

A free black also required a license in order to own a weapon. The license presumably protected individuals' right to have a weapon in their possession. The weapons license was purchased from a justice of the peace, who could revoke the license at any time. If a white person discovered a gun or other weapon in the possession of a free black or mulatto, and the black could not produce a license, the black might be taken before a justice of the peace and tried. If the justice accepted the "proof" of illegal possession, the black or mulatto lost the weapon to the informant, who was permitted to retain it "for his own use." The statute presented two immediate problems for the owner of the weapon. First, the free black with the weapon needed to remember to keep the license on his or her person whenever carrying the weapon. Second, the fact that a justice might revoke a weapons license without cause made its purchase absurd in the first place. It not only encouraged whites to steal, but it also robbed the black man of a symbol of power and manhood that attached to all white men without question. In an important

sense, then, one of the achievements of the law was to emasculate free black men. The law forced blacks to purchase a county weapons license that failed to protect the privilege that it was supposed to deliver.[182] The ability of the county court to restrict free blacks' legal access to weapons enhanced its role as the keeper of local practices and norms.

Free blacks, unlike whites, could not expect their legal status to be recognized as a matter of course, and, in fact, state racial policy assumed that a black was a slave unless proven otherwise; thus, any unknown black entering Missouri was treated as a slave. For a free black, that meant that the first problem to solve was that of legal status.

> "It shall be the duty of every sheriff, constable, coroner and marshal, whenever he shall know . . . that there is in his county, . . . a negro or mulatto, not authorized to reside within this state, to apprehend such negro or mulatto, and take him before some justice of the peace. . . . Whenever any negro or mulatto shall be brought before any justice or other officer, such magistrate or court, unless satisfied that such negro or mulatto is a free person, shall commit him as a runaway slave."

If convicted of being a runaway slave, a free black or mulatto might receive twenty lashes of the whip and be fined court costs incurred in connection with the trial in justices' court. If the defendant did not pay, he or she was hired out by the county and the wages earned were applied toward costs. The measure did not provide guidelines for calculating costs, but left the amount to the discretion of the county.[183] Failure to specify amounts of fees left local authorities free to determine these sums, with the result that the defendant had no recourse if courts imposed unreasonable amounts. A convicted black thus might labor for an indefinite time in order to complete payment of court fees.

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182 Missouri, *An Act concerning free negroes and mulattoes*, Revised Statutes (1845), sections 2, 3.

183 Ibid., sections 23, 27, 29-30.

With the end of legal slavery in the United States, social patterns and labor usages dating from the slave era did not immediately die in Missouri. In Arrow Rock Township in Saline County, the population of blacks was reduced by thirty-six percent between 1860 and 1870, yet sixty percent of them continued to work in white households.[184] Blacks in some Missouri places formed groups of their own for self-protection and other purposes. In Saline County, where slave labor had been deemed essential to the county's economy, former slaves banded together to form a community called Pennytown [185] Violence against blacks continued. In New London, Missouri, for example, the black New London Christian Church, was subjected to harassment by whites who stood outside the church before services began on Sunday and insulted worshippers going inside. On other occasions, ruffians broke the church's windows and offended the women inside. Once, in October of 1869, a male passer-by took two shots at the main door of the church, fortunately striking no one.[186]

Prior to the Civil War, then, statutes concerning race and slavery consumed far more attention than any other dependency law. However, blacks and mulattoes were not alone in suffering "outsider" status enforced by law. Other dependent classes saw limits to their right to locomotion, to select their companions, and to control property.

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[184] Dr. Gary Kremer, "Life in Post-Civil War Missouri," presented before Friends of Arrow Rock, September 17, 2000. http://www.friendsar.org/postcivil.html Accessed March 17, 2010.

[185] Wilson Phillips, *Arrow Rock, The Story of a Missouri Village* (Columbia: University of Missouri Press, 2005), 72, 108.

[186] Gregg Andrews, "The Racial Politics of Reconstruction in Ralls County, Missouri, 1865-1870," in ed. with an introduction, Thomas M. Spender, *The Other Missouri History: Populists, Prostitutes, and Regular Folk* (Columbia: University of Missouri Press, 2004), 25-26.

Missouri's policies on dependency were not unusual. Other states took shifting attitudes toward the poor during the nineteenth century. In his study of social order in antebellum America, David Rotham discusses attitudinal changes toward poverty during the nineteenth century, beginning with the colonial era. Commenting on a tendency to associate poverty with cities, he notes that extreme poverty could be found in rural as well as urban centers.

> Americans in the antebellum era . . . gave unprecedented attention to the issue of poor relief. . . . Observers feared that paupers were draining the nation's resources, demoralizing its labor force, and threatening its stability . . . It was not the actual number of poor in antebellum society that logically and predictably altered the colonial perspective. Rather, nineteenth-century Americans judged the issue from a new viewpoint, so that he who had once been an accepted part of the community now became an odd and even menacing figure. . . . this was an agricultural society, and major causes of poverty were to be found in the low wages paid to the farm help, the seasonal layoffs, the absence of any protection against sudden disaster, illness or injury to those unable to purchase and settle a freehold of their own. [187]

Statutory law enacted in the 1820s indicated that Missouri was slowly working out changes in policies in provisions to care for poor persons and members of other dependent groups. The measure separated dependent persons from the general population, and, as is the tendency with institutionalization, reduced their rights. The initial act was a simple, straightforward measure to institutionalize disabled minors. Passed in 1838, the statute set aside two thousand dollars annually for the education of "deaf and dumb" children between eight and eighteen years of age at an asylum located

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[187] David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, (Boston: Little, Brown and Company, 1971), 154, 160-161.

in St. Louis County. The measure allotted forty dollars to the superintendent of the Carondelet Asylum for each pupil educated during the previous six-month period. Curiously, the law failed to specify standard subjects of instruction. The superintendent submitted a written report every six months, providing information on the condition of the place and general facts about the resident population. It does not appear that any audit was performed or that any inspections were scheduled or made: as soon as the report was submitted to the state's Auditor of Public Accounts, that official was to "draw his warrant on the Treasurer in favor of the superintendent of said asylum."[188]

Neighborhood courts were not called upon to act in this law. It is mentioned for two reasons. First, it initiated a particular strategy, which emphasized fiscal concerns over the rights and needs of the inmate population and was silent on any civil rights. Second, county courts were deeply involved in enforcement of subsequent dependency laws.

Elsewhere, in 1843, local courts were clearly present. The legislature passed a measure that clearly demonstrated the state's commitment to indoor relief, for instance. Lawmakers ordered county courts to construct and superintend institutions to house the poor and undertake responsibility for their care. However, counties received little guidance in terms of the content and quality of daily care. Each county was authorized to buy land to construct a poor house; levy a tax to pay building expenses, including labor and materials; appoint poor house superintendents; establish rules to govern inmates, supply inmates with materials for making products to be sold by the court for inmates'

188 Missouri, *AN ACT to provide for the education of Deaf and Dumb children, between the ages of eight and eighteen years,* Laws (1838).

support; appoint a person to handle the finances of the poor house; and replace superintendents as necessary.[189]

The logical next move was to simplify procedures regarding the welfare of dependent persons. Accordingly, in 1845, the legislature defined "[a]ged, infirm, lame, blind or sick persons, who are unable to support themselves" as poor persons within the meaning of the statute. The definition served as the most direct means of extending to all dependent persons the same legal status attached to the poor, an important state goal. The amended law made clear that the real problem was not the disability, which served as an excuse; in fact, a community's fiscal resources were always affected as a result of caring for dependent individuals.

During the session of 1845, the legislature enacted a private bill that effectively privatized the care of orphans.[190] If not the sole or primary purpose of the law, it established a legal entity with powers similar to those of a Missouri county court as guardian and overseer in the lives of poor and orphaned apprentices. The measure incorporated a home for orphans and named as its managers a private group of women, "Emeline Hough and associates." The statute authorized the corporation to accept poor and orphaned children into the home. Where a parent was still living, the home would accept the "surrender" of the child by the mother or father. Once under the authority of the orphan's home, a child was bound out to "virtuous families" until the age of eighteen or marriage. The statute did not indicate any physical location for the home, nor did it

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189 Missouri, *AN ACT to authorize the county courts of the several counties in this State to erect Poor Houses, whenever they shall deem it expedient*, Laws (1843), sections 1-6.

190 Missouri, *AN ACT to incorporate the Orphan's Home*, Laws (1845).

refer to buildings, grounds, or property that the corporation owned. If the corporation represented solely a legal entity, with no physical address, probably every child under its care received outplacement.

The arrangement sounds very like an indenture, although the word itself does not appear in the law. It is not clear how managers of the orphan's home would acquire the legal power to sign contracts of indenture and supervise placements in the manner of a county court. On the other hand, it may have made little practical difference, as the home's management could always fall back on the vaguely stated but "absolute" powers that that measure provided. Presumably, officers could remove a child from an unsatisfactory placement if his or her best interests suggested it, though the measure is silent on what might constitute reasonable care and support.

In addition to granting the "board of managers" entire control over its charges, the statute gives the board complete control over all income and disbursements. A key provision required the parent of a child under the care of the home to compensate the institution for "expenses incurred in his, her or their relief" if the parent wished to take the child back home. The law apparently operated throughout the state.

More than thirty years, state lawmakers appropriated money to support the Industrial Home for Orphan and other Indigent Children of Missouri. The home was to be run by the incorporated Widow's and Orphan's Home Society in Jackson, Saline County, where the projected institution would be built. The appropriations bill, which set aside $5,467, had followed legislation to establish the institution. Trustees were to provide "care, custody, maintenance and education of such destitute and indigent children as may not have the care, support and protection of a competent parent or guardian." The

grant of money seemed to be a one-time-only financial award. At any rate, there was no reference to a budget year or conditions for renewal of the grant. Release of the funds was conditioned upon acceptance by the Society of the real estate itself, which had been owned originally by the Society, then conveyed to the state. At the time of the bill's enactment in 1877 the state was "the owner in fee simple." The statute does not supply details regarding the children's care. It also leaves vague the meaning of "competent parent" and the mechanism for selecting children for placement in the home. Financing of the institution and title to the property itself are unclear. It is also unclear whether the Widow's and Orphan's Home had any connection with the Orphan's Home incorporated in 1845.[191]

There can be no question that the state's strategy made poor relief more efficient and likely less costly. County courts were centrally involved. They routinely made individual payments toward the care of dependent persons, either to the individual himself or herself, or to a caretaker. In a piece listing expenses of the St. Genevieve County Court for the year 1823, the *Independent Patriot* included $75 paid to a local pauper, while the same newspaper reported a payment of $36 to "Daniel Houser for supporting Desioa a deranged woman" and $25 to "Jonathan Johnson for supporting Matthew Hardin a poor person."[192]

Every time a county court disbursed such payments, it necessarily made an individual judgment in allowing the claim in the first place, and second, deciding the sum

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191 Missouri, AN ACT appropriating money to pay the accruing and necessary debts and expenses of the Industrial Home for Orphan and other Indigent Children of Missouri, and directing the conveyance of certain real estate to the Widow's and Orphan's Home Society, Laws (1877).

192 The name of the pauper is illegible. December 27, 1823; January 3, 1824.

to be paid. The county payments above provide only disbursements. We do not know whether a caretaker submitted a bill of sorts, named a sum that seemed reasonable, or whether court simply came up with a calculation of its own. The new poor house plan at least evened out support of dependent persons, treating them more or less equally. This is not to claim that paupers and other vulnerable members of the community received *better* treatment when institutionalized, though for some probably was true. Treating poverty as a primary category and other disabling conditions as sub-categories within it eased institutionalization of a larger population group, and using the single institution of the poor house was cost-effective.

The terms of the statute—" infirm," "sick, even "aged"—were sufficiently imprecise to create maximum utility for counties. Commitment to an institution was not the worst that could happen to a dependent person, of course, especially if he or she lacked family or close friends willing to assume the responsibility. From that standpoint, the Missouri policy recognized a communal obligation to care for its more vulnerable residents. On the other hand, if the statutory language is taken at face value, inmates of the county poor houses enjoyed very little, if any, freedom of action. They lived according to rules composed by the county court and had no effective means of refusing orders of the county-appointed superintendent, who possessed "power to cause persons kept at such a poor-house, who are able to do some useful labor, to perform the same by reasonable and humane coercion."[193] In practical terms, the state deposited into the hands of the superintendent and members of the county court powers not unlike those

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[193] Missouri, *AN ACT to provide for the support of the poor*, Revised Laws (1845), ch. 134, sections 1-3, 9-10.

enjoyed by slave owners. How inmates fared depended on county resources and the community's understanding of its obligations, filtered through the court, toward vulnerable residents.

A separate law of vagrancy was passed in 1845.[194] According to the statute, vagrants comprised "able-bodied" individuals found "loitering or rambling about," who did not work and lacked a visible means of support. A man was a vagrant who begged or had deserted his family and left them without funds. In addition, "[a]ll keepers or exhibitors of any gaming table or gambling device, and all persons who travel or remain in steamboats, or go from place to place, for the purpose of gaming are deemed and treated as vagrants."

Again, justices of the peace were centrally associated with controlling vagrancy. Suspected vagrants were arrested on orders of the justice of the peace and tried by jury in his court. The measure mandated a jury, which was to "inquire whether the person be a vagrant or not." The use of a jury suggests that neighbors of the defendant would be expected to be better acquainted with circumstances in the defendant's life than even the justice of the peace. Then, too, the justices' court was supposed to rule with fairness in mind, and the jury's knowledge would help ensure a more just result for the defendant. Upon conviction, the violator was hired out "at the court house door . . . for the term of six months, to the highest bidder, for cash in hand." Husbands and fathers who had deserted their families would have been a special source of anxiety to public officials for two reasons. First, a family that consisted of a woman and children, but lacked a husband and father, did not conform to the very popular image of the time of the pioneering

194 Missouri, AN ACT respecting vagrants, Revised Laws (1845), sections 1-3, 9-10.

family. Second, a man-less family was more likely to require financial assistance than a family with a man, and the money might have to come from the public purse.

While vagrancy violations do not crowd the records, they were fairly usual. In Cape Girardeau, a justice arrested Peter, a free black man, in 1832 on a vagrancy charge; in 1871, James H. Stewart, "a colored boy," was arrested and his case sent on up to the circuit court for trial.[195] If the vagrant were a minor, the offender could be committed to jail to wait for the next term of the county court, At that time, he would be placed in an indenture and taught a trade.[196]

Vagrancy apparently was a deeply shameful designation. In the late nineteenth century, attorney S. H. Water wrote to a friend concerning a few local cases, ending the letter with joking reference to an acquaintance by the name of Harkins: "I notified Harkins that if he did not leave town and County by 3 P.M. Saturday I would have him arrested as a vagrant & he left instantly."[197]

Vagrancy posed implications for the public cost of poor relief. Any person committed to the county poor house was supposed to be a county resident. By definition, vagrants wandered about and had no permanent home. Their place of residence, then, was uncertain: hence, the use of a jury to investigate the vagrant's circumstances. A vagrant who was committed to the county poor house was another fiscal burden on

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195 Justice of the Peace Criminal Docket Book, 1832-1889, Cape Girardeau Archive Center, Jackson, MO.

196 Missouri, AN ACT respecting vagrants, Revised Laws (1845), sections 1-5. We know that the statute excluded black minors, who under law could not be taught a trade.

197 George Ambrose, folder 1, R641, WHMC-UMR.

taxpayers, but a vagrant whose labor was hired out produced income for the county.[198] It was therefore as much a matter of economy, as one of justice, to take great care in deciding the future of a person charged with vagrancy.

Dependency could describe many conditions, not including insanity, which involved a mental deficiency rather than a physical disability or inability to show income. An 1843 law declared that county courts would determine cases of alleged insanity and authorized the presiding judge to convene a special term if necessary in order to try such cases.[199] Under that statute, a six-man jury in Carter County in February Term, 1868, found Mary Loyd "perfectly insain" on the basis of evidence presented by an examiner, and ordered her sent to the "State Lunitice Asylum."[200] Wealthy persons who were mentally unstable or those with wealthy connections probably were been cared for at home.

Apprentice law always had been designed to supply cheap labor to farmers and householders and control the movements of poor people, blacks, and other disempowered persons. Indentured apprenticeships differed from other legal statuses in several respects, notably the fact that indentures applied only to children. Additionally, the indentured servant eventually was released from his or her contract. A written contract described the terms, including the number and kind of gifts the worker would be given upon his or her release from the indenture, such as a bible, a little money, and some clothing. Here, as

198 Hendrik Hartog discusses settlement law and vagrancy in just these terms, pointing out the dilemma for a local jurisdiction if a proper determination of a person's residential status could not be made. "The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts."

199 Missouri, *AN ACT to amend "an act relative to insane persons"* Laws (1843).

200 Carter County Court Records vol. A 1859-1882, WHMC-UMC.

elsewhere, the state made the county court an active party to the indenture; indeed, without the signature of a county judge, the agreement was not binding. Masters were required to keep apprentices in Missouri, a requirement that facilitated judicial supervision. Where disputes erupted between masters and indentured servants, county judges decided the case. An apprentice could be moved from one household to another as well, if the court considered it advisable.[201]

Indenture contracts differed very little from one another. One typical document describes the terms to which William Houpt and his brother, six-year-old James Houpt, agreed in 1845 in Cape Girardeau County. The boy's father had died, and the guardian determined, with the approval of the county court, to apprentice both boys to a man named George Cramer, who promised to teach them cigar-making. Cramer also agreed to teach them

> to read and write & the ground rules of arithmetic the Compound rule & The rule of Three and at the expiration of their term of service shall give them each a new Bible two new suits of clothes to be worth forty dollars and one hundred dollars of Current money of the united States each and that he will not remove said apprentices out of the Jurisdiction of This State & that he . . . will constantly find and provide . . . Sufficient food raiment & lodging & all things necessary.[202]

Whether a situation was referred to as an indenture or as an apprenticeship was to some degree a matter of language. Indenture law when applied to white children, moreover, had precise features that did not necessarily apply in the case of black children.

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[201] Missouri, AN ACT concerning apprentices, Revised Laws (1845), sections 2, 8, 13-14, 21.

[202] Indentures, G. H. Cramer, Master of Wm. & James Houpt, Cape Girardeau County Archive Center, Jackson, MO.

The lists below represent children signed to indentures in Cape Girardeau County and Greene Count, respectively.

CAPE GIRARDEAU COUNTY INDENTURES[203]

Name	Age	Trade Taught	Year
Jesse Brent	14	farming	1840
John E. Briant	12	farming	1847
Washington Copeland	13	farming	1844
James Clubb	no age	farming	1848
Jane Clubb	13	housekeeping	1849
John Clubb	11	farming	1849
Andrew Jackson Estes	10	farming	1842
Lydia L. Estes	8	housekeeping	1842
Elizabeth Ford	10	housekeeping	1847
William Giles	11	miller's trade	1844
Jasper A. Glasscock*	no age	farming	1844
Tennessee G. Glasscock*	11	housekeeping	1845
Jenifer Glasscock	13	farming	1845
Mary Hoskins	?	housekeeping	1849
Michael Hoffstatler	no age	coopering	1847
Charles Houpt	10	brickmason	1845
James Houpt	6	cigar-making	1845

[203] Indentures, Probate Records, Cape Girardeau County Court, Cape Girardeau County Archives, Jackson, MO. All information was transcribed unedited from the original record.

William Houpt	8	cigar-making	1845
Albert E. Melton	12	farming	1841
John McCarty	19	carpenter	1844
Bozell McIntosh	12	farming	1842
Catharine Patterson	10	housekeeping	1849
Andrew Perdue	17	farming	1841
Rolen Perdue**	12	farming	1843
Miller Phillips	15	farming	1847
Henry Planert	12	farming	1847
William Henry Poe	"infant son of Simon Poe, De'd"	blacksmithing	1842
Andrew Priestly	10	"Art or Mystery of farming"	184
Thomas A. Punch	15	farming	1849
Julia Ann Sadler	9	housekeeping	1840
John W. Seavors	8	farming	1848
David D. Self (poor)	9	farming	1844
Jacob Self (poor)	15	farming	1844
Hesekiah Self (poor)	10	farming	1844
James Steely	15	farming	1841
Joseph Traller	16	farming	1847, 1849
Loid Odine Westoner (poor)	8	farming	1842

* Tennessee was the daughter, Jenipher the son.

** Rolen Perdue's mother, Ruth Hampton, placed him in the indenture.

GREENE COUNTY INDENTURES[204]

Race/sex	Age	Trade taught	Year
white boy	14	farming	1833
white girl	10	no trade	1833
white boy	12	no trade	1833
white boy	7	no trade	1833
white boy	5	no trade	1838
white boy	14	no trade	1839
white boy+++	16	tailor	1840
white boy, orphan	10	farming	1841
white boy, orphan	17	farming	1841
white boy, orphan	9	farming	1841
white boy	12	saddler	1840
white boy, orphan	11	farmer	1841
white boy	16	farming	1841
white boy	10	farming	1842
white boy	15	farming	1843
white boy	12	farming	1843**
white boy	9	farming	1844
white boy	1 yr., 9 mos.,	farming	1844 (August 7)

[204] Record of Indentures 1833-1854, no. 19, Greene County Archives and Records Center, Springfield, MO.

name Isaac Glover ++

white boy	13	farming	1844
white boy	11	farming	1844
white boy	15	farming	1846**
white boy	12	farming	1847*
white boy	10	farming	1847*
white boy	10	farming	1849
white boy, born 9-17 (18)-49		no trade	1850
white boy	11	farming	1850
white boy	11	farming	1850 (same boy as above, 3 months later, different indenture)

++ Baby son and heir of Jack Glover

+++ Consent of the boy's father given

"Children of colour—will teach them farming but not reading, etc."

black boy, 2 yrs., 5 mos., 9 days

black boy, 5 yrs., 11 mos., 6 days

black girl, 2 yrs., 5 mos.

White boy	14	farming	1853
White boy	7	farming	1853
White boy	5	farming	1853
White boy, bound out to a woman	17	illegible	illegible
White boy	3	no trade	1853 or 1854

Black boy	2	farming	1854

* Brothers

** Same boy; apparently earlier indenture didn't work out, or perhaps owner died

Most of the children were white. White girls were to be taught housekeeping, which was what most women eventually did, whether they married or remained at home. One black girl, two years and five months old, was to be taught farming, which was consistent with the tradition of putting slave women to work in the fields. In the meantime, the child would serve as a financial burden on the family. Most white boys were to be trained as farmers, though a few had opportunities to learn other trades—not so for the black boys listed, who faced futures as farm workers. It is difficult to imagine, in any event, that black and white boys spent their days doing other than as farm laborers—albeit learning all the while.[205]

Several children came from poor families; it is not clear why the fact of their families' poverty was recorded. Most of the children were old enough to work, but three white male infants, seemingly only a year or two in age, would cost money to support with no return for at least four or five years. Possibly they were accepted by family friends or relatives in order to ease the struggles of a surviving widow, if one existed. Duplication of family names suggests that all of the children of a family were orphaned at once or came from exceedingly poor families who saw no choice but to give them up to the county.

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[205] Indentures, Probate Records, Cape Girardeau County Court; Record of Indentures 1833-1854, Greene County.

No one knows how much work apprentices were supposed to perform and under which conditions, nor do we know how much education the white children actually received. Farming is hard work, and at the end of the day, it may have taken precedence over time with school books. There is no ready evidence, of course, that masters and mistresses would treat apprentices other than kindly or would neglect their duties toward them. If they did, the child could take his or her complaints to county justices.

Whether Missouri indentures were intended to serve farmers' needs for workers, or to provide care, education, and training in a trade, it is clear that county courts managed local labor markets in farming communities. In most instances, we do not know exactly *how* children came to the attention of the county court. Did families of some of the children approach a justice of the peace? Did a farmer or the cigar-maker, perhaps, mention needing a laborer or two? Children could be placed in indentures under provisions in the 1845 vagrancy law. It stipulated that a minor thought to qualify as a vagrant could be bound into an apprenticeship arranged by a county sheriff, at the direction of the county court, there to remain until the age of twenty-one.[206] Information about just how specific indentures and apprenticeships were arranged would help us to understand locations and movements of power in early rural communities.

Indentures acted as both social and labor contracts. The idea that the master or mistress would supply the type of care and attention expected of a parent is implicit in the terms of a typical contract. In addition, "the person to whom the apprentice is bound shall make an affidavit that he will faithfully perform the duties required by the indenture, and enjoined on him by law, which affidavit shall be endorsed on the

[206] Missouri, AN ACT respecting vagrants, Revised Laws (1845), sec. 6.

indenture."[207] Even with the protection that the affidavit provided, probably circumstances varied—possibly greatly—between one indenture and another. That information likely is embedded in family histories and correspondence, and accounts of local happenings.

A charge of unfitness could disqualify a parent from keeping a child and worked efficiently as a means of revoking parental rights. If the father of a family were deceased, and the mother deemed unfit, the child easily could be placed in an indenture. That was the case with William Alexander, thirteen years old, the son of James Murray, his deceased father, and Elizabeth Murray, who was said to have "suffered said child to grow up in habits of idleness without any visible means of obtaining an honest livelihood and abandoned all care of him." The boy entered into an indenture on November 21, 1868, "he having no guardian, and by his free will consent and choice of the said Wm. Alexander Murray, hath placed and Bound himself as apprentice to John H. Young . . .".[208]

It is difficult to know whether the charges against Elizabeth Murray were based in fact. What did it mean that she had "abandoned all care of him"? Had she turned him out of the family home? Had she discontinued supplying him with food and clothing? And what can one make of the boy's "free will consent"? A minor and thus lacking legal status of his own, he was caught between the county authorities, his mother, who, according to the indenture no longer wanted him, and his master-to-be. The terms of the portion of the indenture shown here hint at the difficulty of gaining definitive information about the lives of children pledged to indenture contracts and apprenticeships. On one

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[207] Missouri, AN ACT concerning apprentices, Revised Laws (1845), sec. 3.

[208] Greene County Probate Court, Greene County Archives, Springfield, MO

hand, the county may have taken dreadful advantage of Elizabeth Murray, in which case both she and her boy were poorly served by the law. But it is possible that she was the incompetent mother the county claimed her to be, and the indenture represented the best possible solution for the child for the moment.

Circumstances of black children placed in apprenticeships are unknown. They may have lost their parents (or at least the father), parents may have voluntarily relinquished their care, or they may have been taken from their families. As was true in the case of William Alexander's indenture, there is no record of a statement from a mother or father. Because Missouri statutes often were superficially race-neutral (in order to avoid charges of racism made by abolitionists and supporters of black equality), it is difficult to infer special injuries to black mothers from apprenticeship law. However, if white mothers (like William Alexander's) could be deprived of offspring due on highly subjective grounds due to provisions in Missouri law, black mothers must have been even more likely to lose custody of children. A statute in the revised code of 1845 addressed terms of apprenticeship for black and mulatto children. It prohibited masters from teaching "colored apprentices[s]" to read, write, or know arithmetic. "But," the measure declared, "he shall be allowed at the expiration of his term of service, a sum of money in lieu of education, to be assessed by the county court."[209] The provision emphasized the power of the county court to supervise features of an indenture and to order masters to make money payments in amounts decided by the court.

Following the Civil War, Missourians enacted law that allowed county authorities to take children from their parents with even less difficulty. An 1877 measure dealing

[209] Missouri, AN ACT concerning apprentices, Revised Laws (1845), sec.10.

with writs of *habeas corpus* facilitated placement of minor children in apprenticeships and minimized the difficulty of breaking up black and poor families. The law, "AN ACT to provide for the custody of minor children in proceedings in habeas corpus, between the parent of such minor and any person not the parent," enabled the court to award custody of a child to the parent upon issuance of a writ of *habeas corpus* "unless it appear that such father or mother has been adjudged according to law incompetent or unfit for the duties of guardian of such minor, or that such minor has been *legally apprenticed, or is legally held for violation of* law [italics mine]."[210] The statute does not mention the race or color of the parent or child, or the financial means of the parents, nor does it make an exception of race or financial status.

Legal powers of justices' courts and county courts as described above pertained to enforcement of measures directed to individuals' legal status as *social* beings. The power to license and regulate commercial ventures, on the other hand, affected the size and shape of the market place, and this authority resided with county courts of commissioners. County courts were not required to sell a license to all potential purchasers, so not every business owner or operator was assured of being able to sell his goods.[211] In licensing only businesses they approved, county courts managed communities' moral climates and minimized the influence of conniving entrepreneurs. Beginning with 1820, county governments received authority to tax ferries and billiard

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[210] Missouri, Laws (1877). The statute fails to state which court would have jurisdiction in a custody hearing in such an issue; presumably it would be a county court, but that is not certain.

[211] State legislators at times behaved compassionately if a person could not afford the necessary license. Legislators in 1843 passed bills to permit Archibald E. Conn, Moses Fuqua, and Andrew J. Shannon to peddle without a license. Missouri, *AN ACT to authorize Archibald E. Conn to peddle without license;* Moses Fuqua authorized on certain terms, to peddle in this State without a license; *AN ACT to authorize Andrew J. Shannon to peddle without a license*, Laws (1843).

tables,[212] retailers and peddlers,[213] auctioneers and sales at auction,[214] and sellers of wine and liquor.[215] In later law, clock peddlers and clock dealers were covered by the licensing requirement.[216]

Businesses such as billiard parlors and taverns had moral implications in which the public took an interest. Other commercial activity did not pose a threat to a consumer's moral values but could inflict harm by overcharging or offering shoddy goods for sale. Because licenses were valid only for six months, and often were accompanied by conditions, regulated businesses probably were more likely to be good neighbors than businesses unable or unwilling to meet requirements.

Protecting the neighborhood from dishonest business owners was a fitting task to engage the resources of the county court. But the licensing power held open opportunities for government officials to gain close knowledge of a business's operations, financial status, staffing, and so on. It is not suggested that county justices used their knowledge about local businesses improperly, only that the information was available and could be put to use. The power to license steamboats, for example, gave a county judge access to information concerning routes and passenger lists. Authority to license auctioneers and peddlers told counties the numbers and identities of independent sellers

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212 Missouri, *An Act taxing Billiard Tables and regulating Ferries,* Acts (1820), ch.. 31.

213 Missouri, *An Act imposing a Tax on licenses to retailers of Merchandize and Pedlers,* Acts (1820), ch. 40.

214 Missouri, *An Act to license Auctioneers, and impose a tax on Auction License and Sales at Auction,* Acts (1820), ch. 47.

215 Missouri, *An Act to licence and regulate Retailers of Wines and Spirituous Liquors,* Acts (1820), ch. 49.

216 Missouri, AN ACT concerning clock pedlers and clock dealers, Laws (1849).

in the neighborhood, a matter of some importance in terms of identifying vagrants and protecting the community from corrupt practices. The ongoing duty of a county court to collect taxes from a grocer put the grocer in a position of having to reveal how much he sold and provide a listing by item class, information that informed the court if the grocer habitually adjusted his scales to weigh short or misrepresented the goods he sold.

County courts spent a great deal of time with probate matters. In early Missouri settlements, where stable patterns of daily living relied upon factual knowledge of persons and events, county courts enjoyed advantages in administering testamentary law. Justices heard debt litigation that arose from the probate process, heard and usually approved administrators' regular reports of estate activity, named guardian for minor children, settled administrators' and guardians' annual accounts, and approving final distribution of assets. Most debt litigation was for the purpose of entering the indebtedness on the record and was not contested. Thus, the administrator of the estate of William Edwards, deceased, sued the administrator of the estate of Thomas L. Taylor, deceased in November of 1839 in the Saline County Court. The defendant waived notice of the Plaintiff's demand, and neither party requested a jury. Upon reviewing the evidence, the court ruled for the plaintiff, awarding $11.96 from the defendant's estate.[217] The case represents the usual outcome in litigation filed during probate of an estate.

While the economic effects of probate were obvious, personal relationships could be deeply involved in estate settlement. Henry Achtermann died in 1869 in what was ruled a hunting accident while turkey-shooting with friends. The shooter William Hager, probably was related to the justice of the peace, also named William Hager, who ruled

[217] Minutes, Saline County Court, 1839-1846, 1863, 1864, 1865, C18976, microfilm, Missouri State Archive, Jefferson City, MO.

that the shooting was accidental. Achtermann's estate entered probate the following year, 1871. While the identity of the original administrator is not known, the administrator *de bonis non* (who assumes the office of administrator if the person firs named does not complete the administration process) was William Hager. Whether that individual was Hager, the shooter, or Hager, the justice of the peace also is unknown. In any event, it is likely that the county and township, where Achtermann had made his home, accepted the finding of accidental death and Hager's innocence in the tragedy. At least the portion of the population that composed the community's elite probably accepted Hager, who clearly was a member of a more leisured class than some. [218]

Family members did not always disagree on money aspects of estate settlement. In 1842, Wylie Abernathy, resident of the county of Cape Girardeau, died. His widow, Sarah, (who served as guardian to her children) renounced her right to serve as administrator in April of that year and allowed Robert Taylor to serve in her place. Two years later, almost to the month, Sarah signed a receipt for $106 received from the estate, noting that the money included $76 "taken at the appraisement by Widow." It appeared that she was satisfied with the settlement—until 1845, when she joined litigation over the estate with her children, claiming rights to a slave named Ned. In 1846 Sarah requested a ruling against Taylor, on the ground that "said administrator on his final statement claimed and obtained vouchers for the sum of one hundred and seventy dollars to which he was not entitled and for which there is no voucher and the (illegible) amount allowed to the administrator is excessive the amount allowed to the administrator for estate

[218] Probate Index, Cape Girardeau County, Box 83, Bundle 1537, Cape Girardeau Archival Center, Jackson, MO.

services is excessive and unjust. The settlement of said administrator is erroneous and defective." [219]

The social order in a relatively highly populated society can be complex, as well as difficult to maintain. A society may use several tools to control arrangements so that order and the values and interests of the ruling class will prevail. In nineteenth-century Missouri, the type of orderly society favored by many whites depended upon imposing an impaired legal status on blacks. Key elements of secondary status were extended to other categories: paupers, crippled persons, and so on. More positively, order also relied upon straightforward and honest businesses to serve communities, on the ethical settlement of estates, and on provision of proper care for children. Many duties of the justice of the peace in the neighborhood were associated with enforcing the social order. The social order, in turn, helped to determine the content, boundaries, and effects of economic transactions.

[219] Spelling of the family name appears as Abernathie and as Abernathy. Cape Girardeau Probate Files, Wylie Abernathy, decedent,1842, Box 91, bundle 827, Cape Girardeau County Archive Center, Jackson, Mo.

CHAPTER IV

THE ECONOMIC ORDER

Great optimism accompanied Missouri's transformation from territory to state. Immigrants came in waves, particularly following the end of hostilities in the War of 1812. But with the Panic of 1819, the flow of wagons heading west thinned, land prices tumbled, and some "town sites became fields again." [220] Merchants faced demands from eastern creditors to pay for goods bought on credit, while farmers sat with crops they could not sell. Some immigrants from Kentucky and Tennessee felt too discouraged to stick it out and returned home. Good times returned in the mid-1830s, but periodic panics and political events produced uneven economic conditions that persisted for decades.[221]

Missourians' early struggles were profoundly affected by two judicial entities, the justices' courts located in townships and county courts of commissioners. These bodies held broad powers which enabled them to influence local and county economies to a significant degree. In township justices' courts, judgments in actions of debt often allowed creditors to collect money owed them; if the debtor did not pay, the court frequently seized assets to satisfy the judgment. County courts of commissioners, meanwhile, carried out responsibilities with long-term and short-term effects on the economic health of communities and individuals. Justices on county courts negotiated contracts for public projects, facilitated the supply of laborers to local residents, regulated

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220 Dorothy B. Dorsey, "The Panic of 1819 in Missouri," in *Missouri Historical Review* vol. 29, no. 2 (January 1935): 79-91.

221 Dorothy B. Dorsey, "The Panic and Depression of 1837-43 in Missouri," *Missouri Historical Review* vol. 30, no. 2 (January 1936):132-161.

businesses, supervised administration of the estates of deceased persons within the county, and more. County courts maintained their functions throughout the century, with the exception of probate authority which shifted erratically over time and came to rest in 1877 in a system of newly-created probate courts.[222]

In 1819, one observer watched immigrants as they passed through St. Charles day after day, proceeding across the Missouri River on the ferry. "As many as one hundred people per day," he noted, "as many as nine wagons at a time, harnessed with from four to six horses." The land was well worth the struggle. A German official who came to see for himself claimed that "the ground is so black from the humus that has accumulated since primitive times, that it seems one were walking on beds of coal."[223]

Missouri offered prime agricultural assets.[224] Cattlemen said that Little Dixie's "lush grazing lands" were "superb;" its soil was excellent, so rich in quality that a farmer could grow crops indefinitely, according to local lore. The *Missouri Democrat* crowed, "For corn and small grain it may be truly said that the whole of Missouri, with the exception of some of her mineral regions, is admirably adapted."[225] The boot heel region of the southeast was better known for timber and mineral deposits; Cape Girardeau, in fact, sits on a bed of marble. Counties in the southwestern portion of Missouri belong to the Ozark region, with "rich and beautiful prairies in the western areas and timber land with a clay soil on the east." That region, too, was rich in various minerals. One scholar

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222 Missouri, AN ACT establishing probate courts, Laws (1877).

223 Atherton, "Missouri's Society and Economy in 1821, " 5.

224 Fully eighty percent of immigrants in 1821 intended to turn to agriculture to provide sustenance. Ibid.

225 October 29, 1858.

called them "inexhaustible. The Iron Mountain alone," he added, "would supply the world with iron."[226]

Regardless of where pioneers chose to settle, the first task was to find land. Settlers sought water for household use, animals, and transporting goods to market; and wood, for construction and fuel. A nearby spring usually provided enough water for the house and farm, and, before the advent of steamboats in the mid-1820's,[227] market goods could be sent downstream on a flatboat. Wood was used in "houses, bridges, plant roads, fuel, fencing, hinges on doors, curbing for wells, door latches and . . . chimneys."[228]Settlers bartered goods and services, and worked together to reduce the need for hired labor. Animals—horses and cows and hogs—ran wild; farmers coaxed hogs back home with corn when butchering season began; cows returned "regularly" to care for fenced-in calves, and horses seemed to make their way back naturally.[229] In case an animal failed to return, farmers marked them in some fashion to prove ownership.

In general, farmers were limited to subsistence farming for the first few years, but when they succeeded in producing a surplus to send to market, transporting goods was difficult. If a farmer could not send goods by water for one reason or another and was forced to use land routes instead, an immense struggle ensued. The mud was miserable,

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226 R. Douglas Hurt, *Agriculture and Slavery in Missouri's Little Dixie* (Columbia: University of Missouri Press, 1992), 138; R.. A. Campbell, ed., *Campbell's Gazetteer of Missouri from Articles Contributed by Prominent Gentlemen in Each County of the State, and Information Collected and Collaged from Official and Other Authentic Sources, by a Corps of Experienced Canvassers* (St. Louis, R. A. Campbell, Publisher, 1875), 103-104, 216,582; *Marshall Democrat*, October 29, 1858.

227 The first steamboat in Missouri, the *Independence*, left St. Louis bound for the little town of Franklin in Saline County, arriving on May 28, 1819. Frank Clinton Barnhill, *History of Freemasonry in Saline County* (n.p.: Missouri Lodge of Research, n.d.), 6.

228 Atherton, "Society and Economy," 15.

229 Ibid.

and roads existed in name only; even state roads "cannot even be likened to modern-day Missouri dirt roads." Travelers often carried axes in order to cut down trees, if necessary, so that they could get through.[230] As for the appearance of early settlements, one historian claims that, in 1821, most towns and villages were remarkably alike in design and architecture; Franklin, Missouri looked like "a miniature St. Louis."[231] In St. Charles County, the earliest buildings were "a cross between 'hoop cabins' and Indian bark huts." Later, when there were enough men in the neighborhood to raise a log cabin, those became the style.[232] Women helped; certainly they did their share of heavy labor, such as cutting down trees, taking out tree stumps, splitting logs, and "building homes."[233]

Missourians' family records are filled with the remarkable experiences of the women and men who settled the state. An account of the survival of Joseph Rountree and his family, who helped to found the town of Springfield in southwest Missouri's Greene County, reads like an exotic tale. They arrived on January 16, 1831, a cold time to begin a new life. The nearest railroad was in Rolla, 120 miles away; to reach it, a person in Springfield was obliged to use "a rough, rocky wagon road, up and down hill" over the Ozark Mountains. The family was able to produce plenty of food on the family farm, but there was very little money. Wheat was hand-cut, put up into bundles, and the sheaves thrown upon the barn floor to be threshed by running horses. Shoes and boots were made by the local shoemaker, but were not intended to fit a specific pair of feet. For light and heat, the Rountree family had tallow candles and a fire in the large kitchen fireplace.

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230 Ibid.

231 Ibid.

232 Paul R. Hollrath, *History of St. Charles County, 1765-1885* (n. p, n. p., 1997), 9.

233 Robyn Burnett and Ken Luebbering, *Immigrant Women in the Settlement of Missouri*, (Columbia: University of Missouri Press, 2005), 24.

Everyone worked on the farm, cutting hay with a scythe and grain with a cradle. The family raised cotton, sheep for wool, and flax for linen, which the Rountree women spun and wove into cloth for the family's clothing. The men and slaves were responsible for cutting and harvesting grain. While they lacked luxuries, the family had a sufficiency, which permitted them to keep their store purchases down to salt, coffee, and sugar, and a few dyes for textiles.[234] Even in especially small settlements, people could buy groceries and perhaps a few manufactured items, paying the merchant with crops, beeswax, meat, tobacco and other goods.[235]

Missouri was a slave regime; hemp and tobacco growers in Saline County and other counties within the region known as Little Dixie succeeded with labor provided by a large slave labor force.[236] Elsewhere in the state, where farmers did not use slave labor, pioneer families worked to establish productive farms. Their first priority was to grow enough food for the family's consumption, but they also kept an eye on the market. Availability of labor was an obvious and ongoing concern. County courts occupied a position to supply residents with workers through its superintending role with respect to indentures. But counties also took the lead in the planning and construction of roads and the transport of goods, and they also provided cost-effective care for persons within the

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234 Rountree Family Papers, R325, Western Historical Manuscript Collection, University of Missouri-Rolla.

235 Atherton, "Missouri's Society and Economy in 1821," 22.

236 Planters in Louisiana and Mississippi first used hemp rope to tie bundles of cotton for shipment to market. The practice spread to west to Kentucky, and Kentuckians who emigrated to Missouri raised hemp as a commercial crop. During the 1840s, hemp became a major crop, and by the 1850s, hemp brought $200 per ton. Excess product on the market, , lack of currency, bank failures, and the poor quality of much of hemp that was being shipped contributed to a permanent decline in hemp as a major agricultural crop. But hemp was a profitable crop for many planters in Little Dixie who raised it as a large-production crop with the use of slave labor. Hurt, *Little Dixie*, 103, 120-121, 123.

community who lacked visible support. Township courts operated by justices of the peace contributed to the health of local economies in the settlement of debt. Justices of the peace resolved disputes in debt and in other civil causes, such as the recovery of widow's dower; compensation for damages in instances where slaves were injured; injuries to farm animals; and other causes.

Justices' courts specialized in minor civil actions involving sums up to $150.[237] In nineteenth-century Missouri outposts, people sued to collect small sums of money, at times as little as a dollar or two. In an 1824 case filed in Callaway County, to example, a landlord sued a tenant for $1.83 in rent; when the tenant lost, he requested an appeal and it was granted.[238]

When a plaintiff filed suit in a justices' court to recover a debt and won, the judgment required the defendant to pay and normally to assume court costs as well. If the defendant could or would not pay, the usual procedure was to issue a writ of execution in order to permit the sheriff or constable to conduct a search for saleable assets.[239] When there were no assets, either because the defendant owned no property or had left the country with his or her possessions, litigators were disappointed. That was not always the case, however; often assets were located to satisfy the judgment. On other occasions, a defendant waited a few weeks or months before paying the judgment. W. H.

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[237] Missouri, *AN ACT to amend an act entitled "An act to establish justices' courts, and to regulate proceedings therein,* Laws (1841), sec. 7.

[238] Missouri, Callaway County, Cote Sans Dessein Township, Justice of the Peace Docket Book, 1816-1817, 1821-1827, C0966, Western Historical Manuscript Collection, University of Missouri-Columbia. The justice of the peace was William H. Dunnica.

[239] Missouri, *AN ACT to amend an act entitled "An act to establish justices' courts, and to regulate proceedings therein, Laws* (1841), sections 4, 6, 7, 8. 10; Missouri, *AN ACT supplementary to an act entitled "an act to provide for the recovery of debts by attachment,"* Laws (1838).

Duffield waited a full two months to collect his $4.12 ½ cents from James Tuggle in a debt action filed in April of 1843 in a Ray County justices' court. Unhappily, Duffield had mislaid the original account, which encouraged Toggle to request a dismissal. Instead, Judge William Berry allowed a continuance to give Duffield time to locate the missing paperwork. Whether he found it or managed to persuade the judge without proof is not indicated, but judgment went to the plaintiff and was paid in full two months later.[240]

The recovery of assets carried weight in a society where ready money was in extremely short supply.[241] By the late 1820s, most specie in circulation was brought back on the Santa Fe Trail, with the Mexican dollar and bullion serving as "almost the only source of hard money in Missouri in the years preceding the panic[.]"[242] Justices' courts could not manufacture money, but they were able to use the coercive powers of the state to compel payment of debt and thus liberate money for circulation. When a debt was paid, either because the defendant paid or the sheriff seized assets in satisfaction of the judgment, plaintiffs had more money to purchase needed goods, save for hard times, or help another.

Debt actions in nineteenth-century Missouri varied in amounts claimed as owning, categories of debt, and disposition of cases. Debt was ubiquitous on the frontier;

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240 W. H. Duffield against James Tuggle, Ray County Justice of the Peace Docket Book, 1836-1851, C1215,Western Historical Manuscript Collection, University of Missouri-Columbia.

241 M.. M. Parsons wrote to Abiel Leonard in June of 1832 that he could not send the money that he owed Leonard because "the greater part of the money was in the hands of my father and he was absent." It is difficult to appreciate the physical nature of money in that era and the correspondingly tenuous nature oftentimes of financial transactions. Availability of cash was affected by early law that prohibited circulation of private notes. Abiel Leonard, papers, folder 320, C1013, Western Historical Manuscript Collection, University of Missouri-Columbia; Missouri, An Act to prevent the circulation of private Bank notes, Acts (1820).

242 Dorsey, "The Panic and Depression of 1837-43 in Missouri," 135.

owing money and being owed were normal, everyday conditions. Few settlers could weather the first years without borrowing, and there were plenty of people willing to lend. Charles Matthews of New Madrid County found debt to be a very good thing. Matthews "knew New Madrid County well. He was born and raised there, and he knew the land. He concentrated on making loans to the farmers in that county and secured his loans by taking a mortgage on the farms. He found it could be as lucrative to loan money on those farms at rates of 8 to 10 percent as to own the farms himself."[243] Matthews was not alone in using debt to make money. Willis and James Hughes of Ray County were plaintiffs in debt actions throughout the 1830s and 1840s. They, too, did well in the money-lending business.[244]

It is possible to discern few substantial patterns in Missouri debt litigation. Specific townships provide examples. Out of sixty-five money suits filed the month of April in Byrd Township (Cape Girardeau County) between 1818 and 1842, sixty were resolved in the justices' court. Winning plaintiffs often waited months to collect. The Byrd Township court often issued more than one execution: two and three writs of execution on the same judgment were not unusual, and executions frequently were stayed for a month or longer—even where the sum owed was merely a few dollars. Of ten suits filed in April, 1830, the debtor in one case did make a payment until July, in another case, the debtor paid in August, and in a third case, in September. A litigant won a suit to collect $2.50, but the court was forced to issue two executions in order to get the

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243 Edward C. Matthews III, *Matthews: the Historic Adventures of a Pioneer Family* (n.p., Southeast Missouri State University Press), 64.

244 Ray County Justice of the Peace Docket Book 1836-1851, Justices P. Ewell, W. Berry, and W. L. Bransford, C1215, Western Historical Manuscript Collection, University of Missouri-Columbia.

judgment satisfied. Another plaintiff won a suit for $4.50, but payments were spread over several months, with $2 in May, $2.37 ½ in June, and $4.37 ½ in August. Immediate satisfaction of a judgment was rare. In a jury trial over a debt of twelve cents, the defendant apparently paid immediately on judgment. In two suits filed in April, 1830, one for $20.50 and the other for $10, judgment was satisfied immediately.[245] Obviously it was easier to win an action of debt than to collect on it in Byrd Township.

These suits involved various sums of money, outcomes, and types of debt. Suits were based on open debt, note, due bill, account, due bill, and assumpsit. Sums ranged from $90.75 (April, 1833) to twelve cents (April, 1818). At times, the court awarded not only the sum of the debt, plus interest and court costs, but damages as well. In litigation held in April, 1833, the plaintiff sued for $90.75 owed on a due bill; the first execution was issued in April, the second in May, the third in July, and the fourth in April, 1834, at which time the case was sent onto the circuit court. In one suit from 1833, the plaintiff was forced to accept in payment "a Book of the Gospel . . . one epaulet, and also . . . two beds."[246]

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[245] Ed., Catherine Stoverink, *Abstracts and Index of the Docket Books for the Justices of the Peace Byrd Township, County of Cape Girardeau, State of Missouri* (Jackson: Cape Girardeau County Archive Center, 2004).

[246] Ibid., vol. 1, Docket Book of Zenas Priest, J.P. 1805-1820; vol. 2, Docket Book of Peter R. Garrett, J.P., Frederic T. Overfield, J.P., A. H. Brevard, J.P., Jeremiah Ranney, J.P., 1828-1839; vol. 111, Docket Book of John W. McGuire, J.P., Alread Wheeler, J.P., W. J. Cline, J.P. Cases were drawn from April of each year for the years selected. If a justice could not locate assets within the township where he held jurisdiction, he forwarded the paperwork to the circuit court, which searched for attachable assets elsewhere in the county. Judging from instances in which multiple executions were issued, it is likely that plaintiffs were not desperate to collect money owed in all instances, and were prepared give the debtor plenty of time to pay. The Byrd Township debt actions suggest that it would be unwise to infer from litigation that a debtor was necessarily in trouble financially. Debtors may or may not have been financially distressed; plaintiffs may not have pressed debtors very seriously to pay up; and depth of feeling over debt litigation appears to have had little or nothing to do with the amount owed.

Nineteen suits were filed in the Byrd Township court during the month of April, 1818, almost twice as many as in April of the period through 1842. Six cases were filed in April, 1830 and ten in April, 1833, and only one in April, 1834, and that one was continued because the justice failed to come to court. It is difficult to know whether the diminishing number of money suits filed reflected economic conditions or other factors. In Missouri, 1833 was a period of hardship, as it was in many places. But in 1818, settlers were pouring into Missouri and times were promising; the large number of suits filed may point to a large number of money transactions, rather than a distressed economy and subsequent poverty. Other than a decrease in the number of money actions filed in Byrd Township over a (roughly) thirty-year period, and slow payment of judgments, with defendants paying over a period of months (if at all), few patterns reveal themselves.

Throughout nineteenth-century Missouri, creditors also sued over unpaid promissory notes, open accounts, and book accounts. They sued for damages. Nephews sued uncles, and sons and daughters sued fathers. Neighbors sued neighbors. Businesses sued customers. Debt cases dominated the dockets of justices' courts. Of over 100 cases heard between 1841 and 1848 by Virgil Pratt, justice of the peace for Maidenkirk Township in Scotland County, most dealt with debt.[247] Of roughly 200 civil actions filed between 1821 and 1865 in a single township in Cape Girardeau County, the vast majority consisted of debt litigation. These included several cases of debt with damages, one case of unpaid rent, one debt action filed to recover house rent and the hire of a "mulatto boy," several attachments, book accounts, and unpaid notes.

[247] Justice Docket, Scotland County, Missouri, Maidenkirk Township, C1245, microfilm, Western Historical Manuscript Collection, University of Missouri-Columbia.

Personal standing in the community had little to do with status as a creditor or debtor. Willis R. Webb, a resident of Byrd Township during the 1830s, was a litigant twenty-four times in debt or debt-related actions in the township justices' court between August of 1830 and June of 1839. In every instance but one, he was the defendant. The sums that he owed ranged from one dollar (two cases, once in August 1830 and again in December 1831) and fifty dollars (December 1837). He was sued by individuals, business firms, and estates.[248] Each time Webb was sued, the judgment was satisfied in full (with one exception, and that outcome is unclear), at times following a delay of a month or two, at times immediately. Obviously Webb was not a pauper; he owned property of some sort, and the property he owned was sufficient to pay off his creditors. Webb was not always in debt; in fact, for about three years, between 1834 and 1837, his name was absent from the docket books for the court.[249]

Webb's neighbors had to have known the state of his finances and his paying habits, as dates of the law suits indicate he was a resident of Byrd Township for at least nine years and was sued on an average of almost three times a year. No doubt residents talked about Webb; in a small town, it would have been odd if they had not. People many have extended credit to Webb because his pattern of debt was not unusual in the community at that time. It is possible, too, that extension of credit or cash was regarded less as a transaction with the power to alter status and personal relations, than as a courtesy between neighbors, perhaps a momentary matter of convenience. If that is so, it might help to explain why people were willing to lend or borrow and why trials for debt

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248 *Abstracts and Index, Justices of the Peace, Byrd Township*, 42, 46-47, 51-53, 56, 62, 67, 69, 97, 104, 110, 121, 126-127, 129, 132.

249 He may have been absent from the area, of course.

produced so little animosity. Moreover, people may have known that he was good for the money, eventually, and that his creditors would profit in the end.

People *did* gossip about others' financial affairs, seemingly with little encouragement. A brother of Abiel Leonard, M. Leonard, wrote to Abiel on May 2, 1841 concerning some hogs that he had sold the previous autumn. The purchaser, William M. Harris, still owed him money for the hogs, and friends of Leonard, Colonel Briscoe and Henry Coram, accosted him on the subject in a meeting arranged for that purpose. Harris gave the two men the impression that he lacked funds and could not borrow money to pay the debt, but, wrote M., "From what Briscoe & Coram could learn it appears that his neighbors think him perfectly able to pay his debts but that he is a hard man to git money out off."[250] In a situation such as this one, where there is outright intent to defraud, neighbors expressed moral disapproval and did what they could to help the party who had been hurt in the exchange. Leonard's friends knew Harris' capacity to pay because people who lived in the place had their own view of what was just determined to help right the wrong that Harris had committed.

But not everyone could repay a debt. In Missouri's frontier settlements, only a few people owned very much property. Banks did not exist in the state until 1836, and an early attempt to establish state loan offices as substitutes for banks was unsuccessful.[251]

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250 Abiel Leonard, Papers, folder 155, C1013, Western Historical Manuscript Collection, University of Missouri-Columbia.

251 State banks failed very early in Missouri history, and a subsequent attempt by the state legislature to create a common source of currency fell before a federal ruling. The validity of Missouri loan office certificates was called into question in *Craig* v. *Missouri* , 29 U.S.4 Pet. 410 (1830), in which a majority of the U.S. Supreme Court under Chief Justice Marshall ruled that the Missouri law authorizing establishment of loan offices throughout the state violated the federal constitutional prohibition against emitting bills of credit. http://supreme.justia.com/us/29/410/case.html. The Supreme Court decision was only the final blow. According to Dorothy B. Dorsey, loan office certificates "were discredited almost as soon as issued,

If local people lacked cash to pay their debts, it was because there *was* very little in circulation. The fact of being a defendant in a debt action was not proof that a person was habitually over-extended, lacked the sense to manage money, or could not be trusted; it meant only that the defendant owed money to another party who had decided to sue to collect. Poverty was seldom a permanent condition. Indeed, a person's fortunes could change drastically in the space of just a few years. Joseph Burden of Greene County, Missouri, for example became a wealthy slave-owner within a brief period. Between 1851 and 1856, his personal wealth almost doubled; where he had owned only six city lots, by 1856, he was paying taxes on 69 acres.[252] Sidney Ingram, also a Greene County resident, owned one horse and one mule in 1833, for a total value $126. By 1834, Ingram had only the horse. One year later, however, he owned taxable property consisting of a slave, one horse, one cow, and a watch, for a total value of $475. Ingram had a very good year in 1843 as the owner of four slaves, two horses, ten cows, a watch and real estate in Springfield worth $450. The slaves alone were valued at $1300, and total property owned at $3628. He had died by 1851.[253]

Litigators were not above manipulating sums in order to put a law suit under the jurisdiction of a justices' court. Robert Barnes probably was an attorney, judging from the language in his letter to Abiel Leonard in 1832. Barnes was representing a slave owner named Simpson against a steam boat company and its captain. Apparently a slave owned by Simpson had worked on the boat until it had burned, but had not been paid for

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with the result that the currency situation, instead of being improved, was, if anything, made worse." Dorsey, "The Panic of 1819 in Missouri," 88.

252 N.A., *Greene County Tax Assessor's List 1851-1852,* (Springfield: Ozarks Genealogical Society, Inc., n.d..), 11, 146.

253 Ibid., 12, 60, 72, 110.

his labor. Barnes directed Leonard to collect the man's wages and forward them to him. "If it should be necessary to commence a suit in this case (as I suppose will be the case), I suppose it would sooner be collected by bringing it before a Magistrate [justice of the peace], and if the amt is too large for that course, you enter a credit of $2.20[.]"[254]

Defendants in debt actions seldom protested creditors' claims, and, indeed, postponing payment until the creditor filed suit to collect was one way to avoid payment. The strategy was not unique to Missouri; in early Connecticut, too, debt litigation was seldom contentious, as Bruce Mann discovered: "debtors never contested more than 10 percent of the actions on written instruments entered against them. . . . Instead, they appeared in court and confessed judgment against themselves, or they did not appear at all and allowed judgment to go against them by default."[255] Postponement of payment appears to have been the case in two actions filed by Samuel Hahn in the Holt County justices' court over the winter of 1851-52. In the first action, John Masters, a resident of Lewis Township, was sued for $2.00 in late 1851. The money was the amount of his subscription toward construction of a bridge in the township; he lost on a default judgment, was served with an execution, and paid in full on January 6, 1852. In a second case, Hahn sued U. Z. Bozarth for his $2.00 payment. After receiving credit for $1.50 that he claimed as a setoff, Bozarth paid in the remaining fifty cents immediately after the trial ended.[256]

A debtor who failed to pay on time, however, was not necessarily dishonest or putting the money toward a different purpose. An agricultural economy is helpless before the effects of nature, and Missourians' encounters with disaster came and went throughout the nineteenth century. Cholera passed through Missouri periodically and always took a toll on farming families. It first appeared in 1832 and 1833. A week after

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254 R. A. Barnes to Abiel Leonard, Abiel Leonard, papers, C1013, folder 63, Western Historical Manuscript Collection, University of Missouri-Columbia.

255 Mann, *Neighbors and Strangers*, 39-40.

256 Samuel Hahn against U. Z. Bozarth, Samuel Hahn against John Masters, Holt County Justice of the Peace Docket Book, 1845-1852, C12020, microfilm, Missouri State Archives, Jefferson City, MO.

its first appearance in 1833, people began to flee their homes, and hundreds died.[257] Six people died from cholera in the town of Marshall when the disease appeared in Saline County in the summer of 1849. The summer of 1854 was the driest summer in Missouri history; in Saline County, no rain had fallen during the entire previous season and the corn crop across the state was ruined.[258]

Greene County farmers suffered badly in 1857 from the failure of crops the previous year. In the spring, lack of cereal grains produced famine which throughout the Missouri Ozarks. Indeed, in Ozark County, the spring term of the circuit court was canceled because there was not enough food in the town to feed the judges, attorneys, litigants, and usual crowd of onlookers.[259] Throughout these early decades, manmade

[257] "Cholera of 1833," Welcome to Marion County, Missouri: Part of MoGenWeb, http://www.rootsweb.com/~momarion/cholera.htm.

[258] William Barclay Napton, *Past and present of Saline County Missouri* (Indianapolis: B. F. Bowen & Company, Publishers, 1910), 132-133.

[259] *History of Greene County*, 245.

troubles also held Missourians back, including lack of a steady operating currency and[260] imprudent land speculation.[261]

Rather than gamble on collecting the full amount of a debt owed, plaintiffs at times settled out of court. However, this need not mean that the act of filing a law suit served no purpose. The prospect of a trial brought the parties together in the same physical space, thus affording them an opportunity to discuss the situation and seek an alternate solution. Consider two debt actions from 1870, in one of which the plaintiff charged a neighbor with taking a pony which the plaintiff claimed as his own property. The constable seized the horse, returned it to the plaintiff, and ordered the defendant into court; once they met, the parties settled "by Plaintiff keeping the horse and paying the costs of the Justice and constable and defendant paying the Witnesses which was allowed by this Justice." The other case was "an account of $15.42 for suit by attachment against James G. Reed and a [*sic*] attachment . . . made returnable on T2 [second] day of

260260 At the first session of the General Assembly in 1820, lawmakers enacted legislation prohibiting circulation of private bank notes, in order to prevent private banks and business concerns from making and passing their own paper currency. The state was suffering badly from delayed effects of the Panic of 1819. In a letter printed in the *Missouri Gazette*, a citizen, speaking of the county tax collectors, asked "where is the money to come from to pay the tax as well as other debts—every species of circulating medium having disappeared? That broom of destruction, the sale of public lands, has swept off all of our currency, and our private land rights remaining unconfirmed, are of no value. . . This is the beginning of woe! Missouri, An Act to prevent the circulation of private Bank Notes, Acts (1820);. Dorsey, "The Panic of 1819 in Missouri," 86. Western states suffered generally due to an unfavorable trade balance with eastern states. In Missouri, lack of money resulted in reliance on barter, which, while it perhaps contributed to neighborly feeling and interdependence, lacked the universality of cash. Atherton, "Missouri's Society," 22. Missouri did not experience the Panic of 1837 as seriously as other places until the middle of 1841, aside from a temporary reaction in St. Louis. Even the decline in land sales did not result in a disastrous fall in land prices. However, wide variations in currency values finally affected the state, bringing about hard times toward the end of 1841, and throughout 1842 and 1843. Dorsey, "Panic and Depression of 1837-43 in Missouri," 144-145, 153.

261 By 1820, land prices in Missouri had fallen sharply, and newspapers no longer advertized land sales. Due to a great decrease in immigration, farmers who had bought land in order to sell it to new settlers were forced to hang onto it or lose money on their purchase price. Property was worth so little that "the accumulated labor of years is not now sufficient to pay a trifling debt, and property some years since which could have sold for eight to ten thousand dollars, will scarcely, at this time, pay a debt of five hundred." Ibid., 82.

November 1870 my Regular Law day." As it happened, the parties "settled the case between them Selves each one to Pay half the cost by Plaintiff keeping the hogs which they have Paid."[262]

Though most debt actions involved white men suing other white men, occasionally women or blacks were parties to litigation. When women sued, outcomes do not reflect apparent gender bias on the part of the judge. In December of 1828, Mariah S. Clodfelter took George W. Lovell to court over an unpaid note in the amount of $38.75, debt and damages. Either Lovell did not have the money and absconded simply to avoid the sheriff, or he absconded with the money; in any event, he did not appear and default judgment went to the plaintiff for the $38.75 debt and damages, plus costs. A writ of execution was issued, but no property could be located.[263] Similarly, Elizabeth Robinson sued John S. Wills in July of 1844 for $16.25 owed on a note, plus damages of eighty-eight cents and received a default judgment from justice of the peace R. A. Huffard. For reasons not stated, the award was reduced to $13.25, including "[d]ebt and damages also costs." And in a case continued from the court's April term, Catharine S. Kimbrough sued Jesse Day on a note for $90.00, plus damages of $5.60. A summons issued on March 9, 1845 was continued until late July of 1845. "[T]he plaintiff appeared by his attorney but the Deft. came not but made default . . . [I]t is therefore considered that the plaintiff have and [collect] . . . the sum of $95.60." Huffard was the judge in this case as

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262 W. O. Zanyan against W. H. Stalsworth, Shirley V. Taylor against J. G. Reed, Holt County Justice of the Peace Docket Book, 1870-1877, C12020, microfilm, Missouri State Archives, Jefferson City, MO.

263 Cape Girardeau County Justice of the Peace Civil Cases, 1821-1841, Box 1A, no. 320, Cape Girardeau County Archive Center, Jackson, MO.

well.[264] Mary B. Nowlin of Greene County authorized attorney James M. Thompson in 1863 to attempt to collect $1640 owed to her on a note signed by Peyton Nowlin, presumably a relative.[265]

While these cases do not show open gender bias, neither do they reveal the true attitude of the judge toward the appearance of a woman plaintiff in the official space of the court. What they do show is that in early Missouri, women creditors accessed the legal system and succeeded in winning judgments against people who owed them money. They demonstrate as well that the community accepted the appearance of women in court.

No examples of civil litigation by free blacks prior to the Civil War appear in county courts. When blacks were part of money disputes in debt actions prior to the Civil War, normally they appeared as subjects rather than litigants. An 1820 trial, for example, pitted Mosely & Cropper, Medad Randol and Jenifer Sprigg as plaintiffs against defendant John Packie "for the use of James Edmonds." The suit does not supply Edmonds' status, but it appears that Edmonds was a slave who had been hired out to Packie, and that Packie had failed to hand over to the plaintiffs the wages that Edmonds had earned. This kind of law suit, in which a slave's labor was contracted out to

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[264] Elizabeth Robinson against John S. Wills; Catherine S. Kimbrough against Jesse Day, Justice of the Peace Docket Book, no. 231, 1835-1855, Greene County Archives, Springfield, MO. It is puzzling that the plaintiff in Kimbrough was referred to as "he," rather than "she." It also is not clear why the record book refers to a "term" of the court. Unlike circuit courts, justices' courts did not hold terms; rather, justices held court every week.

[265] Elizabeth Remy Dobbs Thompson, folder 1, R671, Western Historical Manuscript Collection, University of Missouri-Rolla.

temporary employer who kept the wages, was not unusual.[266] Suits for damages also could involve slaves. John Baker of Montgomery County sued James Owen in 1853 for "damage for striking a Negro Man[.]" The jury ruled for the plaintiff and fined the defendant one dollar plus costs.[267]

Justices' courts played an important role in settling disputes over indebtedness and facilitating movement of assets in local economies. County courts had a more complex group of duties with respect to economic matters, with far-reaching results. County courts conducted trials in civil actions, though not as many as in justices' courts. In other activity, county justices influenced local markets through commercial regulation. Counties also deeply affected economic transactions through responsibilities in road and bridge construction.

Where money was the issue, many trials heard by county justices arose from the probate process. In such trials, creditors made claims against the estate of a deceased person. Normally there was no genuine argument over whether a sum was owed, and the parties sometimes settled amicably out of court. The county court of Saline County in early 1840 conducted several bench trials in which the estate of George Francisco was sued for small sums: $33.19, $83.69, and $50.25. The plaintiff recovered in each instance, and the transcripts do not indicate whether the parties actually disputed any

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266 Mosely & Cropper, Medad Randol, and Jenifer Sprigg against John Packie, Cape Girardeau Justice of the Peace Civil Cases, 1821-1841, Box 1A, no. 320, Cape Girardeau County Archives, Jackson, MO. The case probably came up in probate.

267 John Baker against James Owen, Robert C. Fulkerson Record Book, 1837-1854, C3804, Western Historical Manuscript Collection, University of Missouri-Columbia.

facts; indeed, the trials probably functioned as a means of recording the debt for legal purposes.[268]

Many trials associated with estates under probate concerned creditors' claims, but justices also dealt with disagreements over the distribution of assets. Most estates, such as that of Charles Finley, were settled without difficulty. Finley, who lived in Cape Girardeau County, died in late 1808 or early 1809. He was fairly well-to-do, with two horses, forty hogs, seven sheep, three beds and bedsteads, two rifles and two bake ovens, a spider (used for cooking on the hearth), a copper tea kettle, saddles, a tin trumpet, a brass candlestick, seven cows, and "some bookes." When it came time to settle the estate, the livestock had to be gathered together for counting, a fact we know because the estate shows that three men split $18.00 between them for spending a week chasing down livestock, while two men were paid $12.00 to keep guard over the livestock for six days, until they could be sold. A minor dispute over payment of a note for $49.68 against the Findley estate was settled on March 27, 1811.[269] It is not clear whether Findley left a will. His wife survived him, but there is no record of future claims against the estate.

Henry Hand's death, on the other hand, created enormous disturbance within his family. Hand died in 1830 or 1831. A document purported to be his will was recorded on 24 July 1831.[270] The document bore his signature, though its appearance suggests that an attempt was made to obliterate it. The will specified that Henry's wife, Sarah, was to enjoy the use of his estate for as long as she lived; afterward, the assets would be divided

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[268] Saline County Court, minutes, microfilm, C18983, microfilm, Missouri State Archives, Jefferson City, MO.

[269] Charles Finley, decedent, 1809, Probate Files, Box 24, Bundle 675, Cape Girardeau County Archive Center, Jackson, MO.

[270] Some of the documents in the case carry one year, some the other.

between his two married daughters, Martha Daughaty and Mary Gosa. It was a substantial estate: two hundred acres of real estate, fourteen slaves, forty-four animals, miscellaneous farm equipment and tools, household goods, tables, beds, chairs, two mirrors, and a clock with its own case. The slaves were valued at sums between $175 and $700. Ten years later, following Henry Hand's death, a grandson and granddaughter came forth to claim one-third of his estate on the ground that he had repented the 1831 will and had "erased his signature thereto . . . and therefore died intestate," making the document on file in the clerk's office "false and fraudulent." Henry and Martha were the offspring of William Hand, a son of Henry and also deceased, who had not been named in his father's will (the will claimed by Henry Hand's grandson as false). The law suit was resolved in May of 1844, in a ruling that awarded Henry and Martha title to a black female slave and her child from the estate. It is not known whether the county court proceeded on the allegation concerning the authenticity of the will on file in the county probate office.[271]

John Jameson, a lawyer, wrote to Abiel Leonard in 1843 to ask his legal advice concerning a will that he expected to be contested. Jesse Evans, the "Old Man," was a resident of Fulton, Missouri and "between 90 and 100 years old." He was evidently well-to-do. His son, Joseph, had recently moved in with him and according to Jameson had convinced Jesse to write a will that left Joseph virtually all of his property. Others, who had expected to inherit, reacted to the turn of events by requesting that Jameson help them break the will on the basis of mental incapacity (apparently Jesse had been mentally

[271] Estate of Henry Hand, Wills, Box 66, Bundle 1256,Cape Girardeau County Archive Center, Jackson, MO. As a point of interest, in 1843, while the case remained in the hands of the county court, young Henry held the office of clerk to the county court of Marshall County in Kentucky.

incapable for some time). Jesse was among the living at the time that Jameson wrote his letter, and, choosing a more conservative course for the time being, he asked that Leonard assist the heirs in "secur[ing] the property," in order to prevent Jesse's son from going through all of the assets while his father still lived. The Old Man's death was expected at any time, making a swift response desirable. There is no indication how the matter ended, unfortunately.[272]

Because the county court held jurisdiction in all testamentary matters, it also proceeded when a married man died and his wife sued to recover dower. Mahala Hendricks sued J. E. Twitchell in the Greene County Court in 1871, asserting that as William Hendricks' widow, she was entitled to a portion of land which her husband had owned and which had been sold following his death. Twitchell had bought the property, and in her suit, she accused him of having "wrongfully defrauded her." The defendant first responded by questioning Hendricks' legal claim to the property. He then argued that, even if Hendricks's widow possessed the dower rights she claimed, the land had been in its natural, "wild" state at the time he purchased it; that he had made improvements on it; and that for that reason, the widow should receive nothing more than minor monetary compensation—certainly she was not entitled to "the one third in kind or value assigned her[.]"[273]

Twitchell did not convince the court, which appointed two commissioners to set off the widow's dower portion of the property. The commissioners' written instructions permitted them to "select such portion of said improved or unimproved land as they may

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[272] Letter from John Jameson to Abiel Leonard, Abiel Leonard, papers, C1013, folder 173, Western Historical Manuscript Collection, University of Missouri-Columbia.

[273] Mahala Hendricks versus J.E. Twitchell (1871), no. 1646, Greene County Archive Center, Springfield, MO.

see proper." Of course, improved land would have greater value than unimproved land, with the difference affecting the widow's award. In his report to the court, A. M. Appleby, one of the commissioners, set the value of the dower portion of the real estate at $525, noting carefully at the time that he was "acquainted with the value of land in this neighborhood of this tract." Twitchell failed in an attempt to persuade the court to throw out the commissioners' recommendations on the ground that the two men had not followed their instructions.[274]

The court's strategy in these actions was characteristic of counties' methods in governing and resolving local disputes. After ruling for the widow, the justices appointed two local men of good character and repute, who lived in the neighborhood and knew enough of the value of local real estate, to work out the details of the judgment—in this case, setting off a portion of the property to satisfy the dower claim and providing a valuation. Much of the case's importance is tied to the commissioners' calculations, for while the court issued the judgment, it did not decide the precise amount of the award; rather, it left the monetary determination to the judgment of the neighborhood. While the justices probably supported the widow's cause out of concern that she receive justice, they also had practical reasons. The litigation was about private property rights, but its outcome held economic implications for the public sector. Because the court supported her claim of unsatisfied dower rights, and its judgment was upheld in the commissioners' award of money, Mahala Hendricks' financial status was substantially improved, making it less likely that she would later become a burden on the public purse.[275]

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274 Ibid.

275 See Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Ithaca: Cornell University Press, 1983) for a discussion of changing

The significance of probate rulings is appreciated when the effects of decisions are considered over time. When a resident died and left property, among persons who hoped to inherit, land probably created more interest than any type of property owned by the estate. Slaves, however, were not far behind. Questions surrounding inheritance of slaves could cause sharp quarrels if the will failed to be explicit on the subject. Even if it did, a dispute could always develop later on. In order to settle disputes—even better, if possible, diffuse some hard feelings—the state called for counties to appoint "three disinterested competent persons, fairly and impartially to audit and settle, under oath, all the claims of the several persons claims as distributes[.]"[276] If a large portion of the deceased person's estate consisted of slaves, the will could order their sale, or the heirs on their own might determine to sell them and divide the proceeds. The minutes of the Saline County Court in May 1839 list a petition submitted by of Robert C. Land "& others" containing a request that the court sell the slaves belonging to the deceased Frances Land.[277] In February, 1840, justices of the Saline court granted permission to David Palmer, administrator of the estate of the late Notley Thomas, to sell "a quantity of hemp & to hire at private hiring the slaves of said estate[.]"[278]

A county court could offer protection of inheritance rights beyond a bare exercise of duties. As an example, justices of the Greene County Court in 1843 ordered that slaves of the estate of A. Staley remain with his widow "*and under her control*" [italics

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conceptions of local government, citizen participation, and the relationship between local communities and the state in early New York City.

276 Missouri, AN ACT supplementary to an act concerning executors and administrators, Acts (1822), sect. 4.

277 Saline County Court, Minutes, C18983, microfilm, Missouri State Historical Society.

278 Ibid.

mine] for her use and "support of minor children."[279] Others may have mounted claims to the slaves, leading the justices to include protective language in their orders.

Probate jurisdiction embraced matters beyond estate settlement to the care of dependent persons. One of the county court's duties was to deal with paupers in the neighborhood. The normal procedure was to sell their labor at auction. Just as slaves were purchased at auction, paupers presented themselves for sale. John M. Williams, "a pauper," was contracted out to Joseph Weaver of Greene County in May 1841, and, during the summer of 1843, "John Bonds filed his petition to be let as a pauper to the lowest bidder for 12 months."[280] According to field specialists for the Missouri State Archives who work with local records and are familiar with nineteenth century practices, paupers continued to be sold on the steps of the Howard County court house well into the latter portion of the century.

The position of a pauper who was hired out differed from that of a slave in that the slave was legally bound for life unless he could purchase his freedom or was emancipated. In other respects, the pauper's life was not wholly different from the slave's and may not have been materially better. In fiscal terms, what distinguished the pauper's situation was the immediate and direct economic benefit to the county.[281] As property, slaves were subjects of taxation. But assessing and collecting taxes was time-

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279 Compiler Marsha Hoffman Rising, *Greene County Missouri Probate Records: Wills, Minutes, Bonds, Letters of Administration, 1833-1871* (Greene County Archive Center, Springfield, Missouri, n.d.).

280 Greene County Court, Minute Book A., no. 106, Missouri State Archives, Jefferson City, MO.

281 Slave owners paid property taxes on slaves over the age of three at the rate of twenty-five cents for each hundred dollars of the slave's value. The tax process began with an assessor appointed by the county court, who visited every property owner or person "possessing or having the care or management of any property taxable by law" within the county to make a list of the taxable. The tax also acted as direct income to the county. Missouri, An Act to provide for Levying, Assessing and Collecting, State and County Taxes, Acts (1820), sections 1, 4.

consuming and taxpayers did not always pay immediately. On the other hand, sale of a pauper's labor was guaranteed in a single transaction. It was a highly effective means of generating county income, and at the same time assured that the public purse would not be lightened by expenses incurred through support of the pauper.

Probate jurisdiction embraced labor arrangements which allowed county courts to seize black minors found wandering or loitering about the neighborhood and bind them into apprenticeships. The law is similar to Missouri's law of indenture, which probably provided a model for the law and also was administered by the county courts. County justices' jurisdictional authority enabled them to manipulate local supplies of labor through indentures, labor arrangements for black minors, and the sale of paupers' labor. In effect, county courts opened up the labor supply for employers. It is doubtful that counties randomly rounded up paupers and children in order to sell off their labor or bind them to labor contracts. It is important to take into account the discretionary aspect of these powers. In other words, county justices were not obligated to allow an indenture to go forward, any more than they were obliged to remove every black child found wandering in the county. The statutes told the court what it *could* do, not what it *must* do.[282] Labor needs, concern for a child's welfare, parents' economic burdens, residents' wish for the neighborhood to present a respectable appearance, perhaps even the early notion that people should not live alone but should live within a household entered into counties' arrangements for dependent persons.

Just as county courts acted to ensure that paupers would not impose burdens on the county budget and that black minors would be put to work, they possessed a general

[282] Missouri, *An Act concerning free negroes and mulattoes*, Revised Statutes (1845), sections 4, 5.

responsibility over all dependent persons. The institution of the county poor house provides an excellent example.[283] Authorized by the state of Missouri to erect and run a poor house in each county, county courts released bids for construction work, bought construction materials, and paid a poor house superintendent to manage the place. Inmates were supplied with materials purchased by the county (presumably from local sources) and were expected to fashion these into items; the items were then sold and presumably the proceeds went toward inmates' support. The first individual to benefit from the poor house plan was the legal owner of land purchased by the county as a site for the institution. Greene County Court Judge W. B. Farmer in 1855 recommended the county purchase 200 acres of land belonging to James Douglass; the court approved his selection and made a substantial partial payment of $1000 to Mr. Douglass for the property.[284] A listing of direct beneficiaries of Missouri's poor policies would show the superintendent of the poor house, the contractor who won the bid to construct the poor house, suppliers of materials used in its construction, the source or sources for materials used by inmates to make products to sell, suppliers of food, clothing and other necessities, workers who maintained the building and grounds, and medical professionals to provide care for sick inmates. In addition, in terms of efficiency it is likely the community as a whole benefited (although calculating a figure might be impossible) from outdoor, rather than indoor, relief. Though state legislators wrote the statute that ordered counties to construct and operate poor houses, they did not supply standards of care, select inmates, or visit supervise a county's care of the poor. Each county supported the

283 Missouri, AN ACT to authorize the county courts of the several counties in this State to erect Poor Houses, whenever they shall deem it expedient, Laws, (1843), sections 1-6.

284 *History of Greene County*, 232.

expenses of the poor house located in it through taxes and other mechanisms. Care of inmates thus varied from county to county, depending on a county's financial resources and notions of an appropriate standard of living for inmates.[285]

The exercise of probate powers immediately affected private individuals, with secondary effects reaching the community at large. But the state also granted county governments key powers within the marketplace, which in turn influenced local economies and social policies.

The selling of licenses and regulation of business provided counties with income and authorized justices to control commercial activity. Income from licenses could be meaningful; further, licensing served as a multi-purpose tool to accomplish state and county objectives. The license sold to peddlers and merchandisers of goods imported from outside Missouri, for example, carried a state tax of between fifteen dollars and two hundred dollars every six months, "which amount or sum shall be fixed in the discretion of the court or clerk in vacation, due regard being had to the value of the stand and amount of business done[.]"[286] The license promoted market development by encouraging sellers to deal in Missouri-made goods and, at the same time, made sure that

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[285] Unlike other dependent persons, who were classed as "poor" for the purpose of housing them in county poor houses, insane persons at times were held in the county jail. While it was not feasible to place them around others, sentiment to consider other means of caring for mentally unsound persons emerged in the late 1840s. The result was a new state insane asylum, constructed in Fulton and managed by a board of managers who were required to visit the facility several times annually and generally take active roles in management of the place. Part of the justification for the asylum was that it would provide a large economic benefit to the state in the form of savings over current methods of care. Patients whose care could be provided with private funds continued to have private care and were admitted to the hospital only if there were empty beds. Richard L. Lael, Barbara Brazos, and Margot Ford McMillen, *Evolution of a Missouri Asylum: Fulton State Hospital, 1851-2006* (Columbia: University of Missouri Press, 2006), 9, 14, 17-18. http://site.ebrary.com.proxy.lib.wayne.edu/lib/wayne.doc

[286] Missouri, An Act imposing a Tax on licences to retailers of Merchandize and Pedlers, Acts (1820), sec. 2.

the state tax would be levied fairly on sales of out-of-state goods. Auctioneers paid a state tax of three dollars on chattel goods and a percentage of the sale price on every sale of real estate, while the license itself was purchased for $100 every six months. To ensure that auctioneers complied with the law they were required to report all sales to the county clerk "from time to time[.]"[287]

Retailers of alcohol paid a remarkably low twenty dollars every six months for a license; however, if the seller were caught selling alcohol to a slave, "directly or indirectly," he forfeited his license, which would not be renewed, and paid a fifty dollar fine.[288] Sales of alcohol were problematic in terms of state social policies, but any dangers were reduced by licensing conditions and loss of the right to do business if those conditions were violated.

License sales indicate that, even in small, isolated communities, settlers enjoyed some of the comforts of a civilized life. Licenses granted by the Cape Girardeau County Court in 1823 included ten issued to retail merchandisers, eleven to retailers of wines and spirits—one sold to a woman with the interesting name of Scarlet Glascock—four to tavern keepers, and one to the keeper of a billiards parlor.[289] Businesses were scattered among Cape Girardeau's towns, one of the principal being Cape Girardeau, described in 1870 as the "chief city of the county." The first store there opened in 1806, two years before Cape Girardeau incorporated as a village. In 1818, the village had two stores and

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287 Missouri, An Act to license Auctioneers, and impose a tax on Auction Licences and Sales at Auction, Acts (1820).

288 Missouri, An Act to licence and regulate Retailers of Wines and Spirituous Liquors, sections 2, 6.

289 *Independent Patriot*, Jackson, MO. January 17, 1824.

"about fifty houses." A tanyard and "still house" were built at about that time, as well. When steamboats began to stop in the town, it grew substantially, and in 1836 the Cape Girardeau *Patriot* began publication. In 1853, the city received its first bank. The war put an end to growth, but commercial activity resumed afterward. By March, 1867, local businesses included twelve grocery and "provision" stores, five breweries, a distillery, fourteen shoe stores, three hardware stores, eleven blacksmith shops, twenty-seven dry goods stores, and others. [290] By the early 1870s, Cape Girardeau boasted three cigar factories, two whole grocery and liquor businesses, four saddle and harness makers, four breweries, and roughly sixty stores of unspecified sorts.[291] Besides providing information regarding the goods and services that people bought over the years, and the kinds of activities that formed daily life, facts about commercial activity demonstrate how county governments manipulated businesses. Justices could determine which categories of business to permit in a town, how many to allow, and who would be permitted to engage in business. The fiscal benefit to county governments and residents from these license sales is clear. Commercial licenses were sold to grocers, tavern owners, auctioneers, peddlers, ferry boat operators, billiard parlor operators, and foreign insurance agencies.[292] Fees varied, and some businesses, such as grocers, were required

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290 N. a., *History of Southeast Missouri Embracing an Historical Account of the Counties of Ste. Genevieve, St. Francois, Perry, Cape Girardeau, Bollinger, Madison, New Madrid, Pemiscot, Dunklin, Scott, Mississippi, Stoddard, Butler, Wayne and Iron and Including a Department Devoted to the Preservation of Persona, Professional and Private Records*(Chicago: Goodspeed Publishing Co., 1888), 411-415.

291 Ed. R. a. Campbell, *Campbell's Gazetteer of Missouri From Articles Contributed by Prominent Gentlemen in each County of the State, and Information Collected and Collated from Official and Other Authentic Sources, by a Corps of Experienced Canvassers* St. Louis: R. A. Campbell, Publisher, 1875), 106-108.

292 Ibid.; Missouri, *An Act taxing Billiard Tables and regulating Ferries,* Acts (1820); Missouri, *AN ACT to license Foreign Insurance Agencies*, Laws (1837).

to perform regularly scheduled accountings which provided the basis for a sales tax, also paid to the county.

The licensing authority was a useful tool possessing both short-term and long-term economic advantages. It should be noted first, that, like the residence and weapons licenses required of free blacks and mulattoes, a commercial license was a gift of the state in the person of the county court. Because state law supplied no criteria for being able to purchase a license, the court had leeway in determining who would have a license and who would not. Such decisions molded the character of a local business community, and power to restrict the numbers and types of businesses allowed county judges to protect commercial operators from competition.

It would be too much to claim that in frontier settlements, every tavern owner, grocer, or peddler hawking goods door to door possessed a valid operating license. However, once on the books, licensing statutes were disregarded at the business operator's risk; penalties for not being licensed to operate normally not only imposed a fine but closed the business down. Even circuses "and other public exhibitions" were taxed by most of Missouri's counties in a special act passed in 1849, with the money going into the county treasury where it was to be kept with other funds for common

schools.[293] Statutes that granted licensing powers to county courts permitted those entities to control commercial activity across frontier Missouri. Licensing not only protected businesses, but the practice minimized the risk that consumers would be taken in by con artists attempting to sell them inferior goods or disappear after making the sale.

Besides regulating markets, acts of county courts of commissioners influenced economic activity through construction and maintenance of highways and bridges, insane asylums, poor houses, jails, and other public buildings. Projects were financed by taxes levied by the county courts. This 1839 law, which authorized county courts to engage in long term development, gave them the right to

> grant charters to individuals, companies or corporations, to construct or erect bridges over streams and causeways, or otherwise improve roads over swamps . . . on public roads and highways . . . for any term or period of time, not to exceed ten years, except where the cost of said bridge or road shall exceed three thousand dollars, in which case, the period , or term of time, for which said courts may grant charters, shall not exceed twenty years; and when said bridge or road shall cost more than five thousand dollars, said charter may extend to a time not to exceed thirty years, at the discretion of the court . . . The said courts shall have power to receive propositions for the erection of bridges, and the construction of roads; to enter into contracts, and stipulations relating to the same . . . No charter shall be granted by the county courts under this act, when one third of the taxable inhabitants of the county where application is made, shall remonstrate against granting said charter; nor shall the courts aforesaid grant any charter contemplated by this act, at the same term at which the application may have been made for the same.[294]

County courts were charged with responsibility for all roads within the state not specifically designated state highways. Accordingly, they devoted enormous attention to

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293 Missouri, AN ACT concerning circuses and other public exhibitions, Laws (1849), sections 1, 3.

294 Missouri, *An Act giving the County Courts authority to incorporate and grant charters to individuals and companies, for the purpose of bridging streams, and to encourage the improvements of roads*, Laws (1839), sections 1, 5.

road construction and maintenance. Road business dominated the first session of Greene County's first county court in March of 1833. Over a four-day period, besides making a number of county appointments, organizing townships, and dealing with probate matters, county justices declared a road leading from Springfield to Fayetteville, Arkansas Territory a public road and appointed commissioners to mark out an extension to it; appointed commissioners to lay out a road from Bledsoe's ferry to "an indefinite point on the Twenty-five Mile prairie; ordered a public road to be viewed and marked out from Springfield to Boonville; and ordered the review of a road between Springfield and Swan Creek. All of these projects required the labor of local residents.[295] Counties sometimes cooperated with each other in road-building projects, too. In 1836, the counties of Greene and Morgan built a "main" road to run from Versaille in Morgan County, continuing through Greene County, and ending at the Arkansas border. Costs were borne by the two counties. The road was much used by travelers afterward on their way to and from Boonville, according to local lore.[296]

As a result of such dogged efforts, settlers journeying in Missouri for the first time in the 1830s traveled on roads that had not existed for the first waves of immigrants ten and twenty years earlier. When Saline County was organized, it had no roads at all;

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295 *History of Greene County*, 158-159.

296 Ibid., 175. An 1833 statute established a fund, proceeds of which were dedicated to internal improvements undertaken by counties. The arrangements made county courts into *ex officio* boards of internal improvement charged with responsibility for planning, overseeing construction of, and paying for projects including the construction of public roads and bridges. Each county was to identify a project, put out bids for the work and have construction proceed. The county clerk would notify the state auditor of costs, and upon receipt of the auditor's approval, the state treasurer would issue a warrant to the county debiting the amount from the county's fund, the size of which was based on the county census. The sole difficulty with the plan was that it did not supply any monies for *private* roads. Missouri, AN ACT directing the subdivision of the Three Per Cent. Fund among the several Counties of the State, to the purposes of Internal Improvement, within the same (1833).

most settlements were made along the edge of the river, and people traveled on the water if they wanted to go anywhere. Writing of hard times in the mid-1850s, a local historian comments that, in Greene County, "long distance[s] from railroad or river transportation made a short crop a serious matter in those days."[297]

Meeting minutes of county courts show payments for all manner of services and goods associated with building and keeping up highways. In Saline County, the court in 1870 approved a payment of $57—a not inconsiderable sum in those times—to T. Boatright for services as a road overseer; Sam Paul was paid $22 for opening a road; and James Martin received $12 for lumber for road use; a man named Rockhold was paid $150 for serving as road commissioner.[298] One resident had lent a sum of money to the county for internal improvements; he received $96 "for cash advanced on road."[299]

Missouri's county governments assumed fiscal responsibilities for internal improvements and had the onerous chore of scheduling residents to perform roadwork. Some jobs were not so time- or energy-consuming as others: surveying, for example, meant that a farmer would have to devote whatever time was required for the task, but after turning in his report, his work ended. Regular construction and repair, however, were jobs of manual labor, and these were rotated among residents. James Finley was appointed in the August term of 1842 by Saline County justices to serve as overseer of a road that began at Dr. Sappington's place and ended at A. G. Wood's fence line; the

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297 Fairbanks and Tuck, *Past and Present of Greene County, Missouri*, p 10 of 15, http://thelibrary.springfield.missouri.org/lochist/history/paspres/ch10.html.

298 *Saline County Progress*, May 4, 1870.

299 Ibid.

appointment was for one year, during which time Finely was expected to keep the road open and in good condition. [300] The labor of hundreds, possibly thousands of Missouri residents over the nineteenth century must have represented an enormous sum of money.

Using county tax money to pay for roads seems reasonable on the basis that many if not most roads were looked upon as local, in the sense that mainly people in the neighborhood used them to visit, transport goods, go back and forth to raise a barn or help deliver a baby, or pay a bill. However, those 'local' roads also formed a political, social, and economic asset to the state, and a statewide network.

With road construction across the state more or less under the control of county courts, the state thus relinquished statewide transportation policies to courts run by justices of the peace. In 1874, lawmakers passed new law that encompassed large changes in transportation policy. Besides putting into place a comprehensive plan for construction and maintenance of roads, it emphasized the role of residents in deciding locations for new road construction and imposed uniform standards of road construction for all new roads, still to be built by county courts. [301]

The new measure authorized each county to appoint a road commissioner, specified dimensions of public roads, and supplied standards for road construction: "All public roads shall be cleared of trees and limbs of trees, which may incommode horsemen or carriages; and no stumps in any public road shall exceed eighteen inches in

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[300] Minutes, Saline County Court, 1839-1846, 1863, 1864, 1865, C18976, microfilm, Missouri State Archives, Jefferson City, MO.

[301] Missouri, AN ACT in relation to roads and highways, providing for establishing, opening and repairing the same, Laws (1874).

hight, [*sic*] and wet grounds and small water-courses shall be causewayed or bridged in such manner as to enable horsemen and carriages to pass with safety." A new county surveyor (also appointed by the county court) would be an "*ex officio* commissioner of roads and bridges." Adjoining counties were encouraged to connect roads that would meet or come close to meeting each other, if boundary lines were not there to prevent it. Finally, the state prohibited action by county commissioners to initiate new road construction in the absence of an application by residents in a petition bearing the signatures of at least twelve persons, all householders of the municipal township or townships through which proposed road would run; the state called for three of the petitioners to be residents "the immediate neighborhood[.]"[302]

The measure seemed to suggest that counties were not as open as they might have been to residents' wishes regarding road construction. The record suggests otherwise. County courts had made it a practice for years to receive and respond to citizen petitions, well before the 1874 road bill. In Saline County, for example, the court appointed three residents in July of 1821 to mark out a road "petitioned for by Lewis Rees and others[.]"[303] Justices did not always respond positively to requests, of course. Citizens of Saline County who petitioned for a bridge to be built over Bear Creek in November of 1831 went away unsatisfied.[304]

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302 Ibid.

303 The road that Rees requested was the first road built in the county when it was first organized. Asst. eds., John R. Hall, Mrs. J. C. Egan, Mr. and Mrs. William Elder, *Saline County History* (n.p., Saline County Historical Society, n.d.), 369.

304 Ibid., 370. It would have been naïve for legislators to conclude that county courts consciously practiced indifference to the public interest, petition or not petition. The same local history records a road "to commence at Burton Lawless' ferry from thence the nearest and best way to Salt Fork between Parmers' and Findlay's Mills and from thence the most direct way to Cheeks Scott works and make a

County courts were highly experienced in planning and organizing internal improvements. They naturally wished to play a part in bringing rail transport to their jurisdictions. Indeed, "railroad mania" affected many residents. State, county and local governments participated in subsidizing the railroads, often at great cost and without much to show for their investments. Before 1861, the only railroad to have been completed in Missouri was the Hannibal and St. Joseph, funded mainly by eastern interests.[305] Four years later, most railroad lines that had begun construction were in default (except for the Hannibal and St. Joseph) and the state had only 810 lines of rail. One project, initiated in 1866 to bring lines into southwestern Missouri, failed due to workers' strikes for higher wages, poor quality of English rails and incompetent management by the railroad itself; by June of 1867, Southwest Pacific had completed only twelve miles of track.[306] Little progress was made until 1868, when the legislature voted to complete funding for the railroads. "By the end of 1870, [the railroads] had laid an additional 626 miles, and all of the lines had been finished to their original intended destinations."[307]

Voters themselves exhibited railroad fever, voting to support bond issues, "often in the hundreds of thousands of dollars." After the war, when plans were announced for the Cape Girardeau & State Line Railroad to go through the city of Cape Girardeau,

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report thereon to the court at their next term." The route clearly was intended to make it possible for residents to use the ferry's services and get to the mills. Residents also could appeal their property taxes: "A special term of court was begun and held [on June 20, 1832] for the purpose of hearing appeals taken the assessments lists and for other purposes." Ibid.

305 Parrish, *A History of Missouri*, 205. See Parrish for a highly detailed account of the history of railroads in Missouri.

306 Ibid., 207, 211, 213.

307 Ibid., 216.

"large majorities" of voters approved a subscription of $150,000, along with a similar sum from the township of Cape Girardeau. When the miles of track never materialized, results for the city were disastrous. Worse yet, "the heavy indebtedness thus recklessly incurred did not present an inviting aspect to manufacturers and other capitalists."[308] Nonetheless, railroads eventually provided huge economic benefits for the state, accounting for a 56 percent gain in population during the decade of the 1860's; other figures indicate that population density was greatest where the railroads ran through.[309]

Acts by county courts with respect to rail expansion probably provided much of the motivation for statutes that sought to rein in county justices' fiscal exercises of power. "To explain the reasons for the adoption of these restrictions," notes William Bradshaw, "would require an analysis of county investments in railroad securities during the era of railroad speculation in Missouri[.]"[310] Entitled "Abuses of Public Trust" a statute enacted in 1872 aimed at preventing prevent financial losses to counties and townships due to improprieties committed by county justices. Simply put, it prohibited county justices from investing in any railroad venture without a two-thirds vote of the county electorate. A violation by "any justice of a county court, member of a city council, or member of a board of trustees of any incorporated town, who shall hereafter vote to donate, take, or subscribe stock for such county, city, or incorporated town in, or loan the credit thereof to, any railroad company, or other company, corporation, or association, . . . shall be

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308 Ibid., 222; N.a., *History of Southeast Missouri, Embracing an Historical Account of the Counties of Ste. Genevieve, St. Francois, Perry, Cape Girardeau, Bollinger, Madison, New Madrid, Pemiscot, Dunklin, Scott, Mississippi, Stoddard, Butler, Wayne and Iron, and Including a Department Devoted to the Preservation of Personal, Professional and Private Records* (Chicago: Goodspeed Publishing Company, 1888), 415.

309 William Parrish, *A History of Missouri*, 223.

310 William Bradshaw, "History of the Missouri County Court," 400.

adjudged guilty of a felony[.]"[311] Lawmakers in the same session passed a measure making appropriation of county funds for personal use a misdemeanor punishable by five years in the state penitentiary[312] The state later mandated that money collected by counties to pay interest on railroad bonds, but had been left unspent, go toward finance of home mortgages, or purchase of U.S. bonds or Missouri state bonds.[313]

Finally, county courts possessed a power of appointment (or patronage) which carried political and economic benefits. Appointments were used to reward friends or persons whose friendship was desired. The value of a county appointment was noted by critics of official policy toward the poor. In a reference to the county poor house in Saline County, the *Saline County Progress* charged that "[i]f representations which have been made to us by sundry reliable citizens be correct, this public institution is sadly in want of "Reconstruction." It has been the means of speculation to divers [*sic*] relatives and friends of men who have had a position upon the County Court bench since the war."[314] There can be no question that county judges were able to surround themselves with friends and supporters through appointments to all manner of public office, and the acknowledgement and gratitude that flowed from them helped to shape county and local affairs. In an 1825 county election result that produced the 'wrong' result, one Lafayette County resident wrote to Abiel Leonard, then a clerk with the court. "Dear Sir, to my

311 Missouri, AN ACT to protect counties, cities and incorporated towns from combinations between railroad companies, county courts, city councils of cities, and boards of trustees of incorporated towns, Laws (1872).

312 Missouri, AN ACT to punish certain abuses of public trust, Laws (1872).

313 Missouri, AN ACT to authorize the several county courts of this State to loan out or invest certain moneys, Laws (1875), sections 1, 2, 7.

314 November 18, 1870.

utter astonishment the election terminated thus for Miller 177 Hon Todd 109 Hon. E. C. Carr nine and for Rufus Easton none. Our sheriff the pretended friend to Judge Todd voted together with his father and brother for Genl Miller."[315] There is no question that offices often were the result of finagling. That it looked like favoritism or self-interest in some quarters is clear, and no doubt it often was the case. David Barton of Washington, Missouri, was vitally interested who would be appointed to the office of register for the town of Franklin. He discussed the question to his friend Abiel Leonard in correspondence whose meaning is not entirely clear. Obviously there was a great deal of competition for the post of Register at Franklin, and the figures suggest that it was worth a substantial amount of money in one way or another. Barton wrote that he had received Leonard's letter of October 27 regarding the position. "Miller's resignation," he added, "is not yet received; but, to avoid smuggling I and John Scott have recommended Mr Boggs for the office. . . . My good friend Gen McRea has reported himself robbed of upward of $9000 . . . From the blood of Ewing I expect he will be robbed also when the receipts amount to 4 or 5,000.[316]

Appointment to public service earned no such gratitude from settlers, who served, whether they wished to, or not, on slave patrols, as surveyors, as supervisors of road repairs or assistants to administrators in the probate of estates. These appointments were made by the judges of county courts and were less in the nature of patronage than scheduling work time; some jobs were compensated, but not extravagantly so. If residents refused to show up when scheduled, they could be sued by the county. In 1828,

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315 Abiel Leonard, Papers, no. C1013, folder 34, Western Historical Manuscript Collection, University of Missouri-Columbia.

316 Letter to Abiel Leonard from David Barton, Abiel Leonard Papers, folder 334, C1013, Western Historical Manuscript Collection, University of Missouri-Columbia.

the county of Cape Girardeau proceeded against Darwin Harbison for failing to perform work on a bridge. Harbison contended that the action was "improperly instituted, and the service of the suit illegal," that his name did not appear on the list of persons appointed to work on the road, and further that he was not under obligation to work as the construction cost of the bridge was estimated at more than $25.00. The case went against him, but he appealed it to the circuit court, where he almost certainly would lose a second time.[317]

Not only jurisdictional powers of the county court, but the site of county government itself possessed immense importance for citizens, as the location was thought to carry great economic impact. Residents of Jackson Township and Cape Girardeau Township, both in Cape Girardeau County, were up in arms over proposals to locate the county seat in one place or the other. In a letter to the *Independent Patriot*, an agitated citizen of Jackson argued forcefully that moving the county site to Cape Girardeau would be a very large mistake.

> At length the monster has emerged from his den, and ventures abroad in open day . . . The Court House and Jail are in the centre of the country, abounding in provisions of various sorts for the accommodation of those who have occasion to attend the court. When the court adjourns, most of the citizens can return the same evening to the bosom of their families. [The other side argues] that if the courts were removed to the Cape, the farmers could then sell any article of export to the traders established or to be established there.[318]

The letter writer argued that the opportunity to feed a few extra mouths at court time would hardly prove the making of the Cape, where the main source of prosperity did

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317 He probably would lose in circuit court, if only because he raised irrelevant errors in procedure. Cape Girardeau County against Darwin Harbison, Appeal 1828 Box 1A, Cape Girardeau County Archive Center, Jackson, Missouri.

318 July 31, 1824

not consist of agricultural products but of the mineral content of the river bed. Further, the number of steam boats that landed at Cape Girardeau would not be increased by the presence of the court there. Finally, he hinted that promises of private parties who had agreed to put up a court house and jail in the Cape should not be taken at face value by the "honest, but simple people" who supported the move.[319]

The letter-writer (probably a prominent business person in Jackson) treated the other side's arguments seriously. Though he maintained that court business would not suffice in itself to improve Cape Girardeau's fortunes, he surely realized that, wherever the county seat was situated, the circuit court would meet there at term time, and that the presence of jurors, attorneys, judges, and litigants—in addition to the crowds that would come to witness the proceedings—could hardly be brushed aside as a financial boon. The dispute illustrates how county courts could dominate county and local affairs; control public discourse; and shape understandings about ways in which local economies operated. The matter also brings to light the existence of connections between business interests and county governments and how those might work in the real world.

Justices' courts and county courts of commissioners actively shaped local and county economies, and, by extension, the economy of the state of Missouri. Almost every action taken by a county court carried some fiscal consequence. Counties scrambled to collect taxes, not a simple assignment in a cash-poor economy where banks were illegal until 1836 and the people of the state suffered the effects of multiple national

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319 The letter writer made a good point with respect to the economic importance of the county seat. Springfield was the county seat for Greene County, but county business may not have mattered as much as other considerations in creating prosperous conditions. The opening of the U.S. Land Office there in 1835 made a discernible difference for the town's fortunes, attracting "hundreds of persons to the town . . . [it] was of great convenience and accommodation to the settlers of Southwest Missouri." *History of Greene County*, 174.

depressions. A large-scale public project, such as the county poor house, created scores of transactions. At the same time, counties generated income with the sale of licenses, collection of taxes, and regulation of businesses. Though their identity as trial courts did not allow them to participate in local economic affairs on a level with county courts of commissioners, township justices' courts nonetheless acted as benefactors to local economies, in the settlement of money disputes and restoration of assets to circulation in towns and farming communities. Together, the courts supplied protections for fragile and developing economic environments. No institution, whether a blacksmith shop, grocer, feed store, or tavern could operate for very long in a chaotic, violent physical environment.

CHAPTER V

PUBLIC DISORDER AND VIOLENCE

Immigrants who settled the Missouri frontier had few institutional protections against instability or violence. Their chief source of law enforcement was the township justice of the peace, who guarded order in the neighborhood, tried minor crimes, and investigated suspected misconduct. Early Missouri settlements were not sites of daily, ongoing violence, as in locations where the population consisted of young unmarried men. Rather, new Missourians usually arrived in family groups and intended from the beginning to create orderly communities. Serious crimes included dueling (thought to have been associated with traditions of hierarchy and honor of the Old South),[320] rape, and child abandonment. Other, less serious transgressions included varieties of assault. Justices dealt effectively with individual and small-scale offenses but lacked powers and resources to stop group violence such as racially-motivated lynchings and gang crime. Problems of crime and disorder in nineteenth-century Missouri supply a unique opportunity to analyze the office of justice of the peace as a guarantor of social peace.

Early settlement in Missouri gave rise to violence that did not diminish when the territory was purchased by the United States. According to one scholar, daily life had been filled with "disorder, . . . drunkenness, profanity, . . . the floating of fraudulent land titles, lawyers fomenting litigation, violence, duels, assaults with intent to kill, and murder.[321] Differences between French, Spanish, and American law (which produced

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[320] Dick Steward, *Duels and the Roots of Violence in Missouri* (Columbia: University of Missouri Press, 2000), 84.

[321] Hattie Mabel Anderson, *Study of frontier Democracy: the Social and Economic Basis of the Rise of the Jackson Group in Missouri, 1815-1828* (Columbia: University of Missouri, 1935), 13.

serious and long-lasting legal disputes concerning property ownership) were only partially responsible for actual disorder. Dick Steward opines that Missouri's "jurisprudence of lawlessness" was rooted in, among other causes, inadequate statutory law to define and punish wrongdoing, relatively slow legal process, a personal preference for private dispute resolution, "open-mindedness" about disorder, and mistrust of courts, judges, and lawyers, who were considered (and sometimes were) corrupt.[322]

If the docket books of justices of the peace are any indication, the territorial period was as crime-filled as any American jurisdiction today. A justice of the peace in Byrd Township in Cape Girardeau County conducted trials for assault and battery, assault with intent to kill, breach of peace, larceny, riot, and stealing.[323] The county itself between 1805 and 1824 tried cases of assault and battery; bastardy; breach of peace and breach of covenant; false imprisonment; fighting; riot; slander; and stealing.[324]

The basic offenses that came before a justice of the peace in Missouri were assault or assault with battery, and breach of the peace. Justices of the peace resolved these matters routinely. Other then money disputes, most of the docket of a Missouri township

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322 Steward argues that the legal culture of frontier Missouri promoted the duel as a means of supporting the honor of the ruling class, which included lawyers and judges. "Contemptuous of the masses," he writes, "the men of the bar echoed the voice of democracy, but in reality they had very little respect for the will of the people." If people did mistrust the courts, as he claims, obvious elitist attitudes by lawyers and judges may help explain it. But he may be thinking of the higher courts; there is no evidence that rural people had doubts about their local courts. Steward, *Duels and the Roots of Violence*, 85; *Saline County Progress*, 28 October 1870, 4 November 1870. James Griffith Harris notes that Republicans (Anti-Federalists) thought that "[o]ften the courts' concept of law was a rather mysterious thing, and they should not be given too much freedom."

323 Stoverink, *Early Court Records of Cape Girardeau County*, 245-248.

324 Ibid.

justice of the peace consisted of trying some manner of breach of the peace and in investigating and forwarding felony matters to the circuit court for disposition.

Most but not all crime in Missouri's rural settlements and villages was committed by men, against men. Women occasionally committed violent crime, and married women were abused by their husbands. Children were victimized, too, and at one point the state created a specific felony of abandoning a child younger than six years of age and leaving the child in the open to die.[325] Men of property and standing in the community were peculiarly apt to engage in duels. Missouri lawmakers prohibited the practice in 1822, but for some, the duel belonged to a cultural tradition that held it to be a legitimate means of rescuing and guarding personal honor.[326] Even judicial officials committed crimes of violence, some serious.

Most disorder in Missouri's rough, early settlements consisted of individual disputes carried to an extreme, whereas major violence intended to result in death or wholesale destruction of homes and populations was far less common. Bar fights, for example, occurred frequently. Saloons surrounded the town square in Marshall, Missouri, with the street itself known as Dog Row "as a result of canine fights which were encouraged by the patrons of Dog Row for betting purposes;" it was said that "[t]ownspeople were astounded if less than six fights broke out along Dog Row" on a Saturday night.[327]

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325 Missouri, Crimes and Punishments, Revised Statutes (1845), sec. 44.

326 Missouri, AN ACT more effectually to prevent Duelling, Acts, (1822); Steward, *Duels and the Roots of Violence in Missouri*, 85.

327 *Marshall Missouri Sesquicentennial, 1839-1989* (n.a., n.p., n.d.) Mid-Missouri Genealogical Society, on loan to Missouri State Archives, Jefferson City, MO.

A public environment in which deadly weapons were openly carried and used in resolving private disputes obviously carried serious threats, but residents did not give them up. William Schrader, a Missourian and soldier for the Union in the Civil War, told the remarkable story of a fellow soldier named Plains, who had had the bad luck to kill a man just before the war. It was a small town, and the man had stabbed and killed a neighbor of Plains for no apparent reason. The village constable rushed to the scene, but the killer outran him. Hearing the constable call for assistance, "Jack came to the door and taking in the situation at a glance stepped into the door of his residence . . . seized his rifle, which hung over the door as was the custom in the west at that time . . . and shot the murderer square in the forehead killing him instantly."[328] Not only ordinary people, but even judges, lawyers, and litigants in a trial were known to arrive at public courthouses armed "with pistols and dirks. Many of the weapons were, according to the custom of the day, concealed."[329]

Many breaches of the peace that occurred during Missouri's early years do not seem to have troubled the neighborhood excessively. Indeed, rural life seems to have been relatively peaceful, even in an environment where disputes often involved violence. In 1809, Moses Byrne sued Jonathan Kirkendall for trespass and assault and battery; the charges seem serious enough, but attorneys for Byrne "voluntarily" withdrew the suit, leaving the defendant, Kirkendall, to recover costs from the plaintiff himself.[330]

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328 William Schrader, Papers, C1519, WHMC-UMC.

329 Steward, *ibid.*

330 Stoverink, *Early Court Records of Cape Girardeau County*,152

In an 1822 statute, justices received jurisdiction over "assault, battery, affray, riot, rout [and] unlawful assembly," with permission to try cases "in a summary mode." Affray was a little-used category of misdemeanor crime occasionally used in court cases, usually when two or more defendants charged. In Missouri against John Fredrick and Jacob Harwine, the justice of the peace for Oregon Township ordered the defendants arrested on January 3, 1852 for a breach of the peace. In the jury trial, heard the same day, both men were found guilty of an affray. The jury ordered Fredrick to pay a fine of ten dollars, Harwine fifteen dollars. [331]

This case recognizes the swift delivery of justice for which township justices' courts were known: defendants were arrested, charged, tried, found guilty, and fined by a jury of their peers on the very day that the offense occurred. This case also supplies a setting in which neighbors treated law as a tool in order to make a point. The penalty portion of the trial acknowledged the community's role in assessing comparative responsibility for the crime.

An action of trover, in which one party took goods from another and failed to return them or to pay for them should be considered akin to stealing or theft; such cases also were filed occasionally in nineteenth-century justices' courts. A jury empanelled in an 1839 case of trover found for the defendant, forcing the plaintiff into filing for an appeal; both, it should be added, were represented by an attorney.[332] The 1822 law explained that unlawful assault or threatening another "in a menacing manner, or . . .

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[331] Missouri against John Frederick and Jacob Harwine, Holt County, Justice of the Peace Docket, 1845-1852, microfilm, Missouri State Historical Society, Jefferson City, MO.

[332] Joseph Baker against Albert G. English (1839), Circuit Court Civil Docket, box 31, folder 8, Cape Girardeau County Archive Center, Jackson, Missouri.

[striking] another, within this state," as long as the assault did not "[extend] to life or limb" should be considered and treated as a misdemeanor offense. A jury trial was an option for the defendant on demand; if found guilty, the convicted party might be fined up to eighty dollars. The statute suggests that defendants slipped through the hands of authorities with some frequency. Should the individual escape, avoiding arrest, the justice was to "diligently enquire, after such breach of the peace [had] been made or committed, and thereof . . . hear and determine according to law."[333] The practice of enquiring in the neighborhood dates from original English procedure ordering the common people "to raise hue and cry and pursue law-breakers from vill to vill, hundred to hundred, county to county, and to arrest and detain them. If they failed . . . they were to inform the guardians who were then to raise the whole power of the county for the pursuit until successful."[334]

Legislators followed the basic assault law of 1822 with a statute on procedure in justices' courts in 1830. The law declared that "no assault, battery, affray, riot, rout or unlawful assembly, [would] be held or considered an indictable offence, but that the same [would] be prosecuted and punishable in a summary mode, before justices of the peace."[335] Exceptions to the rule included assaults with intent to maim, wound, kill, or

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333 Missouri, AN ACT to allow Justices of the peace jurisdiction in cases of breaches of the peace, upon certain conditions, Acts (1822), chap. 28, sections 1, 2, 3, 5.

334 Beard, *The Office of the Justice of the Peace in England,* 37-38.

335 Missouri, AN ACT declaring assaults, batteries, riots, routs and unlawful assembles, [*sic*] not indictable offenses, Laws (1830), chap. 6, sections 1, 2, 3.

commit a rape or a robbery, and assaults in which a person was shot or stabbed. Justices could determine whether "menacing" words, attitudes, or actions, justified the assault. [336]

The statute effectively authorized the justice of the peace to determine the seriousness of the offense. If he concluded that the violation was a felony, he possessed the authority to forward the case to the circuit court. Without such authority, the justice would be unable to act in a felony violation. The facts of an incident were not always immediately clear, but if a justice found upon investigation that the offense was not a misdemeanor (unquestionably under his jurisdiction), but a felony, he would lack a means of dealing with it but for the provisions in the new law. If a grand jury could be called within a suitable timeframe, it might consider charges, and, if appropriate, issue an indictment. However, impaneling a grand jury might be a practical impossibility, particularly in a sparsely populated place. Further, not everyone approved of grand juries, which were considered by some to be ineffective.[337] Grand jury deliberations were always an expense for counties, and a grand jury investigation into a charge of unlawful assembly or riot of necessity could be expensive due to multiple offenders. Bypassing the grand jury was sensible, then, from an economic perspective, and the public was made aware of the fiscal aspect of criminal inquiries. The Jackson *Patriot* in August of 1824 lamented recent indictments for assault and battery, for "[i]f these terminate as they usually have here, the County debt will be considerably increased.

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336 Ibid., sec. 3.

337 On April 2, 1858, the Marshall *Democrat* criticized the Grand Jury for not having investigated violations of liquor licensing laws: "In this county not a single dram-shop license has been granted this year, yet every public day there are drunken men in our streets, and every day the law in evaded or openly violated. If the Grand Jury at its May sitting, would look into this matter as they should, the Circuit Attorney would reap a large harvest, and the interest of the people be subserved."

One of the attractions of a justices' court was that litigants could expect justice to be delivered swiftly. Not every litigant was so lucky. In March of 1827, Emanuel Case was tried on a charge of assaulting Martin Donahoe in Cote Sans Dessein Township, Callaway County. A jury tried Case, found him guilty of assault and fined him five dollars. The legal positions of the two men were turned around as the jury next tried Donahoe on a charge of assaulting Case. Again, the jury found the defendant guilty and fined him five dollars.[338]

The trials were unusual only in that the two defendants accused each other of the identical offense, but the altercation between them did not represent an uncommon happening in a pioneer settlement. Most important, the court, including judge and jury, used the trial as a mechanism to convey the community's disapproval and loss of patience to the defendants. Case and Donahue thought of their differences as personal, but their neighbors thought that they detracted from the value of the neighborhood; hence, the relatively heavy fines. In early Missouri, the delivery of justice depended upon on mutual cooperation between the justice and the community. In this instance, it seems reasonable to conclude that Donahue and Case had gotten into fights earlier and neighbors were tired of putting up with the situation.

The facts in another case appear to be straightforward. In August of 1864, Allen Mitchell was tried in Campbell Township, Greene County, on a charge of assaulting Daniel Chandler "feloniously," using a "large stick . . . a dangerous & deadly weapon . . . cutting and bruising the head of him the said Daniel Chandler, and making and inflicting

338 Emanuel Case against Martin Donahoe, Callaway County, Justice of the Peace Docket book, 1816-1817, 1821-1827, C0966, WHMC-UMC.

there with the said large stick, a raised bruise cut or gash, between two and three inches in length and extending in depth to the skull of him the said Daniel Chandler." Neither party requested a jury, evidently prepared to trust the ruling of the court to Justice of the Peace Richard B. Coleman. The trial lasted three days; in the end, the judge ruled that "the evidence doth not warrant the complaint, and therefore said Mitchell is discharged and . . . execution [shall] issue against said prosecuting witness David Chandler for costs & etc.[339] Regrettably, testimony in the case is unknown as the trial transcript is missing. However, the language used by the plaintiff suggests that he believed that he had been the victim of a felony; Chandler described the weapon as being used "feloniously," the wound was sufficiently deep to reach the plaintiff's "skull," and so on. According to one source, of all of the counties comprising the thirteenth judicial circuit of the state in 1855, only Greene County possessed a lawyer resident to the county. "In the other twenty counties there were no lawyers and Springfield attorneys handled almost all of the legal cases arising from them." Not only were there few attorneys, but there were few county jails, a lack which led courts to impose a standard five dollar fine rather than order incarceration.[340]

At times a defendant was charged with a simple breach of the peace rather than assault; the charges seem to have been interchangeable. In a jury trial conducted in 1850 in Holt County, Thomas Mendinghall was charged with a breach of the peace, having allegedly struck Isaac Jiddings with an auger "and abusing him in an unlawful manner." A warrant for his arrest was issued by the justice of the peace on December 6, 1850; the

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339 Missouri against Allen Mitchell et al (1864), Greene County Archives and Records Center, Springfield, MO.

340 James R. Cox, "History of the Springfield Metropolitan Bar Association," *Springfield Metropolitan Bar Association online*, http://www.smba.cc/SMBAHistory.cfm

defendant seems to have accompanied the constable to court without any trouble, and a jury of six was "sworn in try the case after hearing evidence retiring afterwards produced the following verdict to wit we the jury find the deft guilty & asses the fine at $1.00 & the costs." The name of the justice is not shown—a curious omission but probably not significant. Justices' courts' case records often were roughly written and did not reflect the competence of the court. Though the judge's name is missing, we have the names of the defendant and of the complainant (who appeared as prosecutor), and we know that a jury, heard the case. Amounts of the fine and court costs are included as well. If Mendinghall had wished to appeal the ruling to a circuit court, the paperwork would have served the purpose [341]

In a second Holt County incident, Alexander Hardin was similarly charged and tried in November of 1849. His accuser, James Anderson, testified that Hardin "did fall upon the said James Anderson & beat and otherwise abuse this affiant unmercifully without any just provocation." The reference to "just provocation" suggests that Anderson, or, if he had one, his lawyer, knew that the seriousness of an assault in Missouri law rested in part on whether it had been provoked by the complainant. Did the defendant know about the statute because he had read it himself? Did he simply happen to use the language of the statute without realizing its import? If he had hired a lawyer, were lawyers common in that place in 1849? In any event, a jury heard the evidence and found the defendant not guilty, leaving the county with court costs of $5.64.[342]

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[341] Missouri against Thomas Mendinghall, Holt County Justice of the Peace Docket, 1845-1852, microfilm, C120120, Missouri State Archives, Jefferson City, MO.

[342] Missouri against Alexander Hardin, Holt County Justice of the Peace Docket, 1845-1852, microfilm, C120120, Missouri State Archives, Jefferson City, MO.

In Cape Girardeau County's township justices' courts, civil actions far outnumbered criminal cases. Between 1821 and 1869, justices' courts in that county tried thirty-four criminal causes and 670 civil actions founded on money disputes. Most of the criminal offenses were committed during the 1860s.[343]

OFFENSE/RULING	NUMBER OF INCIDENTS/YEAR
Accidental shooting	1-1869 (Achtermann shooting)
Arson	1-1868
Assault and battery	4-1821, 1834, 1854, 1868
Assault with intent to kill	1-1862
Bigamy	2-1867, 1869
Breach of peace	1-1847
Breaking and entering	1-1868
Destroying handbills	1-1868
Fraud	1-1867
Larceny	7-1865, 1866, 1867, 1868 (2), 1869 (2)
Murder	3-1862, 1868, 1869
Rape	1-1868
Stabbing	1-1848
Stealing	6-1827, 1847, 1865 (3), 1868
Threat to kill	2-1854, 1867
Unlawful assembly	1-1868

[343] Cape Girardeau County, Justice of the Peace Case Files 1821-1869, microfilm, C11872, Missouri State Archives, Jefferson City, MO.

Vagrancy	1-1832

Madison County justices' courts between 1819 and 1821 also heard far fewer criminal than civil cases. Of civil cases heard in township courts during that period, sixty-eight concerned debt, one a mortgage foreclosure, three were cases of breaches of covenant, two were ejectments, and slander and vagrancy accounted for one trial each.[344]

MADISON COUNTY CRIMINAL CASES, 1819-1821

OFFENSE/RULING	NUMBER OF INCIDENTS
Trespass/debt	4
Burglary	1
Assault and battery	17
Assault and stabbing	1
Simple assault	2
Accessory to murder	1
Murder	1
Perjury	4 (one quashed)
Riot	1

When a case of assault was brought before a justice of the peace, his first chore was to determine whether it was a misdemeanor. If that were not obvious, the 1830

[344] Madison County Territorial Records, Index, Alphabetical by Plaintiff, microfilm, C14880, Missouri State Archives, Jefferson City, MO.

statute authorized the justice to investigate the incident and make a determination. As was true of other duties of the office of justice, the investigation of criminal activity has been associated with it since ancient times. "In the Anglo-American criminal justice system, interrogation of suspects was conducted by justices of the peace." When Peter Hoffer notes that "English justices of the peace were required to obtain written testimony in serious crimes and to bring these records to circuit courts of assize along with the suspect," he might have been writing of nineteenth-century practices in Missouri. "By 1619 English justices had lost control of felonies but still heard misdemeanors and "small felonies." The difference between a serious misdemeanor and a small felony, according to Hoffer, was not exact "but a matter of categorization." In other words, it was arbitrary: the judge determined the nature of the charge himself. "In addition, the justices had jurisdiction over those 'as convicted upon examination, and the oath of witnesses.' Examinations by the justices were not trials, and [the] phrase 'convicted upon examination' defies precise explanation."[345]

American practices for dealing with investigation in such instances differed from English procedures. Virginians established a separate court, which was, however, not a grand jury and did not serve as a grand jury. "The examining court was not a simple enlargement of the number of examining magistrates, nor a trial court, nor a grand jury. . . its proceedings were not indictments in either the county court or the General Court." Virginia judges apparently utilized "a legislative act to formalize custom."[346]

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345 Peter Hoffer, *Criminal Proceedings in Colonial Virginia*, xxxv.

346 Ibid., xxxvii-xxxviii.

In many instances, it is difficult to know whether to designate criminal proceedings in Missouri courts either as hearings or trials, or as something else. On paper at least, justices of the peace did not hesitate when it was necessary to conduct an inquiry into an alleged criminal offense. Generally, witnesses were called and their testimony recorded, at times a jury was called, and the court handed down a ruling before it sent the case onto the circuit court. The description sounds like a trial,, and perhaps the justice of the peace thought of it as one. However, it would not have been reasonable to try a defendant on a felony charge in a justices' court and proceed afterward to forward the same case to circuit court for a second felony trial. Very similar inquiries were held by justices of the peace in early Missouri at different places and times, and it remains a puzzle what was happening in the court room.

No statute in the Missouri code provided instructions for conducting a criminal inquiry. Under the circumstances, a justice of the peace could reasonably conclude that some version of a trial would do as a formal mechanism for investigating suspicious conduct. Missouri lawmakers apparently gave little thought to the investigative process as a judicial activity but looked on it as part of the general duty of a justice, or, alternatively, a minor task that did not require mandated process. It is not surprising, then, that township justices fashioned their own practices and that those processes looked very much like trials.

Some incidents resulting in a felony ruling seem to suggest that the defendant was first tried in justices' court. Josua H. Berry was brought before justice of the peace W. B.

Means on May 4, 1850 because of a shooting.[347] Berry was accused of having shot at Robert Cochram on April 26; for the record, the justice wrote, "I had him arrested by my warrant in behalf of the State and brought to trial under charge of intent to kill said Chochram while under arrest." Counsel for Berry delivered a plea of not guilty. The judge proceeded to examine seven witnesses and recorded their testimony, and he questioned and recorded the responses of the defendant as well. On the 27th of April, Means ruled that there was "probable cause that the prisoner is guilty as charged" and forwarded the case to the circuit court for trial. John M. Berry, no doubt a relative of Joshua Berry, paid $330 bond to guarantee Joshua's appearance. In a similar incident, David Swan was accused of "the crime of assault by shooting at William R. Hansel "with intent to kill" and as a result, a warrant for Swan's arrest was issued on November 12, 1863. It was signed by justice of the peace John Priest of Byrd Township, Cape Girardeau County. The warrant was returned on the following day, with the defendant. The justice heard the evidence and was convinced that Swan had committed a felony. As Swan was either unwilling or unable to pay the $500 security bond demanded by the court, he was ordered into the county jail "until he give said Security or he be discharged by due course of law."

In the Berry matter, the justice described the procedure in court as a trial; yet, according to the written record, he merely stated that there was "probable cause" to find Berry guilty and announced that the case would be forwarded to the circuit court. He also ordered that the defendant pay security to ensure his appearance at his trial in the

[347] Missouri against Josua H. Berry, Henry County Justice of the Peace Records 1849-1858, microfilm, R229, WHMC-UMR.

circuit court. Nonetheless, although he spoke of a trial and seemed to treat it as one, the justice clearly did not regard the procedure regarding Berry's offense as a true trial.[348]

In Swan, matters were even simpler: the victim filed a complaint, the justice had Swan arrested, he heard the evidence, and ordered the defendant into jail. The justice did not declare in so many words that he intended to forward Swan's case to the circuit court for trial, but it is the only reasonable inference to be drawn. Again, we cannot be sure how to characterize the court proceeding. Then, too, it is impossible to know who recorded the case; it could have been the justice, the constable or sheriff, or perhaps the clerk of the county court if he happened to be in the area that day. Nothing in Missouri law states which official is responsible for making out the docket book, so it could have been one of several persons.

While Missouri did not create a specific body of law concerning domestic abuse, it singled out the abuse of children. The measure declared that exposing a child younger than six years of age in an open place, such as "a street, field, or other place," with an intent to abandon the child in that place, was a crime punishable by incarceration in the state penitentiary for a maximum period of five years or six months in the county jail.[349] As with other criminal offenses, the investigation into any violation of the statute would be conducted by a justice of the peace.

In late November of 1849, R. A. Huffard, a justice for Campbell Township in Greene County, investigated an incident in which an infant had been abandoned, left at

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348 Ibid.

349 Missouri, Crimes and Punishments, sec. 44, Revised Statutes (1845).

the gate of a farm belonging to a local family.[350] The record in the case is lengthy and complicated, and Huffard was careful in examining witnesses. He warned the defendant that he had no obligation to speak, and recorded all testimony (as far as can be determined). William Potter came into court on November 23, accompanied by his attorney, who unsuccessfully attempted to quash the warrant. Potter requested more time in order for his witnesses to be there to testify and was given until Monday, November 26. The first witness was Marcus Boyd, the farmer at whose home the child had been left. He testified that the baby, "about 4 weeks old," and that, when he found it, it was already cold. "Its eyes appeared to be set," but Boyd took it into the house, where he and his wife did their best to revive it. It was too late, however, and the baby died about an hour later. Boyd testified regarding the baby's clothing and its physical marks; he further confirmed that the infant he found on his property, and the child later disinterred by order of the coroner were one and the same, "and examined by a Coroner's Jury." When she was called to testify, the baby's mother identified herself under two names, Melinda Crasslin and Elizabeth Cowan, and testified that she had gone by Cowan at the time of her confinement. According to her testimony, she had been at the home of a married couple named Burns in the spring of the year, but had left in May because she did not want them to know of her confinement. She further testified that at that time, she was "on the county." The timing is not clear, but it seems that, after she decided to leave the Burns' home Mr. Burns took her to Bolivar, "to the County Court of Polk County." Several weeks after her confinement, on a Sunday in October, she had left the Potters' place, alone: "I did not take my child with me. I left it on the bed in William Potters'

350 Missouri against William J. Potter and Elias Potter, 1849, Greene County Archives and Records Center, Springfield, MO.

house." Mrs. Potter had instructed her not to take the baby with her, and promised, together with her husband, to send the baby to her later. From Potter's house, Cowan returned to Mr. and Mrs. Burns. Following her return there, Elias Potter went to her and "asked if that child was dead & I told him it was not." Elias later told her conflicting stories about what had happened to her child.[351]

At the end of several days of testimony, both William and Elias Potter were charged with child abandonment. Huffard summarized the case.

> Testimony closed case argued most elaborately by Judge Price for Prosecution and Major Barker for defendant And after particularly hearing their arguments and carefully examining all the Testimony for & against Prisoner it is considered by the Justice that there has been an offense as charged against the Defendant committed and that there is probable cause to suspect Deft guilty of said offence; and he is therefore required to enter into recognizance with good security in the sum of $700.00 for his appearance at the next term of the Greene Circuit Court."

On November 29, William Potter and Elias Potter were indicted on a charge of child abandonment. William requested a change of venue on the basis that many Greene County residents were "so prejudiced against him" that he could not have a fair trial there and he asked to be tried in "some county in said circuit where which prejudice does not exist." The narrative ends in December, 1850, with a filing by defense attorneys in which they claimed that the indictment was "insufficient" . . . "double & in other respects . . . insufficient & uncertain." The defendant's attorneys requested judgment for defendant and his discharge.[352]

The role of the community in the affair is striking. The case never would have come to the attention of authorities had it not been for the intervention of local residents,

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351 Ibid.

352 Ibid.

and their willingness to cooperate with officials, including the justice of the peace who investigated the crime and ruled it a felony. Not only did they testify under oath, neighbors probably spoke off the record and out of the court room. Had residents been reluctant to testify—if the farmer who found the child had not contacted the coroner—no criminal charges would have been filed with the court. As for the justice himself, it is clear that he felt a sense of satisfaction at the conclusion of the inquiry and was gratified to have a judge of high status as prosecutor, while the defense was taken by an officer of fairly high rank.

Though the outcome in the case was horrendous, with the community's assistance, the law produced results. It elicited facts, identified individuals involved and ultimately brought charges against the defendants. But occasionally a township justice encountered circumstances which drew a different sort of response from the neighborhood.

Missourians were known to defend the right to resolve disagreements informally, and the temptation was especially strong if parties who sought to settle the score felt that their honor or dignity was under attack. One such incident took place in Cape Girardeau County. [353] The heart of the problem was the marriage of a respected woman to a man who allegedly mistreated her and schemed to gain control over family assets. Her brothers hated their sister's husband with passion, both for injuries to their sister and loss of the family's assets, and they determined to bring him to justice. In the late summer of 1854, members of several prominent local families, including Joseph and Thomas H.

[353] Missouri by John W. Crawford, prosecutor against Joseph Lewis, Thomas H. Lewis, William Randol, Samuel Randol, George Hopper, John W. Collins, Henry Fraser, Justice of the Peace Criminal Docket, box 1, folder 10, Records, 1832-1889, Cape Girardeau County Archives Center, Jackson, Missouri.

Lewis, William and Samuel Randol (of the highly respected pioneering Randol family), George Hopper, and a few others went out to the home of J. W. Crawford to look for Ino Crawford, J.W.'s son, and husband to the Lewis brothers' sister. They did not find him—J. W. said that he was not there—and Joseph Lewis declared "that he did not intend to have such treatment as had been to his sister and said he had only one time to die and had as soon then die then as any other time & that he would kill the man who would carry the money off (illegible) place." William Randol declared that Ino was a "bully" and "wanted him to produce his claim."[354]

The next day the party split up; all but one returned to Crawford's in the evening, "three of them . . . armed." Joseph vowed to "follow him a thousand miles but what he would have the money for the place." A neighbor named Jenkins, who had become involved somehow in the affair "told Mr. Jos Lewis he was doing wrong and going contrary to Law he then said he didn't care a ----------but his neighbors had advised him to take the law in his own hands and go a head with it . . . I . . . also told him if Ino Crawford and your Sister cannot live together he is willing to give her the farm if she would grant him a Divorce Jos Lewis then said damn him but he wants what is on it but should have nothing for he came without any thing and should go away in the same way." No doubt frightened for his life, James Crawford went to Joseph Lee, the local justice of the peace, immediately after the visits by the Lewis party and gave an account. Jenkins testified at the time, along with J. W. Crawford.[355]

It is not clear whether the matter went to trial; if so, the transcript is missing. Probably the men would have been charged with assault with intent to kill in a trial. The

354 Ibid.

355 Ibid.

justice of the peace did not try the defendants, because their crime was a felony, but because he could not locate the defendants in order to have them arrested, he was not in a position to proceed judicially. It is possible that neighbors and friends of the defendants may have concealed their whereabouts from the justice due to the long history of at least some of the families in the area. William and Samuel Randol, for example, descended from Randols who had been residents of Cape Girardeau for close to 150 years. Indeed, an ancestor, Medad Randol, had been indicted in June of 1805 for rioting and breach of peace, only to be appointed the next day, with William Doughertey, to lay out a road to be located between Dougherty's house and Louis Lorimier's ferry. Three months later, the indictment against Randal was quashed. It is noteworthy that at the same time Medad was in trouble with the law in 1805, a relative of his, John Randol, was serving as constable.[356] Stories about the law-breakers and law-makers within the Randol family surely formed part of the local folklore, and, if anything, entertained rather than disturbed the community. Family mattered; in addition, the affair apparently was viewed by elements of the neighborhood as an affair of honor.

In the child abandonment case, the matter went through the judicial system in an untroubled manner because the community joined with the justice of the peace to ensure that the defendants would not escape the charges. In this case, however, Joseph and Thomas Lewis spoke as though they were justified in dealing with their sister's husband as they did at least in part because neighbors urged them to do so. However, the difficulty in bringing the Lewis party into court on charges may be traced to a recalcitrant community, one that identified not with the judicial system but with the more familiar,

[356] Stoverink, *Early Court Records of Cape Girardeau County*, 2, 5.

informal administration of justice. In other words, the community was not united, as it was in the case of the child. The difference between the two cases demonstrates that communal justice could be temperamental. If the community upheld the justice of the peace in his duty to conserve law and order, he stood a much better chance to succeed in keeping his oath to maintain the peace. Conversely, without community support, the justice was hampered in carrying out the responsibilities of his office. The Lewis party had its supporters, as did the Crawford family, if the record is any indication. It also is possible that, regardless of which set of accusations they preferred, neighbors opposed the law's intervention in a tangled matter involving "good" county families, particularly if the result included felony charges.[357]

A compelling need to protect family honor and a sister's personal safety and security fueled the Lewis brothers' campaign to punish her husband. In other instances, where wives complained of abuse committed by husbands, and other women charged men with rape, the justice of the peace was able to act in their defense.

In May, 1845, for example, Mary Dinkle, a married woman, went to Robert C. Fulkerson, the justice of the peace in the township where she lived, to beg for the court's protection. She feared her husband, saying that he had "on sundry occasions ill treated [her] in the last twelve months" and that she feared "some great personal violence." Based on her account, the justice issued a warrant for her husband's arrest. After hearing

[357] Robert Dykstra has noted the same tendency in cattle towns of the far west during the latter portion of the nineteenth century. People tolerated violence to a marked degree, even in homicides. In three such cases in Abilene, the perpetrator was convicted and sentenced to death but was not executed. The guilty party was helped by his youth, especially when he came from a "good family." *Cattle Towns*, 129.

the testimony of husband and wife in court, Fulkerson charged the husband with felonious assault and forwarded the case to the circuit court for trial.[358]

Two years later, Mary Lambert of Cape Girardeau County approached justice of the peace Pinckney Mabrey with a similar story. According to her account, Mrs. Lambert had gone with her child to her father's house to get away from her husband, Ira. However, he followed her there, made his way into the place, and "endeavored by force to take her, her child, and at the same time and place . . . he . . . drew a pistol and struck her . . . and . . . threw a large piece of lead at her. . . [and he also] endeavored by force to carry away the child." The judge arrested Ira Lambert, demanded payment of $100 security, and forwarded the case to the circuit court for trial.[359]

Finally, almost thirty years later, Caroline Stendel swore under oath in justices' court that she feared for her personal safety at the hands of her husband, Henry Stendel. Justice of the peace John J. Moore ordered Stendel arrested and brought into court. The case differs from the others described here in that witnesses testified in the Stendel suit. In fact, the trial had to be delayed so that witnesses could be subpoenaed. The trial included a jury of six "good and lawful Men" who ended by finding Henry Stendel guilty "as he stands charged in the complaint." Stendel was adamant in refusing to agree to keep the peace for twelve months, pay court costs, a $500 recognizance bond and two

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358 State of Missouri Mary Dinkle prosecutor against Frederick Dinkle, Robert C. Fulkerson record Book, C3804, WHMC-UMC.

359 State of Missouri against Ira B. Lambert, 1847, Justices' Court Byrd Township Cape Girardeau County, Missouri, Cape Girardeau County Archive Center.

securities of $100 each. As a consequence, Stendel was committed to the county jail to wait for the next term of the circuit court.[360]

The justice of the peace in such cases acted as a kind of clearing house. When social relations went awry, the official to consult was the township justice. It is notable that, in each instance, the justice system adopted the position of the wife. By tradition, it has been supposed that, as the household governor, a man had the right to "correct" his spouse, just as he would correct a wayward child or a servant, even if some slight injury resulted.[361] However, men also have been expected to protect and defend women as weaker creatures than themselves—again, just as men have been supposed to have an obligation to protect others under their charge. In the cases depicted here, township justices of the peace held that defendants lacked a legal right to commit violence against a spouse. In addition, the court accepted the statement of the wife in every instance in these cases, though in only one case did witnesses supply testimony in support the wife's account. Further, Missouri had no law on the subject of domestic assault at the time these incidents occurred, and justices of the peace treated the women's complaints as they would have in other cases where an individual came forward and claimed to have been attacked by another person.

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360 Missouri against Henry Stendel, 1873, Cape Girardeau County Archive Center, Jackson, MO. No other cases of domestic assault were discovered in this study. Other married women if assaulted may have been reluctant to go to the justice of the peace.

361 Regarding the nineteenth-century movement for reform of women's rights, Sandra VanBurkleo writes that "[m]arital reform . . . affected how all women would be governed, and, by implication, how all household dependents would be treated by all masters." Sandra F. VanBurkleo, *"Belonging to the World" Women's Rights and American Constitutional Culture* (New York: Oxford University Press, 2001), 110. The book includes broad discussion men's powers as household governors in colonial and nineteenth-century America.

These cases were separated by decades but justices acted consistently on behalf of the women. Features of the three cases varied. Dingle's case was forwarded to the circuit court, but the record does not indicate whether he paid bond or was ordered into the county jail. Lambert was found to have committed a felony but remained free on bond while he waited for his trial. In the Stendel affair, the judge conducted what to all appearances was a standard jury trial, but in the end sent Stendel to the county jail to await trial in circuit court.

Reported cases of domestic assault were far from common in early Missouri, and incidents of rape or attempted rape even more rare. In Missouri against Frank A. Bennett, an 1868 case in Cape Girardeau County, an investigation was brought on Maggie Minser's charge that she had been raped by the defendant.[362] Justice of the peace John J. Moore of Cape Girardeau Township first heard the details. On June 6, 1868, Minser appeared before Moore and swore on oath that, on May 1st of the same year, she had been raped by Frank Bennett. After taking her statement, the justice ordered the sheriff to arrest Bennett and bring him to his office, which he did. Henry Vollmers and James McWilliams (the nature of their relationships with Bennett is not clear) appeared and swore recognizance for Bennett in the sum of $500. Moore ordered Bennett to return on June 9th in order to "answer a charge against the said Frank A. Bennet for rape."

Two things happened to delay the hearing scheduled for June 9. First, Thomas P. Gilroy, Minser's attorney, requested a continuance of the "examination" as his client was "absent." He believed, however, that he would be able to have her in court by June 19th.

[362] Missouri against Frank A. Bennett; Missouri against Mrs. Frank Bennett, Justice of the Peace Records, box 6, Bundle 165, Cape Girardeau County Archive Center, Jackson, MO. All material that follows on the case was taken from that account.

The justice granted the continuance until the 19th and at the same time ordered Bennett to pay bail of $1000 and two "securitys" of $500 each. The defendant refused to pay the money and was ordered kept in the county jail until he either paid or was "otherwise discharged by due course of Law."

By the next day, June 10, Bennett had acquired a writ of *habeas corpus,* signed by one of the county justices, leaving Moore no choice but to order him released from jail. The day scheduled for the hearing was June 19th, but on that date neither Minser nor Bennett appeared. It later came out that Mrs. Frank Bennett had given Minser a ten dollar bribe to stay away from court; she "unlawfully wickedly maliciously and corruptly did give the said Maggie Misner the sum of ten dollars . . . [to] induce the said Maggie Minser [to] leave the county." Minser later came forth and on August 6 made a sworn, written statement to Moore, who put out a general order to "any sheriff or Constable" of the county to bring Bennett in to answer charges.

Herman Boder, the county sheriff, arrested Bennett on Sept. 3, 1868. On the next day, Bennett appeared before Moore and requested a change of venue, on the ground that "John J. Moore the Justice of the Peace . . . is a Material witness for defendant without whose testimony he cannot safely proceed to trial." Moore granted the change of venue. The papers in the case were delivered to James R. Hussey, Esq., justice of the peace. Hussey acknowledged receipt, issued a subpoena to Minser, and to Thomas Juden for the defendant. Trial date was set for Sept. 7, with Bennett ordered back into jail until that date. When the case was called on the 7, the sheriff reported that Bennett had escaped, and the case was dismissed. Moore ordered the sheriff to get Bennett again and bring

him back. The deputy sheriff, Charles Vorhoff, reported on Jan. 15, 1869, that the defendant was not to be found and returned the warrant not executed.

It was a complicated business. It is impossible to know how Moore would have testified as a material witness for the defense. The justice did not offer resistance to a change of venue, so presumably he would have testified if called. Moore seemed prepared, indeed, eager, to continue the investigation, which was thwarted by the county's intervention, as well as by what probably was collusion by the sheriff and deputy sheriff. Maggie Minser would have been better off not accepting the ten dollar bribe, but there may have been more to it than that—possibly she feared the Bennetts, both husband and wife. If so, she might have had good reason, for Frank Bennett had strong support from within county government. The case is unusual for bringing together at least three justices of the peace, two for the township and one for the county, the sheriff and deputy sheriff, the circuit attorney, and the attorney for the plaintiff. Maggie Minser and the law of the state of Missouri were represented by her own lawyer, the circuit attorney (who drew Moore's attention to the escape) and John J. Moore. Frank Bennett was represented by everyone else who acted in the case. If Bennett's supporters acted improperly—and it appears they did—it is an extraordinary story of judicial misconduct on a small, quite dense scale. The narrative makes clear as well that in a system like Missouri's, where oversight of local courts was absent, local officials could abuse the law without penalty.

A discussion of justices of the peace and crimes of violence is incomplete without presenting the role of the justice as perpetrator. In incidents that occurred over

several decades, officers of justices' courts and county courts of commissioners either harmed others or failed in a duty to protect others from assault. Charles S. Yancey probably provides a more vivid example than any other could offer. Yancey traveled to Missouri in 1833 and opened a law practice in city of Springfield, in Greene County. Yancey was not known to be a "profound lawyer; several of his contemporaries at the bar here being superior to him in legal erudition and force." However, he was popular in the Springfield area and his career advanced steadily. In 1836 Yancey was appointed a justice of the peace on the County Court. In that same year, he was indicted by the circuit court for failure to perform his duty as a justice of the peace. In April of that year, a free black woman, "one Milly Sawyers a free person of color," was attacked in the street by a crowd of young men from some of the county's elite families. Sawyers suffered "beating, bruising, [and] wounding," all of this apparently in front of Yancey, who did nothing to stop the attack. Yancey subsequently was indicted by a grand jury for neglect of duty and charged with a misdemeanor in office.[363]

Despite this lapse, his career on the county court continued peacefully for some time—until the day he met John Roberts in the public square. Roberts had previously appeared in court on a misdemeanor; there he and Yancey exchanged "high words." The twenty dollar fine the court that imposed on Roberts greatly bothered him. He got into a

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[363] C0192, Yancey, Charles S. Letters, 1839-1865. State of Missouri, Misdemeanor in office, Chas. S. Yancy,A true bill, Hosea Mullings, Foreman of the grand jury, box 598, no. 64, WHMC-UMC. Roberts' misdemeanor trial was held by the county court. Missouri's county courts lacked misdemeanor jurisdiction and it is puzzling that the county, rather than the township justices' court, heard the case. Yancey probably avoided a guilty verdict in Roberts' death partly because of unfavorable local feeling toward Roberts, who, at the time of his death, had been under indictment for assault with intent to kill; Roberts never was tried on the felony, however, because Judge John Phelps, who was county prosecuting attorney *pro* tem dismissed the charge "on account of the death of the defendant." *History of Greene County*, 177-178.

habit of insulting the judge whenever he saw him. The two finally met on the square, where Yancey shot "a pistol and fired. He then drew the second pistol, and was in the act of firing again," when a companion knocked the gun out of his hand. "Roberts exclaimed, 'Don't shoot again—I am a dead man now,' and fell." Roberts died the next day. Yancy turned himself in to authorities and was immediately tried in the Circuit Court and acquitted.[364] The incident was so far dismissed in the public mind that Yancy eventually became a judge of the circuit court where he enjoyed an excellent reputation.

The judge was a colorful, unique figure in Missouri legal history. In an earlier and much less dramatic incident that took place during the early territorial period, an officer of a county court fought a duel and killed a man. Joseph McFerron was a pleasant and well-educated man and the first clerk of the Cape Girardeau courts. In 1807, he somehow fell out with a man named William Ogle. Ogle allegedly insulted McFerron quite badly, to the point where they decided to settle it with a duel. McFerron had never shot a pistol in his life but practiced before the event. He must have been a naturally good shot, as he killed Ogle with a bullet in the head instantly. According to the narrator, "He at once gave up his office, but public sympathy was with him, and he was soon reinstated, and remained in that position until his death in 1821."[365]

In all of these cases, the individuals involved were white. The assault statute of 1830 dealt with violations committed by whites—slave crime always formed the subject

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364 George S. Escott, *History and Directory of Springfield and North Springfield*, http://thelibrary.springfield.missouri.org/lochist/history/directory/ch4.html

365 Joseph McFerron received income as clerk of the board of commissioners and assessors and as clerk of the general court of quarter sessions, offices which he held simultaneously. *History of Southeast* Missouri, 412; *Abstracts and Indexes of the Early Court Records of Cape Girardeau County, Missouri, 1805-1824*, 21-22.

matter of a separate measure in a body of race- and class- based law. The 1845 measure dealing with slave crimes granted justices of the peace enhanced control of offenses committed by blacks. Justices controlled cases of "riots, routs, and assemblies, and seditious speeches of slaves, and insolent and insulting language of slaves to white persons . . . [to] be punished with stripes, at the discretion of a justice of the peace." The act went so far as to permit "any person, without further warrant, to apprehend slaves so offending, and carry them before the justice. Justices were authorized to investigate complaints of slaves gathering in "unlawful assemblies" or disturbing public worship, and could order whippings of persons found guilty[366]

But new law did not guarantee that slaves would be tried more often in justices' courts. Indeed, few slaves appear to have been tried at any time by justices of the peace. In the 1852 case of Missouri against Charlotte (slave of Thomas Cooper), the defendant was tried for using insulting language to the family of S. F. Gabriel.[367] A criminal casebook for Cape Girardeau township documents an 1832 vagrancy charge against Peter, a "freeman of color," in 1832; John Jackson, "a colored man," was charged with assault with intent to kill Clark Horn, also black, in 1865; also in 1865, Thomas Brooks, "colored," was tried for an assault on George Wright, "colored;" and James Lookey, "a man of color," stood trial for stealing a cow in 1866. Finally, James H. Stewart, "a colored boy," was tried in the circuit court on a charge of vagrancy in 1871; justice of the peace Leonard Sargent served as a witness at the trial, having seen the boy "loitering about." Of sixty-five criminal cases recorded in the casebook for the period between

366 Missouri, Revised Code, Chapter 67, AN ACT concerning slaves, art. 1, sections 22, 26, 29

367 Madison County Justice of the Peace Files and Index, 1821-1839, C19540,WHMC-UMC.

1832 and 1889, in only five instances were the defendants black, and just one was in fact bonded: Charlotte, the impudent slave.[368]

Why are there no accounts of slave trials in justices' court records? Were they punished informally, on the plantation? Harriet Frazier's scrupulously researched book on slaves and crime in Missouri is largely based upon circuit court records, which she notes are difficult to locate and usually incomplete; her discussion seldom reaches justices' courts, and then peripherally. For these reasons, it is impossible to know which and how many of the circuit trials in her book began with an examination of the incident by a justices' court. Frazier suggests two possible explanations for the absence of criminal trials of blacks in justices' courts. First, slaves may have been brought before a justice of the peace with the result that, rather than trying the case as a misdemeanor, the justice ruled that the offense was a felony and sent it onto the appropriate circuit court for trial. In that event, the justices' court records, if they still exist, would appear in the circuit court record. Those cases would explain why some slave offenses escaped legal resolution by justices. Second, according to Frazier, even misdemeanor slave crimes were tried routinely by circuit courts, despite the fact that jurisdiction rested with the justice of the peace.[369] A third explanation is that slave owners themselves punished slaves. Particularly in areas like Little Dixie, (usually included are the counties of Saline, Howard, Cooper, Audrain, Boone, Callaway, Ralls, Platte, Jackson, Ray, Carroll,

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368 Justice of the Peace Criminal Docket 1832-1889, Cape Girardeau County, Cape girardeau county archive center Center, Jackson, Missouri.

369 *Slavery and Crime in Missouri, 1773-1865* (Jefferson, NC: McFarland & Company, Inc., Publishers, 2001), 5. The notebook of the lawyer Charles Hardin mentions a slave tried in a justices' court in connection with the same slave being indicted on a felony at a later time: "It is no bar to an indictment against a slave for Grand Larceny that he was convicted and punished before a J.P.—State vs. Payne 4 B. 37th—the Cir Court has exclusive original jurisdiction in all cases of Felony—code 1845 page 414 sec. 33." Charles Hardin, Papers, folder 5, C0111, WHMC-UMC.

Chariton, Monroe, Pike, and Clay), where many settlers from the upper south made their home, planters controlled the legal process in seeing that slaves accused of murder were punished. According to Michael Wayne, it is "most striking . . . how little was left to the elected officials."[370]

It seems doubtful that many slaves passed through Missouri's justices' courts. In any event, the black code was intended for whites, as a means of punishing disruptive conduct by slaves and providing guidelines for the supervision of slaves. Blacks surely were aware of prohibited behavior though it is unlikely that many read the statutes.[371]

Civil jurisdiction in handling money disputes formed one of the most important powers held by the township justice, but the justice of the peace made a more visible contribution in dealing with troublemakers and investigating suspicious incidents that disturbed fundamental living conditions. Settlers must have taken comfort in knowing that a justice of the peace was nearby, and where disorder and violence were acute, they surely relied on his assistance. But there were limits to his capacity to help and protect the innocent. Mob activity, whether racially motivated or generated by war-time hostilities, tenacious adherence to a philosophy of self-help, or plain bloody-mindedness could not be suppressed by local law enforcement techniques. While Missouri did not present the scenario of unending violence, depravity, and corruption that depictions of the

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370 Michael Wayne, "An Old South Morality Play: Reconsidering the Social Underpinnings of the Proslavery Ideology," *Journal of American History*, vol. 77 (December 1990): 838-863 in Thomas G. Dyer, " "A Most Unexampled Exhibition of Madness and Brutality": Judge Lynch in Saline County, Missouri, 1859, Part 2," " *Missouri Historical Review*, vol. 89, no. 4 (July 1995): 367-383.

371 According to Prof. George Lee, who studies the history of the American South, Missouri laws forbidding slaves to assemble and to teach them to read and write were widely ignored, "nor was the slave patrol diligent." He repeats a story from the Canton *North-East Reporter* for June of 1849, concerning a number of slaves who had been seen with copies of Thomas Hart Benton's speech and discussing it. Other groups of slaves, according to the newspaper, had been seen walking in the evening or on Sunday talking "freely and understandingly" on the subject of whites' feelings toward slavery. George R. Lee, "Slavery and Emancipation in Lewis County, Missouri," in *Missouri Historical Review* vol. 65, no. 3 (April 1971): 294-317.

"wild west" suggest, routines of daily life could be difficult to maintain in the face of actual problems.[372]

The legal system itself inherently encouraged mob action in providing tacit approval of violence against slaves. An 1855 law, for example, permitted slave patrols to deliver up to ten lashes of the whip if any slave were discovered off the plantation without a pass. While the slave patrol was sanctioned by law and therefore not a mob as the word is ordinarily used, in practice it may not have functioned very differently from one. Further, it is unclear why lay persons were authorized whip a slave. The statute legalizes, even promotes physical aggression against slaves, and, by extension—because Missouri law assumed all blacks were slaves unless they could prove their freedom—against all blacks. The law also enhances increases the number of lashes that the justice of the peace could order in the same situation for the same offense.[373]

Lynchings and other mob acts menaced whole frontier communities. Lives were lost and property damaged or destroyed; beyond that, mob acts destroyed a community's confidence and discouraged immigration. Mob members and their supporters believed that they had delivered justice but never convinced the entire community. In 1857, a

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[372] John Wunder points out that the so-called "wild west" could hardly have been as violent as depicted. Scholars such as Philip D. Jordan, Fred Harrison, Anton-Hermann Chroust, Walter Preston Scott and others have represented the first settlers as being murderers, thieves, horse-rustlers and other unscrupulous sorts. As Wunder notes, early settlements were made by ordinary, middle-class, decent men and families, who were more interested in taming the environment than in killing each other. While violence was a reality of life on the frontier, there is no evidence that violence made daily routines and institutional functioning impossible. Robert Dykstra, too, comments on the aspect of legend in stories of violence on the western frontier. Cattle towns were violent places, but did not remain so. Nonetheless their reputations lingered on—Dodge City, for example, never outlived its "notoriety." Dystra notes that as more entrepreneurs moved into the cattle towns of the west and opened permanent businesses, towns had an impetus to suppress violence systemically. Steps included incorporation, passing local ordinances against violent acts, and establishing police. In some towns, vigilantes or hired gun fighters provided punishment. *Inferior Courts: Superior Justice*, 171-173; *Cattle Towns*, 113-121, 132.

[373] Missouri, *AN ACT amendatory of an act entitled "an act concerning Patrols," approved December 4, 1855*, Laws (1855).

slave convicted of murdering his master (after being scolded for not cutting enough wood) was removed from the Howard County jail by a mob and hanged. An editor on the local newspaper "lamented this vigilante justice."[374]

A lynching was made even worse when officers of the court participated. In Saline County in 1859, mobs murdered slaves who had been named in a series of offenses dating between April and July of that year. The slaves shared nothing other than the fact that they had been arrested and were being held in various jails throughout Saline County.[375] The first slave to be arrested was named John, who was accused in the April death of a local white man of good family, Benjamin Hinton; John was incarcerated in the jail in Marshall but moved to the Boonville jail when a mob demanded that he be handed over. Nothing happened for a while. Then, on the 22nd of June, a slave named Holman was arrested for murdering a white man named Durrett of Arrow Rock. Holman claimed self-defense, telling authorities that Durrett had sworn he would cut Holman's throat and had pulled a knife. On July 12th, Jim, the slave of James White of Marshall was charged with the attempted rape of Mary Haebcot, a white woman who lived in the same place. Jim had a lawyer who believed that his client had deliberately been wrongly accused. However, he made no headway and Jim remained in jail and waited for the grand jury, scheduled to convene on July 19. The final incident involved an allegation of

374 Hurt, *Little Dixie*, 250.

375 Thomas G. Dyer, " "A Most Unexampled Exhibition of Madness and Brutality": Judge Lynch in Saline County, Missouri, 1859, Part I," " *Missouri Historical Review*, vol. 89, no. 3 (April 1995): 269-289; Thomas G. Dyer, " "A Most Unexampled Exhibition of Madness and Brutality": Judge Lynch in Saline County, Missouri, 1859, Part 2," " *Missouri Historical Review*, vol. 89, no. 4 (July 1995): 367-383.

rape against a slave who belonged to Dr. William Price of Arrow Rock; the 'victim' was a "little girl between ten and two years old." [376]

On July 19, the grand jury gathered and prepared indictments against John, Jim, and Holman, all of whom were imprisoned in the Marshall jail at that point. The circuit judge decided to try all three men immediately, as he feared that the mobs waiting outside would take action if the prisoners were sent back to jail for proceedings at a later time. He was unable to proceed, however, due to the violent excitement of the atmosphere both within and without the court room. To make matters worse, the crowd was being whipped into greater rage by James M. Shackleford, a farmer, Mary Habecot's neighbor, and a justice of the peace. Eventually the mobs (there had been three at one time, there were now two) burned John alive and hanged Holman and Jim. Shackleford subsequently wrote five very lengthy letters to the *Marshall Democrat* defending himself. Most of his claim rested on "the ultimate power of the people in the dispensation of justice."[377]

People within the county worried over how the killings of blacks would affect the county's reputation, once the general population learned of the incidents. One newspaper, the *Marshall Democrat*, endorsed Shackleford's logic. The *Lexington Espress* in Lafayette County "condemned the entire affairs." George Allen, editor of the *Saline County Herald*, was concerned that a drawn-out period of mob law might prove "socially destructive to the white population." Judge Hicks, the circuit judge who had wished to try the three murdered slaves, resigned his position on the court.

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376 Dyer, "Madness and Brutality," part 1, 282.

377 Ibid., 285-289.

> My feelings as a man as well as a Judicial officer have been cruelly wounded . . . To find myself both morally and physically without the aid of people, unable to administer the laws; to be unable . . . to protect the prisoners at the bar of the court . . . to keep them from being dragged from the hall of justice by violence, and hung and burnt in sight of the court house, was a blow I was not prepared to receive.—But it came, and came like a thunderbolt in a cloudless sky.[378]

The judge clearly had counted upon the community—on the good will of the people, loyalty to him, and obedience to the rule of law. It is doubtful that he was alone in his feelings, as judicial enforcement of law in local places depended to a very large degree on loyalty to the court and to the judge who ran it. Judge Hicks' experience supplied a shocking lesson that customary values and practices were mutable, and that morality and law—including the law of the neighborhood—were separate things

The great difficulty associated with mob violence was the sheer inability of the legal system to prevent it or to try and punish the perpetrators. The office of the justice of the peace was designed to serve English villages, which usually consisted of collections of farms surrounding the estate of the resident baron or viscount. In Missouri, the justice served the township, a small gathering of settlers making a community together. Even with the assistance of the hue and cry of the neighborhood, a justice of the peace would have been ill-equipped restrain the brutal, deeply violent mobs and gangs that began to terrorize Missourians during the latter third of the nineteenth century.

In 1853, incorporated Missouri cities became liable for loss and damages incurred as a result of rioting.[379] The statute turning those obligations into law was followed in

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[378] Dyer, "Judge Lynch . . . Part 2," 372.

[379] Missouri, AN ACT to prevent riots and mobs within incorporated cities in the state of Missouri, Laws (1853).

1865 by a comprehensive measure that permitted the governor of the state to call out a militia if informed by a sheriff "that the ordinary process of law cannot be executed in any county, and that the ordinary posse can not be summoned or will not respond to the summon of the officers of the law." The law does not define "ordinary posse" or "ordinary process," nor does it indicate what sort of conditions would trigger a call to the governor for assistance. The importance of the measure is that it tacitly admitted conditions of uncontrollable violence and acknowledged that justices of the peace were unable to stop the disorder. In 1874, the governor received enhanced authority to deal with gang violence, in this instance to order a temporary body of no more than twenty-five men who would pursue "highway robbers, marauders, or other outlaws," paid for by the state. Unlike the previous measure, the newer law left it to the governor's discretion to decide when the state should intervene.[380] In essence, the enactment authorized the state to assemble a militia, whose members would be compensated as state employees.

The township justice of the peace in early Missouri performed invaluable services to folk of rural communities. They succeeded in removing disorderly persons from communities, and in conducting investigations that resulted in felony trials in the circuit courts of the state. Justices displayed a canny sense of human nature, persistence, and apparently sufficient knowledge of statutory law to perform as expected. Because Missouri was a slave regime until 1865, the legislature was required to assign jurisdiction over slave crime to some court. Though justices' courts held jurisdiction in most cases, they tried few if any slaves. In defending women from violence, justices were more

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[380] Missouri, AN ACT to provide for the enforcement of civil law and the payment of the expenses thereof, Laws (1865); Missouri, AN ACT to suppress outlawry and robbery in Missouri, and to appropriate money therefore, Laws (1874).

active; though the nineteenth-century western frontier is not known for sympathetic attitudes toward women, Missouri's township justices' courts tried husbands on assault charges and investigated sexual violence. Some justices committed violent acts or supported acts of violence by others; their actions not only violated law but caused scandal within the justice community. Yet they were few in number, and their dishonorable conduct underscores the dedicated, capable service of the township justices of the peace within early Missouri's hundreds of rural settlements.

CHAPTER VI

CONCLUSION

Settlement of early Missouri's frontier regions was not a smooth, continuous process. The topography itself, though much of it lush to look upon, fought pioneers' efforts as they struggled to build roads and clear land for growing crops. As if the physical environment did not provide a sufficient challenge to early Missourians, they also dealt with disorderly conditions, frequent violence, want, isolation, and settlements with few if any amenities for immigrant families.

However, settlers to the frontier were not forced to endure life without law and government. Every township in Missouri possessed at least one justice of the peace, who was charged with preservation of peace in the community. As soon as the Missouri legislature formally organized a county around a group of townships, county government appeared in the form of a county court of commissioners. These courts administered government services and settled probate matters.

Frontier life gradually eased. Early residents were joined by newcomers, all of whom worked together. Daily life acquired orderliness under the justice of the peace, while the county court collected taxes, built roads and bridges, and generally promoted the interests of the community. Because different regions of the state were settled during different periods, much of Missouri at any given time was still a frontier in terms of buildings, availability of transportation, and the state of agriculture.

Immigration was not an uninterrupted process. The War of 1812, periodic financial panics, and natural disasters, such as cholera and floods slowed state development and growth. But on the eve of the Civil War, the state was covered with

self-supporting farms, small groceries, taverns, and other commercial enterprises, and hundreds of tiny, functioning towns. The railroads had begun to come in and the future was bright.

With war, state government in Missouri convulsed. On July 22, 1861, a convention meeting in Jefferson City vacated the leading state offices: governor, lieutenant governor, secretary of state and the legislature. Candidates appointed by delegates to the convention filled the vacant offices until an election could be held for the new Provincial Government of Missouri. As one study of Missouri politics for the period puts it, though much support existed within the state for the Confederacy's position, "Missouri's position relative to loyal states . . . would have made an overt act of secession suicidal."[381]

Post-war partisan politics on the state level did not have widespread noticeable effects on structures of local justice. Courts had been temporarily politicized during the war, as one side or the other sought control of counties, but the problems were at least as strategic as they were political—governments continued to try to provide services and township justices' courts conducted trials throughout the war.

While state-level governance assumed a holding pattern,[382] county courts of commissioners administered county government—albeit not without difficulty—just as justices' courts held trials and deposed witnesses. In Greene County, judicial officials

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381 Raymond D. Thomas, "A Study in Missouri Politics, 1840-1870, Chapter II, Missouri for the Union," *Missouri Historical Review*, vol. 21, no. 3, (April 1927): 438-454.

382 Judicial officers were affected by events of the war. In Greene County, Judge H. Edwards was elected to the circuit court in 1860 but resigned his position in order to help the Confederacy in the summer of 1861. His action shut down the circuit court for months, until a replacement was appointed by the governor in the springtime of 1862. *Springfield Metropolitan Bar Association online*, June 1, 2007, http://www.smba.cc/SMBAHistory.cfm

worked in the midst of war. One account of conditions there comments that "[t]hose who remained [in Springfield] found themselves in a city that was fought over repeatedly by the opposing forces and changed hands frequently." The county court house was completely destroyed in a fire set by a prisoner during the war, and when a new court house was built, it was used as a barracks.[383] The fact that Springfield was taken by the Union army in late 1862 did not mean that peacetime conditions prevailed in the town. Nonetheless, the common pleas and probate court for the county settled a dower claim of Nancy Roach with the "Usual set off of real estate" in February of 1863, and in July of 1861, just three months after the commencement of war, the court accepted the committee's report with respect to setting off real estate to satisfy Marina Bedell's dower claim.[384]

Courts in other jurisdictions continued to be active including Cape Girardeau County, which operated throughout the war period. Elections were held in many places, war or no war. Buchanan County elected a justice of the peace and a county clerk in August of 1862.[385] In Boone County, clerks and judges served throughout the entire period of the war.[386]

People coped as they could during the war. Greene County was under Confederate control by January of 1862; the county "comprised a grand military camp

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383 *Springfield Metropolitan Bar Association online, Ibid.*

384 Greene County Probate Court Record Book, Greene County Archives, Springfield, MO.

385 Robidoux Family Papers, 1858-1873, one folder, C2627, Western Historical Manuscript Collection, University of Missouri-Columbia.

386 North Todd Gentry, *The Bench and Bar of Boone County, Missouri: including the history of judges, lawyers, and courts, and an account of noted cases, slavery, etc.* (Columbia, 1916), http://galenet.galegroup.com.pryxy.lib.wayne.edu.

and its outposts." People hid their farm animals when they heard the approach of a foraging group. A Greene County history notes that bands of ruffians, moving about either as Confederate soldiers or independent guerilla fighters, "infested" towns, "plundering, and sometimes murdering, the Union citizens whenever opportunity offered."[387]

The Civil War left Missouri burned out and in poor economic condition, but immigration rapidly increased following the war; newcomers bought properties that had been virtually destroyed and then abandoned by Missourians who gave up and left the state permanently. Booming land sales, combined with increasing miles of rail track and improved inland transport of goods led to a remarkable recovery. Political troubles took longer to work out.

With the end of slavery and loss of much of its black population, Missouri became much more a 'white' state. The few blacks who remained tended to turn to each other for help rather than risk hostility from a culture that retained the attitudes of a slave society.

Missourians in the late nineteenth century continued to feel deep attachment to the courts of the neighborhood; in a very real sense, they felt that township justices' courts and the county courts *belonged* to them. The nature of business conducted in those courts did not change noticeably with time. Debt continued to be the major subject of civil litigation in justices' courts. Justices continued to investigate neighborhood incidents, try minor crimes, and rule on felonies. Their jurisdictional powers were not reduced, though in some towns, urban courts assumed powers of the justice of the peace within town boundaries. County courts eventually lost probate jurisdiction, but it is doubtful that they

387 *History of Greene County*, 401, 416.

felt snubbed by the transfer of authority to newly-created permanent courts. Statutory law reined in fiscal exercises by county justices, but only slightly. These courts continued to possess very large powers.

It has been claimed that, in America, traditional practices have invariably given way to forces of modernity. Historians of New England argue that neighborly harmony and identification of community with local institutions could not survive in the face of increasingly heterogeneous population growth, diversified needs, and preferences for codified law and greater formality in legal systems. Continuity, in other words, reflected in an attachment to accepted social and economic practices and trust in local institutions, collapsed before engines of change.

The argument will not hold, at least not for Missouri. Despite enormous changes in state governance, a revised legal system in which slavery was missing, partisan political battles and other changes in top layers of government, local judicial practices and consequently local legal culture did not alter. Residents of small towns and villages kept faith in local courts and would have felt lost without them, because they were familiar, close-by, and trusted. Localism survived and triumphed, not change, certainly not in rural areas, which describes the greater part of Missouri.

The argument that Missouri legal culture underwent a fundamental change with the disappearance of legal slavery as an organizing feature of the state code has a great deal of truth in a superficial sense. However, study of post-war statutes and even some earlier enactments shows that, if legal slavery were no longer possible, local places still were capable of reproducing conditions of slavery for freedmen and freedwomen. Separation of black families, widely discussed and reported in the many decades

following the Civil War, attests to Missourians' ingenuity in retaining a pre-war social ordering.

Arguments for change lose force as they are extended to cover larger and larger segments of a society. It is common, for instance, to speak of 'the economy' or 'education' or 'religion.' But Missouri's nineteenth century 'economy' consisted of many local economies and county-wide economies as well, and in some cases there were wide variances. In some places, 'education' meant being taught at home to read and write; in others, a few families with money might pay a teacher to educate local children whose parents could afford to contribute to the teacher's support.[388]

This is not an argument for micro-histories. However, American legal history has suffered from a serious absence of interest in local judicial bodies and the communities they served during earlier periods. Because minor courts attract no interest, they are deemed unimportant in contributing to notions of legal culture. Scholars have concluded that bureaucratic practices, along with the growing formalism and professionalism in law apparent in states' systems, must have attached themselves to *all* legal structures.

Histories of lawyers in local jurisdictions are badly needed. We need to know more about how 'lawyering' developed in small places, how lawyers learned, what they learned, and how they practiced law along the frontier, in western America, and in the rural communities of the old south. Were lawyers actually as scarce in western places as historians suggest? What sort of life did a Missouri lawyer live in the nineteenth century, and how did he fit into local communities?

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388 Joseph Rountree remembered attending school as a very young boy. He wrote of them that they were " subscripton' schools where so much was paid by the parents for each child and a teacher was employed by the community. the schools were only for the fall and winter months and you were supposed to learn . . . Redin, Ritin, and Rithmetic [*sic]*." Rountree Family Papers, 1 folder, R 325, Western Historical Manuscript Collection, University of Missouri-Rolla.

Histories of local judicial bodies can enhance knowledge of the role of gender in economic practices. How influential were local courts in acknowledging women as creditors and business owners? How did justices of the peace respond to legal issues of bodily integrity? How did minor courts influence the welfare of families, both black and white, in nineteenth century Missouri? Accounts of the role of county courts with respect to indentures, custody rights to orphaned children, and distributions of real assets following a death help to explain how judicial bodies contributed to the welfare of children and helped to influence the flow of important assets within counties.

Justices of the peace were thought to be uneducated, but it is not clear that professional lawyers always possessed a superior knowledge of statutory law. Neither does it seem that circuit judges necessarily were better educated or more principled than township and county justices. Nineteenth century accounts written by and about Missouri's lawyers and judges fail to be persuasive in demonstrating that professionals were superior to amateurs intellectually or morally. They did, however, speak more elegantly, at least in the minds of memoirists.

Several general types of studies are needed immediately to in aid in the search for better knowledge of America's local histories, state legal histories and legal cultures.

We need comprehensive studies of states' judicial systems of an early America: how they were structured, how they interacted with other components of government, and how and why they were modified by state legislatures. We need equally comprehensive studies of minor courts, both on a stand-alone basis and *within* states' judicial systems. Courts of the eighteenth and nineteenth century performed functions that we identify as

'judicial' in that they tried legal cases, but in addition many of them administered governmental services; still they were courts.

A project that intends to examine types and functions of minor courts within state systems ought to be mindful of differences between what is 'judicial' now and what was 'judicial' two hundred or three hundred years ago. Keeping that point in mind can help scholars remain open to ideas regarding functions of law and courts and thus discourage limiting study of local judicial activities. Scholars need to look for judicial law where it intersects in eighteenth and nineteenth materials dealing with economic transactions, political ordering, and ideas concerning the proper roles of women and minorities.

It would help enormously for legal scholars to develop more explicit and better ideas about what constitutes a legal culture. What are its attributes? How do we know when a legal culture has changed in important ways? How is the notion of legal culture necessary to historians of local legal history? It does not so much matter whether scholars agree on a definition of legal culture, as long as they can at least agree that there *is* such a thing and that it must have identifiable attributes.

In terms of questions regarding Missouri's nineteenth courts, how did judges of Missouri's justices' courts and county courts of commissioners function as actors in a statewide network of political relationships? Exactly what did justices' examinations and investigations of suspicious incidents consist of? How were they performed? Why, in Missouri, were non-lawyers trusted with ruling on the seriousness of crimes of assault?

Why did state legislators continue to create special local courts decade upon decade, knowing that the practice disturbed local institutional relationships? Is it fair to characterize the practice as a form of political graft? The suggestion has been made that

legislators, more than anything else, were currying political favor when they introduced yet another court into a local system. Did special courts damage the delivery of justice?

How did county and township justices of the peace get a long? Justices of the peace were poorly regarded, but for reasons that are not entirely clear, but county justices seem to have been more respected than township justices of the peace. Did township and county justices involve themselves in each other's professional tasks? What were their relations outside the court room, when men were concerned with families, crops, and businesses?

One major problem in the literature is that, where minor courts are discussed, they are not placed within any contextual framework that would lead to an understanding of how they functioned in a political and legal sense. Courts of the justices of the peace were concerned with virtually every aspect had Mark Ellis, John Wunder, and Robert Dykstra go so far as to note that major features of urban courts such as police, recorders, and mayors courts, were taken from justices' courts but stop short of discussing how urban courts functioned within a state judicial system. We need to know a great deal more about these urban courts, which seem much more connected to political currents than standard courts in permanent systems.

The study of local judicial bodies in America also is a study of American small towns and traditional ways of living, about local legal ways and about what constitutes community. Closer scholarly attention to these areas of research can greatly enrich historians' understanding of early American history.

APPENDIX

BYRD TOWNSHIP, CAPE GIRARDEAU COUNTY, MISSOURI[389]

Figures below represent money litigation in the Byrd Township Justices' Court between the years 1818 and 1842. All cases were tried in April of the year.

TYPE OF ACTION: APRIL 1818

Bond, debt	4.04, judgment received in full, stayed 1 mo.
Acct	discontinued at plaintiff's request
Note	3.50, judgment received in full
Acct	12 cents; jury trial; judgment for plaintiff, received in full
Note	jury trial, could not reach verdict, trial adjourned for 1 mo.
Note	15.37 ½, judgment received in full, stayed 2 mos.
Note	2.00, judgment received in full, execution stayed 1 mo.
Acct	3.62 ½, 1.50 received in May, balance received in June
Action on judgment	discontinued at plaintiff's request
Acct	non-suit, plaintiff to pay costs
Acct	continued until June, court rules for plaintiff , 7.00, execution stayed 1 mo.
Bond	continued until August by request of parties
Note	25.30, stay of for two months, received 20.00 in bills of Urbana Company June 1818

389 Ed., Catherine Stoverink, *Abstracts and Index of the Docket Books for the Justices of the Peace Byrd Township, County of Cape Girardeau, State of Missouri* (Jackson: Cape Girardeau County Archive Center, 2004).

Note continued for want of time until May 15, court rules for plaintiff 6.86, received 2.00 May 14

Note continued for want of time until May 15, 1.10

Note continued for want of time until May 15, court rules for plaintiff 8.12

Acct 4.50, received 2.00 May 25, received 2.37 ½ June 11, received 4. 37 ½ August 1 (inc. costs)

Acct adjourned for want of time, court finds for plaintiff 6.50, execution stayed 1 mo.

Acct adjourned for want of time, plaintiff no-show in May, must pay costs

TYPE OF ACTION: APRIL 1819

Note 14.?

TYPE OF ACTION: APRIL 1830

Debt 13.40, court rules for plaintiff 15.471/2 debt and damages

Debt 8.00, jury finds for defendant

Debt 38.75, received 35.31 ¼ on January 14 on execution

Debt 82.87 ½ , execution stayed 4 mos., 5. 25 received on judgment

Debt 20.50, defendant confesses to 20. 83 *debt and damages*, judgment received in full in April.

Debt 10.00, defendant confesses to 10.33 ½ *debt and damages*, judgment received in full in April

Debt 4.06 ¼ , execution issued July, returned in Aug not satisfied, 2nd execution issued March 1831.

Debt 12.30, received in full September

Debt	2.00, received in full August
Debt	2.50, judge awards 2.56 ¼ debt and interest, execution issued July judgment Satisfied.

TYPE OF ACTION: APRIL 1831

Note	10.43 ¾, default judgment inc. 81 ¼ cents interest, exec. issued July 13, 2nd exec. July 20, 1832. Total of 4.27½ received
Action on writing. obligatory debt	8.00, execution issued May, 2nd execution Nov. 3rd. execution Dec. 15, execution Dec. 29.
Note	35.31 ¼ plus 37 ½ c costs, execution stayed four months, judgment credited 3.28 ½ Feb. 1832, execution issued June 1832
Note	5.62 ½ defendant confesses 5.67 ½ debt and interest and 37 ½ c costs., received 5.50 June
Due bill	2.50 plus costs, execution issued June
Acct	70.71 ½ plus 37 ½ c costs, defendant agrees to pay plaintiffs 10% interest on acct, execution to be issued Dec. 25

TYPE OF ACTION: APRIL 1832

Debt	Amt. 37.38 ¾. Received 10.43 May 1834, judgment revived by defendant's consent
Debt	8.57 plus .37 ½ costs, judgment paid in full.
Debt	2.50, plus 81 ¼ cents costs defendant confesses to., execution issued April, 2nd execution issued June.

Debt	5.86, plus defendant confesses 36 cents damages and 37 ¼ cents costs., execution issued May.
Debt	24.00 execution issued April
Note	24.40, execution stayed 2 mos.

TYPE OF ACTION: APRIL 1833

Due bill	90.75, execution issued April, 2nd execution issued May, 3rd execution issued July, 4th execution issued April of 1834, case sent to circuit court
Due bill	54.62, defendant confesses to 80.75 "debt and costs expended." Judgment awarded 80.75d, execution issued April, 2nd execution issued May, 3rd execution issued April 1834, case sent to circuit court
Due bill	7.50, execution issued April
Due bill	21.50, defendant confesses to additional 43 cents "damages and costs expended." Plaintiff assigns judgment to a second party. Execution issued April, returned unsatisfied, case sent to circuit court.
Attachment, debt	7.84. Attachment levied "on a Book of the Gospel . . . one epaulet, and also on two beds[.]" Special bail required before July or "judgment will be entered against him."
Attachment, debt	9.00, ditto

TYPE OF ACTION: APRIL 1834

Assumpsit	justice of the peace absent, case continued

TYPE OF ACTION: APRIL 1835

Debt 3.50, default debt plus damages, execution issued June

Note 8.68 ¾ default debt plus damages and costs, execution issued June

Debt 12.50, plus damages, plaintiff to recover debt and costs, first execution issued June, 2nd execution issued Nov, returned and after "deducting the gathering thereof of the corn,' five dollars ninety cents, signed-Jeremiah Ranney, J.P."

TYPE OF ACTION: APRIL 1836

Note 21.79 default judgment including additional for costs, execution issued "no property or body" found, case sent to clerk of circuit court

TYPE OF ACTION: APRIL 1837

Assumpsit

65.87 ½, defendant claims 134.25 set off against claim of 200.12 ½ "which the plaintiff refuses to give evidence. Judgment for plaintiff, limited to the original amt. and costs, execution to be issued

Acct 3.00, deft demands "summary trial but the justice was of the opinion the statute did not allow a trial before the justice, but recognized the case over to the Circuit Court in Jackson. Signed-Jeremiah Ranney J.P."

TYPE OF ACTION: APRIL 1838

Due bill 16.50, add for costs and damages, execution issued Feb 1839 ret. Satisfied

Acct adjourned both parties settled by defendant paying costs

Note 84.00, plus interest and costs, plaintiff has judgment execution to be issued

TYPE OF ACTION: APRIL 1839

Acct 5.62, plus costs, judgment for plaintiff, deft appears in May 1840 admits not paid, judgment renewed

TYPE OF ACTION: APRIL 1840

Note 6.07, judge awards 6.37 ¼ debt and damages, execution issued August returned "nothing found to levy. Revived by scire facias."

TYPE OF ACTION: APRIL 1841

Note 33.90, additional damages and costs, execution served returned satisfied May

TYPE OF ACTION: APRIL 1842

Assumpsit
3.03, judgment satisfied in April

Note 71.40, judgment for plaintiff no rec pmt rec

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ABSTRACT

MINOR COURTS AND COMMUNITIES AT THE FRONTIER
THE JUSTICE OF THE PEACE IN EARLY MISSOURI

by

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MAY 2011

Advisor: Sandra VanBurkleo

Major: American Legal and Constitutional History

Degree: History

This study focused on local and county courts operated by Missouri's justices of the peace between the Louisiana Purchase and roughly 1875. Its purpose was to investigate the role of township justices' courts and county courts of commissioners in terms of interactions with local residents; effects of rulings and other court actions on everyday affairs, and wider impacts on Missouri society. Sources included territorial and state laws, court cases, local histories, memoirs, correspondence, and relevant books and articles from the secondary literature. The courts in question were studied as institutions, with litigation in justices' courts and session minutes of county courts of commissioners as the basic units of study. The study concluded that courts controlled by justices of the peace exerted influence far out of proportion to their official status within the state's judicial hierarchy. Specifically, the study found that actions of justices' courts and county courts of commissioners shaped local, county, and statewide economies; and that post-Civil War political, economic, and legal changes at the state level did not reach into

rural life, where patterns of daily living and legal understandings reflected continuity with the past.

AUTOBIOGRAPHICAL STATEMENT

I was born in Detroit, Michigan on May 25, 1943. I attended Cass Technical High School and graduated in June, 1961 from the Science and Arts curriculum. In September of that year I enrolled in Alma College, and attended classes there for one year. Between 1965 and the fall of 1974, I lived in Idaho. When I returned to Detroit, I took courses at local community colleges on a part time basis while I worked. Eventually I entered Wayne State University, where I earned a series of degrees in History, including a B.A. in 1994, an M.A. in 1998, and a Ph.D. in 2010.

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May, 2010