NEW MEXICO LAW REVIEW

Volume 29
Issue 1 *Winter 1999*

Winter 1999

Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases

Cathy Lesser Mansfield

DISORDER IN THE PEOPLE'S COURT:[1] RETHINKING THE ROLE OF NON-LAWYER JUDGES IN LIMITED JURISDICTION COURT CIVIL CASES

CATHY LESSER MANSFIELD*

> If the will of the individual is subjected arbitrarily to the will of others because the means of protection are too cumbrous and expensive to be available for one of his means against an aggressive opponent who has the means or the inclination to resist, there is an injury to society at large.[2]

---

1. "The People's Court" is, of course, a reference to the television show in which former Los Angeles Judge Joseph A. Wapner adjudicated small claims disputes in a half-hour show. By using this name in the title, I do not mean to limit my comments to small claims cases, as is evident by the text of this article. Nevertheless, the reference seems appropriate given the wide public knowledge of and reference to the television program. *See* William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 L. & SOC'Y REV. 137, 152 n.11 (1988) ("We have been struck by the litigants' repeated references to "The People's Court." While we initially joked about the "Wapner factor," we now suspect that the television program is a significant factor in many litigants' decisions to go to small claims courts and an important influence on the way they prepare their cases.").

* Associate Professor of Law, Drake University Law School. I wish to thank Washburn University and Drake University for research grants to work on this article. I also wish to thank my research assistants: Stephanie Marrett, Jessica Rainey, Sandi Morris, Claire Cumbie-Drake, Darron Brawner, Katie Moreland and Marianne Deagle. I especially wish to thank my primary research assistant Kelly Poff. I also wish to thank Ed Mansfield, Matt Doré, Greg Sisk, Tom Baker and David Walker for reading and commenting on drafts of this article; the Drake University library staff for their assistance; Community Legal Services for allowing me to review my old files while preparing this article; and Maggie Vasquez for helping make those files available.

2. Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 315 (1912-13).

I. MY PROBLEMS WITH NON-LAWYER JUDGES AND THE COURTS OVER WHICH THEY PRESIDE

A. Case Number One

It was January 1992. I confidently marched into the Northeast Phoenix justice court to file an Application and Affidavit for Default. The case I was working on involved an attempt by the plaintiff (a collection agency) and its attorney to collect a debt allegedly owed by my client. During the course of attempting to collect the debt, the collector had engaged in conduct which violated the Fair Debt Collection Practices Act,[3] so in response to the lawsuit, we filed a counterclaim alleging violations of that Act. We waited for an answer to the counterclaim, but none was forthcoming. Ultimately we decided to apply for a default judgment on our counterclaim.

3. 15 U.S.C. §§ 1692-1692o (1994 & Supp. II 1996).

On that particular day, I was filing my Application and Affidavit for Default pursuant to Rule 55(a) of the Arizona Rules of Civil Procedure.[4] Under this rule, my application for default would become effective ten business days after filing, unless the plaintiff pled or otherwise defended before the ten-day period expired.[5] If the plaintiff failed to do this, default would be entered automatically.[6]

In most cases, after an entry of default the moving party can get a default judgment without a hearing simply by filing a motion for a default judgment with the court.[7] In some cases, however, the party entitled to the default judgment must not only apply for the judgment but must also attend a hearing.[8]

This was one of those cases where a hearing would be required. First, the plaintiff had made an appearance in the case and was represented by counsel, although, as described later, that counsel had thereafter failed to participate in the lawsuit. Second, I had asked for an unspecified amount of attorney's fees.[9]

I approached the clerk working at the filing counter of the court and asked about scheduling a hearing in which we could apply for a default judgment after default had been entered. Once the hearing was set, I intended to file a Notice of Application for Default Judgment, which would notify the Plaintiff of the time and date of the hearing on my default judgment. Without missing a beat, the clerk informed me that "We do not have default judgment hearings in this court, regardless of the circumstances." I tried to explain Rule 55 of the Arizona Rules of Civil Procedure to the clerk and reminded her that the Arizona justice courts are required to follow the Rules of Civil Procedure.[10] Still, she insisted, "We don't do

---

4. *See* ARIZ. R. CIV. P. 55(a) (1992). Some states require that informal notice be given to the attorney for a party about to be defaulted for failure to pursue the suit if this is the local custom in the place where the suit is being pursued. *See, e.g.*, Central National Ins. Co. of Omaha v. Insurance Co. of N. Am., 513 N.W.2d 750, 754-55 (Iowa 1994).

5. *See* ARIZ. R. CIV. P. §§ 55(a)(2)&(3), 6(a) (1992).

6. *See id.* § 55(b).

7. *See id.* § 55(b)(1).

8. *See id.* § 55(b)(2).

9. That I was not entitled to a default judgment on motion was clear from a close reading of rule 55(b):

> (b) Judgment by Default. Judgment by default may be entered as follows:
>
> 1. *By Motion.*
>
> (i) When the plaintiff's claim against a defendant *is for a sum certain* or for a sum which can by computation be made certain, the Court upon motion of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, *if the defendant has been defaulted for failure to appear* and is not an infant or incompetent person. If the claim states a *specific sum of attorneys' fees* which will be sought in the event judgment is rendered by default, and if such award is allowed by law and is supported by the affidavit, the judgment may include an award of reasonable attorneys' fees not to exceed the amount of the demand therefor. . . .
>
> . . . .
>
> 2. *By Hearing.* In all other cases the party entitled to a judgment shall apply to the court therefor. . . . If the party against whom judgment by default is sought has appeared in the action, that party or, if appearing by representative, that party's representative, shall be served with written notice of the application for judgment *at least three days prior to the hearing on such application.*

See id. § 55(b) (emphasis added).

10. "The law governing procedure and practice in the superior court so far as applicable and when not otherwise specially prescribed, shall govern procedure and practice in justice of the peace courts." ARIZ. REV. STAT. § 22-211 (1992). The justifications for requiring a hearing in a situation such as the one I faced include acknowledging that the plaintiff has in fact appeared in the case, which is not the case with most defualts, and to set an amount of attorneys' fees.

it that way." Finally, she suggested that although she was sure I would not be granted a *default* hearing, I could file a run-of-the-mill motion for hearing. She then pulled out the court's pre-printed form.

I dutifully obliged, attaching a copy of the relevant pages from West's Arizona Legal Forms and citing to Civil Procedure Rule 55. I figured that any hearing, however obtained, would allow me to explain to the judge the need for a hearing on my motion for a default judgment. I filled out the motion form, made some copies for service on my opponent, and sought to file the original. As she handed it back to me, the clerk informed me that the motion for hearing had to be served on my opponent by certified mail. "Why?" I asked. "Service by certified mail is not required by the Rules of Civil Procedure."[11] The answer: "That is what we require." Once again I reminded the clerk, to no avail, that the Arizona justice courts are required to follow the Arizona Rules of Civil Procedure.[12]

So there I was. I could get a voidable default judgment from the court, which would grant the judgment without a hearing despite rules to the contrary. Alternatively, I could request a generic hearing, but would have to go to the expense and effort of sending my hearing request via certified mail to my opposing counsel. In the end, based on what the clerk told me, I could not be certain that the judge would even address the default judgment issue at the hearing.

This was not the only problematic incident in this particular case. Plaintiff's counsel proved quite difficult to deal with—refusing to respond to discovery requests, filing an answer to our counterclaim and refusing to provide us with a copy, and refusing to communicate with us. Plaintiff's counsel did not respond to our First Set of Requests for Admission nor our Second Set of Interrogatories, which had been served just short of nine months after the case had been filed.[13] Slightly more than two months after plaintiff's counsel had been served with these, we sent her a letter indicating that the Requests for Admission were deemed admitted and insisting that she answer the interrogatories within the next two weeks or that we would file a motion to compel. In response to this letter, plaintiff's counsel sent a letter notifying us that the action had been dismissed from the inactive calendar more than a month earlier because of the plaintiff's failure to prosecute. The letter further informed us that the plaintiff intended to let the suit drop, and that the plaintiff did not intend to respond, and did not deem itself obligated to respond, to our discovery requests.

The inactive calendar is a housekeeping provision of Arizona's Uniform Rules of Practice. Uniform Rule V(e) provides that "[t]he clerk of the court or court

---

11. It was clear from the rules that I had to send a copy of my application for entry of default to my opposing counsel. *See* ARIZ. R. CIV. P. 55(a)(1)(ii) (1992) ("When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney for the party claimed to be in default."). Service of the motion for default judgment was required by Rule 55(b)(2). *See id.* § 55(b)(2) ("If the party against whom judgment by default is sought has appeared in the action, that party or, if appearing by representative, that party's representative, shall be served with written notice of the application for judgment at least three days prior to the hearing on such application."). Service did not, however, have to be by certified mail since an attorney had made an appearance on behalf of the plaintiff. *See id.* §§ 5(a) and 5(c).

12. *See* ARIZ. REV. STAT. § 22-211 (1992).

13. At this point the case was being handled by another attorney since I had left my position with Community Legal Services to take a law school faculty position.

administrator shall place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been filed within nine months after the commencement thereof. . . . All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution."[14] This two-month period can be extended by the court for good cause shown.[15] The rules further provide that "[t]he clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify counsel in writing of the placing of cases on the Inactive Calendar, and no further notice shall be required prior to dismissal."[16]

When we discovered that the case had been dismissed without prejudice from the inactive calendar—and with absolutely no notice to us—we went to the court to find out what had happened. The clerk informed us that it was their practice to notify only the plaintiff of deadlines for prosecuting the case.

Once again, this court had failed to follow the rules it was bound by state statute to follow. First, the case was dismissed off the inactive calendar some time in August 1992. This was done despite the fact that the first permissible date for even placing the case on the inactive calendar was July 23, 1992 (nine months after the plaintiff's complaint was filed)[17] and thus the first permissible date for dismissing the case without prejudice off the inactive calendar would have been September 23, 1992 (two months later).[18] Second, the court had unilaterally decided that only "plaintiffs" were entitled to any notice about the inactive calendar. Never mind that the rule required notice to all counsel. Never mind that we were, in essence, a plaintiff in regard to the counterclaim. Never mind that, due to plaintiff counsel's difficult conduct we had good cause for extending the case on the inactive calendar.

The court's failure to follow the rules, and subsequent dismissal, essentially gave the plaintiff the ability to walk away from the suit with no liability on the counterclaim—a settlement option that the plaintiff had offered and we had rejected.

In response to the clerk's oral notice to us that the case had been dismissed, we asked how we could get the case reinstated—expecting the answer to be upon motion, with an opportunity for the other side to respond. Rather, the clerk told us we merely needed to request a trial date, which we did. In essence, the court allowed us to reinstate a case in which there had been a final order dismissing the case without prejudice by pretending that the case was still active and setting it for trial.[19]

---

14. ARIZ. SUPER. CT. UNIF. PRAC. R. § V(e).
15. *See id.*
16. *Id.* § V(f).
17. *See id.* § V(e).
18. *See id.* § V(f).
19. After the case was reinstated, the court set a pre-trial conference. Just before the pre-trial conference, the entire matter was settled by the plaintiff paying our client $150.00 and both parties agreeing to dismiss their claims with prejudice.

B. Case Number Two

It was March 13, 1992. My extern from Arizona State University Law School and I were at the Central Phoenix justice court to attend a hearing in a case involving a claim by the plaintiff law partnership that our client had committed $3,000 in waste to the residential property she had leased from the plaintiff for three years. Our client insisted that the property had been in despicable condition when she first leased it, that she had actually been forced to make some repairs to the property during the course of her tenancy, and that any damage claimed by the plaintiff had existed at the time the lease was first entered into.

In support of its motion for summary judgment, the plaintiff had submitted four affidavits: one each from the named partners in the law firm that owned and leased the property, one from the maintenance man for the leased property, and one from a secretary for the law firm. Each of the four affiants addressed the condition of the property at the end of the lease, and the two partners testified through their affidavits that the leased premises was not in the same condition when returned to them as it had been at the beginning of the lease.

As counsel for defendant, we had responded to the motion, submitting as our evidence the transcript of the plaintiff's deposition of our client, in which she had consistently testified to the terrible condition of the property at the inception of the lease, the improvements she had made during the tenancy, and the similarly bad condition of the property at the end of the lease. We also submitted a list of defects that the plaintiff had made at the beginning of the tenancy, and that had been produced to the plaintiff in the course of discovery. We pointed out in our response that the issue in the case was not whether the property was in bad condition when the tenancy ended, but whether it was in worse condition when the tenancy ended than it had been when the tenancy began, and that we had submitted evidence on this point.

At the time, Arizona law provided that summary judgment should not be granted if a jury presented with the case could reasonably find for either party.[20] Summary judgment was not to be granted where the judge ruling on the motion would be required to "pass on the credibility of witnesses with differing versions of material facts, . . . weigh the quality of documentary or other evidence, . . . [or] choose among competing or conflicting inferences."[21] Additionally, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[22] Conversely, the case provided that a summary judgment motion "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense."[23]

20. *See* Orme School v. Reeves, 802 P.2d 1000, 1007, 1009 (1990).
21. *Id.* at 1010.
22. *Id.* at 1008-1009.
23. *Id.* at 1008.

The plaintiff filed a reply that argued that it should be granted summary judgment because it had submitted four affidavits which had not been controverted by any affidavits submitted by us.

Obviously the claim that we had submitted no controverting affidavits was disingenuous, given that we had submitted the deposition transcript of the defendant, which directly controverted the affidavits submitted by the plaintiff as to all material relevant facts. Nonetheless, the argument that plaintiff's four affidavits trumped defendant's deposition testimony apparently carried the day. On March 18, 1992, the court issued a final order granting plaintiff its motion for summary judgment. That this motion should not have been granted was later proved by the superior court's reversal of the justice court's summary judgment. Unfortunately for all of the parties involved it took until December 1992, and much more work by each of the parties, before this issue was resolved correctly by the superior court.

The court's improper grant of summary judgment was only the beginning, for after summary judgment was granted a procedural and documentary fiasco ensued. The summary judgment was announced in a minute entry issued by the court on March 18, 1992. The judge had signed the minute entry, which made it a final judgment, although the minute entry did order the plaintiff to prepare formal judgment papers. We believed that the appeal time began running from the date of this signed minute entry, based on Superior Court Rules of Appellate Procedure—Civil Rules 8 and 9, which required that a notice of appeal be taken within ten days after notice of entry of judgment.[24] Therefore, we filed a notice of appeal on March 30, 1992 to preserve our appeal rights.

In the meantime, on Friday, March 27, 1992, plaintiff's attorney had filed a Form of Judgment along with an Application for Award of Attorney's Fees and Statement of Costs. On Monday, March 30, 1992, the court signed two versions of the form of judgment submitted by the plaintiff. The first of these two judgments had the judge's signature on the Form of Judgment submitted by the plaintiff, (including attorney's fees in the amount of $4,607.50) with no changes by the judge. The second of these two judgments had the judge's signature on the Form of Judgment submitted by the plaintiff, but the judge had crossed out the amount of fees indicated on the form by the plaintiff and replaced it with a handwritten attorneys' fee award of $1,000. So now we had three final judgments.

There were many problems with the second and third judgments, in addition to the conflicting amount of attorneys' fees. First, both were signed before we had a chance to object to the amount of attorneys' fees requested or the form of judgment, despite the fact that the rules provided us with an opportunity to object to the form of judgment within five days of service of the proposed form of judgment.[25] I had never before handled a case where the court received a form of judgment on a Friday and signed it on the following Monday without waiting for objection from the other party.

---

24. *See* ARIZ. SUPER. CT. R. APP. P.—CIVIL 8(a) & 9.
25. *See* ARIZ. R. CIV. P. § 58(d)(1).

A second serious defect with the second and third judgments was that the court never sent us a copy of them, although copies were mailed to the plaintiff. In fact, it was quite clear from the judgments that this had been intentional, as the space indicating to whom a copy had been sent had a check next to the plaintiff's counsel's name and a line next to our name. We never received a copy of the second of the three judgments, and we did not find out about the third of the three judgments until April 8, 1992, when a clerk at the court called us to tell us that a final judgment had been signed awarding plaintiff $1,000 in attorneys' fees.[26] We did not actually get a copy of the third of the three judgments until April 14, 1992, more than two weeks after it was signed, and then only by accident. On that date, an employee of a delivery service who did work for us somehow found a copy of the judgment at the courthouse and brought it to us of his own accord.

In the meantime, on April 6, before we found out about the second and third judgments signed by the court, we filed an objection to the plaintiff's application for attorneys' fees, an objection to the plaintiff's form of judgment, and an alternate form of judgment. In response to this motion, the court issued a stinging minute entry, indicating that it had awarded fees of only $1,000, and "admonishing" us for filing an objection to the form of order, in which we had asked that fees of no more than $2,473.50 be awarded, before reading the court's order.[27] Of course, when we filed our objections we did not even know of the second and third final judgments. It was at this time that I received the April 8 call from the court telling me that the final order had been signed awarding $1,000 in attorneys' fees, asking if we thought this was not enough (a rather ridiculous question since we were the party obligated to pay the fees), and informing us that the judge would issue a fourth judgment on the form that we had submitted.

By this point, neither party's counsel knew which was the final order and how to calculate appeal deadlines. Both fed up with the justice court, we conferred and decided to ask the court for a status conference to determine the status of the final judgment for purposes of determining the appeal times and to ask for a new, truly final judgment, vacating all previous judgments, so that the record was clear on appeal. Plaintiff's attorney agreed to call the court to set up this status conference. Much to the amazement of both counsel, rather than set a status conference where counsel for both parties could be present, the judge took plaintiff's attorney's call personally, thereby engaging in an ex parte communication with the plaintiff's counsel. The judge told plaintiff's counsel that she would issue a fourth and final judgment, which she did that day. Once again, this fourth judgment was mailed only to plaintiff's counsel, not to defendant's counsel. At that point, we sent a letter to the judge asking that all further minute entries be mailed to us as well.

---

26. The clerk expressed the rather absurd concern in this phone call that we might think that our opponent should be awarded more than this as a reasonable amount for fees.

27. Specifically, the minute entry said, "With respect to the attorney fees, the defendant is admonished to review the judgment issued by the court which reduced the award of attorney fees from $4,607.50 down to $1,000.00. The court is at a loss as to understand why the defendant objects to the $1,000.00 the court awarded when, in defendants pleading, an amount of $2,473.50 is suggested. *Perhaps defendant's counsel should actually read the judgment before submitting unnessary (sic) pleadings.*" (emphasis added). Minute Entry on file with author.

C. *The Arizona Justice of the Peace Courts*

What was going on in these cases? In the first case, had I merely stumbled on a renegade court clerk, bent on making her own rules despite a statutory mandate that she follow the state's rules? Would the judge of that court, if given the chance, have instructed the clerk to follow the rules? More importantly, would the judge, if given the opportunity, have known the rules or cared what they were? In the second case, did I get caught in some sort of procedural quagmire unique to my case that caused the confusion over the final order? Was it common for the court to keep only the plaintiff apprised of events in the case? This was certainly consistent with what the Northeast Phoenix justice court did in the first case. Was it possible that the judge believed that four sworn affidavits were more probative than one deposition on a matter of direct conflict between them?

Both of these cases were in an Arizona justice of the peace court. The justice of the peace courts in Arizona are authorized by the Arizona Constitution[28] and governed by statute.[29] The justices who preside in these courts are elected.[30] To qualify as a justice of the peace, a candidate need only be 18 years of age, a resident of the state, an elector of the county or precinct in which judicial duties are to be exercised, and able to read and write English.[31] Justices of the peace are not required to be attorneys or have any legal training before their election,[32] and very few justices of the peace are actually lawyers.[33] After they are elected, the Arizona justices of the peace receive a mere 19 days of training before they are permitted to take the bench. Based on an eight-hour day of classes, this justice of the peace training is the equivalent of the class time attended by law students in roughly ten weeks of their three-year law school career.[34] A good portion of the training is devoted to issues relevant to criminal and traffic matters heard in Arizona justice courts.[35]

---

28. *See* ARIZ. CONST. art. 6, § 32.

29. *See* ARIZ. REV. STAT. ANN. §§ 22-201 to 22-283 (West 1990 & Supp. 1997).

30. *See* ARIZ. REV. STAT. ANN. §§ 22-102, 22-111.

31. *See* ARIZ. REV. STAT. ANN. § 11-402; Nicol v. Superior Court, Maricopa County, 473 P.2d 455 (Ariz. 1970). A recent study commissioned by the Arizona Supreme Court recommended increasing judicial requirements by requiring all justice court judges to have a bachelor's degree, be at least thirty years old, be of good moral character, have no prior felony convictions or warrants, and have passed a basic legal competency test. ARIZONA SUPREME COURT, ADMINISTRATIVE OFFICE OF THE COURTS, REPORT AND RECOMMENDATIONS OF THE COMMITTEE TO STUDY IMPROVEMENTS IN THE LIMITED JURISDICTION COURTS 26 (1995) [hereinafter REPORT AND RECOMMENDATIONS]. The report found: "The committee does not believe that all limited jurisdiction court judges must be lawyers. However, it is important to note that cases filed in limited jurisdiction courts are becoming more complex and do require competent, capable judicial officers." *Id.* at 27.

32. *See* State v. Lynch, 489 P.2d 697, 698 (Ariz. 1971) (holding that since justices of the peace are qualified for election so long as they meet the qualifications for eligibility for county office, they do not have to be attorneys); Crouch v. Justice of the Peace Court, 440 P.2d 1000, 1006 (Ariz. App. 1968).

33. As of 1997 there were eighty-three justices of the peace in Arizona. Of those, fourteen were lawyers, "an all time high." Interview with Rhonda McAdams, Arizona Supreme Court Administrator (July 22, 1998).

34. The Arizona statutes require the Supreme Court to establish a program of continuing education for justices of the peace and magistrates. *See* ARIZ. REV. STAT. ANN. § 12-112. The contents of the program are determined by the Supreme Court. *See id.* The agendas for the January 1997 New Judge Orientation and the March 1997 follow-up orientation conducted by the Arizona Supreme Court are attached to this article as Appendix 1.

35. *See id.*

Justice of the peace courts have been a part of the Arizona judicial landscape since Arizona became a state in 1912.[36] "Immediately upon statehood, . . .Arizona was equipped with three operative courts of justice: the justice court, the superior court, and the Supreme Court."[37] The justice of the peace courts began with a $200 jurisdictional limit in civil cases.[38]

In 1989, when I began my practice at Community Legal Services in Phoenix, the Arizona justice of the peace courts had exclusive jurisdiction over matters where the amount in controversy was less than $500, and concurrent jurisdiction with the superior court (the Arizona court of general jurisdiction) over matters where the amount in controversy was more than $500 but less than $2,500.[39]

I didn't have a whole lot of experience litigating in Arizona's justice of the peace courts until after 1990. In 1990, the Arizona Legislature submitted a proposed constitutional amendment to the Arizona electorate to raise the constitutionally permissible jurisdictional limit of justice of the peace courts from $2,500 to $10,000.[40] The legislature also revised section 22-201 of the Arizona statutes to give the justice of the peace courts exclusive original jurisdiction over matters in which the amount in controversy, exclusive of costs, interest and attorneys' fees, was $5,000 or less, effective July 1, 1991.[41] This increase was conditioned upon voter approval of a constitutional amendment increasing the justice of the peace jurisdictional limit.[42] The proposed constitutional amendment was presented to the electorate as Proposition 102 in the November 6, 1990 election. It passed by a fifty-three percent vote, giving the justice courts constitutional authority to take jurisdiction over cases where the amount in controversy did not exceed $10,000.[43] Thus, on July 1, 1991, pursuant to the statutory revision to section 22-201,[44] the justice court was given exclusive original jurisdiction over matters in which the amount in controversy was $5,000 or less.[45] In 1993, however, the Arizona Supreme Court scaled back the exclusive jurisdiction of the justice courts to cases where the amount in controversy is less than $1,000 because the legislature had failed to amend the constitutional provision giving the superior courts of Arizona original

---

36. *See* ARIZ. CIV. CODE 1913 §§ 2506, 2607, 2608, 2628. Reportedly, justices of the peace were historically most active in the mountain and western states. *See* Kenneth E. Vanlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389, 390 (1964).

37. JAMES M. MURPHY, LAWS, COURTS, AND LAWYERS: THROUGH THE YEARS IN ARIZONA 93 (1970).

38. *See id.* at 94.

39. *See* ARIZ. REV. STAT. § 22-201(B) (1984); FORCIBLE ENTRY AND DETAINER ACTIONS—JUSTICE COURT JURISDICTION, 1984, Ch. 113, § 1.

40. *See* Arizona S. Con. Res. 1003 (1990).

41. *See* 1990 Ariz. Sess. Laws 223, § 2.

42. *See id.* § 10(A) ("This act does not become effective unless the Constitution of Arizona is amended by vote of the people at the next regular general election, or at a special election called for that purpose, to amend the constitutional jurisdictional limit of justices of the peace."). The statutory change was to become effective "from and after June 30, 1991." *See id.* § 10(B).

43. A total of 542,325 (53%) of the votes cast were in favor of the proposition, and 471,629 (46%) of the votes cast were opposed to the proposition. *See Election '90 Election Results Across Arizona*, ARIZONA REPUBLIC, Nov. 8, 1990, at A14. The proposition was proclaimed by the Governor on November 26, 1990 and the Arizona Constitution was thereby amended. *See* ARIZ. CONST. art. 6, § 32, cl. C.

44. *See* 1990 Ariz. Sess. Laws 223, § 2.

45. An additional, minor amendment was made to ARIZ. REV. STAT. § 22-201 in 1991 to harmonize subsection F with the jurisdiction granted in subsection A over matters where the amount in controversy was $5,000. *See* 1991 Ariz. Sess. Laws 110, § 3, (effective October 1, 1991).

jurisdiction of matters where the amount in controversy is $1,000 or more.[46] The justice courts thus wound up with concurrent jurisdiction for matters where the amount in controversy is between and including $1,000 and $5,000.[47]

After the 1991 change to the justice courts' jurisdiction, I spent a good deal of my time litigating before these unpredictable, non-lawyer courts. When my clients were sued in these courts, we were stuck there because there is no right of removal to the superior court, even in cases where the justice and superior courts have concurrent jurisdiction.[48] If we filed a counterclaim valued at more than $5,000, which forced the removal of the case to superior court, and if we were ultimately awarded less than $5,000 (exclusive of costs and interest), the superior court could deny us costs and could impose reasonable attorneys' fees on my client.[49]

Furthermore, if I found it necessary to appeal a decision rendered by a justice of the peace, I was faced with several problems. First, appellate review of a decision rendered by the justice court is usually not de novo. A party appealing a justice court decision can only obtain a de novo trial from the superior court "when the transcript of the proceedings in the superior court's evaluation is insufficient or in such a condition that the court cannot properly consider the appeal."[50] By itself, this provision suggests that virtually all reviews will be de novo, since the justice courts are not courts of record under the Arizona Constitution.[51] However, the statute also provides that "a trial de novo shall not be granted when a party who had the

---

46. *See* State *ex rel.* Neely v. Brown, 864 P.2d 1038 (Ariz. 1993) (en banc) (holding that the legislature could constitutionally give justice courts exclusive jurisdiction over matters where the amount in controversy was less than $1,000, but could not constitutionally divest the superior court of jurisdiction in matters where the amount in controversy was between $1,000 and $5,000); *see also* ARIZ. CONST. art. 6, § 14, cl. 3 (giving the superior courts of Arizona original jurisdiction in matters where the amount in controversy is $1,000 or more); ARIZ. REV. STAT. ANN. § 12-123 (granting the superior court original jurisdiction as conferred by the Arizona Constitution).

47. *See Neely*, 864 P.2d at 1040 (stating that although the legislature could not constitutionally divest the superior court of jurisdiction in matters where the amount in controversy was between $1,000 and $5,000, it could grant concurrent original jurisdiction in such matters). This concurrent jurisdiction amount may now be raised to $10,000 pursuant to Proposition 102. *See* ARIZ. CONST. art. 6, § 32, cl. C. In a recent study of the Arizona justice courts a committee appointed by the Arizona Supreme Court recommended that the justice court's civil jurisdiction limit be raised to the constitutional maximum of $10,000. *See* REPORT AND RECOMMENDATIONS, *supra* note 31, at 23.

48. There is no statutory right to remove a case filed in justice court to the superior court. Furthermore, when courts have concurrent jurisdiction, jurisdiction over the case is vested in the first court to exercise jurisdiction. *See* Wilson v. Garrett, 448 P.2d 857 (Ariz. 1969) (en banc); Allen v. Superior Court, 344 P.2d 163, 166 (Ariz. 1959) (holding that where a case was filed first in Cochise County, then by the other party in Maricopa County, Cochise County had jurisdiction); Davies v. Russell, 325 P.2d 402 (Ariz. 1958); *In re* Appeal in Maricopa County Juvenile Action No. A-27789, 680 P.2d 163, 165 (Ariz. App. 1983) (holding that Maricopa County juvenile court had no jurisdiction to determine adoption petition for two minors who had been adjudicated to be dependent minor children by and made wards of the Yavapai County Juvenile Court); Agricultural Employment Relations Bd. v. United Farm Workers of Am., AFL-CIO, 548 P.2d 429, 433 (Ariz. App. 1976). For recognition of this problem in New York, see Colin A. Fieman & Carol A. Elewski, *Do Non-Lawyer Justices Dispense Justice?*, 69-JAN N.Y. ST. B.J. 20 at n.3 (1997). Of course, in some cases there might be a right to remove the case to federal court. *See* 28 U.S.C. § 1441 (1994).

49. *See* ARIZ. REV. STAT. ANN. § 22-201(F). The superior court may also remand the case to justice court if it decides that the amount involved in the counterclaim is really $5,000 or less. *See id.*

50. ARIZ. REV. STAT. ANN. § 22-261(C). This provision was adopted in 1990 along with the change in the jurisdictional limit. *See* 1990 Ariz. Sess. Laws 223, § 5, effective July 1, 1991.

51. *See* ARIZ. CONST. art. 6, § 30, cl. A.

opportunity to request that a transcript of the lower court proceedings be made and failed to do so. [sic]"[52]

So the situation in Arizona is this: justice courts are not courts of record, and so they have no constitutional obligation to make a record of proceedings before them.[53] However, the litigant must request that the proceeding be recorded in order to preserve his/her right of appeal.[54] While a litigant must be warned of his/her obligation to ask for this record, the fact remains that this is the litigant's obligation, not the court's.[55]

Furthermore, getting a copy of the transcript from the justice court is no easy task. In the second case described in the opening of this article, I can remember the court clerks acting as though they had never had such a request. The hearing had been recorded on audio tape.[56] The rules for appealing from the justice court decision required that a transcript of the proceedings be prepared and submitted to the superior court.[57] Although the Maricopa County Local Rules only required preparation of a transcript if the tape was over one hour in length,[58] I felt it was necessary to prepare a written transcript of our proceeding because our case was heard in the middle of the docket, and thus was in the middle of a tape that contained the proceedings of the other cases heard the morning our case was heard. However, the court clerks told me that they do not prepare such transcripts. The rules were of no help to me since they do not say who is responsible for preparing the transcript for the appeal. The rule says only that "a transcript . . . shall be prepared."[59] Left to improvise, I ended up borrowing a copy of the tape of the proceedings from the justice court and having my secretary transcribe it. After she transcribed it, I had her sign a sworn affidavit that the transcript was an accurate transcription of the tape. I had done the best that I could in order to perfect my appeal, yet I knew that carrying the tape out of the justice court and having my own secretary prepare the record for the appeal might lead to problems later on.[60]

Based on my experiences in the cases discussed above, as well as others not recounted here, I began to suspect that the Arizona justice of the peace courts were, for the most part, institutionally incapable of carrying out their assigned function in the civil justice system of the State of Arizona. It seemed to me that Arizona had retained its non-lawyer justice of the peace courts in some effort to hold on to

---

52. ARIZ. REV. STAT. ANN. § 22-261(C). The 1995 study commissioned by the Arizona Supreme Court recommends eliminating all de novo appeals and requiring all matters to be audio-taped, video-taped, or recorded by stenographic means. *See* REPORT AND RECOMMENDATIONS, *supra* note 31, at 23.

53. *See* ARIZ. CONST. art. 6, § 30, cl. A.

54. *See* ARIZ. REV. STAT. ANN. § 22-261(C). Fieman and Elewski point out the irony that the very judges who are most likely to make errors are not required to record proceedings in their court. Fieman & Elewski, *supra* note 48, at 20. This same criticism was leveled in 1927. *See* Chester H. Smith, *The Justice of the Peace System in the United States*, 15 CAL. L. REV. 118, 125 (1927).

55. *See* ARIZ. REV. STAT. ANN. § 22-261(C) ("At the beginning of each proceeding the judge shall advise the parties that their right to appeal is dependent upon their requesting that a record be made of the justice court proceedings. Any party to an action may request that the proceedings be recorded for appeal purposes.").

56. Audio recording is permitted by ARIZ. SUPER. CT. R. APP. P.—CIVIL 11(e)(1).

57. *See* ARIZ. SUPER. CT. R. APP. P.—CIVIL 11(e)(2).

58. *See* MARICOPA COUNTY SUPER. CT. LOCAL PRAC. R. 9.4(a).

59. ARIZ. SUPER. CT. R. APP. P.—CIVIL 11(e)(2).

60. Another problem for appealing litigants is that they generally must post a bond for costs on appeal in order to perfect an appeal from justice court to the Arizona Superior Courts. *See* ARIZ. REV. STAT. § 12-1179.

notions of community resolution of disputes involving little economic value. At the same time, in an effort to afford the same procedural and substantive protections and rights to all Arizona litigants, Arizona had charged these non-lawyers with the task of following the laws of the state. In other words, these justices were assigned the paradoxical task of acting like lawyers, without legal training or education, while retaining their non-legal, member-of-the-community perspective.[61]

The notion of having non-lawyers adjudicating civil matters governed by substantive and procedural legal rules seemed anachronistic to me, particularly in a city the size of Phoenix.[62] I began to wonder if other attorneys in other states were faced with similar problems in courts presided over by non-lawyers. Most importantly, I began to wonder why a litigant, whose dispute involved a substantial sum of money but simple legal issues, should be entitled to have the dispute adjudicated by someone with legal training, while the average person embroiled in a legally complex matter involving "only" hundreds or thousands of dollars was not entitled to, and was statutorily prohibited from, the same level of legal expertise from the judge.[63]

---

61. This schizophrenia in what we expect of limited jurisdiction judges has been recognized by several prominent observers of non-lawyer courts. As early as 1927, Chester Smith observed:

> Our statutes dealing with the justice of the peace system postulate a justice according to law, that is, justice through the application of legal rules, standards and principles, which justice is to be administered by a tribunal which for the most part is wholly unlearned in the law. This proposition seems to be almost a contradiction.

Smith, *supra* note 54, at 127. Later, Doris Marie Provine, a political science professor, lawyer and former New York town justice, commented more deeply on the conflict between legal training and non-legal, community perspective:

> Among those favorable to the continued participation of nonlawyers in adjudication, the call nearly everywhere is for more education. The nonlawyer adjudicators themselves seem as anxious as anyone for more training. Education for personnel ostensibly chosen because they are *not* lawyers, however, raises difficult questions. The temptation is to try to make the nonlawyers more like lawyers; indeed, criticism of lay capacities and performance is usually couched in terms of their deviation from professional standards. Yet lay persons who internalize professional criteria for judgment lose some of the very characteristics that rationalize their presence in the system. Lay participants become more like experts in the institution. A legal system, it seems clear, cannot simultaneously satisfy desires to represent citizen opinion on tribunals and at the same time satisfy professional standards for performance.

DORIS MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 187-88 (1986).

62. As I did my research for this article I was stunned to learn that justice by non-lawyer judges was thought of as anachronistic as early as 1927. *See* Smith, *supra* note 54, at 118; *see also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE COURTS, TASK FORCE REPORT (1967) [hereinafter TASK FORCE REPORT] (using the word "anachronism" to describe non-lawyer judges).

63. Exclusive jurisdiction amounts and inability to remove concurrent jurisdiction cases force litigants into justice court whether they wish to be there or not. This fact distinguishes justice of the peace courts from other voluntary, alternative dispute forums, such as mediation and neighborhood justice centers staffed by non-lawyers. Many of these types of alternative dispute resolution forums enjoy the support of lawyers and bar associations, a fact which has led some court observers to point out an apparent contradiction. *See* PROVINE, *supra* note 61, at 53-55, 59. Yet, it is because these forums are not compulsory or binding that they garner the support of the legal community, a fact also recognized by Professor Provine:

> Nonlawyer mediators are tolerable while nonlawyer judges are not because, theoretically at least, mediators derive their authority from the consent of the parties and they offer judgment in the name of reconciliation. Where rights and social sanctions are at issue, on the other hand, the argument for legal expertise has grown stronger with time.

Id. at 167.

D. *Other Justice Court Stories*

As I began to do research for this article I found other testimonies to the trials and tribulations of litigating civil cases before non-lawyer judges. For example, in their recent article in the New York State Bar Journal, Colin A. Fieman and Carol A. Elewski recount the story of a non-lawyer judge who informed an attorney appearing in her court that United States Supreme Court decisions did not apply in her court.[64] John M. Conley and William M. O'Barr, who personally observed lawyer and lay judges in a 1987 empirical study, tell of a non-lawyer judge who could not decide which party was telling the truth.[65] The judge avoided making a decision by ruling that the defendant had to pay the plaintiff exactly half of what she requested, plus court costs.[66]

In another case reported by Conley and O'Barr, the same lay judge was required to decide whether or not a man had gifted a bedroom set to his ex-fiancée.[67] He claimed he had never gifted the bedroom set to his ex-fiancée, and was thus entitled to have it returned to him.[68] The ex-fiancée claimed that the bedroom set had indeed been gifted to her, and thus she was entitled to keep it.[69] Rather than decide whether there had been a gift or not, the judge ruled that since the man had not fully paid for the furniture he did not have the legal right to gift the bedroom set to someone else, and thus ruled that the man was entitled to get the bedroom set back from his ex-fiancée.[70] This ruling was made by the judge even though there was no evidence introduced suggesting that the furniture was subject to a security interest, let alone

---

The other fact that recommends these types of dispute forums is that they are subject driven, and thus participants can expect to have mediators who have some experience and expertise in discreet areas, such as domestic or employment situations. Conversely, the jurisdiction of many non-lawyer limited jurisdiction courts is based on amount in controversy, not subject matter, or, if subject matter is limited, it is limited to such large subjects as "contracts."

64. Fieman & Elewski, *supra* note 48, at 20.

65. John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 486 (1988).

66. *See id.* In the case reported, a landlord had withheld $24.02 of a tenant's security deposit in order to repair a refrigerator tray that the tenant allegedly damaged. *See id.* Only the landlord offered evidence regarding damage to the tray. *See id.* The judge awarded the tenant $12.01 (half of the retained security deposit) plus $19.00 for court costs. *See id.* Conley and O'Barr define this result as "extralegal." *See id.*

The issue of "splitting the difference" was addressed in Professor Provine's 1980 empirical study of New York town, village and city judges. *See* PROVINE, *supra* note 61. The survey she circulated to the judges asked how frequently the judges "split the difference" in small claims cases. *See id.* at 86-87, 108-09, 227 n.65. Of the lawyer judges surveyed, 34% said they didn't split the difference, 8% said they split the difference less than 10% of the time, 24% said they split the difference 10% to 24% of the time, 29% said they split the difference 25% to 50% of the time, and 4% said they split the difference over 50% of the time. *See id.* at 227 n.65. Of the non-lawyer judges surveyed, 30% said they didn't split the difference, 14% said they split the difference less than 10% of the time, 22% said they split the difference 10% to 24% of the time, 30% said they split the difference 25% to 50% of the time, and 4% said they split the difference over 50% of the time. *See id.* From a supportive perspective, this question appears to get at the number of times the judges were able to abandon the constraints of an all-or-nothing legal approach for a more conciliatory approach. *See id.* at 109. From a critical perspective, this question might also address the number of times the judge could not decide who should win.

67. *See* Conley & O'Barr, *supra* note 65, at 487-88.

68. *See id.*

69. *See id.*

70. *See id.*

one that prohibited transfer of the bedroom furniture.[71] Conley & O'Barr noted that in both cases this lay judge used language which "surrounds all of her actions with an aura of legalism."[72]

Each of these stories simply heightened my concern that at the lowest economic levels of justice parties often receive uninformed approximations of justice cloaked in legal authority and formalism. Why aren't justice court litigants entitled to a judge who is able to comprehend and apply the substantive and procedural rules that apply in their cases? Why wasn't the landlord in the first case entitled to a judge who would be able to assess the credibility of the witnesses and make a decision? Why wasn't the woman with possession of the bedroom set entitled to adjudication by a judge who could make a decision based on the evidence before her and the law regarding secured goods? Why wasn't I able to get the default hearing to which my client, and our opponent, were entitled? How could any judge view the burden of proof as a quantitative rather than a qualitative measure? How could a court unilaterally decide to communicate items to the plaintiff and not to the defendant?

E. The Goal of this Article

My initial goal in writing this article was empiric and reformative. But as I worked on the article, I realized that I could not hope to answer for each of the 50 states whether non-lawyer judges should be permitted to adjudicate civil cases. Keeping in mind the observation that court reform suggestions that set forth standards to be considered rather than ends to be reached are more useful to a greater number of court systems,[73] and the reality that the non-lawyer judge has been a resilient figure in American justice,[74] my reformed goal is to inspire a re-inspection of the civil jurisdiction of non-lawyer courts in as many states as possible, and to set forth considerations that should play a role in that re-examination.[75]

In an effort to provide some essential tools I believe are needed for a re-inspection of the role non-lawyer judges should play in civil cases, in Part II of this article, I address the historical roots of the non-lawyer justice court system in the United States and efforts to reform that system. In Part III, I discuss notions that have perpetuated the use of non-lawyer judges in civil cases, whether these notions are reality-based, whether a law degree should be required given the realities of civil litigation in limited jurisdiction courts, and the effects of mis-matching judicial tasks with judicial qualifications. Finally, in appendices 2 and 3, I present a state-

---

71. *See id.*

72. *Id.* at 489.

73. *See* Carl Baar, *Trial Court Unification in Practice*, 76 JUDICATURE 179, 184 (1993) ("By prescribing a single model of trial court organization, rather than articulating a set of criteria whereby a variety of differently designed trial courts can be assessed, the ABA standards [Relating to Court Organization (Chicago, 1990)] are more likely to curb creative efforts to improve the courts than to spur implementation of needed reforms.").

74. It has been further suggested that due to political considerations, and the disqualification of incumbents, "elimination of the justices of the peace and their equivalents is often the last difficult step to court unification." Justin Green et al., *Iowa's Magistrate System: The Aftermath of Reform*, 58 JUDICATURE 380, 381 (1975).

75. For an example of the type of scrutiny that non-lawyer courts in each state demand, see John G. Baker, *The History of the Indiana Trial Court System and Attempts at Renovation*, 30 IND. L. REV. 233 (1997), which addressed court unification problems in Indiana, and Cynthia Ford, *Civil Practice in Montana's "People's Courts": The Proposed Montana Justice and City Court Rules of Civil Procedure*, 58 MONT. L. REV. 197 (1997).

by-state survey of statutes relating to civil jurisdiction and judicial qualifications in non-lawyer courts.[76]

It is my sincere hope that this article will lead to informed debate and re-examination of the civil jurisdiction of non-lawyer courts by the legislators and electorates who have created and perpetuated these courts, by state bar associations and state courts that have monitored and supervised these courts, and by the consumers and citizens who use these courts.

II. A HISTORY OF NON-LAWYER JUSTICES IN CIVIL MATTERS AND EFFORTS AT REFORM[77]

A. *A History of Non-Lawyer Justices in Civil Matters*

Non-lawyer justices of the peace have been a part of the American legal landscape since its beginning.[78] When the first settlers came to America, there were very few lawyers and, consequently, very few lawyer judges.[79] There likely were many reasons for not using lawyer judges. First, it has been observed that when American law was in its infancy, the law was not complex, and thus could be applied by a lay person.[80] Additionally, logistical difficulties, such as the state of communication and transportation, inhibited adjudication by non-local judges.[81] Reportedly, using non-lawyer judges was also more consistent with democratic ideals, such as the public's belief that the law should be understandable, and thus applicable, by lay persons.[82] There was also the belief, still held by some, that the lay judge was closer to the community than a lawyer judge, and therefore "more likely to reflect the community's sense of justice."[83] Finally, like the rest of our legal system, the practice of using non-lawyer judges was imported from England, although English justices of the peace did not have jurisdiction over civil matters.[84]

Until the Revolutionary War, most colonial courts were officiated by non-lawyer judges.[85] Sometime thereafter, some states began requiring their judges to be trained

---

76. This article does not address criminal or probate matters that may be heard before non-lawyer judges.

77. For an extensive history of non-lawyer justices, see THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., 1982).

78. *See* Allan Ashman & David L. Lee, *Non-Lawyer Judges: The Long Road North*, 53 CHI.-KENT L. REV. 565 (1977); James A. Gazell, *A National Perspective on Justices of the Peace and Their Future: Time for an Epitaph?*, 46 MISS. L.J. 795, 797 (1975) (dating the first use of the justice of the peace to 1607); Smith, *supra* note 54. For a general history of justices of the peace and lay judges, see JOHN P. DAWSON, A HISTORY OF LAY JUDGES (1960) and JOHN R. WUNDER, INFERIOR COURTS, SUPERIOR JUSTICE: A HISTORY OF THE JUSTICES OF THE PEACE ON THE NORTHWEST FRONTIER, 1853-1859 (1979).

79. *See* PROVINE, *supra* note 61, at 1; Ashman & Lee, *supra* note 78, at 567.

80. *See* Ashman & Lee, *supra* note 78, at 567.

81. *See id.*; Smith, *supra* note 54, at 118.

82. *See* Jeffrey R. Pankratz, *Neutral Principles and the Right to Neutral Access to the Courts*, 67 IND. L.J. 1091, 1102-03 (1992) ("Thus, rather than replicate the clumsy in forma pauperis statute to ensure that all citizens could retain counsel, many persons pushed for legal systems that could be understood and thus used by all without the retention of counsel.").

83. Jerold H. Israel, *Cornerstones of the Judicial Process*, 2-SPRING KAN. J.L. & PUB. POL'Y 5, 19 (1993). *See also* PROVINE, *supra* note 61, at 11-19.

84. *See* PROVINE, *supra* note 61, at 26. For a concise history of justice of the peace courts in England, see Gazell, *supra* note 78, at 796-97; *see also* Ashman & Lee, *supra* note 78, at 566-67.

85. *See* Pound, *supra* note 2, at 303.

in the law.[86] Other states excluded lawyers from judicial service, a move largely attributed to popular and religious antagonism toward the legal profession.[87]

Over time, as the federal and state governments evolved and grew, and as commerce increased, the professional practice of law became more common.[88] Legal principles and rules of law developed, requiring a far greater degree of knowledge for their application.[89]

Despite the earlier trend in favor of a non-lawyer bench, by the mid-1800s lawyer judges were the norm except in geographic areas where there were still few lawyers.[90] This was due, in part, to the increasing complexity of the law[91] and to better training and organization of lawyers and judges.[92]

As with all other levels of the judiciary, the first limited jurisdiction courts in the United States were also staffed largely by non-lawyer judges.[93] As the country moved toward a judiciary comprised of lawyers in all other levels, however, courts of limited jurisdiction continued to permit non-lawyers to serve as judges.[94] By far, the most common title for a non-lawyer judge was the justice of the peace.[95]

Originally, the office of justice of the peace "was a part-time, elective office," always filled by "a local resident and often a leader in the community."[96] These justices did not employ advisors who were learned in the law, a practice then common in England, but rather, relied on their own capabilities to rule on matters that came before them.[97] Originally, justices of the peace had administrative as well as judicial responsibilities, although the administrative responsibilities were eventually eliminated.[98]

Justices of the peace were paid with fees collected from litigants, but otherwise received no salary.[99] This fee model, which led to competition for cases among the justices of the peace, and sometimes meant that justices might not collect their fees if they decided for one party over the other party, led to the first significant reform in the lower courts—the elimination of non-lawyer judges in the Chicago municipal courts.[100]

---

86. *See* PROVINE, *supra* note 61, at 10-11, 14.

87. *See id.*

88. *See id.* at 1, 5.

89. One author noted that before this development, "[f]ew legal principles or rules had been worked out and there was little legislation either to guide or hamper the magistrate. Hence, he was probably as capable as anyone to administer justice according to his own judgment and common sense." Smith, *supra* note 54, at 118.

90. *See* PROVINE, *supra* note 61, at 1, 16-17.

91. *See id.* at 17.

92. *See id.* at 30.

93. *See id.* at 10-11.

94. *See id.* at xii, 11, 18.

95. Professor Provine describes justices of the peace as the forefathers of modern nonlawyer judges. *See* PROVINE, *supra* note 61, at xii.

96. PROVINE, *supra* note 61, at xii.

97. *See id.* at 27-28.

98. *See id.* at 30.

99. *See id.* at xii, 27; Smith, *supra* note 54, at 120. This aspect of the system has received a tremendous amount of criticism. *See, e.g.*, Vanlandingham, *supra* note 36, at 392-95.

100. *See* PROVINE, *supra* note 61, at 30; Gazell, *supra* note 78, at 799; Robert S. Keebler, *Our Justice of the Peace Courts—A Problem in Justice*, 9 TENN. L. REV. 1, 4 (1930).

By the 1930s, non-lawyer judges had been eliminated from the municipal courts in most large eastern cities but remained in many other courts in the country.[101] In these areas, the courts moved from a model of non-lawyer justice for all to one of non-lawyer justice for only those civil litigants whose controversies involved "small" sums of money.[102]

B. A History of Efforts to Reform Non-Lawyer Courts

The call for reform in non-lawyer courts in the United States is not a new one. In 1906, Simeon Baldwin published a book in which he claimed that "[t]he weakest point in this system of judicial organization is the vesting of jurisdiction of small civil causes in justices of the peace" who need not be lawyers.[103] That same year, Roscoe Pound raised the issue of non-lawyer judges in a speech to the American Bar Association about the maladies of the American legal system.[104] Dean Pound raised the issue again in a 1912-13 article in the Harvard Law Review.[105]

In 1913, the American Judicature Society, an organization dedicated to court reform, was founded.[106] Around this time, some metropolitan areas began the process of reforming or even eliminating justice of the peace courts.[107] Academics began calling for the elimination of non-lawyer judgeships, arguing that only one trained in the law had the necessary qualifications to adjudicate matters meant to be determined under the law.[108]

In 1927, Chester H. Smith wrote the first major academic article to call for the abolition of the office of justice of the peace, arguing that

> today, with paved roads, automobiles and instant communication, all of which obtain, with but few exceptions, in the remotest rural communities, it is safe to say that the conditions which forced the creation and spread of the justice of the peace system in the United States have long since ceased to exist.[109]

Smith concluded "[t]here is no basis in logic or reason for requiring a different standard of qualifications for the officer deciding disputes between two citizens

---

101. *See* PROVINE, *supra* note 61, at 33.

102. *See id.*

103. *See* SIMEON BALDWIN, THE AMERICAN JUDICIARY 129 (1906).

104. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906) *in* 46 J. AM. JUDICATURE SOC'Y 55, 58 (1962) ("None the less, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States.").

105. *See* Pound, *supra* note 2, at 327 ("Another difficulty is that we assume a petty judge is good enough for petty causes. In these cases we must have free scope for the good sense of the judge, tempered by knowledge of the law . . . or we must deny justice.").

106. For a brief history of the American Judicature Society, see Herbert Harley, *Concerning the American Judicature Society*, 20 J. AM. JUDICATURE SOC'Y 9 (1936). Originally, Harley did not think that using laymen as judges would pose a problem, so long as the court system was unified. *See* Herbert Harley, *An Efficient County Court System*, 73 ANNUALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 189, 190 (1917); *see also* CHRISTINE B. HARRINGTON, *Delegalization Reform Movements: A Historical Analysis*, THE POLITICS OF INFORMAL JUSTICE 35, 45-47 (Richard L. Abel ed., 1982).

107. *See* Gazell, *supra* note 78, at 799; Keebler, *supra* note 100, at 4.

108. *See* Austin W. Scott, *Small Claims and Poor Litigants*, 9 A.B.A. J. 457 (1923); Reginald Heber Smith, *Denial of Justice*, 3 JUDICATURE 12 (1919); Milton Strassburger, *A Plea for the Reform of the Inferior Court*, 22 CASE AND COMMENT 20 (1915-16).

109. Smith, *supra* note 54, at 118. *See also* Gazell, *supra* note 78, at 799.

having large sums in controversy and the officer determining disputes between two citizens having but a few dollars in controversy."[110] Other articles with similar themes followed.[111]

In 1931, the National Commission on Law Observance and Enforcement (popularly named the Wickersham Commission, after its chairman) recommended the improvement or elimination of non-lawyer judges in limited jurisdiction courts, finding that the non-lawyer justice had become outdated.[112] In 1938, the ABA made a series of recommendations, called the Vanderbilt-Parker Standards, that were based on the assumption that all judges at all court levels should be lawyers.[113] This theme of replacing or improving antiquated justice of the peace courts was raised sporadically after this.[114]

By the 1940s, some states had moved to a model that required all lower court judges to be trained in the law.[115] Beginning in the early 1960s, organized groups such as the American Bar Association and the American Judicature Society "explicitly or implicitly sought the abolition of justices of the peace and their kindred offices."[116] Additionally, there were renewed calls by academicians that only lawyers should be allowed to serve as lower court judges.[117] By the mid-1960s, those states that allowed non-lawyers to serve as judges had restricted them to the very lowest courts and placed them "under the supervision of central administrative authorities."[118] Nevertheless, many states still retained courts where non-lawyer judges could serve.

In 1967, President Lyndon B. Johnson appointed a task force comprised of prominent law professors, justice department officials, and members of the bar to study and make suggestions to improve the United States criminal court systems.[119] The task force issued a report making the point, in terms strikingly similar to Chester Smith's 1927 article, that "conditions which gave rise to the development of justice courts largely disappeared with the advent of modern means of travel and almost instantaneous communication. As a result, the lay-manned, fee-paid court

---

110. Smith, *supra* note 54, at 120.

111. *See, e.g.*, A.B. Butts, *Justice of the Peace—Recent Tendencies*, 1 MISS. L.J. 195 (1928); Keebler, *supra* note 100; T.L. Howard, *The Justice of the Peace System in Tennessee*, 13 TENN. L. REV. 19 (1934).

112. *See* PROVINE, *supra* note 61, at 41; Gazell, *supra* note 78, at 800.

113. *See* ARTHUR T. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (1949) (discussed in Baker, *supra* note 75, at 235-36); PROVINE, *supra* note 61, at 40.

114. *See, e.g.*, Gazell, *supra* note 78, at 800; Jack Harrison Pollack, *Cow Pasture Justice*, 28 MICH. STATE B. J. 12, 12-16 (1949); Kenneth E. Vanlandingham, *Pecuniary Interest of Justices of the Peace in Kentucky; The Aftermath of* Tumey v. Ohio, 45 KY. L.J. 607, 607-25 (1957).

115. *See* Linda J. Silberman, *Non-Attorney Justice: A Survey and Proposed Model*, 17 HARV. J. ON LEGIS. 505 (1980). Professors Lamber and Luskin identify the 1930s and 1940s as the first time when prescriptions for judicial change were adopted. Julia Lamber & Mary Lee Luskin, *Court Reform: A View from the Bottom*, 75 JUDICATURE 295 (1992).

116. Gazell, *supra* note 78, at 800.

117. *See, e.g.*, David R. Mason & William F. Crowley, *Montana's Judicial System—A Blueprint for Modernization*, 29 MONT. L. REV. 1, 5 (1967) (presenting a plan for the modernization of Montana's justice system, including the abolition of inferior courts); Vanlandingham, *supra* note 36, at 396, 403 ("The most apparent weakness of minor court reform in some states has been the failure to require judges of minor courts to be lawyers.").

118. *See* Silberman, *supra* note 115, at 505.

119. *See* PROVINE, *supra* note 61, at 44.

is an anachronism."[120] The report concluded that limited jurisdiction courts should have a "wide territorial basis" and be "manned by salaried, law-trained judges."[121]

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals once again concluded that justice of the peace courts should be abolished, stating that "[a] first step for those States without formal plans for court reorganization and unification would be to abolish the justice of the peace and municipal courts in metropolitan areas and to replace them with unified county or multi-county systems . . . staffed by full-time judges with law degrees who are members of the bar."[122]

Reportedly, "by the mid-1970s, most states had reformed [justice] courts significantly, reducing excess judges, instituting training programs and qualifying exams, usually with federal funding from the now defunct Law Enforcement Assistance Administration (LEAA), eliminating the worst aspects of the fee system, and sometimes providing salaries for justices traditionally supported by fees."[123] Nevertheless, the call to eliminate all remaining non-lawyer judgeships continued.[124] One of these articles even predicted the demise of the justice of the peace by the end of the twentieth century.[125]

In the late 1970s, the National Center for State Courts, led by Professor Linda J. Silberman, conducted the first major modern study of non-lawyer justice.[126] The study, the results of which were published in a report and a Harvard Journal on Legislation article, concluded that "in the best of all possible worlds, an attorney judge would be preferred," even in minor matters.[127] Recognizing that this might not be feasible in all areas, the study went on to say that if it was not possible to replace non-lawyer judges with lawyer judges in all cases, "it is recommended that lay courts retain civil jurisdiction only in 'simple' civil actions where the amount in controversy does not exceed $2,000."[128] Cases identified as too complex for non-lawyer judges included "attachments and garnishments, real property actions, slander or libel, and malicious prosecution—and those actions where serious social

---

120. TASK FORCE REPORT, *supra* note 62, at 34. The report particularly criticized the fee-based system for compensating justices of the peace. *See id.* at 34-35. Indeed, the Supreme Court has found that judicial fees dictated by case outcome are unconstitutional in criminal cases. *See* Tumey v. Ohio, 273 U.S. 510 (1927).

121. TASK FORCE REPORT, *supra* note 62, at 35. Perhaps in recognition that this might not be an attainable goal in some states, the final conclusion of the report was that "all persons exercising judicial functions should either be lawyers or be required to complete rigorous judicial training prior to assuming office." *Id.* at 36. However, the report continued, "[w]hile such courses may prove beneficial, to ensure a better quality of training and higher interest in the work performed, it is far preferable that judicial officers be lawyers." *Id.*

122. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 162 (1973) (quoted in Gazell, *supra* note 78, at 795).

123. PROVINE, *supra* note 61, at 55; *accord* Vanlandingham, *supra* note 36, at 389.

124. *See, e.g.*, Ashman & Lee, *supra* note 78; Gazell, *supra* note 78, at 797; Green et al., *supra* note 74; Paul Nejelski, Query, *Do Minor Disputes Deserve Second-Class Justice?*, 61 JUDICATURE 102 (1977).

125. *See* Gazell, *supra* note 78, at 813. Earlier articles had made similar, if less specific, predictions. *See* Vanlandingham, *supra* note 36, at 403. *But see* Ashman & Lee, *supra* note 78, at 568 ("[N]on-lawyer judges are not facing imminent extinction. They have been remarkably resilient through the centuries of dramatic growth and change.").

126. INSTITUTE OF JUDICIAL ADMINISTRATION, INC., NATIONAL CENTER FOR STATE COURTS, NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY (1979) [hereinafter NON-ATTORNEY JUSTICE]; Silberman, *supra* note 115.

127. *See* NON-ATTORNEY JUSTICE, *supra* note 126, at 101.

128. *Id.* at 101; Silberman, *supra* note 115, at 540-41.

consequences are likely to ensue, such as cases involving novel theories of liability."[129] Alternatively, Silberman identified "simple contract and tort cases" as types of cases that lay judges could be adequately trained to handle.[130]

The intensified interest in non-lawyer judges in the 1970s coincided with, and was undoubtedly partly the result of, the appeal of *North v. Russell*,[131] a limited jurisdiction criminal case to the United States Supreme Court. In *North*, the Kentucky non-lawyer judge had jailed Lonnie North for a first offense of driving while intoxicated (DWI).[132] There was no statutory authority for a jail sentence on a first DWI offense.[133] The judge also denied North's request for a jury trial and revoked his drivers license.[134] During the litigation over the non-lawyer judge's conduct, discovery was taken and amicus briefs filed showing that many lay judges came to their positions completely unprepared for their judicial role.[135] Non-lawyer judges appeared to be unable to locate and understand statutes, did not understand what statutes were, and were clueless as to many other basic judicial responsibilities.[136] Nevertheless, the Supreme Court held that Kentucky's lay judge authority did not raise constitutional concerns, since North had the right to trial de novo before a lawyer judge.[137] After this case garnered attention, the same issue was litigated in many state courts, and the policy was revisited by several state legislatures.[138]

In 1980, Doris Marie Provine, a political scientist, lawyer, and former New York town justice,[139] undertook the second major study of the differences between non-lawyer and lawyer justices.[140] As part of the study she examined town and village courts in the State of New York, many of which were at the time and are still staffed by non-lawyer judges.[141] In addition to disseminating a questionnaire, Professor Provine visited 26 judges (13 lawyers and 13 non-lawyers) and observed them

---

129. Silberman, *supra* note 115, at 541.

130. *See id.* at 545. I do not agree with this conclusion. See *infra* notes 179-207 and accompanying text.

131. 427 U.S. 328 (1976); *see also* Gordon v. Justice Court, 525 P.2d 72 (Cal. 1974), *cert. den.* 420 U.S. 938 (1975). This case went to the Supreme Court just after the California Supreme Court had held that defendants, charged with a criminal offense for which they could be jailed, were constitutionally denied the effective assistance of counsel if they were forced to appear before a non-lawyer judge.

132. *See North*, 427 U.S. at 329-30.

133. *See id.* at 329.

134. *See id.* at 330.

135. *See* Allan Ashman & Pat Chapin, *Is the Bell Tolling for Nonlawyer Judges?* 59 JUDICATURE 417, 417-18 (1976).

136. *See id.* at 418 (providing an excerpt from the court file). In *North*, the justice of the peace denied North a jury trial, although he was "clearly entitled to a jury trial upon request" under Kentucky law. 427 U.S. at 343 (Stewart, J., dissenting).

137. *See id.* at 339.

138. *See* John Paul Ryan & James H. Guttrman, *Lawyer Versus Nonlawyer Town Justices: An Empirical Footnote to* North v. Russell, 60 JUDICATURE 272 n.1 (1977). The case also led to critical law review articles. *See, e.g.*, Ashman & Lee, *supra* note 78.

139. Professor Provine was a town justice from 1978 until 1982 in Virgil, New York. *See* PROVINE, *supra* note 61, at 87.

140. *See id.* at 86. Professor Provine sent a written questionnaire to "1,647 non-lawyers and 575 lawyers, 137 of whom were city judges." *Id.* Seventy-four percent of the non-lawyers and fifty-five percent of the lawyers responded. *See id.*

141. In 1980, when Professor Provine conducted her study, New York had over 1,600 non-lawyer judges. *See id.*

conducting the business of their courts.[142] She then wrote a book, published in 1986, largely supportive of the use of non-lawyer judges.[143] At that time, approximately 13,000 judgeships in 43 states were held by individuals with no legal education.[144] Professor Provine's conclusion that non-lawyer judges can be as competent as lawyer judges in courts of limited jurisdiction was a notable exception to the position held by most other authors on the subject. However, her conclusion has found recent support in two articles by Professors Julia Lamber and Mary Lee Luskin.[145]

In 1990, the American Bar Association re-iterated its position that all judges should be lawyers, concluding in a report that there should be a "single-level trial court with a single class of judges."[146] Perhaps the most recent proposal which would impact the jurisdiction of non-lawyer judges is model legislation drafted by HALT—An Organization of Americans for Legal Reform, to raise the jurisdictional limits of small claims courts in each of the fifty states to $20,000.[147] The proposal itself does not address whether the judges in these courts should be lawyers.

While commentators might disagree as to the competence of non-lawyers to adjudicate, everyone can agree that there is very little information available regarding these courts and, particularly, their civil caseload.[148] The only annual information about these courts is a report by the National Center for State Courts and the Conference of State Court Administrators.[149] This report merely provides statistical information about these courts. It does not provide the sort of case-specific observation and information that has led me to conclude that non-lawyers should be divested of civil jurisdiction.

Even the most extensive research regarding non-lawyer judges does not take into account or address what others believe to be important information necessary to a full analysis of the capabilities of lay judges.[150] Indeed, some commentators have suggested that most opinions held about non-lawyer judges are based on something other than information regarding the actual work done by non-lawyer judges.[151]

---

142. *See id.* at 86-87.

143. *See* PROVINE, *supra* note 61.

144. *See id.*

145. *See* Julia Lamber & Mary Lee Luskin, *City and Town Courts: Mapping Their Dimensions*, 67 IND. L.J. 59 (1991); Lamber & Luskin, *supra* note 115.

146. Baar, supra note 73, at 179 (referring to the American Bar Association, Standards Relating to Court Organization (1990)).

147. *See* Jill Schachner Chanen, *Pumping up Small Claims, Reformers Seek $20K Court Limits—With No Lawyers*, A.B.A. J., Dec. 1998, at 18. Obviously, this would impact the non-lawyer judge issue only in those states that allow non-lawyers to preside over small claims.

148. In 1991 civil cases made up only 12% of the cases heard nationally in limited jurisdiction courts. *See* 1991 STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 7 (1991). Therefore, it is not surprising that the information available about limited jurisdiction courts, and any studies of these courts has focused primarily on the criminal and traffic jurisdiction of these courts.

149. *See id.* at xiv.

150. *See, e.g.*, PROVINE, *supra* note 61, at 105 (criticizing the conclusions reached in the Silberman study as not being supported by the observations made during the course of that study).

151. *See, e.g.*, Lamber & Luskin, *supra* note 115, at 298 ("there is no justification–empirical or theoretical—for this proposal [that all judges should be lawyers]; it simply assumes that a lawyer judge would be better."); *see also* David A. Harris, *Justice Rationed in the Pursuit of Efficiency: De Novo Trials in the Criminal Courts*, 24 CONN. L. REV. 381, 398 (1992)("In *Colten* [*Colten v. Kentucky*, 407 U.S. 104 (1972)], the Supreme Court stated that sentences in lower courts usually are not severe. The court, however, offered no support for this

Despite this lack of study, and the continued dominance of the position that the civil jurisdiction of non-lawyer judges should be eliminated or severely limited,[152] non-lawyer courts have proved rather resilient. Currently 29 of the 50 states allow non-lawyer judges to adjudicate civil matters in one form or another.[153] Furthermore, the civil jurisdictional limits in many state limited-jurisdiction courts have been increasing.[154]

It is difficult to determine the impetus for the jurisdictional increases some non-lawyer courts have been granted recently. There is evidence that some jurisdictional increases for non-lawyer justice courts were motivated by a desire to reduce the number of cases on the dockets of courts of record.[155] Changes also may have been spurred by a belief that it costs less money to operate non-lawyer, limited jurisdiction courts than to hear the same cases in general jurisdiction courts.[156] Certainly, inflation has played some role.[157] Whatever the reasons for these jurisdictional increases, they do not appear to have been articulated at the time they were implemented. My concern is that this silence reflects a failure to fully analyze these courts and to determine whether an increase in jurisdictional limit was more beneficial than not. The rest of this article suggests the considerations necessary to such a full analysis.

---

proposition.") (citations omitted). Harris also criticizes the court's assumption in that case that judges on de novo appeal would be more likely to be sympathetic rather than critical of a criminal appellant because of the court's paramount concern for the quality of adjudication below, which would be more important to the court than considerations of the court's time taken by a de novo appeal. *See id.* at 392.

152. *See, e.g.*, Fieman & Elewski, *supra* note 48. *Contra*, Lamber & Luskin, *supra* note 145; Lamber & Luskin, *supra* note 115.

153. These states are Alaska, Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wyoming. *See* Appendix 3, *infra*.

154. *See, e.g.*, COLO. REV. STAT. § 13-6-104 (1987 & Supp. 1996) (raising the jurisdictional limit in 1990 from $5,000 to $10,000); DEL. CODE ANN. tit. 10, §§ 9301, 9303, 9304 (1974 & Supp. 1996) (raising the jurisdictional limit in 1995 from $5,000 to $15,000); OKLA. STAT. ANN. tit. 20, § 123 (West 1998) (raising the jurisdictional limit for special judges from $400 to $1,000); S.C. CODE ANN. § 22-3-10 (Law Co-op. 1978 & Supp. 1997) (raising the jurisdictional limit in 1994 from $2,500 to $5,000); S.D. CODIFIED LAWS § 16-12A-19 (Michie 1995 & Supp. 1998) (raising the jurisdictional limit in 1997 from $4,000 to $8,000 in uncontested civil actions).

155. *See* Ryan Konig, *Justice Courts Could Face 20% Hike in Cases in July Because of Changes*, ARIZONA REPUBLIC, Jan. 4, 1991, at 5N10.

156. *See* PROVINE, *supra* note 61, at xiv, 44, 62. Whether this assumption is true or not is unclear. While it is true that lawyer judges might expect a higher salary and more assistance, such as a secretary or bailiff, there is some evidence to suggest that lawyers can handle matters at a faster pace than non-lawyers. For example, Professor Provine compared the salaries and case loads of New York limited-jurisdiction judges and found that while the lawyers were paid more on an annualized basis, they cost less per case than non-lawyer judges because they disposed of five times as many cases as the non-lawyer judges. *See id.* at 138-39. Whether speed in disposition is a good thing depends to some extent on what the numbers mean. On one hand, quicker disposition might indicate a greater efficiency and ability to act on the part of lawyer judges. On the other hand, it might reflect an unwillingness by lawyer judges to receive information which would be deemed legally insignificant in other court settings. The ability to air one's fuller story is believed by some to be a great benefit to the court clientele. *See, e.g.*, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991). *But see*, Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889 (1995).

157. *See* Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 314-16 (1984).

III. THE ROLE OF THE NON-LAWYER JUDGE IN CIVIL JUSTICE INTO THE 21ST CENTURY: SOME CONSIDERATIONS

A. *Notions that Underlie Perpetuation of the Civil Jurisdiction of Non-Lawyer Judges*

One of the images that underlies much of the non-lawyer judge discourse is that of the wise and experienced member of the community, unrestrained by the formality of court rules, and informed by his knowledge of local custom, and perhaps even the knowledge of individuals before him. This non-lawyer judge is therefore able to craft inventive, practical, community-based solutions to the daily, simple problems of the court clientele.[158] Thus, lay courts are seen as community dispute resolution centers where "little" disputes between parties can be worked out in an informal setting.

Historically, this may have been true. As originally conceived and put into operation, non-lawyer justice courts were forums where litigants with minor claims could come to have their disputes resolved in an informal setting by a trusted community member.[159] Reportedly, as a consequence of using non-lawyer judges, "[t]he early American trial often resembled deliberation of the community on justice or injustice, and equitable principles rather than legal precedent were the basis for decision."[160] De Tocqueville observed that the justice courts in early America served as a sort of bridge between the common man and the law.[161] James Willard Hurst observed in 1950 that the justice of the peace embodied America's emphasis on autonomous local control, bringing justice "close to each man's door."[162] James A. Gazell commented that "[t]he persons elected as justices of the peace, however, were usually the most trusted members in frontier communities."[163] These historic notions have carried forward in recent works on non-lawyer courts. For example, Professor Provine opines in her book that "[g]iven the extent to which the questions at this level require judgment, not technical expertise, informality and democratic influences are probably desirable in most cases."[164]

But the actual circumstances in which many American lay judges work today call into serious question the nostalgic image of the lay adjudicator as the trusted and wise member of the group of individuals appearing in the court, adjudicating small

---

158. For example, Professor Provine implies that lay judges are more sensitive than lawyer judges to the mores and particularities of the community. *See* PROVINE, *supra* note 61, at 58, 59. *See also*, PROVINE, *supra* note 61 at xii; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 535-36 (1992).

159. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 147-49 (1950); PROVINE, *supra* note 61, at 27 (noting that "jurisdiction [of American justices of the peace] was always limited to minor cases"); Pankratz, *supra* note 82, at 1102-03; Vanlandingham, *supra* note 36, at 389 ("Ordinarily, the traditional justice of the peace system may be defined as the administration of petty justice by lay officials paid by fees.").

160. *Id.* at 1103; *accord* Smith, *supra* note 54.

161. *See* 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 76 (1948) (quoted in PROVINE, *supra* note 61, at 29); Gazell, *supra* note 78, at 798; *see also* Lamber & Luskin, *supra* note 115, at 297. *But see*, Smith, supra note 54; Vanlandingham, *supra* note 36.

162. *See* HURST, *supra* note 159, at 148; *accord* Pound, *supra* note 2, at 304, 307.

163. Gazell, *supra* note 78, at 798; *accord* Vanlandingham, *supra* note 36, at 391.

164. PROVINE, *supra* note 61, at 165.

disputes in light of community values and without regard for formalistic rules. Indeed, by perceiving and representing these courts as informal, community-based tribunals, supporters of the courts justify, and even praise them for, the role they play without addressing the work they actually do, at least in the civil context. This section seeks to bring these considerations of myth and reality into the debate.

1. The Myth that all Matters in Limited Jurisdiction Courts Are "Simple"

One of the subtextual, and sometimes even expressed, assumptions about the civil jurisdiction of non-lawyer courts is that civil matters that come before these courts are what we normally think of as small claims cases: that is, cases where the amount in controversy is small and the legal matters are simple, routine, or not very complex.[165] To fully analyze this assumption, the notion of "simplicity" must be broken down into pieces, which considered separately and taken together suggest that, at least as to civil cases, the cases that come before non-lawyers have the potential to be quite complex.

a. Jurisdictional Limits Are Not that Low Anymore

The notion of simplicity has often been linked to the amount in controversy.[166] Thus, to the extent non-lawyer judges have been permitted to retain civil jurisdiction, they have been allowed to do so only in matters where the amount in controversy does not exceed a certain amount. Initially this amount was quite low. For example, in 1979, when the Silberman study was performed, many of the states that gave non-lawyers jurisdiction over civil matters limited that jurisdiction to no more than $1,000.[167]

Currently, four states allow non-lawyer judges to adjudicate civil matters where the amount in controversy is up to $2,500.[168] Nine states allow non-lawyer judges to adjudicate civil matters where the amount in controversy is between $2,500 and $4,999.[169] Twelve states allow non-lawyer judges to adjudicate civil matters where the amount in controversy is between $5,000 and $9,999.[170] Five states allow non-lawyer judges to adjudicate civil matters where the amount in controversy is

165. Lamber and Luskin contend that "[m]ost decisions city and town court judges make are not legally complex." Lamber and Leskin, *supra* note 112, at 298. They further state that "courts of limited jurisdiction require fewer demanding legal judgments than general jurisdiction courts." *Id.* Although the Provine and Silberman studies focused primarily on the criminal jurisdiction of these courts, both professors made comments to this effect. *See* PROVINE *supra* note 59, at 184 ("disputes over liability or responsibility . . . generally involve issues of fact," and "the only significant decisions non-lawyer judges make involve sentencing."); Silberman, *supra* note 115, at 536 ("litigation in lay courts did not usually involve complex legal issues"). This conclusion seems to have been supported in part by the comments of one of the Arizona justices interviewed for the 1979 study, in which he indicated that the majority of his civil cases were "simple" contract and tort actions and landlord-tenant matters. *See id.* at 532, 534, 537 n.222. Nevertheless, the Silberman study concluded that "the proceedings could give rise to legal issues that would pose difficulties for non-attorney judges." *Id.* at 536.

166. *See, e.g.*, Silberman, *supra* note 115, at 541 (concluding that lay courts should retain civil jurisdiction "only in 'simple' civil actions where the amount in controversy does not exceed $2,000.").

167. *See* NON-ATTORNEY JUSTICE, *supra* note 126, at 266-74.

168. These states are Arkansas, Indiana, Louisiana and New Hampshire. *See* Appendix 2, *infra*.

169. These states are Idaho, Indiana, Iowa, Mississippi, Nevada, New York, North Carolina, Oregon and Wyoming. *See* Appendix 2, *infra*.

170. These states are Alaska, Arizona, Georgia, Montana, Nevada, New Mexico, North Dakota, South Carolina, South Dakota, Texas, Utah and West Virginia. *See* Appendix 2, *infra*.

between $10,000 and $14,999.[171] Nine states allow non-lawyer judges to adjudicate at least some civil matters where the amount in controversy is over $15,000.[172] The State of Washington, which allows non-lawyer judges to adjudicate civil cases where the amount in controversy is up to $35,000, has the highest civil jurisdictional limit for non-lawyer judges in the country.[173]

Although these amounts may be low compared to the amount in controversy in most business litigation, these amounts are not low when taken in the context of an average individual's life. Residential rental disputes are likely to fall within this limit. Wage claims for several weeks of work can fall within this limit. Many consumer purchases fall within this limit. Many service contracts fall within this limit. In fact, for most individuals, most disputes that could arise in the course of their lifetime would fall within this limit, with the exception of one's house, one's job and one's life and limb. Thus, almost any dispute in which the average individual might become embroiled would be relegated to a non-lawyer judge, no matter how complex. While these individual suits might not be worth very much money on some large objective scale, the suits can be of paramount importance to the parties to the suit.

Additionally, a suit worth a "small" amount of money on a spectrum that includes all suits in the judicial system can be worth a lot of money to individual litigants relative to their financial situation. The current minimum wage is $5.15 per hour.[174] A person working a forty-hour week at minimum wage grosses only $206.00 per week. It would take this person twenty-three weeks—almost half a year—to earn the current maximum jurisdictional level in some non-lawyer courts. The 1998 Federal Poverty Level for a family of four was $16,450.[175] Thus, non-lawyers in some states adjudicate cases worth eight month's income for a family earning at the Federal Poverty Level. Finally, as anyone who has worked with the poor knows, resolution of a dispute over a very small amount of money can mean housing or homelessness, food or hunger, employment or unemployment, and health care or not to poor litigants. To these litigants, it is essential that any decision rendered be the right one—the first time.

Furthermore, even though non-lawyer judges handle only civil cases where the amount in controversy is relatively low, they collectively adjudicate a tremendous amount of the litigation that goes on in our society.[176] Thus, non-lawyer judges exert

---

171. These states are Colorado, Iowa (livestock matters), Kansas, Oklahoma, Tennessee (in some areas). *See* Appendix 2, *infra*.

172. These states are Arkansas (in certain areas only), Delaware, Idaho (in certain areas only), Iowa (in certain areas only), Louisiana (in certain areas only), Tennessee, Texas (in certain areas only), Washington and West Virginia (in certain areas only). *See* Appendix 2, *infra*.

173. *See* WASH. REV. CODE § 3.66.020 (1998).

174. *See* 29 U.S.C. § 206(a)(1) (1994).

175. *See* Department of Health and Human Services Annual Update of the HHS Poverty Guidelines, 63 Fed. Reg. 9235, 9236 (1998).

176. For example, in a 1995 study of the Arizona justice courts a committee of the Arizona Supreme Court found that Arizona's limited jurisdiction courts processed ninety percent of the approximately 1.6 million cases filed in Arizona courts each year. *See* REPORT AND RECOMMENDATIONS, *supra* note 31, at app. A, p.1. It has been pointed out that, "'minor' disputes are major disputes to the parties involved and, when taken collectively, constitute the major portion of the total workload [of the courts]." Nejelski, *supra* note 124, at 103; *see also* REGINALD HEBER SMITH, JUSTICE AND THE POOR 42 (1919).

a great deal of influence on individual pieces of economic resource allocation. This larger picture impact must not be ignored.

Thus, it is no longer true that "[l]ay authority seldom extends to civil disputes involving large amounts of money or to major crimes, unless the lay persons serve on juries or on mixed benches under the supervision of a lawyer judge."[177] Furthermore, because so many suits fall within the "low" jurisdictional cutoffs, we must be aware that non-lawyer courts will dictate to which elements of society financial resources may be allocated, whether the interests of individual litigants will be protected, and whether many members of our society will conclude that our society in fact provides the oft-heralded "justice for all."[178]

b. Complex Legal Issues Can Arise in any Case

The tradition of placing a jurisdictional limit on the civil jurisdiction of non-lawyer judges points to an assumption that because the amount of money in controversy in a case is comparatively low, the legal issues will not be complex. Similarly, it is often assumed that certain categories of cases are simple enough for a layperson to analyze and adjudicate.[179] Of the states that permit lay judges to hear civil matters, many permit those judges to hear contracts cases,[180] collection cases,[181] residential landlord tenant cases[182] and torts cases.[183] That states permit non-lawyer judges to hear cases in these categories may indicate a legislative belief that all cases in these categories are simple enough for a lay judge. But neither a low amount in controversy nor a certain categorization means that the issues arising in a particular case can be competently handled by a non-lawyer judge.

It is easy to see how certain types of cases might be assumed to contain legal issues simple enough for a non-lawyer judge to adjudicate. One can imagine a

---

177. PROVINE, *supra* note 61, at 184.

178. As James Willard Hurst observed:

> The jurisdiction of these courts was "minor" in the sense that they were authorized to impose only limited penalties or to dispose only of cases that involved relatively small sums. But only in this sense were they minor courts. In terms of human welfare and the practical experience that masses of people had of "justice" in our society, these courts dealt in issues of first importance.

HURST, *supra* note 159, at 147; *accord* Keebler, *supra* note 100, at 3.

179. For example, the Silberman study, which concluded in general that it is best not to use non-lawyer judges, identified "simple contract and tort cases" as types of cases which lay judges could be adequately trained to handle. *See* Silberman, *supra* note 115, at 545. *See also id.* at 535, 541. On the other hand, Professors Lamber and Luskin, who generally support the role of non-lawyer judges, opined, "In contrast [with criminal law], the law in civil cases is complicated, or at a minimum unpredictable and wide-ranging." Lamber & Luskin, *supra* note 145, at 79. *But see* Lamber & Luskin, *supra* note 115, at 298. That a lower court might be faced with difficult legal issues was recognized by a British appellate judge who complained, "A question which the Divisional Court or Court of Criminal Appeal, assisted by experienced counsel, would have difficulty answering has to be answered by the retired farmer, the checkweighman and the school-caretaker." PROVINE, *supra* note 61, at 186 (citing to an anonymous author in *The Lay Justices: Some Criticisms and Suggestions*, CRIM. L. REV. 658 (1961)).

180. *See, e.g.*, DEL. CODE ANN. tit. 10 § 9301 (1974); IDAHO CODE § 1-2208(1)(a)(1) (1994); NEV. REV. STAT. § 4.370(a) (1997); N.M. STAT. ANN. § 35-3-3(B) (1978); WASH. REV. CODE § 3.66.020(1) (1989).

181. *See, e.g.*, DEL. CODE ANN. tit. 10 § 9301; IDAHO CODE § 1-2208(1)(a)(4); MISS. CODE ANN. § 9-11-9 (1972); OKLA. STAT. tit. 20 § 123(A)(1) (1996); OR. REV. STAT. § 51.080 (1987); S.C. CODE ANN. § 22-3-10(4) (1976); UTAH CODE ANN. § 78-5-104(2) (1953).

182. *See, e.g.*, COLO. REV. STAT. § 13-6-104 (1997); DEL. CODE ANN. tit. 10 § 9301; LA. CODE CIV. P. art. 4912 (West 1998); NEV. REV. STAT. § 4.370(h); S.C. CODE ANN. § 22-3-10(10); W.VA. CODE §50-2-1 (1994).

183. *See, e.g.*, IDAHO CODE § 1-2208(1)(a)(1); NEV. REV. STAT. § 4.370(b); N.M. STAT. ANN. § 35-3-3(B); S.C. CODE ANN. § 22-3-10(2); WASH. REV. CODE § 3.66.020(2).

contracts case where the issues might be largely factual: Did the plaintiff perform work for the defendant for which he has not been paid? Did the plaintiff sell something to the defendant for which he has not been paid? Did the defendant pay the plaintiff? If so, how much? Did the plaintiff pay for something which he did not receive?

But it is just as easy to imagine a contracts case, seemingly simple, where a host of complex issues could arise.[184] Take, for example, a case I saw over and over in practice: a case in which the defendant purchased a used car from the plaintiff for an amount within the jurisdictional limit of the non-lawyer court. The defendant claims to have been told by the car salesperson that the car was in good working order, or will be a good car for the defendant to use for getting to and from work, or some other such representation. The defendant signs a written contract for the purchase of the car, and the contract has an integration clause (that is a clause saying that the writing is the full agreement between the parties). The car is sold "as is," but the defendant doesn't quite understand what that means. The defendant takes the car home, and within a very short time the car won't drive. The defendant contacts the seller to complain, and the seller either refuses to give any assistance at all, performs a short-term fix-up of the car, or even exchanges it for another car which operates as poorly as the first. The defendant refuses to make further payments on the car, or perhaps cannot make further payments on the car because the defendant's resources have been re-allocated to alternate means of transportation, or to expensive efforts to repair the car. The plaintiff repossesses the car, and then files a lawsuit in a non-lawyer court, claiming in the complaint only that a car was sold to the defendant, that the defendant missed payments, that the car was repossessed and re-sold, and that a deficiency of several thousand dollars is owed to the plaintiff.

Many complex legal issues will most certainly arise within this case. The first, a parole evidence rule issue, is whether any promises made by the seller not contained in the writing are admissible.[185] Whether the "as is" warranty disclaimer is binding on the defendant is an issue under Article 2 of the Uniform Commercial Code.[186] Whether the contract complies with state and federal consumer statutes requires an understanding of the Federal Truth in Lending Act,[187] the concept of negotiable instruments under Article 3 of the Uniform Commercial Code[188] (since some states bar the use of negotiable instruments in consumer contracts),[189] the Federal Trade Commission's Buyer's Guide regulations,[190] and the Federal Trade Commission's Anti-Holder in Due Course Regulations,[191] among other things. Adjudicating fraud requires an understanding of the elements of fraud, the

184. Indeed, the contracts casebooks used to teach in law school are replete with such "simple" cases which stand for profoundly important, and often complex, common law principles.

185. *See* U.C.C. § 2-202 (1995).

186. *See id.* § 2-316(3)(a).

187. 15 U.S.C. §§ 1601-1667e (1994 & Supp. II 1996).

188. U.C.C. § 3-104 (1990).

189. *See, e.g.*, IOWA CODE § 537.3307 (1997) (derived from the UNIFORM CONSUMER CREDIT CODE § 3.307 (1974)).

190. 16 C.F.R. §§ 455.1-455.7 (1998).

191. 16 C.F.R. §§ 433.1-433.3.

difference between a fact and an opinion and when one has the right to rely on each, and the difference between common law fraud, and statutory fraud.[192]

Likewise, within a debt collection case, another type of case frequently adjudicated by the justice court, a number of complex issues regularly arise. First, the Federal Fair Debt Collection Practices Act[193] governs the conduct of debt collectors. Although the act on its face is quite simple in its regulation of conduct by debt collectors, it contains a number of formal prescriptions with which debt collectors must comply.[194] Only someone with knowledge of the Act or the ability to research the Act and the many cases decided thereunder would be able to bring these factors to bear in adjudicating a case. Furthermore, many issues, such as who is a debt collector,[195] what is a debt,[196] and what would be likely to mislead a consumer,[197] are still unsettled under the Fair Debt Collection Practices Act. Addressing these issues requires legal knowledge. A debt collection case also raises issues under Article 3 of the Uniform Commercial Code, such as whether an instrument is negotiable[198] and whether the holder of the instrument is a holder in due course,[199] who takes free of most defenses the obligor might have.[200]

Similarly, complex legal issues can arise in landlord tenant cases[201], student loan cases, and even home ownership cases, which do not always involve a large amount in controversy.[202] For example, in the second case discussed at the beginning of this article, a landlord tenant/waste case, the court was forced to rule on a motion to disqualify the attorney for the plaintiff, who was a material witness and one of two partners in the partnership plaintiff.[203] The court was also required to rule on a

---

192. For an example of this type of fraud, see Arizona's Consumer Fraud Statute, ARIZ. REV. STAT. ANN. §§ 44-1521 to 44-1534 (West 1994 & Supp. 1997).

193. 15 U.S.C. §§ 1692-1692o (1994 & Supp. II 1996).

194. For example, the "mini-Miranda" warning section requires all correspondence with a debtor to say "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. . . ." *See* 15 U.S.C. § 1692e(11) (1994 & Supp. II 1996). Another section requires collectors to notify debtors of their right to dispute the debt. 15 U.S.C. § 1692g(a) (1994).

195. *See* 15 U.S.C. § 1692a(6); *see also, e.g.*, Heintz v. Jenkins, 514 U.S. 291 (1995); Garrett v. Derbes, 110 F.3d 317 (5th Cir. 1997); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992); Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989); Vasquez v. Allstate Ins. Co., 937 F. Supp. 773 (N.D.Ill. 1996); Griffin v. Bailey & Assoc. Inc., 855 F. Supp. 1047 (E.D. Mo. 1994).

196. *See* 15 U.S.C. § 1692a(5); *see also, e.g.*, Brown v. Budget Rent-A-Car Systems, Inc. 119 F.3d 922 (11th Cir. 1997); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997); Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987); Sarver v. Capital Recovery Assoc., Inc., 951 F. Supp. 550 (E.D. Pa. 1996); Azar v. Hayter, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd* 66 F.3d 342 (11th Cir. 1995).

197. *See* 16 U.S.C. § 1692e.

198. *See* U.C.C. § 3-104 (1990).

199. *See id.* § 3-302.

200. *See id.* § 3-305.

201. *But see* Smith v. Justice of the Peace Court No. 1, 1990 WL 123051 (Del. Sup. Ct. Aug. 7, 1990) (finding that Delaware justices of the peace are competent to adjudicate issues that arise under Delaware's Landlord-Tenant Code, 25 DEL. CODE §§ 5101-7014).

202. *See, e.g.*, O'Barr & Conley, *supra* note 1, at 155 (discussing a case involving an illegal lockout of the tenant and resultant damages).

203. The memorandum I submitted on this issue required consideration of several ethical rules and cases, including Ethical Rule 3.7 (prohibiting a lawyer who is a witness from acting as an advocate); Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296 (Ariz. 1981) (prohibiting attorney who executed deeds on behalf of corporation from representing corporation in litigation involving the deeds); Hunt Inv. Co. v. Eliot, 742 P.2d 858, 863-64 (Ariz. Ct. App. 1987) (holding that a partner not acting as attorney for the partnership can only represent his own interest in the partnership, not the partnership itself).

motion to compel discovery and a motion for protective order during the course of the case. Each of the two motions was briefed extensively by both sides, citing case and statutory law. Yet the judge ruling on these motions was not schooled in the law.

Thus, the common categorical assignments granted to non-lawyer judges are quite broad, and the areas identified as those that a non-lawyer can adjudicate contain some of law's most complex matters. In the cases I handled, more often than not, these types of complex legal issues were present. Nevertheless, it would be difficult to raise these issues before a non-lawyer judge with any confidence that they could be adequately addressed. In the myriad of cases where a lawyer is not involved, it is likely these issues would go completely unaddressed, since the judge would not have the requisite legal background to raise these issues *sua sponte*.[204]

The complexities of these cases become of greater concern when these cases make up a large part of the civil docket of the court. Thus, states must determine how prevalent these types of cases are. Based on research already done, it would appear that these types of cases, where the individual defendant might have complex statutory defenses, make up a large part of the civil docket.[205] In one of the only studies to address this issue, the author looked at a random sampling of 2,079 cases that had been filed in the small claims court of Middlesex County in London, Ontario, Canada.[206] That study found that of the cases studied, "consumer issues were at the heart of 33 percent of all disputed cases (21 percent involving businesses versus consumers and 12 percent involving consumers versus businesses). Other individual versus business disputes (i.e., landlord/tenant, employer/employee, financial institution/debtor) accounted for an additional 25 percent of the cases."[207] Surely, if this were the finding in regard to the caseload of a limited jurisdiction court it would call into question any decision to use non-lawyer judges, who almost necessarily would have insufficient ability to protect the individual rights implicated in these litigation pairings.

c. Many Non-Lawyer Judges Are Required to Follow the Rules of Civil Procedure and Evidence

One author who argued for a constitutional right to counsel in all cases commented that "Over the years, state decisions have brought the American legal system from a point where it was used and operated by laymen to a system 'inundated with technicalities of procedure and nuances of law which present

204. The legal ability of the judge in cases where parties are unrepresented is of particular importance given the apparent increase in self-representation in our court system. *See, e.g.*, Laura Parker and Gary Fields, *Do-It-Yourself Law Hits Courts*, U.S.A. TODAY, Jan. 22, 1999, at 3A.

205. *See* Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 L. & SOC'Y REV. 515 (1984).

206. *See id.*

207. *Id.* at 531. The same article mentions a case in which the outcome turned on "whether, under the law, the plaintiff's contributory negligence required that she assume the burden of the remaining one-fourth [of the damages]." *Id.* at 541.

incomprehensible barriers to laymen who seek access to the courts'."[208] This observation is certainly supported when one looks at the rules that govern lawsuits before non-lawyer judges. These rules have come a long way from the informal setting that was the trademark of the community non-lawyer tribunal. Indeed, the procedural and evidentiary rules that govern many non-lawyer courts today have made them virtually indistinguishable from general jurisdiction courts, where judges must be lawyers.[209]

That these rules are difficult to comprehend and apply is apparent in a number of ways. First, in most law schools Civil Procedure is a full year course, while most other courses are taught in one semester. Similarly, evidence is a four-credit hour, rather than a three-credit hour class in many law schools, a designation saved in most schools for the most difficult upper level courses. In his dissent in *North v. Russell*,[210] Justice Stewart opined that applying the rules of evidence is a task for which non-lawyer judges are not well prepared. Others have made the same observation,[211] and concluded that for this reason lay judges should be barred from conducting jury trials.[212]

Complying with evidentiary and procedural rules is difficult even for those persons who have attended law school. This is illustrated by the number of continuing legal education and mock trial opportunities available each year on these subjects. The same difficulties become apparent to anyone who has tried to handle a case in a lawyer-adjudicated court without the assistance of counsel.

Thus, in many states the non-lawyer courts have been made into smaller versions of the state's general jurisdiction courts. Yet the myths that persist about the simplicity of civil cases brought in these courts and the procedural rules in these courts have made it possible for advocates and observers of lay courts to continue to maintain that a law degree is not needed.[213] The result is that litigants are left in the undesirable position of appearing before uninformed adjudicators, and non-lawyer judges are left in the unenviable position of finding out that they are not well trained for the job.[214]

2. The Myth that Justice Courts Serve One Class or Group of Litigants

Another dominant image of the justice court is that it is a place where litigants of a single group or class bring disputes between themselves to be adjudicated by a judge who is also a member of the same group or class. The problem with this

---

208. Pankratz, *supra* note 82, at 1110 (quoting Lester Brickman, *Of Arterial Passageways though the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595, 617-618 (1973)).

209. *See, e.g.*, ARIZ. REV. STAT. § 22-211 (1992); UTAH R. CIV. P. 1(a) (1998); NEV.—JUSTICES' COURTS R. CIV. P. (1998). For a discussion of the natural conflict between lay discourse and the rules of evidence, see William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 L. & SOC'Y REV. 661 (1985).

210. 427 U.S. 328, 342, 344 (1976) (Stewart, J., dissenting).

211. *See, e.g.*, Silberman, *supra* note 115, at 536, n.220.

212. *See id.* at 542 ("Non-attorneys should not have to deal with the complexities of the *voir dire* or thread their way through the labyrinthine rules of evidence.").

213. Professors Luskin and Lamber maintain that "[e]xisting evidence does not show that lawyers and nonlawyers differ in how they judge." Lamber & Luskin, *supra* note 115, at 297.

214. *See* PROVINE, *supra* note 61, at 187-88 (regarding the desires of non-lawyer judges to be better trained).

image is that, in modern times, many civil cases that must be adjudicated in non-lawyer courts are not between individuals on equal footing, but rather are between members of different groups. This was evidenced by the Vidmar study, which found that at least half of the cases filed in the court were filed by larger businesses against individuals.[215] Similarly, the authors of a 1975 study of Iowa's newly created magistrate courts, which had replaced the justice of the peace courts but continued to allow non-lawyer judges, found that the typical civil plaintiff in these courts represented business and debt collection interests against individual defendants.[216] A like observation was made in 1972 by a judge who, in describing the D.C. Small Claims Court, observed that "the court . . . is primarily the court of the skilled lawyer representing large debt collection companies, credit stores, corporate defendants and insurance companies."[217] Indeed, historically the cases litigated in limited jurisdiction courts have pitted powerful business interests against individuals. In 1919, Reginald Heber Smith observed that justices of the peace "formed unholy alliances with collection agencies, installment houses, and the like."[218]

Even some of the categorical types of cases typically authorized to be litigated in non-lawyer courts necessarily pit more powerful interests against individuals. For example, a landlord filing a case against a tenant has several advantages over the tenant that clearly separate the landlord into a different and more privileged group than the tenant. First, the landlord owns property, an American dream to which many aspire but cannot attain. Second, the landlord, unless he owns very little rental property, is likely to have experience litigating other similar cases. Thus, the landlord, as a repeat player, may have experience with the very judge before whom he is appearing, and thus may be able to rely on his prior relationship with the judge in knowing what to expect, how to act, and what the judge will see as relevant to a resolution in the landlord's favor.[219] Furthermore, the landlord may have an attorney who regularly takes on these cases on the landlord's behalf, or who at least advises the landlord in regard to what is required, for example, to evict a tenant properly or retain a security deposit.[220] The tenant, on the other hand, may have difficulty

---

215. *See* Vidmar, *supra* note 200, at 528. However, the focus of this part of the study was on what types of cases lead to defaults, rather than disputes. *See id.* at 526-27. I feel obligated to point out my disagreement with the study's assumption that where there was no dispute raised by the defendant the business plaintiff's claim must have been "clear and unequivocal," a conclusion drawn by the authors based on the types of plaintiffs against whom no response was raised, such as "banks, department stores, and utility companies" and interviews with collection agencies. *Id.* at 530. It does not seem possible that these types of plaintiffs could know whether there is a defense.

216. *See* Green et al., *supra* note 74, at 387 (finding that 67.9% of the justices of the peace surveyed said that business interests were the typical plaintiff in their court, while 89.1% of magistrates, who replaced justices of the peace, reported that business interests were the typical plaintiff in their court).

217. CENTER FOR AUTO SAFETY, LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER 98 (1972) (*quoted in* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 118 (1997)).

218. SMITH, *supra* note 176, at 42; *accord* Gazell, *supra* note 78, at 810.

219. For a description of accommodations made to landlords in Baltimore, Maryland's rent court, see Barbara Bezdek, *supra* note 158.

220. *See* Vidmar, *supra* note 205, at 535 (concluding in his study of cases in the Middlesex County, Canada small claims court "that businesses are more likely to be represented by counsel and more likely to be repeat players.").

complying with the formalistic requirements of making a complaint about the condition of the property or some other defect that might be interjected into the lawsuit if proper procedures were followed.[221]

Similarly, a debt collector is likely to have many advantages over a debtor sued in a limited jurisdiction court. A party whose purpose is to collect debts is likely to have a great deal more litigation experience than the average person, and is also more likely to have access to legal counsel. This, in turn, can provide great advantage over the average debtor. As described by one court administrator, commenting on collection cases adjudicated by non-lawyer judges in his state before non-lawyers were prohibited from becoming judges in his state:

> Lawyer judges can't be razzle-dazzled about the law. I can guarantee you, that used to happen a great deal, particularly in the area of collections. The creditor's attorney would come into court and say, "Now look, your honor, the law is thus and so. The defendant has got to pay us everything," but in fact the defendant might have had a good defense to the claim.[222]

A similar observation was made in 1924 by the Attorney General for the State of Kansas, who in a letter to Chester H. Smith remarked, "The worst trouble about Justices of the Peace, however, is that so many times some man is elected who does not hold himself aloof from being misled by some unscrupulous lawyer."[223]

The uneven balance of power in limited jurisdiction courts is evidenced by one of the stories recounted by O'Barr and Conley. In that case, a woman sued a garage owner who had sold her a defective engine.[224] The authors observed the following about the defendant's response to the woman's complaints:

> The owner was an experienced businessman who ran the garage with his father. He did not respond to the woman's recounting of her troubles. Instead, he talked about his limited legal duty to the woman, as evidenced by the written form contract that he produced, and asserted that he had met that limited duty, making specific reference to actions that he had taken and offers that he had made. The magistrate accepted his characterization of the relationship without question or discussion.[225]

Thus, far from being places where members of the same group or class can argue amongst themselves, non-lawyer courts are often venues for cases by the haves against the have nots — landlords against tenants, debt collectors against debtors, merchants against customers. Therefore, before legislatures, bar associations and state courts can safely conclude that by using non-lawyer judges the limited jurisdiction courts achieve the goal of self-governance by the clientele using the court, the cases filed in these courts must be carefully studied. This study must include categorization of plaintiffs and defendants by relevant definition, such as

---

221. *See generally*, Bezdek, *supra* note 158.

222. Ashman & Chapin, *supra* note 135, at 420; *see also* Bezdek, *supra* note 158, at 580 (recognizing that consumer defendants in collection suits may not be aware of defenses available to them).

223. Letter from C.B. Griffith, Attorney General of Kansas, to Chester H. Smith (Jan. 4, 1924) (*quoted in* Smith, *supra* note 54, at 122 n.19).

224. *See* O'Barr & Conley, *supra* note 209.

225. *Id.* at 688 (Note that it is not clear whether this magistrate was an attorney).

landlord v. tenant; tenant v. landlord; consumer v. business; business v. consumer; and individual v. individual.[226] If a state finds that the litigation pairings in its non-lawyer courts involve litigants who are not of the same status, then the notion of non-lawyer courts as a forum that preserves adjudication "by the people, for the people"[227] must be discarded. In that event, the civil jurisdiction of non-lawyer judges must be maintained only if defensible on some other grounds.

3. The Myth that a Judge Can Be the Personification of Community Standards in the Heterogeneity that Is Modern American Life

The clientele of limited jurisdiction courts is not only economically diverse, it is diverse in other respects. The jurisdiction of limited jurisdiction courts is determined geographically. This, of course, means that the larger the geographic area served by the court, the more diverse the clientele served by the court. For example, in Arizona the jurisdiction of the Phoenix justice courts is divided into seven areas. Within each area there are wealthy and poor neighborhoods; Christians, Jews and Muslims; men and women; young and old; and individuals who are Hispanic, Native American and Caucasian. In other words, the jurisdiction of each court is descriptively quite diverse.[228]

This contrasts significantly with the historical jurisdiction of lay courts, which often operated in homogeneous frontier communities.[229] In those communities, it might have been possible to determine a set of local community values that a lay adjudicator could discern and bring to bear in adjudicating disputes between members of the community. Perhaps this is still possible in the smallest rural communities today, which may explain perpetuation of the notion of the non-lawyer court as a community tribunal through which a community can define itself.[230] Nevertheless, it is a fact of American life that many communities are no longer homogeneous, but are rather quite diverse.

It is the essence of democracy that in a diverse society the rules that govern the conduct of the society's members are worked out through constant compromise and readjustments based on community members' conflicting ideas, needs and goals. This sort of constant adjustment of rights between societal members is essential in a heterogeneous society, where it would be unusual, if not impossible, to find socially constructed, uniformly recognized group notions about the rights of the

---

226. For an example of similar categories used in a study with a different focus, see Vidmar, *supra* note 205, at 526-27.

227. Abraham Lincoln, Gettysburg Address (1863).

228. The diversity of urban populations was cited by Roscoe Pound as a challenge to the administration of justice in modern cities. *See* Pound, *supra* note 2, at 311.

229. Roscoe Pound observed that to understand the administration of justice in American cities, one would first have to "perceive the problems of administration of justice in a homogeneous pioneer or rural community of the first half of the nineteenth century" which he then contrasted with "the problems of administration of justice in a modern urban community." *Id.* at 303.

230. *See, e.g.*, Lamber & Luskin, *supra* note 145, at 82-83 ("That these courts have [endured], despite social, economic, and technical change and in the face of considerable hostility, attests to their importance to their communities. Local autonomy implies the ability of a community to define itself by its choices, and the choices a community makes within this sphere tell us something about how the community defines itself."); Lamber & Luskin, *supra* note 115, at 295-96. For a narrative of legal life in a modern small town, see Mark Curriden, *Small-Town Justice*, A.B.A. J., Nov. 1994, at 64.

community's members. Rather, the group notions that emerge in a heterogeneous society about conduct, rights and acceptable outcomes do so in the form of law—both statutory and common. Law in our society is, after all, the democratic resolution of conflicts arising out of our heterogeneity. To the extent there are group values that cut across the diversity of the governed, those values will certainly be reflected in the laws of the system.[231] In this way, the rights of all groups are continuously balanced and re-balanced by legislatures and through the application of law to the facts of a specific case.

Because heterogeneous communities have diverse populations, with varying beliefs and standards, it is not possible to create a court that personifies local values for purposes of adjudicating disputes between members of the community. Rather, such a court can only emerge from communities with an identifiable, over-arching grouping. It is for this reason that one of the most prevalent examples of a successful civil dispute resolution system officiated by laymen is that of the Tribal peacemaker in Native American cultures.[232] But individual Native communities possess notions so prevalent in the community over which the peacemaker has jurisdiction that they provide a common basis for reaching adjudicated decisions.[233] Most communities served by a non-lawyer judge, particularly urban areas, lack this commonality. Thus, the lay judge given power to adjudicate the disputes that arise between members of the community within the court's jurisdiction has no common rules to apply in adjudicating the case. Rather, the judge must apply either the law as reflected in the state's statutory and common law, or the law as he or she believes it to be—a sort of ad hoc construction of norms as the judge perceives them to be, rather than norms dictated by caselaw. But where parties are likely to come from diverse sectors of the community, it is not possible for the lay adjudicator to make decisions which comport with the parties' differing norms. This leaves the lay adjudicator with no set of values to be applied in adjudication as an alternative to law, and yet the lay adjudicator is most certainly not in as good a position as a lawyer to apply the law.

The non-lawyer justice court model, which assumes that the judge reflects the values of some identifiable, unique group served by the court, ignores the heterogeneity of the groups served by each of the courts and falsely recognizes a community standard where, in fact, there are likely to be multiple communities, with varying often conflicting standards. Nevertheless, we seem to assume that the pronouncements of non-lawyer judges reflect a discernible community standard, even if a lawyer judge would reach a different result. I suggest that what we have done, instead, is substitute the more democratic community standard reflected by statutory and case law, for a more fleeting appearance of a community standard that

---

231. For an article recognizing that community values are embodied in the laws of a society, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). In discussing the role of the judge Fiss says, "Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to *explicate and give force to the values embodied in authoritative texts* such as the Constitution and statutes: to interpret those values and to bring reality into accord with them." *Id.* at 1085 (emphasis added).

232. For a discussion of the Navajo peacemaking process and why it could not be readily transported to non-Indian communities, see Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003 (1997).

233. *See id.*

cannot exist in a heterogeneous community. Worse yet, we may have replaced law's resolution of the conflicts between community members with the view of the majority, as personified by the judge.

Given the diversity of the clientele that is served by limited jurisdiction courts, it is not possible to have a single community standard which would be reflected in the rulings of the non-lawyer judge. In light of this contemporary reality, we must be careful not to draw analogies between present-day non-lawyer courts and either the non-lawyer courts that once existed, when communities were less diverse, or the non-lawyer courts currently in existence which serve heterogeneous communities, such as Tribal Courts.

B. Replacing Myths with Information

Once the myths about civil cases in non-lawyer courts have been discarded, they must be replaced by a true picture of what non-lawyer courts actually do in civil cases. This inquiry requires both a statistical analysis of what is expected currently of non-lawyer judges, such as whether they are required to follow state statutory and common law, and observation of how these judges perform in the civil arena. The latter inquiry necessarily requires observation of non-lawyer judges by lawyers who can assess the outcomes of cases adjudicated by non-lawyers.[234]

It is this second inquiry—the kind of inquiry that would uncover the stories told in this article—which seems to have been ignored in places where it could provide the most important information relevant to non-lawyer judge's civil capabilities.[235] Furthermore, states cannot rely on the conclusions reached in studies that look primarily at the criminal work of non-lawyer judges for help in determining whether non-lawyer judges should be permitted to retain jurisdiction over civil matters, even when the conclusions reached in those studies purport to address the full jurisdiction of non-lawyer courts.[236] The skills needed to adjudicate liability on a traffic

---

234. It has been suggested to me that any thorough review of these courts should include a study of what non-lawyer judges do better than lawyer judges, particularly in regard to how the judges relate to the litigants in these courts. While this is an important component of a full study of these courts, I believe these matters are secondary in courts where the judges are expected to know and apply all aspects of the law. To my mind, the ability to comprehend and discover the law that is required to be applied in cases is of primary importance. Once the court is structured so that this concern is addressed, there will be other matters of great importance, such as assisting judges in conducting court in a litigant-sensitive manner.

235. For example, Arizona's 1995 study of its limited jurisdiction courts, while quite comprehensive, seems to have paid little, if any, attention to civil case studies. Nevertheless, the study recommends raising the civil jurisdictional limit of the limited jurisdiction courts to $10,000. *See* REPORT AND RECOMMENDATIONS, *supra* note 31, at 23. This recommendation was made even though the study recognizes that "cases filed in limited jurisdiction court are becoming more complex and do require competent, capable judicial officers." *Id.* at 27.

236. For articles that have made conclusions about the effectiveness of non-lawyer judges after studying primarily their criminal jurisdiction, see PROVINE, *supra* note 61; Harris, *supra* note 151; Lamber & Luskin, *supra* note 115; Lamber & Luskin, *supra* note 145, at 78-79 (finding that Indiana's non-lawyer judges did not handle many civil cases, and thus paid little attention to those civil cases that they do handle); Silberman, *supra* note 115, at 523-31; Vanlandingham, *supra* note 36. For an annotation of cases which have addressed the requirement that judges have law training, see Thomas R. Trenkner, Annotation, *Validity and Construction of Constitutional or Statutory Provision Making Legal Knowledge or Experience a Condition of Eligibility for Judicial Office*, 71 A.L.R.3d 498 (1977). For an example of this focus in a government report, see TASK FORCE REPORT, *supra* note 62 and NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 162 (1973).

That civil jurisdiction considerations have been inadequately addressed is not all that surprising since much of the jurisdiction of limited jurisdiction courts is over criminal matters. Again, in 1991, civil cases made up only 12%

ticket are not necessarily the same as the skills needed to adjudicate even the most simple contracts or torts case.

Finally, states must not rely on non-lawyer judge's assessments of their own capabilities in civil cases when re-examining the civil jurisdiction of non-lawyers. A non-lawyer judge who has never been to law school, handled a case before a lawyer judge, or spent a significant amount of time in a courtroom presided over by a lawyer judge, is simply incapable of making this judgment. I am not suggesting that non-lawyer judges should be excluded from participation in an examination of what their jurisdiction should be in the future. However, the participation should not be merely conclusory.[237] Rather than asking judges whether they believe they are competent to handle civil cases that come before them, studies should focus on questions such as whether there have been cases during which the non-lawyer judge wished he or she knew what "the law" was in a certain area, or felt at a disadvantage when legal points were made before him or her by lawyers, and whether the non-lawyer judge ever did research on legal points in order to make decisions.[238] Of course, even these types of questions may fail to paint a true picture of how often non-lawyer judges have difficulty applying the law, since a lay judge might not know that law on a certain point exists.

Only an examination of the cases that have come before non-lawyer judges, and whether legal issues presented by the cases were recognized and properly analyzed by non-lawyer judges, can answer with any certainty questions about the competence of non-lawyer judges to adjudicate civil cases. Furthermore, only a realist's look at the cases being directed to non-lawyer judges will address the question of

---

of the cases heard nationally in limited jurisdiction courts. *See* CASELOAD STATISTICS ANNUAL REPORT, *supra* note 148, at 7. Historically it seems to be true that the primary focus for limited jurisdiction courts has been traffic and other such matters, with civil cases making up a small part of the docket. *See, e.g.*, PROVINE, *supra* note 61, at 93 ("Civil and small claims cases also constitute a small portion of most dockets."). Furthermore, constitutional concerns are more serious in regard to the criminal jurisdiction of limited jurisdiction courts.

237. For example, the study conducted by Professors Lamber and Luskin asked the judges surveyed to conclude whether they had the capacity to address the issues that came before them. *See* Lamber & Luskin, *supra* note 115, at 296, 298. Eighty-six percent of the judges surveyed indicated that their training was adequate to address the civil cases that came before them. *See id.* at 298-99. The authors of this study perceived that inability to be impartial was the main criticism of non-lawyer judges, not capacity to analyze legal issues adequately. *See id.* at 298. Thus, the study focused on rebutting criticism of non-lawyer judges' ability to be impartial.

The Provine study asked the non-lawyer judges surveyed whether they believed there was a significant difference between attorney and non-attorney judges. *See* PROVINE, *supra* note 61, at 196. Question 36 of the survey asked:

> In New York, some judges at this level in the judicial system are attorneys. Do you believe there are significant differences between attorney and nonattorney judges?
> ____ yes ____ no. Please explain:_____

Id. While this question elicits more than just a response regarding non-lawyer judges' views of their own capabilities, this is an implicit part of this question.

238. Professor Provine's report did find that most of the judges observed kept code books and other reference material at their desk. PROVINE, *supra* note 61, at 97. The report also discusses a justice who kept "a two-room suite full of law books, including a complete set of all published New York cases." *Id.* at 97. Professor Silberman's study found that when legal questions arose some lay judges turned to attorneys or lawyer judges for assistance, and "most judges said they relied on statutes or benchbooks provided to them or used legal materials from a local law library." Silberman, *supra* note 115, at 537. However, the Silberman study focused on the majority of cases in lay courts, which are criminal matters, and the judges themselves indicated that they were not faced with many "legal questions" in these types of cases. *See id.* Professor Silberman's study did ask what the non-attorney judges surveyed did if they had a question about the law, and whether they consulted with anyone when they had a legal question upon which to rule. *See* NON-ATTORNEY JUSTICE, *supra* note 126, at 328.

whether the judges in these courts should be required to have a law degree. It is impossible to determine whether a law degree is important to the ability to serve as a judge until one determines what tasks will be required of the judge.

C. *The Importance of a Law Degree to the Ability to Serve as a Judge*

1. Matching Judicial Requirements with the Tasks of the Job and the Needs of the Court Clientele

Based on my experiences in civil cases before non-lawyer judges, I believe most states that endeavor to replace the myths of non-lawyer courts with reality will find that many civil cases currently directed to non-lawyer judges are virtually indistinguishable from cases directed to the state's lawyer-officiated, general jurisdiction courts, except for the amount in controversy. Given the jurisdictional limit of many limited jurisdiction courts, the rules that must be followed in these courts, and the complexity of the civil cases that are permitted and sometimes forced to be brought in these courts, new attention must be given to the question of whether judges allowed to adjudicate civil matters in these courts should have law degrees.

This debate must start with the recognition that except in the rarest of circumstances it is difficult, if not impossible, to master the law, even for the most devoted and sincere non-lawyer judges.[239] The desire to understand and accurately apply the law, and the ability to do so, are simply not one and the same. Our entire legal education system is based on the belief that understanding law is a process that requires direction, guided reflection and trial and error. The days when we believed that one could become proficient in the complexities of the law by simply studying the law independently are long gone.[240] To a great degree the barriers to becoming

---

239. Jeffrey Pankratz acknowledged that "[s]tatutes and judicial decisions are written in such a way that they are fully intelligible only to the legally trained." Pankratz, *supra* note 82, at 1109. Regarding the dedication of non-lawyer judges, Professor Provine recounts the story of one non-lawyer judge who

> even teaches evidence at a nearby fireman's academy. This justice also had published opinions and had persuaded a leading form company to correct an error in its seal order form. He works from his car-repair shop, a grimy establishment strewn with old motors, spare parts, filthy rags, and empty oil cans, but equipped with a two-room suite full of law books, including a complete set of all published New York cases.

PROVINE, *supra* note 61, at 97.

240. The modern belief that legal education is essential to developing adequate analytical skills is reflected in the standards for bar admission in the United States. Of the fifty states, the District of Columbia and the four U.S. possessions, thirty-five require graduation from an ABA-approved law school for initial applicants to the bar. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AND NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, 1997-98.

Eleven more allow graduates from some law schools unapproved by the ABA, either in or out of the state, to apply for admission to the bar. Even then, two of these (Alabama and Colorado) require that the applicant have practiced in the state where the unaccredited law school is located for a minimum number of years. Two of these states, Georgia and North Carolina, are moving to a system where only ABA-approved law school graduates are eligible to apply for membership in the bar.

Only eight states indicate that they permit individuals who have engaged in law office study to apply for initial admission to their state bar. Even in these eight states, the rules are limited as follows:

In Alaska, "The clerkship program is provided for by statute but has not been implemented by the University of Alaska in recent years. Applicants who are not graduates of ABA-approved law schools may be eligible to take the bar exam if they have been licensed to practice for five years and were engaged in the practice of law during

a lawyer, such as maintaining a minimum grade point average in law school and passing a bar exam, serve as a sieve through which only those with not merely the desire, but also the ability and training, can pass. When this filter is not applied to the judicial pool, a significant check on the abilities of the judiciary is lost.

Critics might downplay the importance of a law degree as anything but a professional credential.[241] Some even suggest that success in law school is merely a measure of conformity to standards set by an in-group of professionals, so that academic success reflects political and social conformity (and white male values) rather than a student's ability to grasp and analyze legal issues.[242] But this ignores the number of law school classes that are not doctrinal, but instead require statutory interpretation or other such disciplined analysis. When a student in my Payment Systems class (Articles 3 and 4 of the Uniform Commercial Code) gets a marginal grade, it is because the student doesn't know or understand the intricacies of the U.C.C. When a student in my Contracts class gets a marginal grade it is often because the student did not understand even the basic concepts of contract law, such as offer and acceptance or consideration, not because there was some political or doctrinal difference between myself and the student. And so it goes with many law school classes, as with practicing law. A student who cannot comprehend statutory rules is likely to have difficulty in the practice of law. To a great degree, a law student's grade point average reflects the student's basic ability to understand and apply law. Thus, it is fair to view grade point averages and bar examinations as a method for weeding out the willing but unable. One is fully prepared for adjudicating civil cases only if one receives complete training as a lawyer and is able to

---

those five years."

In California, "Applicants who obtain legal education by attending unaccredited law schools, through correspondence or by law office study, must take an examination after their first year. Applicants who pass the examination within three consecutive administrations of first becoming eligible to take it will receive credit for all law study completed to the date of the administration of the examination passed. Applicants who pass it on a subsequent attempt will receive credit for only one year of study."

In Maine, "Applicants may have graduated from a law school accredited by the jurisdiction where it is located and have been admitted to practice by exam within the U.S. and have been in the active practice of law for at least 3 years; or 2) have completed 2/3 of graduation requirements from an ABA-accredited law school and within 12 months after successful completion pursued the study of law in the law office of an attorney in active practice of law in Maine on a full-time basis for at least one (1) year; provided that the attorney must, in advance, present the proposed course of study to the Board for its approval and, at its conclusion, certify that the course, as approved, was completed."

In New York, "Law office study [is] permitted after successful completion of one year at an ABA-approved law school. Graduates of non-ABA-approved law schools can write the examination if they have at least five years active and continuous practice within the last seven years in some other state or states."

In Virginia, "Currently no non-ABA-approved law school is approved by the Virginia Board of Bar Examiners."

In Washington, "Currently no non-ABA-approved law school is approved by the Washington Board of Bar Examiners."

In Wyoming, "Law office study [is] permitted as a structured course comparable to balance of up to 2 years at an ABA accredited law school (by statute). Prior approval of independent study required."

241. *See, e.g.*, PROVINE, *supra* note 61, at 170, 174.

242. *See, e.g.*, Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 69-71 (1994). Others have criticized law school as a process whereby emotion and logic are deemed oppositional pairings, with emotion discarded and logic exalted. *See, e.g.*, Bezdek, *supra* note 158, at 594.

demonstrate competence by maintaining a certain grade point average and passing the bar examination.[243]

Defenders of non-lawyer judge courts argue that lawyers' interest in restricting judicial office to those with law degrees results from territorialism by the bar[244] and elitism,[245] and is merely reflective of American society's push to professionalize dispute resolution.[246] But when the tasks required of a non-lawyer judge involve interpretation and application of statutes and case law, obedience to procedural rules, which rules may have been interpreted by the courts, and legal research, it can hardly be said that any efforts by the Bar to require that these judges be formally trained in the law is a collective exercise in self-preservation and promotion.[247] Rather, it is a recognition of the kinds of matters that will be addressed in these courts. It is not universally true that "skill in negotiation, ability to manage limited resources, and common sense are more significant to judicial effectiveness at this level" than legal training.[248] Many limited jurisdiction court judges *are* required to apply something other than common sense. They are required to adjudicate as if they were trained as lawyers. Only training as lawyers can ensure these judges can perform their tasks competently.

2. Even the Most Sympathetic Non-Lawyer Judge Is Not Better Equipped to Protect the Interests of the Common Man than a Lawyer Judge

Given the legal nature of the tasks required of limited jurisdiction court judges in civil cases, allowing non-lawyers to take these positions is defensible only if there are other, overriding justifications for using non-lawyer judges. Some studies have suggested that this justification can be found in the tendency of the non-lawyer judge, himself a member of the less privileged class, to be more likely to want to protect the interests of the less privileged.[249] The essence of this assumption is that

---

243. Indeed, many states require more, maintaining rules that prohibit lawyers from becoming judges until they have practiced for a certain, minimum number of years. *See* Appendix 3, *infra*.

244. *See, e.g.*, PROVINE, *supra* note 61, at 170 (assuming that a law degree is insignificant to adjudicating limited jurisdiction court cases and suggesting that the lawyer's sense of self-importance makes him unable to "concede the insignificance of credentials to decision making."); *see also*, Green et al., *supra* note 74, at 389 (stating that many justices of the peace who had been replaced by lawyer-selected magistrates maintained that "the basic reason for the reform was to support the professional interests of the bar").

245. *See* PROVINE, *supra* note 61, at xiii. Professor Provine maintains that some control by the legal profession helps:

> make the nonprofessional's role more palatable to lawyers. Lay judges, on the other hand, operate independent of professional authority, and they even have the power to discipline lawyers who appear before them. It should be no surprise that this form of lay participation has provoked the loudest complaints from lawyers and the bar's most sustained efforts at reform.

Id.

246. *See id.* at xii.

247. This observation was made as long ago as 1927, when Chester H. Smith observed that because of our "highly technical and specialized body of law . . . It is as inconsistent to assume that a layman can administer law correctly as it is to assume that a litigant should go to a blacksmith to have his dental work done or to a farmer to have a cost accounting problem in manufacturing worked out." Smith, *supra* note 54, at 124.

248. *See* PROVINE, *supra* note 61, at 81.

249. One article expressly recognized this assumption. *See* Green et al., *supra* note 74, at 388 ("Justices of the peace are far less likely to be legally educated than magistrates. It might therefore by [sic] hypothesized that justices of the peace are more likely to base their decisions upon a sense of justice or equity than upon the letter of the law, hence extenuating circumstances and similar factors are thought to be more salient to 'citizen judges.'").

a judge from a lower socio-economic class will be more likely to be sympathetic with the less privileged person in litigation between that person and a more powerful or stationed opponent.

Determining whether or not this assumption is true requires an examination of such things as: whether non-lawyer judges are members of a different socio-economic class than lawyer judges;[250] whether, having attained a judgeship, a non-lawyer judge can still be considered a part of the less privileged class; whether lawyer judges, just because they have more education or a higher salary than individual litigants in the court, will be unable to identify with the needs of the individual litigants;[251] and whether such a judge would not be swayed by a litigant with privilege and power. Determining who is most likely to be most protective of the litigant who is less privileged also requires recognition of the fact that even a non-lawyer judge may lose his outsider's perspective and become as insensitive, cynical and critical of the court clientele as lawyers are accused of being.[252] Finally, it is possible that a non-lawyer judge might adopt an approximation of a legal construct against which to measure the testimony of participants to a lawsuit, thereby eliminating the alleged advantage of having an adjudicator able to hear and consider non-legal aspects of the parties' dispute in rendering a decision.[253]

Thus, there are differing opinions as to whether lawyer or non-lawyer judges are most likely to be sympathetic to the needs of the poor. However, because I do not think that natural sympathies are as important as other qualities, I do not attempt to

---

See also PROVINE, *supra* note 61, at 145-47.

250. Professor Provine's study concluded that, at least in New York, non-lawyer judges were of a different socio-economic class than lawyers. *See* PROVINE, *supra* note 61, at 145-47.

> The one potentially relevant respect in which lawyer and nonlawyer justices do tend to diverge significantly is in socioeconomic status. Class differences between the two groups may thus help explain why lay justices interact more with litigants and would-be litigants: closer than lawyers to the social status of the court's clientele, lay justices are more likely to travel in the same social orbits. The socio-economic gulf between lay and lawyer justices is wide.

Id.

251. At least one study supports the notion that wealth or education does not necessarily translate into insensitivity toward the poor. *See* Ryan & Guterman, *supra* note 138. That study attempted to discern the biases of lawyer versus non-lawyer judges in regards to minorities, women and the poor. *See id.* The study surveyed all New York town, village and city court justices in communities with a population of between 10,000 and 50,000, to which at least one judge in 67 of the 155 communities surveyed responded. *See id.* at 274. In regard to women and minorities, the study found few differences in the attitudes of lay and lawyer judges. *See id.* at 277. But in regard to the poor, the authors found that "a higher percentage of lawyer judges expressed positions sympathetic to poor people." *Id.* at 277-78.

252. For example, one of the non-lawyer judges discussed in Provine's book confessed that both lawyer and non-lawyer justices "refer to the most confused and ignorant of this lot [i.e., the litigants] as 'packrats' or 'woodchucks,' which one justice defined as 'people who don't know to take their hats off in court.'" PROVINE, *supra* note 61, at 152.

253. Conley & O'Barr describe the small claims court success of litigants who frame their testimony in "law talk" as opposed to those who use more normal, complete speech in presenting their small claims cases. *See* Conley & O'Barr, *supra* note 65. They conclude that litigants who are able to frame their cases into a legal structure do better in small claims court than those litigants who are unable to do so. *See id.* This finding held true both in Colorado's small claims courts, where judges were required to be attorneys, and in North Carolina's small claims courts, where judges were not required to be, and many were not, attorneys. *See id.* at 477.

In her 1979 study, Professor Silberman observed that "many non-attorney judges . . . viewed their role as that of formal adjudicator within legal norms. Hypotheses that lay judges will stress community norms rather than legal rules were not supported by the site visits, at least when the judge was called upon to 'decide' a case." Silberman, *supra* note 115, at 532.

address here the question of whether non-lawyer judges are naturally more sympathetic to the needs of less privileged litigants in limited jurisdiction courts. Rather, I emphasize that even if this natural preference for the "common man" is accurate, the analysis cannot end there. The desire to protect the rights of less privileged litigants and the ability to do so are two different things.

As discussed earlier, non-lawyer courts are not necessarily places where matters are between members of the same class or group.[254] Rather, they are forums where members of a more privileged group often litigate against a less privileged group. Thus, it is crucial for the members of the less privileged group that the judges in these courts be able to afford them the protection to which they are entitled. This is of particular concern when the member of the less privileged group does not have counsel.

Many of the protections afforded to less privileged litigants are by operation of statute. The Uniform Residential Landlord Tenant Act prescribes a particular way in which an eviction can be carried out.[255] If the statutorily prescribed process is not specifically and carefully followed by the landlord, an eviction is improper. The same statute dictates under what circumstances a security deposit can be kept[256] and how one can force a landlord to cure poor conditions.[257] The U.C.C. dictates how secured goods can be repossessed and resold.[258] The Fair Debt Collection Practices Act[259] specifically dictates what debt collectors can and cannot do in an attempt to collect debts. If the act is not followed, damages are awarded to the debtor.[260] Various state statutes govern cancellation of home solicitation sales,[261] use of negotiable instruments in consumer sales,[262] disclaimer of warranties in consumer sales,[263] and a host of other consumer transactions.

While these laws may signify a legal system so complex that those living under it cannot necessarily comprehend it all,[264] which may not be desirable in the abstract, these are the laws that prevent a landlord from throwing a tenant out in the middle of the night, that keep a debt collector from calling a debtor's home at 3:00 in the morning, and that entitle the owner of a car to catch up on past due payments before losing the car to the secured party.

The ability to find and apply these statutory rules is essential to the protection of the less stationed litigant. No amount of natural sympathy for that litigant can compensate for the lack of this information.[265] The judge's ability to locate, know,

---

254. *See supra* notes 228-233 and accompanying text.
255. *See* Uniform Residential Landlord Tenant Act §§ 4.201-4.207 (1972).
256. *See id.* § 2.201.
257. *See id.* §§ 4.103-4.105.
258. *See* U.C.C. §§ 9-501 to 9-507 (1972).
259. 15 U.S.C. §§ 1692-1692o (1994 & Supp. II 1996).
260. *See* 15 U.S.C. § 1692k.
261. *See, e.g.*, IOWA CODE §§ 555A.1-555A.6 (1997).
262. *See, e.g.*, IOWA CODE § 537.3307.
263. *See, e.g.*, KAN. STAT. ANN. § 50-639 (1997).
264. *See* PROVINE, *supra* note 61, at 190 (arguing that "the elimination of nonlawyer judges suggests the incapacity of laypersons to comprehend the rules they must live by."); *see also* Pankratz, *supra* note 82, at 1102-03 (suggesting that early Americans may have intended to avoid such a complex system).
265. In the criminal context Jerold Israel has observed that:

> The movement away from lay magistrates stems from concern that the advantages provided by

interpret, and apply these rules is of even greater importance in a limited jurisdiction court, where economic considerations mean that individual litigants may not be represented by counsel.[266] Without any attorneys involved in the litigation, either as advocate or judge, it is possible that legal considerations will never come to the court's attention.[267] As observed more than sixty years ago, "It is not enough that we should have good substantive laws. We must have good courts which will speedily, wisely, justly and economically administer them."[268]

Because many of these statutory protections for the common person were products of the 1970s, it is not surprising that analyses of the abilities of lawyer judges to protect individual litigants undertaken before and during the 1970s do not take this factor into account.[269] But with the advent of consumer protection legislation,[270] the Uniform Residential Landlord Tenant Act,[271] and other similar enactments, the legal abilities of the judge become one of the most important aspects of protecting the individual litigant. I suspect that studies might demonstrate that in cases in which there is some statutory protection for less privileged litigants, non-lawyer judges do not use these statutory shields to protect less privileged litigants. This comports with my own observations as a legal services attorney. For example, on those occasions where I had to appear in regard to a landlord/tenant matter, I remember sitting through other cases and watching tenants get "railroaded" through the process, whether or not they had rights under the Arizona Residential Landlord Tenant Act.[272] Certainly, this might occur with a lawyer judge as well, but it would be less likely to be caused by a failure to understand the relevant statutes and case law.

Furthermore, other studies suggest that lawyer judges can serve the function of translating lay accounts of incidents that are the subject of litigation into legal structure, thereby assisting parties in transforming stories from non-legal discourse

---

> their perspective are diluted by the bureaucratization of the magistrate's position within the judicial hierarchy and are offset by the typical magistrate's lack of familiarity with, or lack of inclination to take seriously, the defendant's basic legal rights.

Jerold H. Israel, *Cornerstones of the Judicial Process*, 2-SPG KAN. J.L. & PUB. POL'Y 5, 19 (1993). Linda Silberman recognized that "[t]he growing complexity of constitutional and statutory law has aggravated the problem caused by the absence of formal legal training among lay judges." Silberman, *supra* note 115, at 507.

266. Question 23 of Professor Provine's survey asked about the frequency with which any lawyer played a part in small claims cases in the courts of those judges surveyed. *See* PROVINE, *supra* note 61, at 194. The study found that in non-lawyer courts lawyers had a role in 9% of the small claims cases. *See id.* at 109, 227 n.66. In lawyer courts, lawyers had a role in 21% of small claims cases. *See id.* Use of lawyers appears to be decreasing in these types of cases. *See* Parker & Fields, *supra* note 204.

267. *See* Silberman, *supra* note 115, at 536-37.

268. Keebler, *supra* note 100, at 3.

269. *See, e.g.*, Green et al., *supra* note 74, at 388 ("Conversely, a judge trained in the law . . . might be more disposed toward enforcing the letter of the law; a role orientation that is certainly conducive to decisions in favor of the business plaintiff.").

270. *See, e.g.*, Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (1994 & Supp. II 1996); Uniform Consumer Credit Code (1974).

271. *See supra* notes 255-257 and accompanying text.

272. ARIZ. REV. STAT. ANN. §§ 33-301 to 33-1381 (1990 & Supp. 1997).

into legal results.[273] This task is difficult for any magistrate, but can be most difficult for the lay magistrate.[274]

It would indeed be ironic if we were to opt for a system where the judge is perceived to be sympathetic to less privileged litigants rather than one where the judge would have the actual ability to protect the rights of these litigants. Even if non-lawyer judges are more sympathetic to these litigants, they are the very same people who may not have the ability to locate, apply and interpret the laws intended to protect these litigants.

3. Advocating the Use of Lawyer Judges wherever Possible Signifies an Attempt to Protect the Rights of the Poor and Less Privileged

The position that I have taken in the previous section—that lawyer judges are better positioned than non-lawyer judges to protect the interests of less privileged litigants—has been criticized as reflecting an elitist view of less privileged litigants as parties capable of consuming, but not administering justice.[275] Others have criticized such a position as "largely symbolic, based on the notion that only lawyers should be judges."[276] I suggest, rather, that it reflects a pragmatic recognition that in all judicial settings, including those involving less privileged litigants, lawyers are better able to address legal issues than non-lawyers. To my mind, this explains the continued use of lawyer judges and lawyer advocates in all but limited jurisdiction courts. In other words, advocating the use of lawyer judges in limited jurisdiction courts does not reflect a distrust of the skills of non-lawyer judges from certain socio-economic groups, but of non-lawyer judges in general.[277] This is not a knee-jerk reaction to non-lawyer judges, but rather the recognition that, at least in the civil context, judges at all levels are likely to be faced with vexing, complex legal matters, and in all other civil settings these matters would only be trusted to lawyer judges.

The crowded dockets of courts all over the country, despite the availability of non-public alternatives to judicial dispute resolution, such as arbitration and mediation, support the notion that our society trusts the skills of lawyer judges over non-lawyer judges. Furthermore, only public courts can force parties to participate in a lawsuit, or risk liability, and only public courts provide an adjudicator paid for out of the public coffers. No one in recent times has suggested that wealthy or

---

273. *See* O'Barr & Conley, *supra* note 209, at 690-94. The authors found that "the effect of the magistrate's participation is often to provide the legal structure and explicit assessment of blame that is lacking in many unquestioned lay accounts." *Id.* at 661.

274. *See id.* at 697. ("However, the small claims court magistrate must not only perform this evaluative function but must also develop the hypothesis to be evaluated, all in the course of a brief hearing, aided only by a one or two-sentence complaint. This may be asking too much, particularly when the magistrate lacks legal training or expertise.").

275. *See* PROVINE, *supra* note 61, at 32. Professor Provine also takes the position that this is a disenfranchisement of the poor. *See id.*

276. Lamber & Luskin, *supra* note 115, at 299.

277. Others have even suggested that using non-lawyer judges in courts that serve the less privileged, far from promoting the interests of the less privileged, serves to control them. *See* Conley & O'Barr, *supra* note 65, at 494 (citing 1 R. ABEL, THE POLITICS OF INFORMAL JUSTICE 6 (1982)("A critical legal theorist might carry the argument further and contend that these texts [of hearings before non-lawyer judges] provide evidence that judicial officials use informal courts as an instrument of class control.")).

privileged litigants should be forced to litigate before similarly situated non-lawyer judges. Rather, the preference is for lawyer judges.

Thus, it is quite clear that appearance before lawyer judges is the preferred choice for most litigants whose cases involve more money than the jurisdictional limit of the justice courts.[278] How, then, can anyone conclude that given a choice litigants who are not members of a "privileged" group, and most need protections afforded by law, would opt for a non-lawyer judge?

My point is this: class considerations favor using lawyer judges rather than non-lawyer judges. We should be less concerned about representation by the less privileged on the bench, and more concerned with the competence and quality of justice dispensed at that level.[279] This is particularly important in light of the fact that the business of limited jurisdiction courts is subject to little scrutiny, and the court retains jurisdiction over disputes involving individuals who are less politically organized or powerful. As explained by Conley and O'Barr, "we are concerned that this unchecked discretion is concentrated at the lowest levels of the judicial system, and suspect that it would not long be tolerated at levels where parties have the wherewithal to assert their own rights vigorously, or benefit from the efforts of organized advocacy groups."[280]

Finally, we must be mindful of why civil litigants choose to bring their cases to court rather than seek out mediation or arbitration from non-legal sources. Litigants bring disputes to court once they frame them as involving legal issues. Since the litigants themselves have characterized the issues this way, the primary attribute of the courts should be the ability to apply law in the resolution of these issues.[281] If we do not provide less privileged litigants with judges possessing this ability, we run the risk of creating a system where access to a lawyer judge is reserved for businesses and the upper classes.

D. *The Effect of Not Matching Judicial Requirements to the Task of the Job: What Happens when We Expect Non-Lawyer Judges to Act Like Lawyer Judges*

I doubt I will ever forget the insecurity of being a law student and then a new lawyer, asked to function in a world where words have a different meaning than in other contexts, and where analysis requires a precision with which I was unfamiliar. I am reminded of this "pre-law" status each year as I call on contracts students in the first months of their first year of law school. From these experiences, I can

---

278. Professor Provine recognizes this: "To date, the middle class has been more involved in administering dispute resolution centers than in using them to resolve their own disputes." PROVINE, *supra* note 61, at 53.

279. The concern for the quality of justice dispensed at the bottom of the court structure has been recognized in other places. *See, e.g.*, Baar, *supra* note 73, at 179 ("Minnesota, the one state to approximate the ABA standards [regarding court unification] most fully, has also transformed the unified trial court concept from one rooted in doctrines of efficiency to one reflecting an emerging concept of judicial equality—a concept that moves beyond the equality of contending parties toward the equal importance of all types of court work.").

280. Conley & O'Barr, *supra* note 65, at 506.

281. *See* Mansfield, *supra* note 156 (addressing the role of "law" and legal content in the lives of litigants). Regarding whether the main purpose of small claims litigants is to air their grievances and let off steam, see O'Barr & Conley, *supra* note 209. The authors conclude that providing a court where litigants can tell their stories "may be a mechanism by which informal procedures substitute expressive satisfaction for the enforcement of rights." *Id.* at 699.

imagine how hard it must be for a non-lawyer judge to address the complex questions that can arise in a civil lawsuit with judicial authority, certainty and accuracy. It strikes me that without the training and experience required of a lawyer judge, the non-lawyer judge is left to find ways to appear knowledgeable when he is not and to legitimize his exercise of judicial power.

One way for a non-lawyer judge to cope with his lack of knowledge and education is to study the law on his own. As discussed before, this is now deemed an inadequate method for learning the law.[282]

Another way for a non-lawyer judge to appear knowledgeable is to rely on the advice of lawyers when she adjudicates a case which, in her estimation, requires the knowledge of a lawyer to be accurately decided.[283] There is evidence that some lay judges consult lawyers when they feel the need. For example, Professor Provine interviewed one non-lawyer judge who "kept three lawyers and a local judge 'on call.'"[284]

Of the possible ways to cope with lack of a legal education, this is probably one of the best. After all, the non-lawyer judge gets access to the expertise of a lawyer whenever he feels the need. But this method of coping has limitations. First, one of the main justifications for allowing non-lawyers to sit on the bench is the dearth of available lawyers in less populated areas of the United States.[285] Another justification for allowing non-lawyers on the bench is that they diversify the bench, economically and socially.[286] If both of these justifications are true, then not all non-lawyer judges will have access to lawyer advice, either because lawyers are not geographically available or because the non-lawyers are not socially "grouped" with lawyers, and thus they may not know any lawyers to whom to turn for advice.

Of course, one could argue that lawyer advice can be made easily available through means other than face-to-face contact. After all, with the advent of the internet, e-mail, and other technological advances, almost anyone in a remote area can access expertise of almost any kind. However, this same argument can be made in regard to access to lawyer judges. In other words, if lawyer advisors can be made available through modern technology, why not just make those lawyers available as judges through the same technology?

A more important concern for me is the public policy choice to give the non-lawyer authority over the courtroom, rather than the lawyer behind the scenes. It seems to me it would be more appropriate to have whoever is responsible for selecting judges (either by appointment or election) pass judgment on the judicial capabilities of a lawyer judicial candidate, rather than pass judgment on the judicial capabilities of a non-lawyer judicial candidate, who then has the discretion to choose which lawyer to turn to for legal advice.

---

282. *See supra* note 240 and accompanying text.

283. *See* Silberman, *supra* note 115, at 545-46 (suggesting maintenance of panels of attorneys to whom non-lawyer judges can turn with legal questions, or providing non-attorney judges with a legal staff to provide advice on legal issues).

284. PROVINE, *supra* note 61, at 97.

285. *See* Silberman, *supra* note 115, at 507.

286. *See* PROVINE, *supra* note 61, at 145-47, 168.

A third, and unfortunate, method for a non-lawyer judge to cope with his lack of adequate legal training is to engage in the pretense of knowledge where there is none, in an effort to appear knowledgeable in the law. This pretense might involve, for example, the use of legal jargon which the judge does not really understand.[287] Finally, a judge might compensate for inadequate ability by controlling the types of arguments and issues that may be brought into court. This can be done by restricting legal argument to the level at which the judge comprehends the law,[288] thereby preventing the judge from losing legitimacy through inability to comprehend the arguments being made, or by maintaining idiosyncratic rules or procedures to which only the judge and insiders to that particular court are privy.[289]

These judicial attempts to cope without a legal education in a world where law controls can result in a court system without some of the professed advantages of a non-lawyer court, such as informality of process and rules. In fact, the resulting system may be less litigant-friendly than a lawyer-officiated court system because litigants may end up in a court with the same atmosphere for which lawyer-officiated courts are criticized: one in which only insiders have the ability to manage their cases and try to predict outcome. Yet because of the judge's lack of legal training, there is nothing, not even representation by an insider (i.e. a lawyer) or access to other inside information (such as court handbooks,[290] statutes, and court rules) that can compensate for the litigant's lack of information about the litigation process and potential outcomes. Rather, the process and outcomes are dictated solely by the unmonitored judgment of the lay judge.[291]

Given the different perspectives that legal training affords, it is not surprising that non-lawyer judges reportedly do not like lawyers.[292] Such non-lawyer hostility toward lawyers raises the disturbing concern that those who choose to use lawyers in these courts will be discriminated against, thus leaving litigants in a "damned if you do, damned if you don't" position. If the litigant represents himself, he is likely to have difficulty obtaining the information necessary to do it right. If the litigant uses a lawyer, she risks suffering consequences from the hostility felt toward her lawyer.

In addition to observing judges who engaged in the pretense of superior knowledge of the law, various authors have observed lay judges engaged in practices which show their misconceptions regarding the proper roles of the various

---

287. *See supra* note 69 and accompanying text.

288. *See supra* note 62 and accompanying text.

289. *See supra* notes 10 through 12 and accompanying text.

290. RALPH WARNER, EVERYBODY'S GUIDE TO SMALL CLAIMS COURT (1995).

291. This was bemoaned in 1927 as a lack of "certainty in the treatment of cases in courts . . . on which litigants should be able to rely with confidence." Smith, *supra* note 54 at 128. The author further noted that "[t]he advantage of this certainty is given the man with a case involving large sums but is utterly denied the man with a case involving a sum over which the justice of the peace has jurisdiction." *Id.*

292. Professor Provine points out that many lay judges do not like lawyers, partially because they are "repelled by the willingness of lawyers to represent anyone, guilty or not, for a fee." PROVINE, *supra* note 61, at 161. She also states that "[t]hese justices, not surprisingly, relished opportunities to put lawyers in their place. Nearly every one of them told and appreciated jokes about lawyers, and many recounted instances where they had set one straight on a legal issue." *Id.* at 162. As more fully described in the opening of this article, in my own practice I was occasionally the object of non-lawyer judicial disdain, as demonstrated by the judge's condescending comment in her minute entry that I should have "actually read the judgment before submitting unnessary (sic) pleadings." *See supra* note 27 and accompanying text.

actors in a lawsuit (plaintiff, prosecutor, defendant and judge). For example, in one study the authors used a question about pre-trial discussions with the prosecution in criminal matters to discern, it appears, whether non-lawyer judges were more likely than lawyer judges to rely on the prosecution.[293] What they uncovered instead was evidence that non-lawyer judges engage in prohibited ex parte communication with the prosecution, apparently not realizing that pre-trial contact with the prosecution alone is prohibited.[294] The lawyer judges surveyed apparently recognized that such contact was improper, as the only such contact reported in the survey was by non-lawyer judges. This comports with my own experiences reported at the beginning of this article.

These examples of judicial coping behaviors are disturbing indicators of an entire court system for the common people that does not accept the most basic tenets on which our justice system is founded, such as access to information, the right to choose to use counsel, the right to an informed and unaffiliated adjudicator, and the right to equal communication with and access to the court. Yet, we cannot be surprised that non-lawyers must engage in such pretenses in states where the non-lawyer judiciary is expected to apply the same procedural and substantive rules as those that govern lawyer officiated courts. How else can a non-lawyer judiciary cope with the daunting problem of needing to appear knowledgeable in the law and court procedure?

In states where limited jurisdiction courts function like smaller versions of general jurisdiction courts, lawyers and legislators responsible for creating and overseeing these courts must recognize that if skills and credentials do not match, judges will be forced to engage in the types of coping behaviors described in this article.

E. The Efficacy of External Controls on the Conduct of Non-Lawyer Judges in Civil Matters

In courts where the judges are lawyers, certain controls on the quality of adjudication are naturally present. First, any judge sitting on a bench where a law degree is required must have maintained the minimum grade point average necessary to graduate from law school and must have passed the bar exam. This ensures that the judge is at least minimally competent in the law. This assurance is not present when the judge is not a lawyer, and minimal competency tests, which necessarily must focus mostly on the criminal jurisdiction of the non-lawyer judge, are not the same as successful progression through three years of law school and bar passage.

Second, lawyer judges retain their membership in the bar. Therefore, a judge who is a lawyer is governed by the ethical rules that regulate all lawyers, in addition to the rules that govern the conduct of judges. This has the added benefit of insuring that the judge knows what is expected ethically of the lawyers that appear in the court. When the judge is a lawyer, the judge is better equipped to recognize and

293. Ryan & Guterman, *supra* note 138, at 279.
294. *See id.*; *accord* Silberman, *supra* note 115, at 535.

regulate unethical conduct by lawyers appearing before the judge.[295] When the judge is not a lawyer, and the suit involves a represented party against an individual, unrepresented party, the lawyer's conduct with the unrepresented party can escape judicial scrutiny. A non-lawyer judge, himself not governed by the ethical rules that govern members of the bar, is less familiar, or may even be unfamiliar, with rules that would come into play in such a setting. Thus, judicial oversight of such conduct, which has been recommended as one of the effective means of controlling misconduct in this type of setting, cannot be effective.[296]

That we as a profession value the oversight that comes naturally with membership in the bar is evidenced by the recent attention paid by bar associations to the unauthorized practice of law. The organized bar's efforts to eliminate the unauthorized practice of law flows in large part from the fear that there is no adequate method of overseeing and controlling the quality of services provided by non-lawyers giving legal advice (including such concerns as confidentiality, fiscal responsibility, etc.).[297] Mandatory compliance with the rules that govern an attorney's conduct provide this oversight and control in regard to lawyers licensed to practice in a state, whether they are on the bench or not. While some control and oversight can be gained through judicial conduct rules governing non-lawyer judges, there is still a level of control missing that exists with lawyer judges who are members of the bar. Nevertheless, we seem to maintain the position that even though a non-lawyer is incapable of practicing law, a non-lawyer *is* capable of adjudicating legal cases. This use of non-lawyers as judges in limited jurisdiction courts in a system ardently opposed to any form of law practice by non-lawyers suggests that there is some ability to oversee and control non-lawyer judges that does not exist in regard to non-lawyers giving legal advice to clients.[298] Thus, we convey the impression that an adequate means of official oversight exists when, in fact, it does not.

Societal apathy toward the business of non-lawyer courts eliminates a third control on the quality of adjudication in these courts. The courtrooms of lawyer judges are likely to garner more public attention, and the scrutiny that necessarily accompanies that attention, from the organized bar, the rest of the judiciary, and the public than limited jurisdiction courts.[299] While this lack of scrutiny might allow

---

295. The issue of lawyer conduct in regard to unrepresented, poor opponents was addressed fully by Russell Engler in a recent article. *See* Engler, *supra* note 216. While this article assumes that judges will be lawyers, it does make the point that lawyer judges can exercise control over such conduct: "The legal proceedings likely occur under the auspices of judges, whose behavior is regulated in their capacities both as judges and lawyers." *Id.* at 158.

296. *See id.* ("Courts must provide additional oversight to ensure that the rights of unrepresented litigants are protected."). Indeed, lack of "supervision and control" was cited by the 1967 Task Force Report on the Courts as a defect of justice of the peace courts. *See* TASK FORCE REPORT, *supra* note 62.

297. *See, e.g.*, Lynda C. Shely, *Lawyers and UPL: What Should You Do*, ARIZONA ATTORNEY, Feb. 1998, at 31.

298. For example, Arizona permits non-lawyers to hear cases worth up to $5,000, *see* ARIZ. REV. STAT. § 22-201, and yet strictly prohibits nonlawyers from giving any legal advice at all. *See* Shely, *supra* note 297, at 31.

299. *See* PROVINE, *supra* note 61, at 151; (noting "the perception that these courts are insignificant . . . " and the resultant lack of scrutiny from "news reporters, court watchers, and the bar"); *see also* Harris, *supra* note 151, at 415-16, 431 (maintaining that lower courts in de novo systems (including non-lawyer and lawyer judge courts) have little accountability due to lack of appellate review and relative lack of influence of constituencies that appear in these courts). At least one group of authors have argued that all courts escape public attention, and that "[t]his low visibility tends to submerge the problems of the court system under a blanket of silence." Green et al., *supra*

certain freedoms from restraint for limited jurisdiction judges,[300] it also means these courts escape the primary means by which our society holds government accountable. There is the added concern that the non-lawyer court system is the one that is the most relevant to the affairs of the average person, particularly people who are poor, and yet is the part of the system which escapes oversight the most. Thus, there is a lack of oversight of a system that governs people who are the most politically powerless to change the system if they are dissatisfied with it, and which uses adjudicators who are the least prepared for their professional role. In other words, we allow non-lawyers, who ought to have the most oversight and scrutiny, to adjudicate in the court level that garners the least attention.

Since the controls that normally exist with a lawyer judiciary are not present with a non-lawyer judiciary, states that choose to use non-lawyers to adjudicate civil matters must consider whether other, substitute controls are effective. The remainder of this section discusses possible external controls for making the non-lawyer judiciary accountable, and whether such controls can work.

1. De novo Appeals

Perhaps in recognition of the need for some sort of oversight when a non-lawyer presides in civil matters, many states that force litigation of certain civil matters in non-lawyer courts provide for de novo appeal to lawyer courts.[301] At first glance, the right to a de novo appeal would seem to protect litigants who are forced to appear before a non-lawyer judge the first time around. Indeed, the right to trial de novo before a lawyer judge is what led the Supreme Court to hold that there is no denial of due process when criminal litigants appear before a non-lawyer judge.[302] However, there are problems with the use of de novo appeals to compensate for mandatory litigation before non-lawyers.

First, appeal rates generally show that parties do not tend to appeal decisions rendered by non-lawyer judges.[303] Thus, even in states which grant de novo appeal

---

note 74, at 381.

300. *See* PROVINE, *supra* note 61, at 151 ("The perception that these courts are insignificant, a view that is widely shared outside law-enforcement circles, does carry with it one advantage, however. It frees town and village justices from the scrutiny of news reporters, court watchers, and the bar, giving them room to respond creatively to some of the limitations built into the system.").

301. *See, e.g.*, DEL. CODE ANN. tit. 10 § 9571(c) (Supp. 1998); LA. CODE CIV. PROC. ANN. art. 4924 (West 1998); MINN. STAT. ANN. § 33-10.1-5-9 (1997); N.H. CONST. pt. 2, art. 77; N.M. STAT. ANN. § 35-13-2 (Repl. Pamp. 1996); N.D. CENT. CODE § 40-18-19 (West 1997); S.D. CODIFIED LAWS § 15-38-39 (Michie 1984); UTAH CODE ANN. § 78-5-120 (Supp. 1998); *see also* PROVINE, *supra* note 61, at 27 (discussing the history of nonlawyer courts in the United States); Silberman, *supra* note 115, at 539; NON-ATTORNEY JUSTICE, supra note 123, at 60-61. A more cynical view is that trial de novo exists because of a total lack of trust in non-lawyer judges, with the expected result of delaying litigants and causing them greater expense. *See* Smith, *supra* note 54, at 129.

302. *See* North v. Russell, 427 U.S. 328 (1976). In that case the defendant had claimed that effective assistance of counsel was denied since the lay judge could not fully comprehend his counsel's arguments. *See id.* at 332, 334. The Court disagreed, stating that a right to trial de novo protected defendant's right to due process. *See id.* at 339, *see also* Ryan & Gutterman, *supra* note 138.

303. One study showed that in 1976 the rate of appeal from decisions rendered by New York's town and village courts was less than one percent. *See* JACK M. KRESS & SANDRA L. STANLEY, JUSTICE COURTS IN NEW YORK STATE: THE COURTS CLOSEST TO THE PEOPLE 107 (1976). Professor Provine recognizes that "[a]ppeals are rare everywhere, and trial de novo, the traditional means of supervising justices of the peace, has apparently never been attractive to litigants." PROVINE, *supra* note 61, at 132, 223 n.26. Professor Silberman acknowledges the same low rate of appeals, and attributes this potentially to the requirement in many states that the litigant post a bond

as of right, litigants may not take the opportunity for appeal afforded them by court rules. With low appeal rates, the reality is that non-lawyer courts are "the court of first and final resort."[304]

Second, considering the litigation pairings in these courts in civil cases, recognizing the advantages that certain litigants have over the average individual litigant, and recognizing the economic realities for many individuals in these courts, it becomes essential for states to provide a system where the right answer is reached on the first try. Many individual litigants cannot afford the costs of extended litigation. It is simply not sufficient to force a tenant to wait until an appeal is perfected and trial de novo obtained to tell that litigant—a litigant who may have been rendered homeless by the non-lawyer judge's decision—that he was wrongfully evicted.

States with low appeal rates should be asking why de novo appeal is not attractive to litigants. Perhaps appeals are rare because litigants are satisfied with the judgments rendered by non-lawyer judges. But it is equally possible that they are rare because litigants have expended their litigation energy (financial, emotional, mental, etc.) in the first court, because appeals are so cumbersome, or even because litigants become disenchanted with the courts and feel that the second time around could not be better than the first.[305]

In some states the right to trial de novo does not exist,[306] or is discretionary.[307] In other states the right to a de novo appeal is somewhat illusory (for example where the litigant is charged with making sure an adequate record is kept for purposes of

---

in order to perfect an appeal. *See* Silberman, *supra* note 115, at 539, n.239; NON-ATTORNEY JUSTICE, *supra* note 126, at 61. Other potential causes of low appeal rates identified by Silberman are the litigant's lack of knowledge of the right to appeal, or the desire to have the matter over. *See* Silberman, *supra* note 115, at 539; NON-ATTORNEY JUSTICE, *supra* note 126, at 61-63. That appeal rates are indeed low was observed as long ago as 1927. *See* Smith, *supra* note 54, at 125. A recent study of Montana's justice and city courts found that only 1.6% of civil cases were appealed, "probably due to the minimal amounts at issue." Ford, *supra* note 75, at 203. Similarly, out of more than fifty cases Conley and O'Barr observed during two weeks in one city court, only one was appealed. *See* Conley & O'Barr, *supra* note 65, at 497 n.148.

In the criminal context it has been pointed out that one would expect a large appeal rate from lay and non-lay limited jurisdiction court decisions since "defendants have nothing to lose and everything to gain by requesting a new trial" and yet appeal rates are notoriously low. *See* Harris, *supra* note 151, at 397 & n.109. The author attributes these low appeal rates to "the structure of de novo systems," which he argues "discourages defendants from requesting new trials." *Id.* at 383, 401; *accord* Ludwig v. Mass., 427 U.S. 618, 632-38 (1976) (Stevens, J., dissenting).

Whatever the reasons for low appeal rates from non-lawyer courts, it appears that the number of appeals that do take place decrease tremendously when non-lawyers are barred from sitting as judges in limited-jurisdiction courts. *See* Ashman & Chapin, *supra* note 135, at 421 (finding that appeals from limited-jurisdiction courts dropped 50% to 60% in Colorado, and approximately 50% in Maryland after the two states required all judges to be attorneys).

304. Ford, *supra* note 75, at 72.

305. Possible reasons for litigant failure to take de novo appeals from lay and lawyer judgments in criminal cases in limited-jurisdiction courts are explored in depth in Harris, *supra* note 151. These reasons include monetary cost (such as the cost of counsel for two trials, lost income from having to attend two trials, and expert fees for two trials); non-monetary costs (such as activity opportunity costs—for example, showing up in court and preparing for trial instead of doing anything else); and psychological costs. *See id.* at 393, 401-405. Harris argued that in the criminal area, the structuring of de novo appeals "discourages defendants from requesting new trials," and that "de novo systems operate invisibly but forcefully to deter the exercise of the express right to a new trial." *Id.* at 383.

306. *See, e.g.*, NEV. J. CTS. R. CIV. P. 72A(a).

307. *See, e.g.*, N.H. CONST. pt. 2, art. 77; COLO. REV. STAT. ANN. § 13-6-310 (West 1998); IDAHO CODE § 1-2213 (1998).

the right to trial de novo,[308] or where the litigant is forced to pay for the court reporter in order to get an adequate record of the trial).[309] In each of these states, proper functioning of the system is dependent on transcripts sufficient for adequate appellate review. Despite this, in many of these states the "record" below consists of tape recordings[310] or, worse yet, only of notes taken by judges or clerks.[311]

The final, most basic problem with de novo appeals as a means of ensuring legally correct decisions in limited jurisdiction courts with non-lawyer judges is that it places the burden on litigants, most of whom are not represented, to recognize when their case has been extralegally decided.[312] Certainly, wherever possible it is better to have the rules of law applied by lawyer judges in civil matters than to force litigants in these courts to recognize when an extra-legal decision has been made.

2. Training Programs

As discussed earlier in this article, several days, weeks, or months of training, most of which by necessity must focus on the criminal cases non-lawyer judges will handle, is not and never will be the same as three years of law school. The issues that can arise in civil cases are too varied and too complex to be handled by judges who have not had traditional legal training. This was the finding of the Silberman study, which concluded that while training programs helped teach judges how to protect basic rights, they were inadequate to give lay judges the analytic ability to deal with legal issues.[313]

3. Automatic Right of Removal

The right of defendants to automatically remove their cases to the courts of lawyer judges is an appealing idea because it protects litigants from being forced to appear before a non-lawyer.

Professor Silberman's study concluded that: "In civil cases, lay-judge court jurisdiction should be made concurrent with that of an attorney-judge court and a defendant should have the right to transfer an action brought before a lay judge to an attorney-judge court."[314] According to Professor Silberman, the primary benefit of an automatic right of transfer is that the lay-court's civil jurisdiction becomes consensual rather than mandatory.[315] She suggests that litigants will then be given the option to consent to determination by a lay judge "when it appears that the

---

308. See *supra* notes 50-60 and accompanying text.

309. *See* Silberman, *supra* note 115, at 539.

310. *See, e.g.*, ALASKA S. CT. Rule 2(1); ARIZ. REV. ST. ANN. § 22-261(c) (West Supp. 1998), ARIZ. SUPER. CT. R. APP. P.—CIVIL 11(e)(1); COLO. REV. STAT. ANN. § 13-6-309 (West 1998); IDAHO CODE § 1-2212 (1998).

311. Silberman, *supra* note 115, at 539; NON-ATTORNEY JUSTICE *supra* note 126, at 59 (stating that lay judges in New York often keep their own notes when there is no stenographer paid for by the court system).

312. *See* PROVINE, *supra* note 61, at 184 ("Litigants at this level usually appear without counsel."). Indeed, this problem can exist whether the right to appeal from a non-lawyer's decision is by de novo appeal or only through traditional appellate review. Another related problem is the problem with ensuring that litigants are informed of their right to de novo or traditional appeal. *See, e.g.*, Harris, *supra* note 151.

313. *See* Silberman, *supra* note 115, at 538; NON-ATTORNEY JUSTICE, *supra* note 126, at 98-99, 118, 235-49.

314. Silberman, *supra* note 115, at 543-44.

315. *See id.* at 544.

attorney court is too distant, slow, or expensive."[316] Professor Silberman identifies another benefit of making lay jurisdiction consensual through a right of removal or transfer: if the defendant intends to re-litigate the case before a lawyer judge in any event, the right of removal eliminates the costs of two trials and avoids a first "sham" trial.[317]

Clearly a right of removal serves the purpose of making lay-judge jurisdiction consensual. Providing such a right of removal might also serve to finally answer the question that scholars and researchers have been unable to definitively answer—whether litigants prefer local, community-based justice or access to an attorney judge. However, even a right of removal cannot tell us what is best for litigants. As with the right to de novo appeal, the right of removal puts in the untrained litigant's hands the decision regarding whether she would be better off appearing before a non-lawyer judge. This assumes that the litigant has a host of information that she is unlikely to have, such as whether her case implicates any statutory defenses or counterclaims.

4. Simplified Rules

A final option for these courts would be to go back in time, as it were, and turn them back into the informal community tribunals they once were. This would entail, among other things, the return to extremely informal rules of procedure.[318] The cost of doing this, of course, is that the protections and rules of law deemed necessary to protect other litigants would not be available to individual litigants, even when facing more experienced and powerful opponents. This too, seems an untenable and undesirable option. Litigants at all levels of society should be entitled to the protections deemed necessary in all other litigation settings.

F. Non-Judicial Alternatives to Non-Lawyer Limited Jurisdiction Courts

It may not be feasible for all states to provide all limited jurisdiction courts with lawyer judges. Indeed, one of the primary justifications for the continued existence of non-lawyer courts is a dearth of lawyers in rural America.

One legislative means of compensating for the lack of lawyers in small towns has been to set up a tiered judiciary, with increased judicial qualifications in areas with a larger population base.[319] Fans of this approach claim that it takes into account the shortage of lawyers in rural areas, the historical preference for non-lawyers in rural America, where populations are more homogeneous and familiar, and the varying community standards and anonymity of life in urban America.[320] This census-based approach was one of the main legislative recommendations that grew out of the 1979 Silberman study.[321]

---

316. *Id.*

317. *See id.* at 543.

318. For an example, see the recent rules proposals made in Montana. *See* Ford, *supra* note 75, at 204.

319. This approach is currently taken by various states. *See, e.g.*, COLO. REV. STAT. ANN. § 13-6-203 (West 1998); IOWA CODE ANN. § 602.6404 (West Supp. 1998); NEV. REV. STAT. § 4.010 (1997); N.M. STAT. ANN. § 35-2-1 (Repl. Pamp. 1996); TENN. CODE ANN. § 16-15-5005 (1994); WASH. REV. CODE § 3.34.060 (1988).

320. *See* PROVINE, *supra* note 61, at 22.

321. See *Model Non-Attorney Judge Improvements Act*, 17 HARV. J. LEGIS. 547 (1980) (based on Silberman,

I suggest, instead, a different alternative to using lawyer judges at all court levels in all communities. Given the state of communications, and the number of lawyers licensed to practice law in every state, states should consider providing every litigant in a limited jurisdiction civil matter with an attorney adjudicator through the use of lawyer judges or judges pro tem, where possible, and the use of appointed lawyers serving as arbitrators where lawyer judges are not possible. The State of Arizona currently uses this approach by mandating that all cases filed in superior court where the amount in controversy is less than $50,000 are subject to binding arbitration conducted by a lawyer.[322] Lawyers are generally assigned a case or two a year which they are to arbitrate. The arbitration decisions are binding as final judgments.[323]

Whether this approach could work for limited jurisdiction civil cases must be addressed at the state level. One way to do this would be to compare the number of active members of the bar with the civil filings currently routed to non-lawyer judges. For example, in Arizona the active membership in the Arizona bar was at around 10,000 members in 1998.[324] There were 135,662 civil cases filed in justice courts in the state of Arizona in 1995.[325] Thus, it would be possible for every limited-jurisdiction civil case to be adjudicated by a lawyer so long as each lawyer in Arizona agreed to handle 13 cases per year. Of course, this number could be made lower by the use of lawyer judges in highly populated areas, or by only requiring the use of a lawyer-arbitrator in cases where an answer is filed or where no settlement is reached. This would significantly reduce the number of cases for which each lawyer-arbitrator would be responsible during a given year. These alternatives should be considered in all states where the ratio of lawyers to limited jurisdiction civil cases is similarly low.

Given the technology available, the plan to use lawyer adjudicators should work even where the adjudicator is not physically located where the parties are. The state need only supply litigants with modern methods of visual, audio and documentary communication to facilitate the contact that would likely be needed to arbitrate a civil dispute.

By having an arbitration system that appoints individual attorneys as adjudicators in smaller civil matters, all litigants would enjoy the advantages of educated adjudication, while at the same time the system would not be dependent on finding a large number of lawyers willing to serve as full-time judges adjudicating smaller matters.[326]

---

supra note 115); *see also* NON-ATTORNEY JUSTICE, *supra* note 126.

322. *See* ARIZ. REV. STAT. § 12-133 (Supp. 1997). The statute permits the superior court of each county to set a level, not greater than $50,000, below which the case is referred to binding arbitration. In Maricopa County, only those who are members of the bar are eligible to serve as arbitrators. *See* 17B ARIZ. REV. STAT. SUPER. CT. LOCAL PRAC. RULES, MARICOPA COUNTY, Rule 3.10(d) (1997).

323. *See* ARIZ. REV. STAT. § 12-133(E) ("The award shall be entered by the court in its record of judgments, and shall have the effect of a judgment upon the parties unless reversed upon appeal.").

324. There were 10,372 lawyers admitted and practicing in the State of Arizona as of June 2, 1998. Telephone interview with the State Bar of Arizona, June 23, 1998.

325. *See* STATE COURT CASELOAD STATISTICS, NATIONAL CENTER FOR STATE COURTS 148 (1995).

326. Professor Provine suggests that it is hard to find lawyers willing to serve as judges in limited jurisdiction courts. She spends a part of her book on the abysmal and locally controlled financing of limited jurisdiction courts. This leads to holding court in inappropriate buildings and to no clerical help for judges. *See* PROVINE, *supra* note

IV. CONCLUSION

I cannot claim from my experiences in Arizona to know what is best for every state or community in the United States, nor would it be possible for me to gather all of the information necessary to make reformative suggestions for every court system that uses non-lawyer judges.[327] However, I do suggest that the bar, bench and legislatures of each state should re-visit with a critical eye their decisions to perpetuate, whether intentionally or through neglect, the non-lawyer adjudicatory system for civil matters at the lowest end of the court spectrum. This renewed call for examination is particularly appropriate given the recent attention paid to access to justice issues by the American Bar Association and other organizations.[328]

Each state must start out by assessing the true reasons for the maintenance of civil jurisdiction in non-lawyer courts, and then examine whether the existing courts serve those purposes. If the true reason for the continued power of these courts over civil matters is to provide alternative communitarian-based forums for dispute resolution, then the rules must be crafted so as not to require legal knowledge in their application, so as to insure the application of homogeneous community standards, and so as to prevent the courts from being a tool for use by the haves, who use the courts with some frequency, against the have nots. If the true reason for the continued power of these courts over civil matters is simply to provide a swift, inexpensive method for resolving disputes without taking up court and judicial resources, then I believe states should be looking at models such as the mandatory arbitration model used in the Arizona superior courts. If the true reason for the continued power of these courts over civil matters is, as I suspect, unarticulated, and perhaps even unformed, then notions of fairness and equal access to justice demand that these courts be subject to closer inspection and exposure.

Any comprehensive analysis of whether a state should maintain the civil jurisdiction of its non-lawyer courts must include empirical information and actual observation of the courts and study of the clientele that use the courts. The empirical data gathered must not lead to knee-jerk conclusions, such as the assumption that large numbers of filings or few appeals signify a citizenry satisfied with the operation of the courts. Rather, studies must seek to discover why there so many filings; why there are few appeals. The analysis must also address basic assumptions upon which the jurisdictions of non-lawyer courts have been based for the last two centuries, such as whether litigants really prefer having a non-lawyer judge available down the street, or in their town, over access to a lawyer-officiated court a little further away. This analysis must look at whether modern communica-

---

61, at 124-27. Although she never says directly that this deters lawyers from seeking to become limited jurisdiction judges, it is implicit from her description of the conditions under which some justices labor. Of course, many attorneys in public service, such as public defenders and legal services lawyers, work in similar conditions.

327. As Neil Vidmar recognized in his assessment of the study he had performed, "the kinds of cases brought to the Middlesex County Small Claims Court may differ from those brought to small claims courts in Portland, Maine, or Chicago, Illinois, or some other jurisdiction." Vidmar, *supra* note 200, at 547.

328. *See, e.g.*, J. Michael McWilliams, *Justice for All-All for Justice, Making the System Work for Everyone*, A.B.A. J., Sept. 1992, at 6 (announcing the theme for the up-coming A.B.A. year as "Justice for All—All for Justice"). The subject of the 1993 Litigation Section's Fall Meeting was "Justice in America." *See* Nancy Scott Degan, *Section Examines Justice in America at Annual Fall Meeting in DC*, 18 LITIGATION, Aug. 1993 at 1.

tion could serve both interests, making lawyer judges available through some form of instant long-distance communication, such as fiber optic cable systems or video linkups. Finally, the financial assumptions about the economic efficiency of using non-lawyer judges must be carefully analyzed. It may not be cheaper for litigants to litigate civil matters in limited jurisdiction courts, particularly in light of the need to file an appeal before a review is made by an attorney judge. Most importantly, states must find out what non-lawyer judges are really doing in civil cases in their courts. The best place to start this inquiry is with the lawyers who, like myself, practice in these courts. This must be followed by observation of these courts by lawyers at a case-specific level.

The worst thing that states and bar associations can do is to allow the continuation of civil jurisdiction of non-lawyer courts without proper examination, while at the same time extolling the virtues of access to justice at all economic levels. If limited jurisdiction courts are expected to operate in civil matters as smaller versions of the rest of the court system, and to adjudicate matters involving technical statutory law and common law, then we must insist that the judges given this task have the necessary training to perform the task. The best indicator of this ability, and the best training for this task, is a law degree.

It is my sincere hope that the states that still have non-lawyer judges will take the time and effort to engage in appropriate study and reform of these courts.

APPENDIX 1

1997 Limited Jurisdiction New Judge Orientation

January 6 - 11, 1997

AGENDA

Monday, January 6 1997

ALL DAY JOINT SESSION WITH GENERAL JURISDICTION JUDGES

8:00 - 8:30 **Registration**

8:30 - 8:45 **Welcome and Introductions**
Honorable Thomas A. Zlaket
Honorable Stephen A. Gerst
Dean, Judicial College of Arizona
Honorable Stuart J. Shoob
Chair, Limited Jurisdiction Judges
Honorable David R. Cole
Chair, General Jurisdiction Judges
Karen Thorson, Division Director
Education Services, AOC

8:45 - 9:30 **What's Different Now That You're a Judge?**
Honorable Thomas A. Zlaket
Former Chief Justice Frank X. Gordon

9:30 - 9:45 **Break**

9:45 - 10:00 **Judicial Ethics**
Keith Stott, Executive Director
Commission on Judicial Conduct

10:00 - 12:00 **Judicial Ethics and Demeanor**
Honorable Robert W. Kuebler, Jr.
Honorable Allen G. Winker

12:00 - 1:30 **Group Lunch**

1:30 - 2:30 **Matrix Personality Inventory**
Jane Ball, Director of Training
National Curriculum and Training Institute

Monday, January 6,1997 (Continued)

2:30 - 2:45	**Break**
2:45 - 3:45	**Matrix Personality Inventory (Continued)**
3:45 - 4:00	**Break**
4:00 - 5:00	**Matrix Personality Inventory (Continued)**
5:00 - 6:30	**Reception for New Judges at Mesa Hilton Pavilion in Mesa**

Tuesday, January 7,1997

8:30 - 9:30	**Evidence** Honorable Joseph D. Howe
9:30 - 9:45	**Break**
9:45 - 10:45	**Evidence/Problem Solving (Continued)**
10:45 - 11:00	**Break**
11:00 - 12:00	**Evidence/Problem Solving (Continued)**
12:00 - 1:00	**Lunch on your own**
1:00 - 2:00	**Civil & Criminal Traffic** Honorable Jerry Adams
2:00 - 2:15	**Break**
2:15 - 3:15	**Civil & Criminal Traffic (Continued)**
3:15 - 3:30	**Break**
3:30 - 5:00	**Common Traffic Violations/Traffic Hearing/Role Play**
5:30 - 7:30	**Judicial College Dinner**

Wednesday, January 8,1997

8:30 - 9:30	**Arrest/Non-Vehicle Search & Seizure Warrants/Confessions/Motions/Pretrial Identification** Honorable Louis F. Dominguez Honorable Karyn Klausner
9:30 - 9:45	**Break**
9:45 - 10:45	**Vehicle Search ~ Seizure/Warrants/Problem Solving** Honorable Louis F. Dominguez Honorable Karyn Klausner
10:45 - 11:00	**Break**
11:00 - 11:45	**Vehicle Search & Seizure/Warrants/Problem Solving (Continued)**
11:45 - 12:00	**Mentor Discussion**
12:00 - 1:30	**Lunch on your own**
1:30 - 2:30	**Guilty Pleas** Honorable Joseph L. Olcavage
2:30 - 2:45	**Break**
2:45 - 3:45	**Guilty Pleas Demonstration and Role Play**
3:45 - 4:00	**Break**
4:00 - 5:00	**Initial Appearances** Honorable Joseph L. Olcavage

Thursday, January 9,1997

8:30 - 10:15	**Summary of DUI Law & Motions** Honorable Elizabeth R. Finn Honorable R. Michael Traynor Honorable Karyn K]ausner Kent Kearney, Esq., Asst. Prosecutor, City of Phoenix Sgt. Jeff Trapp, Department of Public Safety Sgt. Toby Dyas, Tempe Police Department
10:15 - 10:30	**Break**
10:30 - 11:30	**Summary of DUI Law and Motions (Continued)**
11:30 - 12:00	**Mentor Discussion**
12:00 - 1:30	**Lunch on your own**
1:30 - 1:45	**Summoning of Jurors** Honorable R. Michael Traynor
1:45 - 2:45	**Voir Dire/Challenges** Honorable Elizabeth R. Finn Honorable R. Michael Traynor
2:45 - 3:00	**Break**
3:00 - 3:45	**Mock Trial: Shoplifting**
3:45 - 4:00	**Break**
4:00 - 4:30	**Jury Instructions ~ Forms of Verdict** Honorable Elizabeth R. Finn Honorable R. Michael Traynor
4:30 - 5:00	**Discussion**
5:00 - 5:30	**Mentor Discussion**

Friday, January 10 1997

8:30 - 9:30	**Restitution/Victim's Rights** Honorable MaryAnne Majestic Honorable Roxanne Song Ong
9:30 - 9:45	**Break**
9:45 - 10:45	**Appeals/Sentencing** Honorable MaryAnne Majestic Honorable Roxanne Song Ong
10:45 - 11:00	**Break**
11:00 - 12:00	**Sentencing/Role Play** Honorable MaryAnne Majestic Honorable Roxanne Song Ong
12:00 - 1:30	**Lunch**
1:30 - 2:30	**Domestic Violence/Orders of Protection/Harassment** Honorable Elizabeth R. Finn
2:30 - 2:45	**Break**
2:45 - 3:45	**Domestic Violence/Orders of Protection/Harassment (Continued)**
3:45 - 4:00	**Break**
4:00 - 5:00	**Priors/Documentation** Honorable Michael K. Carroll

Saturday, January 11, 1997

8:00 - 9:30 **Landlord/Tenant & Problem Solving**
Honorable Robert Melton
Honorable Clayton R. Hamblen

9:30 - 9:45 **Break**

9:45-10:00 **Weddings**
Honorable James J. Sedillo

10:00 - 11:15 **Preliminary Hearings**
Honorable Judy Ferguson
Honorable Stuart Shoob
Honorable James Sedillo

11:15 - 12:00 **Lawyer Control**
Honorable James E. Carter
Honorable Stuart J. Shoob

I:\limited.nja\97-nja\agenda.jan /rev. 07/02/9ytrr~

1997 LIMITED JURISDICTION NEW JUDGE ORIENTATION - (Follow-up) March 10-14, 1997

AGENDA

Monday, March 10, 1997

8:30- 9:30	**Pre-trial Motions** Honorable James E. Carter, Maricopa County Superior Court Honorable John Kennedy, Mayer Justice Court
9:30 - 9:45	**Break**
9:45 - 10:45	**Pre-trial Motions (continued)**
10:45 - I 1:00	**Break**
1:00 - 12:00	**Pre-trial Motions (continued)**
12:00- 1:30	**Lunch**
1:30- 2:30	**Contracts** Honorable Toby Maureen Gerst, Maricopa County Superior Court
2:30 - 2:45	**Break**
2:45 - 3:45	**Contracts (continued)**
3:45 - 4:00	**Break**
4:00 - 5:00	**Contracts (continued)**

Tuesday, March 11, 1997

8:30 - 9:30	**Managing Trials Effectively (full day program)** Honorable Robert W. Kuebler, Jr., Prescott Justice Court
9:30 - 9:45	**Break**
9:45 - 10:45	**Managing Trials Effectively (continued)**
10:45 - 11:00	**Break**
11:00 - 12:00	**Managing Trials Effectively (continued)**
12:00 - 1:30	**Lunch**
1:30 - 2:30	**Managing Trials Effectively (continued)**
2:30 - 2:45	**Break**
2:45 - 3:45	**Managing Trials Effectively (continued)**
3:45 - 4:00	**Break**
4:00 - 5:00	**Managing Trials Effectively (continued)**

Wednesday, March 12, 1997

8:30 - 5:00	**Courtroom Observations (full day program)** Scottsdale Justice Court (new judges will choose which court they will observe according to their jurisdiction)

Thursday, March 13, 1997

8:30 - 9:30 **Operational Review**
Agnes Felton, Court Services, Arizona Supreme Court

9:30 - 9:45 **Break**

9:45 - 10:45 **Administrative Issues**
Honorable R. Michael Traynor, Chandler Municipal Court
Joan Harphant, Court Administrator, Chandler Municipal Court

10:45 - 11:00 **Break**

11:00 - 12:00 **Administrative Issues (continued)**

12:00- 1:30 **Lunch**

1:30 - 2:30 **Administrative Issues (continued)**

2:30 - 2:45 **Break**

2:45 - 3:45 **Human Resource Issues**
Carol Porter, Human Resource Officer - Arizona Supreme Court

3:45 - 4:00 **Break**

4:00 - 5:00 **Human Resource Issues (continued)**

5:00 - 6:30 **Reception**

Friday, March 14, 1997

8:30 - 9:30 **Contempt**
Honorable Edward C. Voss, III - Arizona Court of Appeals

9:30 - 9:45 **Break**

9:45 - 12:00 **Roundtable Discussion**

APPENDIX 2

JURISDICTIONAL LIMIT FOR NON-LAWYER JUDGES					
STATE	**$0 - 2,499**	**$2,500 - $4,999**	**$5,000 - $9,999**	**$10,000 - $14,999**	**$15,000 and up**
Alabama					
Alaska			$7,500 § 22.15.120(a)(1); 22.15.040		
Arizona			$5,000 § 22-201		
Arkansas	$300: Justices of the Peace - Art. 7, § 40d				
	$20 - $500. Nevada County Court of Common Pleas. § 16-16-1102.				
	$500: Garland, Lee, and Prairie County Courts of Common Pleas. § 16-16-704.				
	$1000: Mississippi County Court of Common Pleas - in actions of replevin and damage to persons or property § 16-16-1002(2)				No Limit: Mississippi County Court of Common Pleas - in contract actions § 16-16-1002(1)
	$1,000. Ashley, Drew, Chicot, Crittendon, Cross, Lonoke, and Madison County Courts of Common Pleas. §§ 16-16-202, -303, -403, -502, -803, -903.				
	$1,500. Desha County Court of Common Pleas. § 16-16-602.				All forcible entry and detainer actions. § 16-16-602.
California					
Colorado Class C & D Counties				$10,000 § 13-6-104	
Connecticut					

APPENDIX 2 (Continued)

STATE	$0 - 2,499	$2,500 - $4,999	$5,000 - $9,999	$10,000 - $14,999	$15,000 and up
Delaware					$15,000 tit. 10, § 9301, 9303, 9304
Florida					
Georgia			$5,000 § 15-10-2		
Hawaii					
Idaho		$3,000 § 1-2208			All forcible entry and detainer actions. § 1-2208
Illinois					
Indiana	$500 § 33-10.1-2-3.1	$3,000 § 33-10.1-2-4 (Certain large cities and towns); § 33-10.1-2-5 (Third class cities)			
Iowa		$4,000 §§ 602.6405; 631.1		Disposition of livestock worth less than $10,000. § 602.6405.	Most forcible entry and detainers. § 631.1(2).
Kansas				$10,000 § 20-302(b)	
Kentucky					
Louisiana	$2,000 § 13 L.S.A. 2586				Landlord/tenant - no limit unless it is a commercial rental or a farm. (Then, limit is $2,000) LA Code of Civ. Pro. Art. 4912
Maine					
Maryland					
Massachusetts					
Michigan					
Minnesota					
Mississippi		$2,500 § 9-11-9.			
Missouri					

APPENDIX 2 (Continued)

STATE	$0 - 2,499	$2,500 - $4,999	$5,000 - $9,999	$10,000 - $14,999	$15,000 and up
Montana Justice of the Peace & City Courts			$5,000 § 3-10-301(1), 3-11-102.		
Nebraska					
Nevada		$3,500 - all small claims for the recovery of money. § 4.370(1)(n); § 73.010	$7,500 - actions arising on contract for the recovery of money, actions for damages for personal injury, and for injury to real property. § 4.370(1)(a), (b).		
New Hampshire	$100 Const. art. 77				
New Jersey					
New Mexico			$5,000 § 35-3-3		
New York		$3,000 Uniform Justice Ct. Act § 201, 202			
North Carolina		$3,000 § 7A-210			
North Dakota Small claims referees			$5,000. § 27-08.1-01		
Ohio					
Oklahoma				$10,000 20 O.S.A. § 123	
Oregon		$3,500 § 51.080			
Pennsylvania					
Rhode Island					
South Carolina			$5,000 § 22-3-10		

APPENDIX 2 (Continued)

STATE	$0 - 2,499	$2,500 - $4,999	$5,000 - $9,999	$10,000 - $14,999	$15,000 and up
South Dakota			$8,000 § 16-12A-19 (noncontested proceedings only)		
Tennessee				$10,000 (Population of county between 285,000 - 286,000) § 16-15-501(d)(1)	$15,000 (Population of county up to 700,000) (excluding counties between 285,000 and 286,000) § 16-15-501(d)(1)
					$25,000 (Population of county 700,000 or over) § 16-15-501(d)(2)
					All forcible entry and detainer matters and recovery of personal property matters
Texas			$5,000 - Constitutional County Courts § 26.042		
			$5,000 - Justice Courts § 27.031		All forcible entry and detainer actions.
Utah			$5,000. §§ 75-5-104; 78-6-1.		
Vermont					
Virginia					
Washington					$35,000 § 3.66.020

APPENDIX 2 (Continued)

STATE	$0 - 2,499	$2,500 - $4,999	$5,000 - $9,999	$10,000 - $14,999	$15,000 and up
West Virginia			$5,000 § 50-2-1. No actions in equity		All matters of unlawful entry or detainer of real property or wrongful occupation of residential rental property if the title is not in dispute. § 50-2-1.
Wisconsin					
Wyoming		$3,000 § 5-4-106(a)(x)			

APPENDIX 3

LIMITED JURISDICTION COURT JUDICIAL QUALIFICATIONS						
STATE	COURT	Age	Citizen/Resident	Language	Education	Other
Alabama[1]						
Alaska[2]	District Court Magistrate	21	6 month Alaska Resident		No requirement	
Arizona[3]	Justice of the Peace	18	Resident of Arizona and elector where seeking office	Able to read and write English	No requirement	Qualifications same as for any elected county official. Training as required by the Arizona Supreme Court.[4]
Arkansas	Justice of the Peace[5]		Qualified elector and resident of township for which elected			
	All County Courts of Common Pleas[6]	25	US Citizen, Resident of state for 2 years, and Resident of county		Good business education	Man of upright character
California[7]						
Colorado[8]	Class A & B County Courts		Resident of County		Admitted to the Bar	
	Class C & D County Courts		Resident of County		High School diploma or equivalent	If not an attorney, must attend an institute.
Connecticut[9]						

1. All judges, except in probate court, must be licensed to practice law in Alabama. *See* ALA. CONST. amend. 328, § 6.07.
2. ALASKA STAT. 22.15.160(b) (Michie 1998).
3. ARIZ. REV. STAT. § 11-402 (1998).
4. *Id.* § 12-112.
5. ARK. CONST. art. 7, § 41.
6. *Id.* §§ 29, 32.
7. In 1966, justice of the peace courts were eliminated and made into municipal courts with lawyer judges. *See* CAL. CONST. art. 6, § 1; art. 6, § 15.
8. COLO. REV. STAT. ANN. § 13-6-203. The only Class A county is Denver. *See id.* § 13-6-201. Adams, Arapahoe, Boulder, Douglas, Eagle, El Paso, Jefferson, La Plata, Larimer, Mesa, Pueblo, and Weld counties are all Class B counties. *See id.* All of the rest are Class C or D counties. *See id.*
9. Justices of the Peace were abolished in 1961. *See* CONN. GEN. STAT. § 51-95a. All other judges, except probate judges, are required to be attorneys. *See id.* § 51-47(c).

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
Delaware[10]	Justice of the Peace				No requirement	
Florida[11]	County Court - population greater than 40,000				5 year member of Florida bar.	
	County Court - population less than 40,000				Member of the bar.[12]	
Georgia[13]	Magistrate Court	25	Resident of county 1 year before term of office begins.		High School diploma or equivalent	
Hawaii[14]						
Idaho[15]	Non-attorney Magistrate	30	Qualified elector of state of Idaho and Resident of County		High School graduate or equivalent	Must attend and institute
Illinois[16]	All Courts				Admitted to the Bar	
Indiana[17]	City and Town Court		Resident of City		Attorney is required in some courts.[18]	
	Marion County Small Claims Court (up to $6,000)[19]		US Citizen/ 1 year Resident of County		Admitted to the Bar[20]	High Moral Character and Reputation

10. There is no statutory or constitutional requirement that the justices of the peace be legally trained.
11. FLA. STAT. ANN. § 34.021 (West 1998).
12. If, on July 1, 1978, a non-lawyer had successfully completed a three-year law training program approved by the Florida Supreme Court and held a position as a judge, that person could seek re-election. *See* FLA. CONST. art. 5, § 20(c)(11); FLA. STAT. ANN. § 34.021(4) (West 1998).
13. GA. CODE ANN. § 15-10-22 (1998).
14. All justices and judges in Hawaii are required to be residents and citizens of Hawaii and the United States and licensed to practice law by the Supreme Court. *See* HAW. CONST. art. 6, § 3.
15. IDAHO CODE § 1-2206 (1998).
16. ILL. CONST. art. 6, § 11.
17. IND. CONST. art. 6, § 6; IND. CODE § 33-10.1-3-2 (1998).
18. There must be an attorney judge in Anderson city court, Brownsburg town court, Carmel city court, a city or town court in Lake County, Muncie city court, Noblesville city court, and Plainfield town court. *See* IND. CODE § 33-10.1-5-7 (1998).
19. *Id.* §§ 33-11.6-4-2, -3.
20. *Id.* § 3-8-1-30. If a person had one year of experience as a justice of the peace before January 1, 1976, and served as a justice of the peace on December 31, 1975, that person is "grandfathered" in. *See id.*

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
Iowa[21]	District Court Magistrates	Younger than 72	Resident of County of Appointment			Those admitted to bar are considered first by magistrate appointing commission.
Kansas[22]	District Court Magistrates		Resident of County		High School or secondary school graduate or equivalent.	If not attorney, must be certified by Kansas Supreme Court as qualified.
Kentucky[23]						
Louisiana[24]	Justice of the Peace		Qualified elector	Read and write the English language correctly	No requirement	Good moral character. The justice of the peace must also complete a Justice of the Peace Training Course once a year.[25]
Maine[26]	Justice of the Peace				Admitted to the Bar	
Maryland[27]	All Courts				Admitted to the Bar	
Massachusetts[28]						

21. IOWA CODE § 602.6404 (1998).
22. KAN. STAT. ANN. § 20-334(b) (1998).
23. Kentucky requires all judges to be licensed to practice law. *See* KY. CONST. art. 6, §§ 109, 122. A trial commissioner may be appointed by the chief judge of the district in any county in which no district judge resides. *See id.* § 113; KY. REV. STAT. ANN. § 5.010 (1998). This commissioner must be an attorney unless one is not available. KY. CONST. art. 6, § 113. Trial commissioners have civil jurisdiction in authorizing attachment and garnishment and writs of possession, conducting judicial sales, issuing emergency domestic abuse protective orders, issuing orders of arrest in domestic abuse cases, issuing writs of forcible entry, detainer, and warrants of restitution, preliminary proceedings; involuntary commitments; and compelling attendance of witnesses and production of evidence. KY REV. STAT. ANN. § 5.030.
24. LA. CIV. CODE ANN. art. 13, § 2582(A) (1998).
25. *Id.* art. 49, § 251.1
26. ME. REV. STAT. ANN. tit. 4, § 161 (West 1998).
27. MD. CONST. art. 4, § 2. The administrative judge of each district can appoint trial commissioners who may handle various criminal matters but have no civil jurisdiction. *See* MD. CODE ANN., CTS & JUD. PROC. § 2-607 (1998).
28. Although there is no statutory or constitutional provision requiring judges to be attorneys, Massachusetts has a Judicial Nominating Council that screens potential candidates and ensures there are attorney judges. Telephone Interview with Maria Z. Mossaides, Administrative Director, Supreme Judicial Court of Massachusetts (July 22, 1998).

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
Michigan[29]	District Court				Licensed to Practice Law in Michigan	
Minnesota[30]	County Court		Resident of County		Learned in the Law (Attorney)	
Mississippi[31]	Justice Court		2 year resident of county		High School graduate or equivalency[32]	
Missouri[33]						
Montana	City Court[34]		Resident of County			Must have the same qualifications as the Justice of the Peace and any other additional qualifications prescribed by ordinance
	Justice of the Peace[35]		US Citizen/1 year Resident of County			The justices are required to complete mandatory training.[36]
Nebraska[37]	County Court	30	US Citizen/Resident of County		Admitted to the Bar	Practicing law in NE for five years

29. MICH. COMP. LAWS ANN. § 600.8201 (West 1998). The district court has jurisdiction in civil cases up to $25,000. *See id.* § 600.8301 The court also has jurisdiction in small claims up to $1,750. *See id.* § 600.8401. District court judges can appoint non-lawyer magistrates to handle various criminal matters. *See id.* § 600.8507.

30. MINN. STAT. § 487.03 (1998). "Learned in the law" requires the judge be an attorney. *See* State v. Lindgren, 235 N.W.2d 379, 380 (Minn. 1975); State *ex rel.* Jack v. Schmahl, 147 N.W. 425 (Minn. 1914). The county court has jurisdiction in civil matters up to $15,000. *See* MINN. STAT. § 487.15 (1998). Those county court judges who are not learned in the law "shall not act in hearings, try or dispose of any case or proceeding involving jurisdiction in addition to that exercised by the judge at the time of the effective date of Laws 1971, chapter 951." *Id.* § 487.04.

31. MISS. CONST. art. 6, § 171.

32. If the person was a justice before January 1, 1976, then a high school education is not required. *See id.*

33. All judges in courts that handle civil cases must be licensed to practice law in Missouri. *See* MO. CONST. art. 5, § 21. The only non-lawyer judges in the state are in municipal courts that do not handle civil matters. *See* MO. REV. STAT. § 479.020 (1998).

34. MONT. CODE ANN. § 3-11-202 (1998).

35. *Id.* § 3-10-204.

36. *Id.* §§ 3-10-203; -202; 3-1-1502; -1503.

37. NEB. REV. STAT. § 24-505.01 (1998). Those who were county judges on August 24, 1979, can continue to serve even if they do not meet these requirements. *See id.* The civil jurisdiction limit in these courts is $15,000. *See id.* § 24-517.

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
Nevada[38]	Justice Court - population greater than 250,000		Qualified elector		Attorney in Nevada[39]	
	Justice Court - population less than 250,000		Qualified elector		High School education or equivalency	
New Hampshire[40]	Justice of the Peace		Registered Voter in NH for 3 years		No requirement	
New Jersey[41]						
New Mexico[42]	Magistrate Court - population less than 200,000		Qualified elector and reside in district		High School graduate or equivalency	Must attend qualification training program and yearly continuing education.[43]
	Magistrate - population over 200,000		Qualified elector and reside in district		Member of NM Bar and licensed to practice law	
New York	City Court within New York City[44]				Admitted to the Bar	
	District, Town, Village, or City Court outside New York City.[45]					If not a lawyer, must complete a course of training and education.

38. NEV. REV. STAT. § 4.010 (1998).
39. This provision does not apply to those who were justices before June 30, 1981. *See id.* § 4.010(3).
40. N.H. REV. STAT. ANN. § 455-A:1 (1998).
41. All New Jersey judges handling civil matters must be attorneys. *See* N.J. CONST. art. 6, § 6; N.J. REV. STAT. § 2A:6-8.1 (1998). There are non-attorney surrogates which have no civil jurisdiction. *See id.* § 2A:5. Municipal judges, who have criminal jurisdiction, do not have to be attorneys. *See id.* § 2B:12-7.
42. N.M. STAT. ANN. § 35-2-1 (1998).
43. *Id.* §§ 35-2-3, -4.
44. N.Y. CONST. art. 6, § 20(a).
45. *Id.* § 20(c). For application of the Uniform Justice Court Act to these courts, see N.Y. [UNIFORM] JUST. CT. ACT § 103 (1998).

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
North Carolina	District Court -Small Claims Actions[46]				Admitted to the Bar	
	District Court - Small Claims Actions-Magistrates[47]		Resident of the county		4 year degree from accredited senior institution of higher education or a 2 year associate degree and 4 years of work experience in a related field.	Course of training
North Dakota[48]	Small Claims Court[49]				Admitted to the Bar	
	Small Claims Court Referees[50]				Versed in the law.	
Ohio	County Court[51]				Admitted to the Bar	
	Municipal Court[52]				Admitted to the Bar	
Oklahoma	District Court Special Judges[53]				No requirement	Non-lawyer may be appointed if no lawyer available.
Oregon[54]	Justice Court		US Citizen/3 year Resident of State/1 year Resident in District			

46. All persons elected to or serving in judicial capacities on or before January 1, 1981 can continue to serve even if they are not attorneys. *See* N.C. CONST. art. 4, § 22.
47. N.C. GEN. STAT. § 7A-171.2 (1994). The Chief District Judge can refer small claims actions in district court to a magistrate. *See id.* § 7A-211.
48. N.D. CENT. CODE § 40-18-01 (1998).
49. Small claims court judges are district judges. *See id.* § 27-08.1-01. District Court judges must be learned in the law. *See* N.D. CONST. art. 6, § 10. This means they must be admitted to the bar. *See* Pearce v. Meier, 22 N.W.2d 94 (N.D. 1974).
50. N.D. CENT. CODE § 27-08.1-08. Referees are appointed by the presiding judge of the judicial district. *See id.*
51. OHIO REV. CODE ANN. § 1907.13 (Anderson 1998). This requirement does not apply to a judge holding office on November 1, 1962, who is subsequently a candidate to succeed himself or herself. *See id.*
52. *Id.* § 1901.06.
53. OKLA. CONST. art. 7, § 8(h).
54. OR. REV. STAT. § 51.240 (1998).

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
Pennsylvania[55]	District Courts					
Rhode Island[56]	Justice of the Peace		Qualified elector of state/Resident of Rhode Island			
South Carolina[57]	Magistrates	21	US Citizen/5 year Resident of State		High School diploma or equivalent	Training program and certification required
South Dakota[58]	Lay Magistrate		Qualified elector in appointed circuit		High School diploma or equivalent	
Tennessee[59]	Court of General Sessions	35	Resident of the state for 5 years and of the circuit or district for 1 year.		Licensed to practice law.[60]	If a vacancy occurs and no licensed attorney applies, a non-attorney may fill the position[61]
Texas	Constitutional County Court[62]					Well informed in the law of the State
	Justice of the Peace and Small Claims[63]					40 hours of education "in the performance of his duties" required.[64]

55. PA. CONST. art. 5, § 12; 42 PA. CONS. STAT. ANN. § 3101 (West 1998). Justices of the peace were changed to district justices who must be lawyers. The jurisdictional limit of these courts is $8,000. *See* 42 PA. CONS. STAT. ANN. § 1515(3) (West 1998). Judges of the traffic courts in Philadelphia and Pittsburgh do not have to be lawyers, but they do not have civil jurisdiction.
56. R.I. GEN. LAWS § 42-30-5 (1998). Judges of the District Court and Probate Court must also be members of the bar. *See id.* § 8-8-7(b); 8-9.2.1.
57. S.C. CODE ANN. § 22-1-10(B) (Law Co-op. 1998).
58. S.D. CODIFIED LAWS §§ 16-12A-5, -6 (Michie 1998).
59. TENN. CONST. art. 6, § 4; TENN..CODE ANN. § 17-1-106 (1998).
60. TENN. CODE ANN. § 16-15-5005 (1998). A §grandfather§ provision exists allowing those non-lawyers in office on August 1, 1990, to seek reelection so long as the person is continuously reelected. *See id.*
61. *Id.*
62. Tex. Const. art. 5, §§ 1, 15; This has been interpreted to not require a license to practice law. *See* Ex parte *Craig*, 193 S.W.2d 178 (Tex. 1946).
63. TEX. CONST. art. 5, §§ 1, 19.
64. TEX. GOV'T CODE ANN. § 27.005 (West 1998).

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
Utah[65]	County Justice Courts	25	Qualified voter, US Citizen, 3 year resident of Utah, and 6 month resident of precinct		High School diploma or equivalent.[66]	"Demonstrated maturity of judgment, integrity, and the ability to understand and apply the appropriate law with impartiality."
	Municipal Justice Court	25	Qualified voter, US Citizen, 3 year resident of Utah, and 6 month resident in county of municipality or adjacent county.		High School diploma or its equivalent	"Demonstrated maturity of judgment, integrity, and the ability to understand and apply the appropriate law with impartiality."
Vermont[67]					Admitted to the Bar	
Virginia[68]						
Washington[69]	District Court		Registered Voter of District		Admitted to the Bar	
	District Court - Population of less than 5,000		Registered Voter of District			If not attorney, must pass a qualifying examination.[70]

65. UTAH CODE ANN. § 78-5-137 (1998).
66. This requirement was added as of 1989. *See id.* § 78-5-137(3).
67. Judges that handle civil cases must be admitted to the practice of law for five years. *See* VT. STAT. ANN. tit. 4, § 602 (1998).
68. The justice of the peace system in Virginia was abolished in 1973. *See* VA. CODE ANN. § 19.2-30 (Michie 1974). There are non-lawyer circuit court magistrates whose jurisdiction is limited to criminal and ministerial matters. *See id.* § 19.2-45. The district courts are the courts not of record in Virginia. *See id.* § 16.1-69.6. All district court judges must be licensed to practice law in the Commonwealth. *See id.* § 16.1-69.15.
69. WASH. REV. CODE 3.34.060 (1998). If a person was elected a justice of the peace, district judge, municipal judge, or police judge before 1984 (when the justice courts were eliminated), he or she may remain a judge. *See id.*
70. WASH. S. CT. R. 8.

APPENDIX 3 (Continued)

STATE	COURT	Age	Citizen/Resident	Language	Education	Other
West Virginia[71]	Magistrate Court	21	Resident of County of Election		High School education or equivalent	Not convicted of crime involving moral turpitude. Must attend and complete a course in "rudimentary principles of law and procedure."
Wisconsin	Municipal Court[72]					
Wyoming	Justice of the Peace[73]		Qualified elector. Resident of the county unless specially appointed attorney from adjoining county		No requirement	Good moral character and reputation. 10 hours of continuing education is required each year.

71. W.V. CODE § 50-1-4 (1998).

72. Municipal Courts are not courts of record and therefore are not required to have attorney judges. *See* WIS. CONST. art. 7, § 24; WIS. STAT. ANN. § 755.01 (West 1998). The municipal courts handle no civil matters. *See* WIS. CONST. art. 7, § 14.

73. WYO. STAT. ANN.§ 5-4-105 (Michie 1998); WYO. J.P. CT. ADMIN. R. 2.

APPENDIX 4

STATE-BY-STATE COURT STATISTICS[1]			
STATE	**COURT**	**NUMBER OF COURTS**	**NUMBER OF JUDGES**
Alabama	District Court	67 districts	98
Alaska	District Court	56 locations in 4 districts	16 judges, 57 magistrates
Arizona	Justice of the Peace Court	82	82
Arkansas	Municipal Court	127	114
	County Court	75	75
	Police Court	5	5
	City Court	100	73
	Court of Common Pleas	4	4
	Justice of the Peace	55	55
California	Municipal Court	129	670 judges, 174 commissioners and 4 referees
Colorado	County Court	63	114 (62 full time and 52 part time)
Connecticut			
Delaware	Court of Common Pleas	3 counties	5
	Justice of the Peace Court	19	53 and 1 chief magistrate
Florida	County Court	67 counties	254
Georgia	Civil Court	Bibb and Richmond counties	3
	Municipal Court	1 court in Columbus	1
	State Court	65	50 full time and 43 part time
	Magistrate Court	159	159 chief magistrates, and 314 magistrates, 27 of whom also serve probate or civil courts
Hawaii	District Court	4 circuits	22
Idaho			
Illinois			
Indiana	County Court	15	15
	City Court	48	48
	Small Claims Court of Marion County	9	9
Iowa			
Kansas			
Kentucky	District Court	59 judicial districts	125 (plus 71 trial commissioners)
Louisiana	Justice of the Peace	~390	~390
	City and Parish Courts	53	73
Maine	District Court	13 districts, 32 locations	25

APPENDIX 4 (Continued)

STATE	COURT	NUMBER OF COURTS	NUMBER OF JUDGES
Maryland	District Court	12 districts in 24 counties	98
Massachusetts			
Michigan	District Court	101 districts	259
	Municipal Court	5	6
Minnesota			
Mississippi	County Court	19 counties	23
	Justice Court	92	191
Missouri	Municipal Court	412	335
Montana	Justice of the Peace	71	75, 36 of these also serve as city court judges
	Municipal Court	1	1
	City Court	86	54 plus 36 JOPs who also serve as city court judges
Nebraska	County Court	93 courts in 12 districts	57 judges
Nevada	Justice Court	56	67
	Municipal	19	30 (11 also serve as JOP)
New Hampshire	District Court	40	16 full time and 70 part time
	Municipal Court	1	1 part time
New Jersey	Municipal Court	535	365 (about 14 full time)
New Mexico	Magistrate Court	32	59
	Bernalillo County Metropolitan Court	1	15
New York	Town and Village Justice Court	1487	2242
	Civil Court of the City of New York	1	120
	District Court (Nassau and Suffolk counties)	1	50
	Court of Claims	1	64 judges, 46 act as supreme court judges
North Carolina	District Court	39 districts	192 judges and 676 magistrates
North Dakota	Municipal Court	80	76
Ohio	Municipal Court	118	201
	County Court	49	55
Oklahoma			
Oregon	Justice Court	35	33
Pennsylvania	Philadelphia Municipal Court	1	22
	District Justice Court	538	550
	Pittsburgh City Magistrates	1	6
Rhode Island			
South Carolina	Magistrate Court	286	285

APPENDIX 4 (Continued)

STATE	COURT	NUMBER OF COURTS	NUMBER OF JUDGES
South Dakota			
Tennessee	General Sessions Court	93 counties, 2 additional counties have a trial justice court	154
Texas	Constitutional County Court	254	254
	County Court at Law	171	171
	Justice of the Peace Court	842	842
Utah	Justice Court	171 cities/counties	128
Vermont			
Virginia	District Court	204	118
Washington	District Court	49 courts in 61 locations for 39 counties	112
West Virginia	Magistrate Court	55	154
Wisconsin			
Wyoming	Justice of the Peace	10	10
	County Court	16 courts in 14 counties	19

1. All statistics are from 1995, published by the National Center for State Courts§ Statistics Project. *State Court Caseload Statistics, 1995*, National Center for State Courts' Statistics Project, 8-59 (1996).