
**WHO DECIDES JUSTICE: THE CASE FOR LEGALLY TRAINED
MAGISTRATE JUDGES IN WEST VIRGINIA**

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I. INTRODUCTION

What if you were arrested for a crime and went to trial only to find out that the judge for your case was not licensed to practice law? What if they had not even gone to law school? What if your judge’s only prior experience was “working in a chemical dependency program and a grocery store”?¹ In January

¹ Tony Mauro, *Nonlawyer Judges? SCOTUS Doesn’t Seem to Mind*, LAW.COM (Jan. 18, 2017, 4:28 PM), <https://www.law.com/almID/1202777059148/?mcode=1202615549854&curindex=97>.

2013, the routine functions of such a magistrate judge were put to the test in Montana when a citizen, Kelly Davis, was found guilty of driving under the influence,² punishable by up to one year in jail.³ Before trial, Davis filed a motion to dismiss, arguing the “prosecution of a jailable offense before a non-lawyer judge” violated both the Due Process and Right to Counsel Clauses of the United States and Montana Constitutions.⁴ The Justice Court⁵ denied the motion and Davis was found guilty.⁶ He then appealed the judgment, demanding a de novo review or a completely new trial from the district court, staffed by lawyer-judges.⁷

The district court, however, denied Davis’s motion to dismiss, and concluded his constitutional rights “had not been violated . . . by a non-lawyer judge.”⁸ Undeterred by his defeats in lower courts, Davis appealed. Again, he argued any cases involving potential incarceration should be heard by lawyer-judges,⁹ noting, “laypersons, by definition, lack the requisite expertise of an attorney to evaluate arguments.”¹⁰ Perhaps most powerfully, Davis noted that even *if* a non-lawyer judge’s mistake is caught during an appeal, defendants could serve their entire term of imprisonment before the appellate system could provide relief.¹¹

Ultimately, Davis’s best attempts appealing through the state system proved futile. The state supreme court upheld the lower court, recognizing that a case before a non-lawyer judge, even without a de novo review, did not violate constitutional rights to due process or effective assistance of counsel.¹² It also rejected claims that a defendant’s constitutional right to counsel confers a similar right to a lawyer-judge.¹³ The court even tried to justify the lack of formal educational requirements by noting that justices of the peace go through

² State v. Davis, 371 P.3d 979, 982 (Mont. 2016).

³ *Id.*

⁴ *Id.*

⁵ Some jurisdictions, such as Montana, have the equivalent of magistrate judges and magistrate court. *Id.* These are known as justices of the peace and justice court. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 983.

¹¹ *Id.* at 984.

¹² *Id.* at 990.

¹³ *Id.*

“extensive training.”¹⁴ Yet somehow, this “extensive training” amounts to less than a business week of classes and sessions.¹⁵

What follows is a debate with essentially two sides. On the one hand, there is a rich, historical tradition in allowing non-lawyers to serve as lower court judges. Proponents of non-lawyer judges argue that there are few, if any, adverse consequences for defendants and the public. In fact, it may even be more practical and timely to use non-lawyer judges for lower courts.¹⁶ On the other hand, citizens have been long afforded constitutional rights to a trial by jury and to be represented by an attorney. Defendants facing non-lawyer judges are potentially handicapped by facing a legal system without a lawyer in arguably the most consequential role, a judge. As judges take the chief role in admitting or excluding evidence, issuing warrants, setting bail, and other important legal matters, they can greatly influence the outcome of legal proceedings. From beginning to end, few others can lay claim to such power in shaping legal outcomes.

Perhaps, then, it would take many by surprise to learn the front lines of the legal system in some states are staffed by non-lawyer judges, armed with no more than a high school diploma and a short, legal education in the form of orientation and on-the-job training.¹⁷ Consider the judge presiding over Davis’s case, whose background consisted of working in a chemical dependency program and a grocery store.¹⁸ But non-lawyer magistrates have a long history throughout the country, products of an arguably by-gone era where the country was more rural and lawyers were fewer in number.¹⁹ Nevertheless, eight states allow non-lawyer judges to try misdemeanor cases that can result in prison sentences, without the opportunity for de novo review before a lawyer-judge.²⁰ Another 14 states allow for non-lawyer judges to try criminal cases, but offer a subsequent trial before a lawyer-judge.²¹

¹⁴ *Id.* at 983. The “extensive training” the court referred to, however, is merely a four-day certification course. By comparison, to be a massage therapist in Montana you need 500 hours of study and to become a certified barber, you need 1,500 hours of study. MONT. CODE ANN. § 37-33-502(2)(a) (West 2018); MONT. CODE ANN. § 37-31-304(3)(a) (West 2018).

¹⁵ *Id.*

¹⁶ See DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* (1986).

¹⁷ W. VA. CODE ANN. § 50-1-4 (West 2018); *Davis*, 371 P.3d at 990.

¹⁸ Mauro, *supra* note 1.

¹⁹ “[I]t is not until one is past the middle of the eighteenth century that society is complex enough to afford the luxury of a specialized professional legal class of size or influence.” James Willard Hurst, *Lawyers in American Society 1750-1966*, 50 MARQ. L. REV. 594, 594 (1967).

²⁰ Mauro, *supra* note 1.

²¹ *Id.*

This Note sets out to explore the shortcomings brought on by the utilization of non-lawyers as magistrates. More specifically, this Note will focus on the magistrate justice system in West Virginia and argue magistrates should be required to possess a law degree from an American Bar Association accredited law school. First, Part II of this Note will begin by providing background information concerning the history of magistrates in West Virginia, their necessary qualifications, and an exploration of the appeals process brought on by their decisions. It will also introduce Kentucky as a model jurisdiction for West Virginia to follow. Part III of this Note will then compare Kentucky's exclusive use of lawyer-judges to West Virginia's system, arguing jurisdictions that only use lawyer-judges offer more protections and rights for defendants, thus giving West Virginia a template to follow. Finally, this Note will conclude in Part IV by expressing hope that legislators, legal scholars, and citizens in West Virginia will continue pursuing multiple ways to secure a higher benchmark for the judicial system by installing and encouraging more lawyer-judges at the magistrate level.

II. BACKGROUND

Part II of this Note examines the current state of the magistrate judge system in West Virginia, noting current requirements and shortcomings. Section II.A provides an overview of the history of magistrate judges in West Virginia, including many changes in their elections and workloads over the years. Section II.B explores the current qualifications necessary to serve as a magistrate judge in West Virginia today, including the few constitutional requirements. Section II.C explores West Virginia's unique appeals process in magistrate court, which provides de novo review to bench trials, but only "on the record" appeal for jury trials. Section II.D discusses the historical tradition of non-lawyer judges and their popularity, and continued presence as part of court systems nationwide. Finally, Section II.E provides a model jurisdiction for West Virginia by discussing Kentucky's transformation from a state that once defended the constitutionality of non-lawyer judges to one that ultimately decided to outlaw them.

A. *How Did We Get Here? A History of Magistrate Judges in West Virginia*

There are currently 158 magistrate judges in West Virginia today, with at least two in each county, and up to ten in the state's largest county, Kanawha.²² Current magistrates are chosen by local citizens, serving four-year terms upon

²² *Magistrate Courts—Trial Courts of Limited Jurisdiction*, W. VA. JUDICIARY, <http://www.courtswv.gov/lower-courts/magistrate-courts.html> (last visited Oct. 4, 2018).

their election.²³ The role of magistrates in West Virginia, however, only dates back a few decades itself.²⁴ The modern magisterial position finds support in both the West Virginia State Constitution and the West Virginia Code. Before 1976, magistrates were instead local “justice[s] of the peace.”²⁵

Over the intervening years since, the Legislature has taken it upon itself to revise and review the role of magistrate judges, including caseload discrepancies.²⁶

For instance, the Legislature enacted a law which found “large and unwarranted” discrepancies in caseloads between magistrate courts in a system last reformed in 1991.²⁷ The Legislature blamed “certain anomalies which cause[d] reallocation” of magistrate resources, leading to inequitable workloads, wasted funding, avoidable resource shifting, and confusion between counties.²⁸ As a result, the Office of Legislative Services was ordered to undertake a comprehensive study of magistrate courts to determine how work time was spent.²⁹ This study was ultimately submitted to the Legislature by the end of 2001.³⁰

Further, the State Legislature ordered the Division of Criminal Justice and Highway Safety and the Supreme Court of Appeals of West Virginia to compile statistical data on caseloads.³¹ This data broke down cases per magistrate, county, and circuit, along with recommendations to improve the process, such as developing a weighted formula to evaluate cases by the amount of time needed to achieve a resolution.³² While this report was submitted to the

²³ *Id.*

²⁴ Justices of the peace were the precursor to magistrate judges in West Virginia, and many states. *See* W. VA. CODE ANN. § 50-1-4 (West 2018); Krista Unterzuber, *Justices of the Peace and Magistrates in Virginia and West Virginia* (May 1977) (unpublished Master’s Thesis, University of Richmond), <https://scholarship.richmond.edu/masters-theses/1188>. In fact, justices of the peace have historical roots dating back to Great Britain. *Id.* While many duties between justices of the peace and magistrates are the same, there are some key differences. *Id.* Notably, while magistrates today can oversee criminal misdemeanors involving jail time up to a year, the State Constitution did not grant justices of the peace any jurisdiction in criminal cases, except where county-wide criminal jurisdiction could be provided by law, and imprisonment did not exceed 30 days. *Id.*

²⁵ W. VA. CODE ANN. § 50-1-4 (West 2018).

²⁶ *Id.* § 50-1-2(c).

²⁷ *Id.*

²⁸ *Id.* § 50-1-2(c)(1).

²⁹ *Id.* § 50-1-2(c)(2).

³⁰ *Id.*

³¹ *Id.* § 50-1-2(c)(3).

³² *Id.*

Legislature in early 2002, much of this information is still published by the courts and publicly available today.³³

Sensing reform was still incomplete, the Legislature also called for a new study in 2013. This time, the National Center for State Courts in conjunction with the Supreme Court of Appeals of West Virginia was to review caseloads and make recommendations on how to best adequately use magistrates in the state.³⁴ This included proposals for magistrates to be potentially reassigned or add a jurisdiction to hear cases from neighboring counties with higher caseloads.³⁵

Yet, it is not just concerns about magistrate caseloads which have come under scrutiny. Even the way magistrates are elected has changed in recent years. In 2015, for example, the Legislature enacted judicial reform, which provided for nonpartisan judicial elections statewide, from magistrate judges all the way up to the state's highest court.³⁶ As a result, party-driven primary elections were eliminated and instead replaced with nonpartisan elections, which take place in the spring alongside primary elections for legislative and executive offices.³⁷ The first of these nonpartisan elections took place on May 10, 2016.³⁸

Finally, West Virginia magistrates also used to be paid on a tier system, where those serving smaller, more rural populations would be paid less than those magistrates serving larger populations.³⁹ While the discrepancy was under \$7,000 annually, the system nevertheless proved to be controversial and the subject of numerous "equal protection violations" lawsuits of both the state and federal constitutions.⁴⁰ Even as the tiered payment system survived these charges, the Legislature took the advice of the Supreme Court of Appeals and decided a two-tiered salary schedule based on population was "no longer an equitable and rational manner" to compensate magistrates.⁴¹ As a result,

³³ For information regarding the various reports organized by the type of filing available, see W.VA. JUDICIARY, 2016 MAGISTRATE COURT STATEWIDE DATA, <http://www.courtswv.gov/lower-courts/pdfs/2016MagistrateCourtStatewideData.pdf> (last visited Oct. 7, 2018).

³⁴ W. VA. CODE ANN. § 50-1-3(e) (West 2018).

³⁵ *Id.*

³⁶ Wendy Holdren, *Governor Signs Nonpartisan Election of Judges Measure*, REG. HERALD (Apr. 18, 2015), http://www.register-herald.com/news/governor-signs-nonpartisan-election-of-judges-measure/article_3b5de5ea-7bde-539b-ae0-d6280dbafc13.html.

³⁷ W. VA. CODE ANN. § 50-1-1 (West 2018).

³⁸ *Statewide Results Primary Election-May 2016*, W. VA. SEC'Y OF ST., <http://services.sos.wv.gov/apps/elections/results/results.aspx?year=2016&eid=22&county=Statewide> (last visited Oct. 7, 2018).

³⁹ W. VA. CODE ANN. § 50-1-3 (West 2018).

⁴⁰ *State ex rel. Moody v. Gainer*, 377 S.E.2d 648, 649 (W.Va. 1988); *State ex rel. W. Va. Magistrates Ass'n v. Gainer*, 332 S.E.2d 814, 815 (W. Va. 1985); *Donaldson v. Gainer*, 294 S.E.2d 103, 104 (W. Va. 1982).

⁴¹ W. VA. CODE ANN. § 50-1-3 (West 2018).

beginning on January 1, 2017, all magistrates were paid an equal salary of \$57,500.⁴²

B. What's in a Magistrate? The Current Qualifications

The West Virginia Code lays out the few requirements necessary to serve as a magistrate in West Virginia. You must (1) be at least twenty-one years old, (2) possess a high school education or equivalent, (3) be free of any felony conviction or misdemeanor involving moral turpitude, and (4) reside in the county of election.⁴³ There is also a further restriction that no magistrate shall be an immediate family member of any other magistrate in the county.⁴⁴

Yet to fully understand the magistrate requirements in West Virginia is to also understand what the requirements are *not*. West Virginia's Constitution specifically bans any requirement for magistrates in the state to practice law.⁴⁵ Amending the Constitution, like many constitutions, would also be difficult. Amending the West Virginia Constitution requires a vote of both the Legislature and citizens.⁴⁶ It is worth noting, however, a ban on *requiring* magistrates to be lawyers does not mean magistrates *cannot* be lawyers. In fact, some magistrates are lawyers in the state.⁴⁷

Without the requirement of a law license, a newly elected magistrate must instead attend and complete a course encompassing "rudimentary principles of law and procedure," as laid out by supervisory rules from the Supreme Court of Appeals.⁴⁸ Magistrates are also required to attend continuing education courses and failure to attend can constitute negligence of duty.⁴⁹ Magistrates who serve populations of 5,000 or fewer are required to devote time to the position as determined by a judge or chief judge of the circuit court, whereas those serving larger populations are considered fulltime in the role.⁵⁰

A magistrate can be removed from the position for conviction of a felony or a misdemeanor if it involves moral turpitude or a duty of the office.⁵¹ There are several mechanisms for removing a magistrate, including a motion from a

⁴² *Id.* § 50-1-3(f).

⁴³ *Id.* § 50-1-4.

⁴⁴ *Id.* In the state Code, immediate family means a mother, father, sister, brother, child, or spouse. *Id.* If more than one member of an immediate family is elected, only the member receiving the highest number of votes is eligible to serve. *Id.*

⁴⁵ W. VA. CONST. art. VIII, § 10.

⁴⁶ W. VA. CONST. art. XIV, § 2.

⁴⁷ See *Magistrate Courts—Trial Courts of Limited Jurisdiction*, *supra* note 22.

⁴⁸ W. VA. CODE ANN. §50-1-4 (West 2018).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* § 50-1-5.

circuit court judge of the county.⁵² A magistrate can also be censured or temporarily suspended.⁵³ If a vacancy occurs, a circuit court judge fills the seat, and an election for the unexpired term can be held.⁵⁴

Magistrates are also provided magistrate assistants and sometimes court clerks to help with their legal duties. Each magistrate is entitled to one magistrate assistant. In counties with three or more magistrates, they are entitled to a magistrate assistant *and* a court clerk.⁵⁵ State law also provides for the appointment of court deputy clerks on an as needed basis.⁵⁶

Finally, in addition to abiding by the Code of Judicial Ethics adopted by the Supreme Court of Appeals, no magistrate or staff member can (1) acquire or hold interest in any matter before the magistrate court, (2) purchase any property being sold upon execution issued by the magistrate court, (3) act as agent or attorney for any party in any proceeding in any magistrate court in the state, or (4) engage or assist in any private business while on magistrate court property.⁵⁷

C. *What if I Disagree? Appeals Process from Magistrate to Circuit Courts*

In general, each citizen who goes before a magistrate court in West Virginia may appeal as a matter of right in both civil and criminal cases.⁵⁸ Circuit judges review appeals from magistrate court, typically in the same county.⁵⁹ A key difference in the appeal emerges, however, based on whether a bench or jury trial took place.⁶⁰ For jury trials, civil or criminal, any appeals are based on the *record*, whereas bench trials are considered *de novo*, or without any deference to the magistrate trial judge.⁶¹ Citizens who disagree with the trial outcome can also

⁵² *Id.* A circuit court judge is only likely to motion for a magistrate's removal upon meeting the other statutory grounds for removal, including, but not limited to, conviction of a felony, or a misdemeanor if it involves moral turpitude or a duty of the office. *Id.*

⁵³ *Id.*

⁵⁴ *Id.* § 50-1-6.

⁵⁵ *Id.* §§ 50-1-8, 50-1-9.

⁵⁶ *Id.* § 50-1-9a.

⁵⁷ *Id.* § 50-1-12.

⁵⁸ A defendant cannot, however, appeal if they have pleaded guilty and were represented by counsel when the plea was entered. W. VA. JUDICIARY, INFORMATION REGARDING THE APPEALS PROCESS FROM MAGISTRATE COURT TO CIRCUIT COURT 1, http://www.courtsww.gov/lower-courts/magistrate-forms/information_regarding_the_appeal_process_from_mag_ct_to_cir_ct_sca_m1250_1.pdf (last visited Nov. 11, 2018).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

motion for a new trial.⁶² These motions are filed with the magistrate who entered judgment and will only be granted on a “good cause showing” that a new trial would be “in the interest of justice.”⁶³

Although civil and criminal appeals of magistrate rulings are similar in many respects, they differ in a few, key ways. Rule 18 of the Rules of Civil Procedure and West Virginia Code § 50-5-12 govern the civil appeals process for magistrate courts.⁶⁴ The act of merely filing the appeal automatically stays further proceedings to enforce the judgment.⁶⁵ Notice of appeals must be filed within 20 days after judgment is entered or denial of a motion for a new trial.⁶⁶ Appellees are also required to post an appeal bond, pay a circuit court filing fee, and file a petition for appeal with the circuit court’s office.⁶⁷ If appealing a jury verdict, the appellee must then designate the “portions of the testimony or other matters reflected on the record” to rely on in the appeal.⁶⁸ The responding party then has an opportunity to designate additional parts of the record to include in the appeal before the circuit judge schedules the matter for a hearing.⁶⁹

By contrast, Criminal Procedure Rule 20.1 and West Virginia Code § 50-5-13 govern the criminal appeals process.⁷⁰ Similarly to civil appeals, however, filing a criminal appeal automatically stays further proceedings, and the notice must be filed within 20 days.⁷¹ Much like civil appeals, criminal appellants are also required to post an appeal bond, pay a circuit court filing fee, and file a petition for appeal with the circuit court’s office.⁷² If appealing a jury verdict, the appellant must also designate the “portions of the testimony or other matters reflected on the record” to rely on in the appeal.⁷³ Like in civil cases, the responding party then has an opportunity to designate parts of the record for inclusion in the appeal.⁷⁴ In criminal appeals, however, the responding party will be the prosecutor.⁷⁵

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

D. *What's in a Magistrate Now? Judicial Adequacy in a Modern Era*

Before reading a case such as *State v. Davis*,⁷⁶ some may assume all important judicial functions—from setting fines and bail to sentencing citizens to jail—fall upon an entrusted member of the legal community, who has passed a state bar exam and graduated from a rigorous, accredited legal program.⁷⁷ After all, becoming a lawyer is one of the most popular professional programs in the United States, with estimates putting lawyers over the one million mark.⁷⁸ The United States is even unique in regarding legal education as a post-graduate education—only obtainable once a prospective law student has graduated from an undergraduate institution, taken a standardized entrance exam, and performed well enough to warrant admittance.⁷⁹ With such vestiges of time and resources—mental, emotional, and financial—it is no secret that law is a highly regulated and protected industry.⁸⁰

As such, criticism of non-lawyer judges is not necessarily a new phenomenon.⁸¹ While defenders of non-lawyer judges note the historical roots of the practice, critiques of non-lawyer judges date back several decades.⁸² As early as the 1970s, leading newspapers ran front-page stories calling into question the role of non-lawyer judges.⁸³ In one account, a non-lawyer judge held a jury trial in an abandoned schoolhouse that finished in less than 90 minutes, and a bench

⁷⁶ 371 P.3d 979, 981 (Mont. 2016).

⁷⁷ “I’ve noticed district magistrates have a great variety of backgrounds. I was often sort of stunned about the paucity of lawyers.” Bob Kalinowski, *Most District Judges in County Lack Legal Background*, STANDARD-SPEAKER (Mar. 24, 2015), <https://www.standardspeaker.com/news/most-district-judges-in-county-lack-legal-background-1.1852312>.

⁷⁸ AM. BAR ASS’N, LAWYER DEMOGRAPHICS (2011), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf

⁷⁹ “Most law schools require the LSAT, and many will require you to take the test by November/December for admission the following fall.” *Steps to Apply: JD Programs*, LSAC, <https://www.lsac.org/jd-applicants/steps-apply-jd-programs> (last visited Oct. 5, 2018).

⁸⁰ See generally *Rules for Admission to the Practice of Law*, W. VA. JUDICIARY, <http://www.courtswv.gov/legal-community/rules-for-admission.html> (last visited Oct. 5, 2018).

⁸¹ See *North v. Russell*, 427 U.S. 328, 346 (1976) (Stewart, J., dissenting).

⁸² “Where is the justice . . . who has ever studied law, or who could pass the entrance examination to any accredited college? Some, perhaps the majority, are kindly men who make good friends and neighbors; but as ministers of law and justice they are strangely [sic] out of joint with the times.” Robert S. Keebler, *Our Justice of the Peace Courts—A Problem in Justice*, 9 TENN. L. REV. 1, 12 (1930); Cathy Lesser Mansfield, *Disorder in the People’s Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. REV. 119 (1999).

⁸³ Lesley Oelsner, *Nonlawyer Judges Under New Attack*, N.Y. TIMES (June 2, 1975), <https://www.nytimes.com/1975/06/02/archives/nonlawyer-judges-under-new-attack-nonlawyer-judges-under-attack-in.html>.

trial in just 15 minutes.⁸⁴ In some instances, the remaining flourish of non-lawyer judges is owed to their popularity. In many jurisdictions that allow for non-lawyer-judges, their fellow citizens often elect them.⁸⁵ Consider the example of a South Carolina game warden, armed with no more than a high school education, who ran against a local attorney in the 1970s.⁸⁶ The lawyer ran on the campaign slogan, “Wouldn’t you rather have a lawyer as a judge?” and lost two to one.⁸⁷ Some defenders of non-lawyer judges even quip that it is not a requirement for U.S. Supreme Court Justices to be lawyers.⁸⁸ In reality, however, all 114 Justices to ever serve on the court to date have been lawyers, and frankly most people would probably want them to be.⁸⁹

In addition to their popularity and historical tradition, defenders of non-lawyer-judges argue that in rural areas, they are merely more practical.⁹⁰ Thus, some states allow non-lawyer judges to serve in rural or sparsely populated areas.⁹¹ Additionally, some defenders of non-lawyer judges may point to low numbers of citizens who hold associates or undergraduate college degrees, let alone law degrees.⁹² This is especially true in West Virginia, where citizens rank near last or last among states in post-secondary degrees.⁹³

Unfortunately, another troubling reality is that some jurisdictions, such as West Virginia, still allow non-lawyer judges *without* an automatic right to

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Ken Rudin, *Nonlawyers on the Supreme Court?*, NPR (May 28, 2009), https://www.npr.org/sections/politicaljunkie/2009/05/nonlawyers_on_the_supreme_cour.html.

⁸⁹ Every single Justice has “either attended law school, took law classes, was admitted to the bar, or practiced law.” *Id.*; see also *FAQs—General Information*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx (last visited Sept. 23, 2018).

⁹⁰ “[S]low transportation among the communities of sparsely populated states made it almost impossible for the handful of attorney judges to cover all the rural areas.” Allan Ashman & David L. Lee, *Non-Lawyer Judges: The Long Road North*, 53 CHI. KENT L. REV. 565, 567 (1977).

⁹¹ In West Virginia, an argument can be made that much of the state is encompassed in rural areas. Matt Ford, *When Your Judge Isn’t a Lawyer*, THE ATLANTIC (Feb. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/>.

⁹² While Americans have come a long way since less than 5% of citizens 25 or older held a degree in 1940, over 65% of Americans, 25 or older, still lack a college degree today. Reid Wilson, *Census: More Americans Have College Degrees than ever Before*, THE HILL (April 3, 2017), <http://thehill.com/homenews/state-watch/326995-census-more-americans-have-college-degrees-than-ever-before>.

⁹³ Karsten Strauss, *The Most—And Least—Educated States in The U.S. in 2017*, FORBES (Feb. 3, 2017), <https://www.forbes.com/sites/karstenstrauss/2017/02/03/the-most-and-least-educated-states-in-the-u-s-in-2017/#27d7213171be>.

appeal in all cases.⁹⁴ While West Virginia has long used non-lawyer judges, only defendants before a *bench trial* have an automatic right of appeal.⁹⁵ In some jurisdictions, this is presented as an attempt to save money.⁹⁶ Some states even allow counties to exclude themselves from *any* right of appeal if they designated their magistrate courts as “courts of record.”⁹⁷ To advocates of all lawyer-judges, this development is especially alarming, conjuring questions of whether the use of non-lawyer judges is even fair to due process, or the Sixth Amendment right to a fair trial.⁹⁸ As one law professor openly asks, “What’s the point of having a legally-trained lawyer if the judge can’t understand what they’re saying?”⁹⁹

This is exactly the question jurisdictions, like West Virginia, struggle to answer. In fact, a state bordering just to the southwest provides the perfect case study in how to answer it: eliminate non-lawyer judges altogether.

E. Case Study: Comparing Kentucky’s Transformation

As previously noted, there are eight states with non-lawyer judges where criminal defendants are *not* entitled to a *de novo* review by a lawyer-judge.¹⁰⁰ Another 14 allow for a new trial before a lawyer-judge on appeal.¹⁰¹ Only nine states allow for non-lawyer judges in civil cases. In total, 31 states allow for non-lawyer-judges in some capacity.¹⁰² This leaves a minority of states, only 19, where all judges are lawyers.¹⁰³

For its part, the U.S. Supreme Court has yet to answer a central question: whether it is constitutional for a criminal defendant to be tried by a non-lawyer judge when a state does *not* provide the criminal defendant a new trial before a lawyer-judge. In the little precedent that exists, the Court previously upheld the constitutionality of non-lawyer judges when defendants *do* have a right to *de novo* review.¹⁰⁴ Section II.E.1 explores that case law, which is the Supreme

⁹⁴ W. VA. CODE ANN. §§ 50-1-8, 50-1-9 (West 2018).

⁹⁵ *Id.*

⁹⁶ Ford, *supra* note 91.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Mauro, *supra* note 1.

¹⁰¹ While West Virginia is included in the 14 states allowing for a new trial before a lawyer-judge on appeal, it is more accurate to refer to the state as a “hybrid model,” because an appeal before a lawyer-judge is only given for bench trials, and not jury trials. *Id.*

¹⁰² David Carroll, *Should Non-Lawyer Judges Be Sending People to Jail? SCOTUS Asked to Review*, SIXTH AMEND. CTR. (Dec. 12, 2016), <http://sixthamendment.org/should-non-lawyer-judges-be-sending-people-to-jail-scotus-asked-to-review/>.

¹⁰³ *Id.*

¹⁰⁴ *See infra* Section II.E.1.

Court's decision in *North v. Russell*,¹⁰⁵ in which the court upheld Kentucky's use of non-lawyer judges because defendants had a right to a de novo appeal, or new trial, before lawyer-judges at the circuit level. Section II.E.2 notes that although Kentucky's use of non-lawyer judges was technically upheld, the state decided to switch to exclusively lawyer-judges anyway, through a judicial overhaul that brought together lawyers, scholars, the media, and citizens alike.

1. Supreme Approval: *North v. Russell*

The standard on the constitutionality of non-lawyer judges traces back to *North v. Russell*, a 1976 U.S. Supreme Court case, which held the Due Process Clause permits a criminal defendant facing jail time to be tried by a non-lawyer judge—provided that the defendant has the right to a de novo trial before a lawyer-judge.¹⁰⁶

In blessing the use of non-lawyer judges, the Supreme Court went to great lengths to describe the existing standard in Kentucky at the time, which allowed a new trial to be granted as an absolute right.¹⁰⁷ This right was so absolute that Kentucky allowed defendants to plead guilty, bypass the lower court, seek the de novo trial review, and essentially “eras[e] any consequence which would otherwise follow” from entering a guilty plea.¹⁰⁸ In its holding, the Court described in detail Kentucky's two-tier court system, where the majority of non-lawyer judges were in the first tier, which primarily existed in smaller cities.¹⁰⁹ This contrasted with the second tier, primarily of lawyer-judges, located in the state's larger urban areas.¹¹⁰ Several reasons were proffered for this, including a “greater volume of court business” in larger cities, lawyers being more readily available in metropolitan areas, and larger cities possessing “greater financial resources” leading to better-qualified personnel.¹¹¹ Yet the Court made it a point to note that courts with lawyer-judges are not necessarily more fair or impartial than courts with lay judges.¹¹²

The Court was hardly unanimous in its decision, however, with a fiery dissent by Justice Potter Stewart who noted that to be tried and sentenced before a non-lawyer judge could deprive the accused their right to “effective assistance

¹⁰⁵ 427 U.S. 328 (1976).

¹⁰⁶ *Id.* at 339.

¹⁰⁷ *Id.* at 335.

¹⁰⁸ *Id.* at 337.

¹⁰⁹ *Id.* at 339.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 338.

¹¹² *Id.*

of counsel guaranteed by the Sixth and Fourteenth Amendments.”¹¹³ Just as even the most educated layman has “small and sometimes no skill in the science of law,” the right to counsel presumes the judge conducting the trial “will be able to understand what the defendant’s lawyer is talking about.”¹¹⁴ Yet a non-lawyer-judge often lacks the familiarity with accepting a guilty plea, determining voluntariness of confessions, advising defendants of trial rights, giving jury instructions, and enforcing other rules of evidence a lawyer-judge, building off years of legal training, can account for.¹¹⁵ Non-lawyer judges making mistakes on any number of these legal issues could overrule otherwise competent counsel, rendering even the most capable defense attorney with “little or nothing to prevent an unjust conviction.”¹¹⁶

Justice Stewart lays out that the right to a de novo review assumes that defendants are even adequately informed of their right to one.¹¹⁷ Even if a defendant knew of their right to a de novo review and exercised it, holding a brand new trial would still involve multiple court appearances, increasing delay in the outcome and increasing attorneys’ fees and court costs.¹¹⁸ A trial de novo is also an imperfect remedy because an argument can be made that a defendant deserves a fair hearing at the *first* trial, not merely a guarantee the second go-around will be okay.¹¹⁹ Further still, in the case of Kentucky, Justice Stewart noted such a system turns a “solemn court proceeding” into a “sham” by requiring defendants to plead guilty merely to reach the de novo review.¹²⁰

In the end, while the Court’s majority may have upheld Kentucky’s two-tiered court system, it proved to be a hollow victory for the Commonwealth’s attorneys. Although the Court upheld Kentucky’s use of non-lawyer judges in a split decision, change was already underway. By the time the U.S. Supreme Court announced its decision in *North v. Russell*, Kentucky had already decided to abandon the flawed judicial system it fought so hard to uphold.

¹¹³ *Id.* at 340 (Stewart, J., dissenting).

¹¹⁴ *Id.* at 341–42.

¹¹⁵ The judge in this case was described as a “coal miner without any legal training or education whatever.” *Id.* at 339–40, 344.

¹¹⁶ Details of the case paint an even starker picture of incompetence by the judge. *Id.* In the case, the judge denied a motion for trial by jury, even though the defendant was entitled to a jury trial upon request. *Id.* Further, after finding the defendant guilty, the judge imposed a sentence of imprisonment, even though a sentence of imprisonment was unauthorized under state law. *Id.* at 343 (internal citations omitted).

¹¹⁷ *Id.* at 346.

¹¹⁸ *Id.*

¹¹⁹ See Ashman & Lee, *supra* note 90, at 575.

¹²⁰ *North*, 427 U.S. at 346 (Stewart, J., dissenting).

2. Judicial Overhaul: Kentucky's Decision to Change

For all of the time the Court spent dissecting and ultimately upholding Kentucky's two-tier court scheme, it is no longer the system the state has in place today.¹²¹ In fact, today, Kentucky is one of the 19 states with all lawyer-judges.¹²² In response to its own "confusing patchwork" of trial courts with overlapping jurisdiction, growing backlog of appellate cases, and uneven justice, voters approved a ballot initiative that brought about sweeping changes to the Commonwealth's justice system.¹²³ Long before Kentucky's two-tier system was litigated all the way to the Supreme Court in the 1970s, a committee began identifying issues with the system, including non-lawyer judges as early as 1924.¹²⁴ Counting among its "innumerable specific defects" was its inefficiency, over-politicization, and lack of a uniform standard of justice.¹²⁵

Ultimately, Kentucky's changes to its judicial system were the result of several years, indeed several decades of work, including many failures before ultimately succeeding.¹²⁶ To the chagrin of reform activists, issues proved deep and systemic. County judges at the lower court levels proved to be powerful figures that often helped further a "courthouse gang," controlling politics and patronage in both urban and rural areas.¹²⁷ Perhaps patronage and political favors seeped their way into the minds of Kentucky citizens, who expressed their displeasure with lower courts in various polls.¹²⁸

Change did not come easy to Kentucky, however, as resistance was widespread.¹²⁹ First, Kentucky tried to reform the courts in a wide-scale effort to replace the entire existing State Constitution, tying the idea of judicial reform to other controversial measures, such as eliminating many of the state's 120 counties.¹³⁰ As these measures proved unpopular, an attempt to replace the entire

¹²¹ See Kurt X. Metzmeier, *A Constitutional Amendment to Reform Kentucky's Courts, in UNITED AT LAST, THE JUDICIAL ARTICLE AND THE STRUGGLE TO REFORM KENTUCKY'S COURTS* 23–25 (2006), https://works.bepress.com/kurt_metzmeier/15/.

¹²² See Carroll, *supra* note 102.

¹²³ See Metzmeier, *supra* note 121, at 13. The state of Kentucky is referred to as the "Commonwealth of Kentucky" in its State Constitution. See, e.g., KY. CONST. pmbl.

¹²⁴ See Metzmeier, *supra* note 121, at 13.

¹²⁵ *Id.* at 14.

¹²⁶ "Although reformers had decried Kentucky's confusing court system since the 1940s, the real roots of the revision . . . can be found in the failed movement in the late 1960s." See *id.* at 13.

¹²⁷ *Id.* at 14.

¹²⁸ *Id.* at 14–15.

¹²⁹ See *id.*

¹³⁰ *Id.* at 15.

State Constitution failed in 1966.¹³¹ Nevertheless, groups, such as the Kentucky Bar Association, found the judicial reforms important, and began working on a separate measure aimed at just the court system.¹³² After several more years of work, a court reform bill was introduced into the General Assembly in 1972, based in large measure off the previous reforms proposed in the 1966-revised Constitution.¹³³ Buoyed by supporters of the existing trial judges, though, the bill was defeated and marked the end of attempts to reform the judiciary through the legislative branch alone.¹³⁴

A continued push on multiple fronts finally led to success when the sitting governor at the time created a judicial advisory committee,¹³⁵ the Bar Association kept its work going,¹³⁶ and the state judiciary itself began forming committees to investigate reform.¹³⁷ Finally, advocates realized it was an issue they needed to take to the citizens, in an exercise of direct democracy.¹³⁸ A nonprofit was formed, and it reached out to the public via several conferences, and invited numerous stakeholders, including the Kentucky League of Women Voters, judges' associations, and even a retired U.S. Supreme Court Justice.¹³⁹ Another key factor separating Kentucky's successful push for judicial reform from its failed 1966 constitutional changes was regular polling.¹⁴⁰ In its polling, reform advocates saw "strong support for judges being licensed attorneys" and installing an intermediate court of appeals.¹⁴¹ Notably, the polling did not come without its own setbacks. Polls indicated voters in Kentucky were not excited about the notion that all judges would be appointed, preferring to keep the power to elect judges squarely in voters' hands.¹⁴²

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 17.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ "The failure of the 1966 constitution was a stark lesson to reformers that the success of the judicial article depended on a well-organized and vigorous campaign that actively engaged the citizens in the process and that produced a proposal that could *win at the polls*." *Id.* (emphasis added).

¹³⁹ *Id.* at 17–18.

¹⁴⁰ *Id.* at 18.

¹⁴¹ *Id.*

¹⁴² *Id.*

Ultimately, it took some bits of political maneuvering by members of the legislature to pass a bill allowing the amendment on the ballot for the voters.¹⁴³ Once the issue was placed on the ballot by the legislature, judicial reform advocates had 19 months to campaign and convince voters to change the state judiciary.¹⁴⁴ An extensive educational campaign ensued, with the enlistment of 200 plus lawyers, judges, and civic leaders. “Information kits” were distributed in neighborhoods around the state, and educational programs went to state colleges and universities, focusing on Kentucky’s three law schools.¹⁴⁵ Student leaders were even enlisted to write editorials and articles in student papers.¹⁴⁶ From there, the effort continued to snowball, securing endorsements from “nearly two dozen major groups,” from business groups to churches, reporters, and the like.¹⁴⁷ Many major newspapers and small papers endorsed the measure, and two leading gubernatorial candidates supported the measure as well.¹⁴⁸

Ultimately, this campaign proved successful in Kentucky, with some 54% of voters approving the amendment.¹⁴⁹ It only managed to win 35 of the Bluegrass state’s 120 counties but racking up large margins in the state’s urban areas, while tamping down losses in the rural areas, proved to be a winning strategy.¹⁵⁰

III. ANALYSIS

West Virginia should adopt a requirement that only lawyer-judges can serve in the state, including at the magistrate level. Part III of this Note provides an analysis of the risks associated with allowing non-lawyers to serve as judges in West Virginia. It then compares West Virginia’s judiciary with a model jurisdiction, Kentucky, which only uses lawyer-judges. Section III.A is split into two subsections. Section III.A.1 discusses West Virginia’s Constitution and the limitations built in that make requiring a magistrate to be a lawyer difficult. Section III.A.2 explores the numerous failed attempts by the West Virginia Legislature to change requirements for magistrates, including work experience and degree requirements. Section III.B is split into two subsections. Section

¹⁴³ Advocates for the bill found the judicial reform amendment stuck in committee where its fate was tied to a bill attempting to rescind Kentucky’s 1972 ratification of the Equal Rights Amendment to the U.S. Constitution. *Id.* at 20.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 21.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 22.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 24.

¹⁵⁰ *Id.*

III.B.1 explores what barriers have led to the Legislature's failure to reform magistrate requirements, including the lack of citizens holding college degrees, the small population, and the state's rural geography. Next, Section III.B.2 explores what incremental and long-term changes the state can undertake to work around the constitutional barriers and legislative failures, including moving to a judicial appointment system, raising magistrates' salaries, and garnering more media attention for the issue. Finally, Section III.C differentiates lawyers, who are licensed by typically passing a bar exam, from law school graduates. This distinction could ultimately lead to a requirement that magistrates be at least law school graduates, if not licensed attorneys.

A. *Can They Follow the Lead? West Virginia's Capacity for Change*

As evidenced by the campaign waged from its southwestern neighbor, there is a template for a state like West Virginia to successfully reform its judicial system to bar non-lawyer judges. For West Virginia to succeed in its endeavor, however, would require a full-scale constitutional change, not unlike that undertaken in Kentucky.

1. Constitutional Protection of Magistrates: Limitations and Amendments

Currently, West Virginia's Constitution states that "the Legislature shall not have the power to require that a magistrate be . . . licensed to practice the profession of law, nor shall any justice or judge of any higher court . . . mandate that a magistrate be a person licensed to practice the profession of law."¹⁵¹ Amending the State Constitution would be, naturally, a difficult endeavor. Not only would a bill have to pass the State Legislature, but it would also have to be approved by voters in a special election or the next available general election.¹⁵² West Virginia also does not have a statewide initiative process.¹⁵³ The citizens alone cannot pass judicial reform. Thus, the only avenue for amending the State Constitution is having two-thirds of each chamber in the Legislature, a supermajority, pass a constitutional amendment, which would then go to the

¹⁵¹ W. VA. CONST. art. VIII, § 10.

¹⁵² W. VA. CONST. art. XIV, § 2.

¹⁵³ A statewide initiative process would allow the voters to bring an issue to the ballot themselves. West Virginia does not have a statewide initiative process, but some other states do. *Initiative and Referendum States*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last visited Sept. 23, 2018). It is sometimes called the most direct form of democracy. *Id.*

people for a ratification or rejection vote.¹⁵⁴ To illustrate the difficulty involved in ratification, since the West Virginia Constitution was ratified in 1872, the document has only been amended 20 times, the majority relating to veterans' benefits and roads.¹⁵⁵

2. Legislative Struggles: How the Failure to Act is Failing Us All

Although enacting constitutional changes would be a difficult task, there have been attempts to work around the constitutional language. In fact, attempts to bring West Virginia into the age of all-lawyer-judges have been numerous over the years. From the years 2009–2013 alone, various bills were introduced into the State House and Senate.¹⁵⁶ Companion House and Senate bills from 2009, for instance, would have required all magistrates to hold a college degree or have four years of experience as a magistrate.¹⁵⁷ Neither of those bills advanced from their assigned committees.¹⁵⁸ A watered down version managed to pass the House in 2010, which would have only applied to *new* magistrates and required a college degree or two years' experience.¹⁵⁹ Thus, existing magistrates armed with only a high school diploma would still be grandfathered in. Nevertheless, the House bill never passed the Senate.¹⁶⁰ The most recent bill

¹⁵⁴ W. VA. CONST. art. XIV, § 2.

¹⁵⁵ *Constitutional Amendments Again a Possibility in 2016*, THE W. VA. HUB (Jan. 20, 2016), <http://wvhub.org/constitutional-amendments-again-a-possibility-in-2016/>. While the majority of amendments to the State Constitution have involved veterans' benefits or roads, issues concerning the judiciary have been voted on by the legislature and subsequently the public a few times. In 1998, voters rejected a judicial reform amendment, which would have authorized the Legislature to "create additional courts of original and appellate jurisdiction." *Statewide Ballot Measures Database*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx>. In 2000, state voters approved a unified family court amendment, which established a "system of courts with jurisdiction over family law and child welfare matters." *Id.* In 2018, the legislature and voters approved reigning in state judiciary spending, passing an amendment that grants the state legislature authority to reduce the state judiciary's budget and require the state's chief supreme court justice to appear before the Legislature and answer questions. *Id.* The last of these amendments came after considerable criticism of state judiciary spending, leading to the impeachment of the entire state supreme court. *See infra* note 206. As such, although amending the State Constitution is difficult and rare, it is not an inconceivable method of passing judicial reform, including barring non-lawyer judges.

¹⁵⁶ Bill Raftery, *Will West Virginia Magistrate Court Judges Have to Possess a College Degree?*, GAVEL TO GAVEL (Jan. 23, 2012), <http://gaveltogavel.us/2012/01/23/will-west-virginia-magistrate-court-judges-have-to-possess-a-college-degree/>.

¹⁵⁷ H.B. 2840, 2009 Leg., Reg. Sess. (W. Va. 2009); S.B. 609, 2009 Leg., Reg. Sess. (W. Va. 2009).

¹⁵⁸ Raftery, *supra* note 156.

¹⁵⁹ H.B. 4292, 2010 Leg., Reg. Sess. (W. Va. 2010).

¹⁶⁰ Raftery, *supra* note 156.

to increase the educational requirements of magistrate judges was introduced by then State Senator Evan Jenkins¹⁶¹ in the 2013 legislative session.¹⁶² Its proposed additions were perhaps the most modest of all, only requiring magistrates to hold an associate's degree or four years of experience as a magistrate.¹⁶³ It never advanced out of committee.¹⁶⁴ Perhaps sensing how fruitless many of these efforts proved, no member of the State Legislature has introduced a bill attempting to alter the requirements for magistrate judges since the failed Senate bill in 2013.¹⁶⁵

Unfortunately, while the State Legislature has sputtered in attempts to increase the educational requirements, West Virginia continues to see mistakes by magistrate judges, which arise at least in part from a lack of formal legal training. Consider a complaint investigated by the West Virginia Judicial Investigation Commission, which found a Kanawha County magistrate judge had “failed to give a defendant a requested jury trial, publicly endorsed a candidate for appointment for magistrate and improperly commented on an impending matter in court.”¹⁶⁶ Yet another magistrate inappropriately commented on a

¹⁶¹ Evan Jenkins was later appointed and elected to the Supreme Court of Appeals of West Virginia. See Jake Zuckerman, *Jenkins Stepping Down from House, Joins WV Supreme Court Monday*, THE HERALD-DISPATCH (Sept. 29, 2018), http://www.herald-dispatch.com/news/jenkins-stepping-down-from-house-joins-wv-supreme-court-monday/article_aecab306-1672-56f6-8777-6f44c0cf84e2.html. With Jenkins' election, at least one current state supreme court justice is on the record having supported increased educational requirements for magistrate judges.

¹⁶² S.B. 54, 2013 Leg., Reg. Sess. (W. Va. 2013).

¹⁶³ *Id.*

¹⁶⁴ *Bill Status – 2013 Regular Session*, W. VA. LEGISLATURE, http://www.legis.state.wv.us/Bill_Status/Bills_history.cfm?input=54&year=2013&sessiontype=R&stype=bill (last visited Oct. 5, 2018).

¹⁶⁵ Since 2015, the only bills introduced in the Legislature relating to magistrate courts have been bills to revoke driving privileges for out-of-state citizens who write worthless checks and then fail to appear on a summons in magistrate court, to “increas[e] the minimum number of magisterial districts in a county,” and to “permit[] . . . magistrates to carry concealed handguns without a permit.” H.B. 2090, 2017 Leg., Reg. Sess. (W. Va. 2017); H.B. 2265, 2017 Leg., Reg. Sess. (W. Va. 2017); H.B. 2265, 2015 Leg., Reg. Sess. (W. Va. 2015); H.B. 2134, 2015 Leg., Reg. Sess. (W. Va. 2015); H.B. 2036, 2015 Leg., Reg. Sess. (W. Va. 2015). Shrewd political observers may also note that, since 2015, political priorities in the State Legislature may have shifted, with the Republican Party taking control of both chambers of the Legislature after eight decades as the minority party. Reid Wilson, *Party Switch Gives Republicans Control of West Virginia Senate*, WASH. POST (Nov. 5, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/05/party-switch-gives-republicans-control-of-west-virginia-senate/?noredirect=on&utm_term=.09c14535c89d. While this may be true, several of the bills introduced in the years 2009–2013 had bipartisan sponsors and bipartisan votes for and against, suggesting there is not a neat or clear party divide on the issue.

¹⁶⁶ Lacie Pierson, *State Judicial Commission Admonishes Two Kanawha Magistrates*, CHARLESTON GAZETTE-MAIL (Nov. 15, 2017),

pending case on Facebook.¹⁶⁷ Further, there are cases of corruption, such as a magistrate judge forced to resign after being accused of embezzling from the West Virginia Magistrate Association.¹⁶⁸ Not all these mistakes can be chalked up to younger or newly-elected magistrates. Many of the admonishments handed down by the Judicial Commission implicate magistrates who have served for several years. The magistrate accused of embezzlement had served since 2004.¹⁶⁹ Worst of all, however, some mistakes can even be deadly. A decision by one magistrate to leave the night shift early meant an arrest warrant went unsigned, and the would-be arrestee was found dead of a gunshot wound the next morning.¹⁷⁰

To replicate the success of a jurisdiction like Kentucky, West Virginia would require a grassroots movement to make a law degree the requirement for *all* judges, not just some. West Virginia would have to engage on a local level, enlisting the aid of the state bar association, media, universities, and the like.

B. Why is Change Hard and What are the Solutions? West Virginia's Barriers

Why West Virginia allows non-lawyers to serve as magistrate judges has an easy answer on the surface level: it is specifically allowed by the State Constitution.¹⁷¹ The more difficult question perhaps is why efforts to reform the magistrate requirements, even to require just a college or associate's degree with built-in grandfather clauses to protect currently serving magistrates, have consistently floundered. There are likely several potential factors. Section III.B.1 explores the "why," or the reasons West Virginia has struggled to require its lower court judges to be legally trained. Section III.B.2 argues the "how" and propose potential solutions to issues such as low pay and eliminating judicial elections in favor of appointment or "merit-based" judicial systems.

https://www.wvgazettemail.com/news/cops_and_courts/state-judicial-commission-admonishes-two-kanawha-magistrates/article_308656ff-9241-5e4d-a177-27527df8c1f6.html.

¹⁶⁷ *Id.*

¹⁶⁸ Lacie Pierson, *Ex-magistrate Embezzlement Case May Not Reach Grand Jury Until 2018*, CHARLESTON GAZETTE-MAIL (Oct. 15, 2017), https://www.wvgazettemail.com/news/cops_and_courts/ex-magistrate-embezzlement-case-may-not-reach-grand-jury-until/article_777849c1-47ae-506c-9d51-f047ed42d009.html.

¹⁶⁹ *Id.*

¹⁷⁰ Lacie Pierson, *Kanawha Magistrate Pauley Suspended for 45 Days*, CHARLESTON GAZETTE-MAIL (Jan. 5, 2018), https://www.wvgazettemail.com/news/kanawha-magistrate-pauley-%5csuspended-for-days/article_763a56e1-cb24-5059-ab57-293078668a4d.html.

¹⁷¹ W. VA. CONST. art. VIII, § 10.

1. The Issues: Understanding West Virginia

Although attempts to increase the educational requirements of magistrates have been numerous over the years, they have always managed to fail for one reason or another. In fact, there are actually several issues explaining the opposition. One, the State Legislature is a part-time legislature and, as such, cannot devote as much time to consider, debate, or pass legislation that it does not consider vital.¹⁷² Even if magistrate requirements were a legislative priority, even the most well-planned and thought-out legislative agendas can be derailed by natural disasters or unexpected occurrences.¹⁷³ Fights over the annual budget can also eat up time and attention.¹⁷⁴

Further, West Virginia has the dubious distinction of being one of the “least educated” states, in terms of citizens holding a college degree.¹⁷⁵ According to one study, West Virginia ranked lowest in the country for educational attainment; in fact, West Virginia ranked last in several categories, including “percent of associates degree holders and college experienced adults, percent of bachelor’s degree holders and percent of bachelors or professional degree holders.”¹⁷⁶ This lack of formal education, worst in the country,¹⁷⁷ could help explain why even the most modest of measures by the Legislature fall flat. There is a real concern that there are too few college-educated citizens in the state.

The numbers are even worse when you consider the state population, which is both small and rural. Not only does West Virginia lack in the percentage of adults with a post-high school education but its population also ranks in the bottom 13 of states.¹⁷⁸ As such, in terms of raw numbers, West Virginia has a small pool of college-educated citizens.¹⁷⁹ Understandably, this extends to the number of practicing lawyers as well. While data pinning down the number of

¹⁷² “[B]ills that are taken up [by full-time legislatures] generally are given more thought and have far more input from legislators and the public at large When you’re only in session for a brief time, it’s impossible to keep up.” Maxine Berman, *Part-Time Legislatures*, DOME (Jan. 31, 2013), <http://domemagazine.com/mb020113/>.

¹⁷³ See Trip Gabriel, *Thousands Without Water After Spill in West Virginia*, N.Y. TIMES (Jan. 10, 2014), <https://www.nytimes.com/2014/01/11/us/west-virginia-chemical-spill.html>.

¹⁷⁴ See Brad McElhinny, *A Month After WV Sets a Budget, the Budget Battle of Words Goes on . . . and on*, METRONews (July 26, 2017, 5:14 PM), <http://wvmetronews.com/2017/07/26/a-month-after-wv-sets-a-budget-the-budget-battle-of-words-goes-on-and-on/>.

¹⁷⁵ See Strauss, *supra* note 93.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *The 50 US States Ranked by Population*, WORLD ATLAS, <https://www.worldatlas.com/articles/us-states-by-population.html> (last updated Sept. 14, 2018).

¹⁷⁹ See Strauss, *supra* note 93.

active attorneys in a state is difficult to find, as recently as five years ago, the American Bar Association pegged West Virginia as having fewer than 5,000 active attorneys in the state.¹⁸⁰ Only 12 states had a smaller number of active, resident attorneys.¹⁸¹

West Virginia's rural geography only adds to the challenge of finding enough qualified lawyers to serve as magistrates. Although West Virginia lays claim to a unique status as the only state entirely engrossed in Appalachia,¹⁸² its lack of college graduates is exasperated in rural areas.¹⁸³ In fact, in some counties, fewer than six percent of residents age 25 and over even hold a bachelor's degree.¹⁸⁴ And given that West Virginia's magistrate system runs through its 55 counties, some areas understandably struggle to produce and retain any college graduates, let alone lawyers.¹⁸⁵

Money could also be a contributing factor to the sustainability of non-lawyer judges. Lawyers nationwide earned a median salary of \$119,250 in

¹⁸⁰ AM. BAR ASS'N, NATIONAL LAWYER POPULATION BY STATE (2013), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_lawyer_by_state.authcheckdam.pdf (last visited Oct. 05, 2018).

¹⁸¹ *Id.*

¹⁸² *Appalachian Region*, APPALACHIAN REGIONAL COMMISSION, <https://www.arc.gov/images/appregion/AppalachianRegionCountiesMap.pdf> (last visited Oct. 5, 2018).

¹⁸³ The largest counties by population also have the highest percentage of adults 25 or older holding a bachelor's degree in West Virginia. *Census Explorer*, U.S. CENSUS BUREAU, <https://www.census.gov/censusexplorer/censusexplorer.html> (last visited Oct. 05, 2018). These include Monongalia, Kanawha, and Cabell counties, which are three of the four largest counties in the state. *Id.* These three counties are three of just five counties in the state where 25% or more adults hold a bachelor's degree. *Id.* By contrast, Wirt, Tucker, and Pendleton counties are the three smallest counties by population in the state. *Id.* Each has no more than 16% of adults holding a bachelor's degree. *Id.*

¹⁸⁴ Britt Arcadipane, West Virginia's Low Percentage of Population with at Least a Four-Year College Education (May 2014) (unpublished master's thesis, Marshall University).

¹⁸⁵ Compounding this problem is the fact that a majority of students who graduate from West Virginia's public colleges do not go on to work in the state. While some of these students are from out-of-state, even a third of students native to West Virginia still choose to leave after attending a state college or university. Jake Jarvis, *Majority of WV Public College Grads Leave State for Work*, CHARLESTON GAZETTE-MAIL (Nov. 5, 2016), https://www.wvgazette.com/news/education/majority-of-wv-public-college-grads-leave-state-for-work/article_a9f5cfa3-69b6-5276-8302-e1943406cf16.html. West Virginia Public Broadcasting has launched a series, "The Struggle to Stay," which exemplifies the difficult choice many young people in West Virginia face. Jessica Lilly & Roxy Todd, *Inside Appalachia Launches the Struggle to Stay*, W. VA. PUB. BROADCASTING (Apr. 14, 2017), <http://www.wvpublic.org/post/inside-appalachia-launches-struggle-stay#stream/0>.

2017.¹⁸⁶ Meanwhile, magistrates in West Virginia earn a set rate of \$57,500.¹⁸⁷ Thus, the median lawyer nationwide earns over *double* what a magistrate in West Virginia makes. And with the average law school graduate accumulating up to and over \$100,000 in debt, the pressure to make money to pay back those loans is greater than ever.¹⁸⁸ Furthermore, because the salaries are set, there is no room or potential for growth as there is in the private market. Despite some setbacks during the recession in the mid-2000s, employment prospects for lawyers are projected to grow some eight percent between 2016 and 2026, on par with other professions.¹⁸⁹ Thus, if money is a motivating factor, lawyers in West Virginia interested in public service may be more inclined to seek out circuit and family court judgeships, which promise more power and a much heftier salary. Currently, family court judges earn \$94,500, and circuit judges earn \$126,000 annually.¹⁹⁰ Plus, lawyers in West Virginia do not have to compete with non-lawyers for these higher paying and more powerful judgeships. When running for magistrate court, they do.

Thus, whether it is lack of competitive pay, a small population, or even rural geography, West Virginia faces several structural challenges, in addition to legal ones, in increasing the educational requirements of magistrates. Some of these challenges are not insurmountable, however, and it would behoove citizens statewide to explore how to boost the qualifications of judges in the lower courts.

2. Alternatives to Act: How West Virginia Can Position Success in the Long-Run

As the lack of success in the state legislature has exemplified, it is difficult to know where advocates for all lawyer-judges in West Virginia should turn now. It appears a direct legislative fix may be an unfeasible solution for the near future, even on modest reforms for educational requirements. As noted, some of the issues preventing legislators from upping the requirements are deeply-embedded, structural issues that would take a multi-faceted attack.¹⁹¹ Boosting the state's educated population, for example, has long been a challenge, and some issues, such as rural geography, are impossible to change. Yet, other

¹⁸⁶ *Occupational Outlook Handbook: Lawyers*, BUREAU OF LAB. STATS., <https://www.bls.gov/ooh/legal/lawyers.htm> (last modified Apr. 13, 2018).

¹⁸⁷ W. VA. CODE ANN. § 50-1-3(f) (West 2018).

¹⁸⁸ Robert Farrington, *Law School and Student Loan Debt: Be Careful*, FORBES (Dec. 18, 2014), <https://www.forbes.com/sites/robertfarrington/2014/12/18/law-school-and-student-loan-debt-be-careful/#413b78dc11f9>.

¹⁸⁹ *Occupational Outlook Handbook: Lawyers*, *supra* note 186.

¹⁹⁰ Brad McElhinny, *Pay Raises Recommended for West Virginia Judges*, METRONNEWS (Dec. 7, 2017), <http://wvmetronews.com/2017/12/07/payraises-recommended-for-west-virginia-judges/>.

¹⁹¹ *See supra* Section III.B.1.

areas present opportunities for advocates to advance or study. As the case of Kentucky exemplifies, it takes several working pieces and even several years before any efforts can truly succeed. Thus, in tackling the issues, there are three potential solutions: (1) legislative change, even despite the noted hurdles; (2) higher pay to attract lawyers; and (3) abolishing judicial elections, including at the magistrate level.

On the issue of low compensation, there have been several proposals over the years to increase magistrate pay.¹⁹² Increasing the pay of the position could certainly make it more attractive to lawyers who otherwise may be interested.¹⁹³ The Legislature, too, has demonstrated interest in increasing judicial pay.¹⁹⁴ It appointed the Judicial Compensation Commission, which stated in December 2017 that magistrates in the state should have a five percent increase in pay.¹⁹⁵ Although a five percent increase would not change the reality that many lawyers can still make more money in private practice, it would make salaries just over \$60,000.¹⁹⁶ This money, of course, goes further in West Virginia and its rural counties than it may in other states with higher costs of living.

West Virginia could also consider abolishing judicial elections altogether, or at least doing away with them for magistrates. On the surface level, this may seem like a gargantuan task. A vast majority of the states still retain some form of judicial elections.¹⁹⁷ Moreover, destroying the peoples' will is not always a popular endeavor. The case study of Kentucky demonstrates that voter backlash can be a powerful weapon against eliminating voters' voices.¹⁹⁸ Yet proponents of judicial reform do have some hope. Some may not have expected West Virginia to even ban partisan judicial elections, but the State Legislature

¹⁹² See *supra* Section III.B.1.

¹⁹³ There is not a significant amount of research on pay rates and whether lawyers would be more likely to take county-level magistrate positions if salaries were higher, but the broader issue of how much judges should be paid has been studied. One study indicates a “comparatively low judicial salary slightly increases the chance that an appellate judge will leave the bench.” James M. Anderson & Eric Helland, *How Much Should Judges Be Paid? An Empirical Study on the Effect of Judicial Pay on the State Bench*, 64 STAN. L. REV. 1277, 1281 (2012).

¹⁹⁴ *W. Va. Magistrate Pay Hikes Prevail as Session Ends*, HERALD-DISPATCH (Apr. 18, 2013), http://www.herald-dispatch.com/news/recent_news/w-va-magistrate-pay-hikes-prevail-as-session-ends/article_b554d6e2-0f15-5ca9-8c5a-a639c905607e.html.

¹⁹⁵ See McElhinny, *supra* note 190.

¹⁹⁶ *Id.*

¹⁹⁷ Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), <https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html>.

¹⁹⁸ See Metzmeier, *supra* note 121.

did convert all judicial elections to non-partisan elections in 2015,¹⁹⁹ giving rise to some hope that judicial reform beyond may be possible.

If judicial elections were eliminated, the Legislature could create a commission or vest power in the governor, or even another entity, to select appointed judges. Thus, moving to appointments of magistrate judges would allow West Virginia's governor, or some other body, to select nominees.²⁰⁰ In fact, all states already enjoy the service and benefit of some appointed judges.²⁰¹ This is because nearly three quarters of sitting justices nationwide were initially appointed, likely due to the resignation, death, or retirement of elected justices during their term.²⁰² Although some states simply appoint all judges, even in contested-election states, over one-third of those initially appointed went unopposed in their first election.²⁰³ Thus, initial interim appointments can have huge impacts on whether states engage in "selecting a high-quality and diverse bench"²⁰⁴ and make a strong case for states utilizing a judicial appointment system.²⁰⁵

¹⁹⁹ Wendy Holdren, *Governor Signs Nonpartisan Election of Judges Measure*, REGISTER-HERALD (Apr. 18, 2015), http://www.register-herald.com/news/governor-signs-nonpartisan-election-of-judges-measure/article_3b5de5ea-7bde-539b-ae0-d6280dbafc13.html.

²⁰⁰ Several states that do not elect judges utilize the Missouri Plan, where the governor appoints judges after nomination by a commission. *State Courts Guide*, THE FEDERALIST SOC'Y, <http://www.statecourtsguide.com> (last visited Sept. 23, 2018). Some states do a hybrid model, where the governor appoints judges after nomination by a commission *and* confirmation by a democratic body, such as the state legislature. *Id.* Finally, in still other states, a democratic body directly appoints judges, or the governor appoints judges with the advice and consent of some democratic body. *Id.* Any of these systems could succeed if West Virginia adopted them and result in the placement of only lawyer-judges for magistrates across the state. *Id.*

²⁰¹ Kate Berry & Cathleen Lisk, *Appointed and Advantaged: How Interim Vacancies Shape State Courts*, BRENNAN CTR. FOR JUST. (May 5, 2017), https://www.brennancenter.org/sites/default/files/analysis/Appointed_and_Advanaged_How_Interim_Appointments_Shape_State_Courts_0.pdf.

²⁰² *Id.* at 1.

²⁰³ *Id.* at 2.

²⁰⁴ *Id.*

²⁰⁵ Recent observers of West Virginia's judiciary may be split on the idea of gubernatorial or commission-led appointments to the bench. West Virginia's recent controversy involving the impeachment of the entire State Supreme Court was approved by a majority of legislators in a party-line vote in the State House of Delegates but decried as a "partisan witch hunt" by others. Daniel Arkin, *Impeachment of Entire West Virginia Supreme Court Draws Cry of 'Partisan Witch Hunt.'* NBC NEWS (Aug. 14, 2018), <https://www.nbcnews.com/news/us-news/impeachment-entire-west-virginia-supreme-court-draws-cry-partisan-witch-n900746>. Nevertheless, while the appointment of judges at state or federal high courts may draw larger ideological considerations, it is unclear the same political incentives would be at play for magistrate judgeships. For especially concerned observers, however, a stronger role by a nonpartisan nominating commission could ease doubts that magistrate appointments would become too overtly political in nature.

Although abolishing judicial elections would not eliminate the state constitutional proscription on requiring magistrates to be lawyer-judges, it would allow the governor to *exclusively* select lawyer-judges. This could easily be accomplished by selecting from a list, comprised entirely of lawyers, provided by a state bar association or legislators. Although not all states utilize judicial appointments, the federal judiciary is famous for requiring all judges to be appointed by the President and confirmed by the Senate.²⁰⁶ The federal judiciary also uses the American Bar Association²⁰⁷ to rate any potential nominees as either well qualified, qualified, or not qualified, in addition to thorough vetting, background checks, and committee hearings and votes.²⁰⁸ Notably, too, the United States Constitution does not require federal judges to be lawyer-judges,²⁰⁹ but in the prudence and wisdom of the President and Congress, they almost always are. Thus, the federal judiciary is a model example of what West Virginia could be, a system where judges are not legally required to be lawyers, but effectively always are.

Understandably, however, federal district and appeals court judges are not a perfect comparison to county level magistrates in at least a few ways. The legal stakes are generally considered higher in the federal system, where federal judges preside over full-length trials, potentially lengthy sentences, capital cases, constitutional questions and the like. Federal judges also serve lifetime tenures, a feature that does not exist in West Virginia or many other states. Additionally, the prestige associated with serving as a federal judge, at any level, is considered more noteworthy than a county magistrate. There are also far fewer federal judges serving, and their jurisdictions are much larger than the thousands of magistrates that exist nationwide.

If providing for judicial appointments or large pay scale increases are not on the immediate horizon, there are still other avenues the state can explore. Just as publicity played a large role in convincing Kentucky to change its system, media and journalists throughout West Virginia can be agents in bringing to light some of the most serious indiscretions or concerning actions of magistrate

²⁰⁶ *Federal Judicial Nominations: 9 Steps from Vacancy to Confirmation*, CTR. FOR AM. PROGRESS (Jan. 29, 2013), <https://www.americanprogress.org/issues/general/news/2013/01/29/50996/federal-judicial-nominations-9-steps-from-vacancy-to-confirmation/>.

²⁰⁷ The American Bar Association has supported a judicial appointment or “merit selection” system for all states in addition to its ratings work for the federal judiciary. *See* AM. BAR ASS’N STANDING COMM. ON JUDICIAL INDEP., STANDARDS ON STATE JUDICIAL SELECTION: REPORT OF THE COMMISSION ON STATE JUDICIAL SELECTION STANDARDS (2000), https://www.americanbar.org/content/dam/aba/administrative/judicial_independence/reformat.aut_hcheckdam.pdf.

²⁰⁸ *Id.*

²⁰⁹ *FAQs: Federal Judges*, U. S. CTS., <http://www.uscourts.gov/faqs-federal-judges> (last visited Sept. 23, 2018).

judges. In New York, for another example, the *New York Times*, in 2006, ran a series on town and village justices, which are not required to hold law degrees and number in the thousands in New York.²¹⁰ That reporting provoked “real and promised reforms.”²¹¹ Several articles in this Note are cited from newspapers around the state, including the *Charleston Gazette-Mail*, which has the highest circulation of any newspaper statewide.²¹²

Thus, there is not one single avenue of requiring magistrates to be legally trained in West Virginia. In fact, there are several options to achieve lawyer-judges at each level. Some of these options, such as eliminating judicial elections or increasing judicial pay, could have positive effects for the entire judiciary and be passed as part of a larger judicial reform package. It may take stakeholders in media, academia, private firms, non-profits, bar associations, and other groups to start a grassroots movement that citizens can get behind before change is enacted.

C. *The Diploma Privilege: The Case for No Bar Required*

The West Virginia Constitution is clear that the state may not require magistrates to be lawyers. What is less clear is what a lawyer *is* under the State Constitution. Is a lawyer someone who must be licensed to practice law in the State of West Virginia? In other words, would they have to pass the bar exam? If so, the state could require magistrates to have a formal, legal education without truly being a “lawyer” or without the licensure requirement. West Virginia could instead require magistrates to be law school graduates from any ABA-accredited school in the country.

At first blush it would appear holding a law degree and practicing as a licensed attorney go hand-in-hand. In fact, for many they do. The other reality, however, is that many law school graduates do not hold jobs that require them to pass the bar exam. In fact, for the national class of 2014, just 60% had long-term jobs which required them to pass the bar exam.²¹³ While some of this is certainly driven by a high demand for jobs which require graduates to pass the bar exam, there is also reason to believe other factors are at play. Between 2013 and 2014,

²¹⁰ Joe Sexton, *Despite Exposés and Embarrassments, Hundreds of Judges Preside in New York Without Law Degrees*, PROPUBLICA (June 26, 2017), <https://www.propublica.org/article/hundreds-of-judges-new-york-preside-without-law-degrees>.

²¹¹ *Id.*

²¹² AMERICAN NEWSPAPER REPRESENTATIVES, <http://gotoanr.com/documents/database/west-virginia.pdf> (last visited Oct. 05, 2018).

²¹³ Steven J. Harper, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES (Aug. 25, 2015), <https://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html>.

for example, the number of jobs that require bar passage fell overall.²¹⁴ Many of these jobs are considered “J.D. advantage” positions, or careers that do not require a license to practice law but for which holding a Juris Doctor nonetheless advantages applicants.²¹⁵

Requiring magistrates to be law school graduates, if not practicing attorneys, could also attract attorneys from other states or regions, who may want to put their legal skills to work in West Virginia but not go through the rigorous process of becoming licensed in another state or face another bar exam.²¹⁶ While it may be a stretch to assume attorneys from other states would move to West Virginia with the primary motive of becoming a magistrate judge, it could nevertheless be a powerful avenue for recent transplants or those who once held a license but let it become inactive.

To be sure, there may be those who are skeptical that the authors of the West Virginia Constitution could have imagined this distinction between licensed attorneys and law school graduates to take hold. Nevertheless, it can be alternatively argued that it may have been intentionally left vague—and it should be left up to the modern interpretation to rule the day. Here, a requirement that magistrates be law school graduates would confer all the benefits of a legal education, without running afoul of the Constitution. As such, it deserves serious merit by the Legislature, academia, and other stakeholders in improving the quality and product of the state judiciary.

IV. CONCLUSION

On July 22, 2016, defendant Kelly Davis had one more chance to demonstrate his concern for non-lawyer judges, including the one who presided over his case.²¹⁷ With the enlistment of UCLA Law Professor Stuart Banner and his students, his claim was petitioned for a writ of certiorari to the U.S. Supreme Court. After exchanges of petitions and replies, the petition was distributed multiple times for consideration in Supreme Court conferences.²¹⁸ On January 17, 2017, however, the U.S. Supreme Court announced it had denied the petition

²¹⁴ *Id.*

²¹⁵ Lynae Tucker, *Put Your J.D. Advantage to Its Greatest Advantage*, ABA FOR L. STUDENTS (Jan. 1, 2017), <https://abaforlawstudents.com/2017/01/01/put-j-d-advantage-greatest-advantage/>.

²¹⁶ The recent introduction of the Uniform Bar Exam (UBE) is easing the difficulties of becoming licensed in multiple jurisdictions. *Jurisdictions That Have Adopted the UBE*, NAT’L CONF. OF BAR EXAMINERS, <http://www.ncbex.org/exams/ube/> (last visited Sept. 23, 2018). However, not every U.S. state has currently adopted the UBE, and each state is allowed to set its own minimum passing score. *Id.* Further, only one of the five largest states by population has currently adopted the UBE. *Id.* West Virginia adopted the UBE in July 2017. *Id.*

²¹⁷ Matt Ford, *When Your Judge Isn’t a Lawyer*, THE ATLANTIC (Feb. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/>.

²¹⁸ Mauro, *supra* note 1.

for certiorari and, thus, continued to leave states free to allow non-lawyer judges to send clients to jail, make erroneous rulings, and in the process waste judicial resources and time. With the denial of certiorari, the 1976 *North v. Russell* decision is still technically the leading precedent, allowing states to continue using non-lawyer judges.

In light of the Supreme Court refusing to visit the issue, this Note proposes West Virginia adopt measures which would increase the educational requirements of magistrate judges, from merely high school graduates to trained lawyers. Relative to other states, West Virginia is in the minority of jurisdictions that allows for non-lawyer judges without a guaranteed de novo review. While West Virginia's unique hybrid system allows for a de novo review of any bench trial at the magistrate level, this same opportunity is not afforded to bench trials. Furthermore, conducting a bench trial, which may ultimately be meaningless, is a waste of judicial resources at best and an affront to our justice system at worst.

It should be remarked that although this Note discusses the high potential for errors and mistakes at the hands of non-lawyer judges, the majority of magistrates do serve capably and dutifully. Many magistrates are long-time members of their local communities and serve as beacons of moral righteousness. Some serve for many terms and are elected and re-elected due to their popularity with their fellow citizens. This is not to be ignored or underappreciated. Some scholars even argue non-lawyer judges are readily as capable as lawyer-judges in courts of limited jurisdiction, such as magistrate court, and arguments against them merely serve the professional interests of lawyers.²¹⁹ Yet as Justice Stewart noted in his *North v. Russell* dissent, even the most educated layperson has "sometimes no skill in the science of law."²²⁰ Those who have gone through the rigors of legal studies can testify that there is no substitute for a formal education, and this Note proposes West Virginia take this step forward as well.

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²¹⁹ See PROVINE, *supra* note 16, at 189–90.

²²⁰ *North v. Russell*, 42 U.S. 328, 341 (1976) (Stewart, J., dissenting).

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