

DO ALL JUDGES HAVE TO BE LAWYERS? SIDE JUDGES IN VERMONT: THE CASE OF *STATE v. DUNKERLEY*

Vermont's courts of general jurisdiction, the superior courts,¹ consist of three judges:² a presiding judge, who is required to be a lawyer, and two assistant judges, also known as side judges. The assistant judges are not required to be lawyers or to have had legal training.³ Until recently, the decision by a majority of the court determined the disposition of each case. This meant that the assistant lay judges had the ability, by combining their votes, to overrule the presiding lawyer-judge on all issues of law and fact.⁴

In *State v. Dunkerley*,⁵ the Vermont Supreme Court held that assistant lay judges may not participate in ruling on questions of law that might arise in a criminal trial. The court's decision did not affect, however, the authority of the assistant lay judges to decide questions of fact and to participate in sentencing decisions in criminal cases, nor did it affect the ability of the assistant lay judges to rule on questions of law in civil cases.

This note will examine the validity of the court's holding in *Dunkerley* proscribing lay judges from ruling on questions of law in criminal trials. Following a brief discussion of the *Dunkerley* decision, the history of the use of assistant judges will be reviewed

1. VT. STAT. ANN. tit. 4, §§ 113, 114 (Cum. Supp. 1977). Almost all cases heard before the superior courts are civil. *Office of the Court Administrator, Vermont Supreme Court, Superior Court Statistics for the Period Jan. 1, 1975 to Dec. 31, 1975, SC-Table 1*. Except for major felony cases, the superior court has permitted its criminal jurisdiction to be exercised by the district courts. NATIONAL CENTER FOR STATE COURTS, A UNIFIED COURT SYSTEM FOR VERMONT 11-12 (1974). Major felony cases must be tried in superior court. VT. STAT. ANN. tit. 4, § 439 (1972).

2. VT. STAT. ANN. tit. 4, § 111(a) (Cum. Supp. 1977) provides: "A county court shall be held in each county at the times and places appointed by law, consisting of one presiding judge, . . . and two assistant judges elected by the county, and two of whom shall be a quorum"

3. VT. STAT. ANN. tit. 4, §§ 602, 603 (Cum. Supp. 1977) specifies that the presiding judge be either a lawyer or have been a judge for at least five of the preceding ten years. Although there is no such requirement for assistant judges, there have been instances where lawyers have served as assistant judges. See *Cady v. Lang*, 95 Vt. 287, 115 A. 140 (1921). Presently all 28 assistant judges are lay persons.

4. *State v. Dunkerley*, 134 Vt. 523, 524-25, 365 A.2d 131, 132 (1976).

5. 134 Vt. 523, 365 A.2d 131 (1976).

because courts and commentators have used a historical analysis in support of their findings that lay tribunals in criminal cases are unconstitutional. The note will then examine the constitutional argument based upon the right to counsel, which has most often been asserted by opponents of the lay-judge systems; the due process argument that a legally trained judge is necessary to understand counsel's arguments. The note concludes that the Vermont Supreme Court erred in *State v. Dunkerley* in two important respects: First, it assumed that lay judges were instituted in Vermont because of a shortage of lawyers, while in fact they were intended to provide a check upon the legally trained judges; and second, the court's result was not compelled by the cases it relied upon, and seems to be inconsistent with major federal and state court decisions in this area.

I. THE CASE OF *State v. Dunkerley*

In *State v. Dunkerley*,⁶ the defendant, charged with first degree murder, was to be tried before a mixed tribunal⁷ in the Superior Court of Caledonia County. The defendant, by interlocutory appeal⁸ to the Vermont Supreme Court, moved that the two assistant lay judges be excluded from participation in his upcoming trial. He argued that their participation would jeopardize his right to a fair trial as guaranteed by the due process clause of the fourteenth amendment.⁹ After recognizing that the two assistant lay judges

6. *Id.*

7. The term mixed tribunal in this note will be used to refer to a tribunal consisting of both lay and legally trained individuals. Although Vermont is the last American state with such a tribunal, mixed tribunals are commonplace in Europe. For a discussion of these tribunals see H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 3 n.1 (1966); Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972); Comment, *Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description*, 7 CASE W. RES. J. INT'L L. 198 (1975).

8. VT. R. APP. P. 5(b) (Cum. Supp. 1976). This procedure permits an appeal to be brought to the state supreme court before the beginning of trial, similar to a claim for extraordinary relief. *Dunkerley* was one of the first to take advantage of this procedure.

9. Brief for Appellant at 7, *State v. Dunkerley*, 134 Vt. 523, 365 A.2d 131 (1976). *Dunkerley* raised five points in claiming that he would be denied a fair trial as a result of the participation of assistant lay judges in his trial:

a) The right to effective assistance of counsel perforce implies judges who are qualified to comprehend and utilize counsel's legal arguments;

could combine their votes to form a majority on any legal ruling, the Vermont Supreme Court found that the "possibility of a lay majority ruling on questions of law in a trial is a sufficient deviation of due process to require proscription [T]herefore the Assistant Judges must be disqualified from participation in the legal issues relating to trial."¹⁰

In arriving at this conclusion, the court briefly reviewed the historical origins of assistant judges and the constitutional right of every defendant to a fair trial. The court's decision, however, was based primarily on the defendant's right-to-counsel claim. It held that "a defendant has a right to representation by a legally qualified attorney . . . [and] [t]o require a lesser standard of judicial authority would be to defeat that constitutional purpose."¹¹ Justice Billings, in a concurring opinion, stated that the assistant lay judges should be proscribed from deciding questions of law in both criminal and civil trials.¹²

Two weeks after the *Dunkerley* opinion was released, the court amended the Vermont Rules of Criminal Procedure to require that both pure questions of fact, and questions of fact in mixed law-fact determinations be decided by a majority of the judges, whereas questions of law and the application of the law to the facts shall be determined only by the presiding lawyer-judge.¹³ The purpose of

b) It is improbable that a non-attorney judge would be able to rule properly on questions regarding the admissibility of evidence which are raised in the pretrial motions;

c) It is improbable that a non-attorney judge would be able to handle the sophisticated determinations regarding the voir dire of jurors, the prejudicial effect of evidence and argument, and the submission of proper jury instructions;

d) It is improbable that a non-attorney judge would have the training and experience to maintain an absolutely impartial demeanor in respect to the many issues which would arise during the trial of the cause, such apparent impartiality being crucial to a fair trial;

e) It is improbable that a non-attorney judge would have the expertise necessary to make proper sentencing decisions.

10. 134 Vt. at 526, 365 A.2d at 132.

11. *Id.* (Citations omitted).

12. Justice Billings believed that lay judges participating in ruling on questions of law in both criminal and civil trials violated the fourteenth amendment of the United States Constitution. *Id.* at 526-27, 365 A.2d at 133 (Billings, J., concurring).

13. Order Amending Vt. R. CRIM. P. 54 (Oct. 13, 1976). Three problems are raised by the court's order. First, the procedures do not provide for the possibility that a lawyer may

the amendments was to clarify its ruling in *Dunkerley* and to eliminate the "divergent interpretations" of the *Dunkerley* opinion.¹⁴

II. HISTORICAL PERSPECTIVE

The *Dunkerley* court supported its finding that the Vermont lay-judge system was unconstitutional by relying on a historical analysis. It stated, without support, that assistant judges came into existence at a "time in Vermont's history when legally trained men were so rare that all judges were usually lay persons," and thus the fact that the position of assistant judge had come to be "filled by laymen [was] at least partly a matter of historical accident."¹⁵ In concluding that the existence of the assistant lay judges resulted from a shortage of lawyers, and not from any conscious state policy, the court aligned itself with those commentators who have argued that, since the shortage of lawyers no longer exists, the lay-judge system is an anachronism which violates the fourteenth amendment. The essential claim is that lay-judge systems subject the defendant to a needless risk of an erroneous decision.¹⁶

be elected to the position of assistant judge. Will he be permitted to rule on questions of law? Second, the court is requiring the presiding judge to draw a distinction between fact and law which is difficult if not impossible to make at times. See 5A MOORE'S FEDERAL PRACTICE § 52.05(1) (2d ed. 1977). Perhaps the court should have permitted the presiding judge to rule completely on certain issues of law. For instance, the presiding judge could be given total responsibility for evidentiary rulings, thus enabling the trial to proceed in a more orderly fashion. Third, once the presiding judge determines the applicable law, there is no reason why the assistant lay judges should not be permitted to apply the law to the facts. The law is frequently applied to the facts by jurors, and there is no reason to prohibit assistant lay judges from performing this same function. See F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, *CASES AND COMMENTS ON CRIMINAL PROCEDURE* 1289-91 (1974); H. UVILLER, *THE PROCESS OF CRIMINAL JUSTICE: ADJUDICATION* 750-53 (1975).

14. Order Amending Vt. R. CRIM. P. 54 (Oct. 13, 1976). After the court's original opinion, there were "divergent interpretations" throughout the state on just how far *Dunkerley* had gone in proscribing the power of assistant lay judges. Some commentators interpreted the *Dunkerley* opinion to proscribe assistant judges from participating in ruling on questions of law and participating in sentencing decisions. See, e.g., Burlington Free Press, Oct. 7, 1976, at 1B, col. 5; Rutland Daily Herald, Oct. 7, 1976, at 16, col. 1. Others interpreted the *Dunkerley* opinion to mean that the assistant lay judges were totally proscribed from their judicial functions including determining questions of fact. See, e.g., Burlington Free Press, Oct. 15, 1976, at 1A, col. 2; Rutland Daily Herald, Oct. 9, 1976, at 6, col. 1; Id. Oct. 12, 1976, at 1, col. 3; The Times Argus, Oct. 7, 1976, at 4, col. 1.

15. 134 Vt. at 525, 365 A.2d at 132.

16. See Comment, *Long Overdue-Process: California and the Lay Judge*, 63 KY. L.J. 490,

The anachronism argument is unpersuasive when applied to Vermont because the institution of lay judges in the state was the result of conscious state policy, not a shortage of lawyers. The office of assistant judge was first recognized in the Vermont Constitution nearly two hundred years ago,¹⁷ and the specific duties of these judges were subsequently defined by statute in 1781.¹⁸ The original superior bench consisted of a presiding judge and four assistant judges, none of whom were required to have legal training.¹⁹ After 1825 the bench was reduced to its present number of three judges; and it became general practice for the presiding judge to be legally trained,²⁰ though the legal requirement was not formally embodied in statutory law until 1967.²¹ In 1850, the Vermont Constitution was amended to require that the presiding judge be chosen by the state legislature, while the two assistant judges were to be selected by county election.²² This selection process remains in force today.

More importantly, the reason the lay persons were retained as judges during the state's early history was not because of a shortage of trained lawyers, but rather because of popular distrust of the legal profession.²³ This strong distrust of the legal profession by Americans in the early years of our nation's development is described by historian Perry Miller in his *Life of the Mind in America*. As Miller

492-93 (1975); Note, *The Constitutionality of Nonattorney Judge Statutes*, 55 B.U.L. REV. 827, 836-39 (1975); Note, *Gordon v. Justice Court: Defendant's Right to a Competent Tribunal*, 2 HASTINGS CONST. L.Q. 1177, 1179-80 (1975); Note, *The Right of the Accused to Trial Before a Lawyer Judge*, 51 NOTRE DAME LAW. 833, 842-43 (1976).

17. VT. CONST. ch. II, § 45.

18. 1781 Vt. Acts (An Act Directing the Courts in Their Office and Duty, Apr. 14, 1781).

19. Taft, *A Legal Medley*, in V PROCEEDINGS OF VERMONT BAR ASSOCIATION 108 (1898).

20. *Id.*

21. 1966 Vt. Acts No. 64, § 2 (codified at VT. STAT. ANN. tit. 4, §§ 601, 602 (1972)) (current version at Cum. Supp. 1977).

22. VT. CONST. ch. II, §§ 42, 45.

23. See *Faretta v. California*, 422 U.S. 806, 826-27 (1975):

The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." This prejudice gained strength in the Colonies where "distrust of lawyers became an institution." . . . The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class."

notes, "[t]he mass of the people in rural or frontier regions cherished around 1800 an ingrained hostility to the law as a profession."²⁴ Thus, even though there was a sufficient number of lawyers in Vermont to fill judicial positions,²⁵ it was not the "custom in the state for many years to select lawyers for judicial positions."²⁶

Natural distrust of lawyers is not the only basis, however, for the continued use of lay persons in a judicial capacity. Although the system may have originated in response to the state's earlier period of distrust of the legal profession, it is significant that Vermont maintained the use of assistant lay judges because of the notion that lay judges know the local conditions and consequently can "temper justice with mercy."²⁷ In 1967, and again in 1974, amendments to the Vermont Constitution were proposed that would have terminated the judicial functions of assistant judges in the criminal justice system. The General Assembly, in soundly rejecting the proposed amendments, determined that a mixed tribunal was more desirable than one lawyer-judge sitting alone.²⁸ Because Vermont's

24. P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 102 (1965).

25. After several years of research on the early history of the Vermont judiciary, Samuel Hand, Professor of History at the University of Vermont, concluded that the state's early use of lay persons in judicial positions was not due to a lack of lawyers, but rather resulted from distrust of the legal profession and political reasons. Professor Hand's conclusion was based upon statistics that he compiled relating to the number of attorneys in each county during the state's early history. His findings indicate that there was a sufficient number of attorneys available in Vermont to fill judicial posts had this been desired. Hand, *A Discourse on Lay Judges and the Vermont Judiciary to 1825, or "the idea of employing side judges without legal training developed at a time when such training was rare," and other non-sequiturs* (1977) (unpublished paper on file at the University of Vermont).

26. Taft, *The Judicial History of Vermont*, in III *THE NEW ENGLAND STATES* 1415 (W. Davis ed. 1897).

27. A. NUQUIST & E. NUQUIST, *VERMONT STATE GOVERNMENT AND ADMINISTRATION* 226 (1966).

28. The attitude of the legislature is exemplified by remarks of a member of the House Judiciary Committee who stated that the assistant judges are needed to keep a rein on the legally trained judges, and that the laws are drafted clearly enough for lay persons to understand. *Vermont House Judiciary Committee Meeting on H-107* (Feb. 2, 1966). See Hebard, *Courts Have Become Second Legislature*, Burlington Free Press, Oct. 17, 1976, at 9A, col. 4. In this article, former State Representative Emory A. Hebard stated:

The most recent example [of judicial legislating] is the destruction of the functions of the Side Judges by a recent Vermont Supreme Court decision [*Dunkerley*]. This subject was thoroughly aired in the Legislature when the last Constitutional Amendments were considered. At that time the Legislature decided to retain the Side Judges although there was considerable objection from the Bar.

system of lay judges had been continued by deliberate legislative policy decisions, it was incumbent upon the court in *Dunkerley* to substantiate any alleged constitutional infirmities of the Vermont lay-judge system.

III. THE RIGHT TO COUNSEL: THE RIGHT TO BE UNDERSTOOD

The sixth amendment of the United States Constitution guarantees the defendant the right to the assistance of counsel in all criminal proceedings.²⁹ Some courts and commentators have held that this right is meaningless if the presiding non-lawyer judge is incapable of understanding the arguments of counsel.³⁰ Most of the state courts which have considered this argument, however, have rejected it.³¹ Representative of the majority approach is the Kentucky Supreme Court decision in *Ditty v. Hampton*.³² In rejecting the claim that the right to counsel requires that the judge be legally trained, the court acknowledged that an "accused needs counsel to defend him, as pointed out in *Gideon v. Wainwright*, because the government employs lawyers to prosecute him—because our system of criminal justice is an adversary system."³³ But the court determined that since the judge is not an adversary in the system, there was no reason for him to be legally trained. The function of a judge is "not to defend the accused, or to represent him, but to decide fairly and impartially."³⁴

The California Supreme Court represents the opposing view. In *Gordon v. Justice Court*,³⁵ it accepted the right-to-counsel argument

29. U.S. CONST. amend. VI provides in part: "In all criminal prosecution, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

30. See *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), cert. denied, 420 U.S. 938 (1975); Note, *The Constitutionality of Nonattorney Judge Statutes*, 55 B.U.L. REV. 827, 831-36 (1975); Note, *Gordon v. Justice Court: Defendant's Right to a Competent Tribunal*, 2 HASTINGS CONST. L.Q. 1177, 1193 (1975); Note, *The Right of the Accused to Trial Before a Lawyer Judge*, 51 NOTRE DAME LAW. 833, 842-43 (1976).

31. See, e.g., *City of Decatur v. Kushner*, 43 Ill. 2d 334, 253 N.E.2d 425 (1972); *Ditty v. Hampton*, 490 S.W.2d 772 (Ky. 1972); *Tsiosdia v. Rainaldi*, 89 N.M. 70, 547 P.2d 553 (1976); *Ex parte Ross*, 522 S.W.2d 214 (Tex. Crim. App. 1975); *Shelmidine v. Jones*, 550 P.2d 207 (Utah 1976).

32. 490 S.W.2d 772 (Ky. 1972).

33. *Id.* at 775.

34. *Id.*

35. 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), cert. denied, 420 U.S. 938

in holding that due process requires a lawyer-judge who can understand the arguments of the defendant's attorney. The *Gordon* court reasoned that "[s]ince our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process."³⁶ Thus, the court determined that a defendant would be denied a fair trial if the judge were not able to understand counsel.³⁷ It concluded that there is "little guarantee that the background of a non-attorney judge will have prepared him to recognize . . . [the legal and constitutional] issues and resolve them according to established legal principles."³⁸ The court did not suggest, however, that a fair criminal trial is impossible in a court presided over by a non-lawyer, but only intimated that the likelihood of such a trial would be substantially diminished.

The United States Supreme Court recently addressed the lay judge issue for the first time in *North v. Russell*.³⁹ In that case the defendant was to be tried before a single lay judge for driving while intoxicated. Although the defendant was entitled to an unconditional right to a later trial de novo before a lawyer-judge, he claimed that the initial proceeding before the lay judge was constitutionally impermissible.⁴⁰ The defendant argued "that the right to counsel articulated in *Argersinger v. Hamlin* . . . and *Gideon v. Wainwright* . . . is meaningless without a lawyer-judge to understand the arguments of counsel."⁴¹

Before reaching its decision, the Court noted that the United States Constitution is silent as to any requirements that "judges of the United States Courts, including Justices of the United States Supreme Court be lawyers or 'learned in the law.'"⁴² It also noted that in "excess of 95% of all criminal trials in England are tried

(1975). Apparently certiorari was denied because of mootness. See Comment, *Long Overdue-Process: California and the Lay Judge*, 63 Ky. L.J. 490, 510-11 (1975).

36. 12 Cal. 3d at 333, 525 P.2d at 78, 115 Cal. Rptr. at 638.

37. *Id.* at 328-31, 525 P.2d at 75-77, 115 Cal. Rptr. at 635-37.

38. *Id.* at 330, 525 P.2d at 76, 115 Cal. Rptr. at 636.

39. 427 U.S. 328 (1976).

40. *Id.* at 333.

41. *Id.* at 334.

42. *Id.* at 333 n.4.

before lay judicial officers.”⁴³ The Court ruled that the later right to a trial de novo before a lawyer-judge satisfied any right-to-counsel claims that the defendant may have had,⁴⁴ and therefore did not answer the question of whether the right to counsel mandates the right to be heard by a lawyer-judge in the absence of such de novo review.

In dissent, Mr. Justice Stewart and Mr. Justice Marshall insisted that the trial de novo was an insufficient constitutional procedural protection and argued that the original trial before the single lay judge deprived the accused of his right to the effective assistance of counsel guaranteed by the sixth and fourteenth amendments of the United States Constitution.⁴⁵ The dissent contended that the “essential presupposition of this basic constitutional right is that the judge conducting the trial will be able to understand what the defendant’s lawyer is talking about.”⁴⁶ Explicit in the dissent’s opinion was the belief that only a legally trained judge—not necessarily a lawyer—can protect the defendant’s right to counsel at trial.⁴⁷

The majority in *North* also hinted at the need for requiring a standard of legal capability to be met by a judge before he can preside over a criminal trial. Stating that its “concern in prior cases with judicial functions being performed by nonjudicial officers has . . . been directed at the need for independent, neutral, and detached judgment, not at legal training,”⁴⁸ the Court nonetheless considered cases like *Shadwick v. Tampa*⁴⁹ to be relevant to the issue of capability. The issue focused on by the Court in *Shadwick* was the constitutionality of the Florida system which permitted lay persons without a law degree or specific legal training to issue arrest and search warrants for violations of municipal ordinances.⁵⁰ The

43. *Id.*

44. *Id.* at 334-35.

45. *Id.* at 340 (Stewart, J., joined by Marshall, J., dissenting).

46. *Id.* at 342.

47. *Id.* at 339-40. The dissent stated that a trial before a judge who is without any legal training or education whatever deprived the defendant of his sixth amendment right to counsel and that the result might have been different had the judge received the kind of special training that several states provide. *Id.* at 340 n.1.

48. *Id.* at 337.

49. 407 U.S. 345 (1972).

50. *Id.* at 352.

Court determined that the constitutionality of such a system depended upon two requirements: First, the issuing officer must be neutral and detached; and second, he must be capable of determining whether probable cause exists for the requested search or arrest.⁵¹ The Court held that the issuing officer satisfied both requirements.⁵² Thus, in *Shadwick* the standard of judicial capability to issue arrest and search warrants was met by a lay person without any specific legal training. In contrast, the Court in *North* did not attempt to define the standard of capability that would be required of a judicial officer who presided over a criminal trial, as it believed that the trial de novo was sufficient constitutional protection for the defendant.

The *North* decision provides a two-step test for determining the constitutionality of a lay-judge system. First, the system will be examined to determine whether adequate safeguards are afforded that will provide the defendant with an opportunity to have his legal claims reviewed by a legally trained judge. If adequate safeguards are present, the defendant is protected from an erroneous decision by the lay tribunal and the system will be upheld without further inquiry. If, however, the system does not provide adequate safeguards for review by a legally trained individual, then a second inquiry will be made into the ability of the judge to fully comprehend all of the legal aspects relating to a criminal proceeding.⁵³ This two-step approach is demonstrated in *North* where the Court up-

51. *Id.* at 350.

52. *Id.* at 351.

53. Once a judge is deemed to be competent, regardless of the standard imposed, he should be permitted to preside over any criminal trial where there is a possibility of imprisonment. The complexity of a criminal trial does not substantially differ from one criminal trial to another. This position is supported by the United States Supreme Court decision in *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972), where the Court stated:

We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more. (Citations omitted).

The trial of vagrancy is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions. (Citation omitted).

held the constitutionality of the Kentucky lay-judge system at the first step because it found that the Kentucky system provided the defendant with an opportunity to have his legal claims reviewed by a legally trained judge through the trial de novo process. Thus the Court never had to reach the second issue of legal capability. The dissenters, however, because they did not believe the trial de novo provided adequate review, reached the second step—the issue of legal capability.

The two-step approach developed in *North* has been followed by state courts in determining whether their respective lay-judge systems were constitutional. The state supreme courts of Washington⁵⁴ and New Hampshire,⁵⁵ for example, relied directly on the holding in *North* because their states, like Kentucky, provided the defendant with a right to a trial de novo before a lawyer-judge. In contrast, Delaware and New York did not provide the defendant with a trial de novo; nevertheless, the Delaware Supreme Court in *Shoemaker v. State*⁵⁶ and the New York Court of Appeals in *People v. Skrynski*⁵⁷ concluded that the defendant was afforded sufficient protection from an erroneous decision by a lay judge because their procedures permitted pretrial removal to a court presided over by a lawyer-judge.⁵⁸

Similarly, the Supreme Court of Arizona in *Palmer v. Superior Court*⁵⁹ concluded its analysis on the first step of the *North* test, believing that the state's appellate system provided the defendant with sufficient opportunity to have his legal claims reviewed by a legally trained judge. The Arizona system required that a record of the proceedings before the lay-judge tribunal be kept. If the record was incomplete, an appellate court, consisting of a lawyer-judge, could grant a trial de novo. If the record was complete, then based on the record the appellate court could take one of several courses: reverse and remand for a new trial; reverse and direct an acquittal;

54. *Young v. Konz*, 88 Wash. 2d 276, 558 P.2d 791 (1977).

55. *Jenkins v. Canaan Municipal Court*, 116 N.H. 616, 366 A.2d 208 (1976).

56. 375 A.2d 431 (Del. 1977).

57. 42 N.Y.2d 218, 366 N.E.2d 797, 397 N.Y.S.2d 707 (1977).

58. *Shoemaker v. State*, 375 A.2d at 436; *People v. Skrynski*, 42 N.Y.2d at 220-21, 366 N.E.2d at 799, 397 N.Y.S.2d at 709 (1977).

59. 114 Ariz. 279, 560 P.2d 797 (1977).

or affirm the decision of the lay judge.⁶⁰ The Supreme Court of Arizona held that the Arizona system, by providing a record, insured that a legally trained judge could adequately review the proceedings before the lay tribunal.⁶¹

The Supreme Court of South Carolina in *State v. Duncan*⁶² also determined that a record which could be reviewed by a legally trained appellate court provided the defendant with sufficient protection to have his legal claims adequately reviewed.⁶³ As additional support for upholding its state lay-judge system, the South Carolina Supreme Court reached the second step of the *North* analysis and determined whether the lay judges had sufficient legal capability to preside over a criminal trial. It concluded that the lay judges in South Carolina met the standard of capability since they had attended an extensive legal training program. The *Duncan* court held that such training qualified the lay judges to preside over criminal trials in their own right.⁶⁴

Unlike the courts that were able to resolve the constitutionality of their state lay-judge systems because of sufficient safeguards to ensure adequate review by a legally trained judge, the state courts of Florida and Illinois found it necessary to examine the ability of the lay judge to understand complex legal issues. Since the State of Florida did not provide any special procedural safeguards for the defendant, such as a trial de novo, pretrial removal or a record of the proceedings, the Florida Supreme Court in *Treiman v. State ex rel. Miner*⁶⁵ therefore had to address the issue of judicial capability. The court held that the state's mandatory legal training program provided its lay judges with sufficient legal competence to preside over a criminal trial.⁶⁶ Because the State of Illinois did not provide the defendant with any procedures to have his legal claims reviewed by a legally trained judge, the Illinois court in *People v. Sabri*⁶⁷ also reached the second step. Unlike South Carolina and Florida, the

60. *Id.* at 280-81, 560 P.2d at 798-99.

61. *Id.* at 281, 560 P.2d at 799.

62. 238 S.E.2d 205 (S.C. 1977).

63. *Id.* at 209.

64. *Id.*

65. 343 So. 2d 819 (Fla. 1977).

66. *Id.* at 823-24.

67. 47 Ill. App. 3d 962, 362 N.E.2d 739 (1977).

State of Illinois did not provide its lay judges with any legal training program. Nevertheless, the court held that a lay person, even without any legal training, was competent to preside over a criminal trial.⁶⁸

In summary, several courts have held that the safeguards afforded a defendant by a trial de novo, pretrial removal or a record of the proceedings provide the defendant with an adequate opportunity to have his legal claims reviewed by a legally trained judge. Those courts were able to uphold the constitutionality of their lay-judge systems without inquiring into the legal capabilities of the lay judges. Of the courts that determined that their systems did not provide adequate safeguards, and thus had to reach the issue of legal capability, all but one court determined that a legal training program enabled a lay person to competently preside over a criminal trial. Moreover, one court has gone so far as to hold that a lay person without any legal training satisfied the standard of capability.

Since the *North* decision, the only state court to declare its lay-judge system unconstitutional has been Vermont. Noting that no trial de novo was available to the defendant, the *Dunkerley* court proceeded directly to the second step of the two-step analysis to hold that since the assistant lay judges are not legally trained, they could not decide, or participate in, ruling on questions of law. But, in doing so, the court overlooked an important procedural safeguard—the assistant lay judges sit upon a court of record⁶⁹ from which a defendant has an automatic right of appeal to the Vermont Supreme Court.⁷⁰ Thus, the court did not recognize the significance of a procedure which had been found by two other state courts to be sufficient to uphold the constitutionality of state lay-judge systems.⁷¹ While reliance on the safeguards provided by the appellate process may be seen to present difficulties and additional burdens for a defendant,⁷² the lay-judge system in Vermont provides the

68. *Id.* at 967-68, 362 N.E.2d at 744.

69. VT. R. APP. P. 10 (1974); VT. STAT. ANN. tit. 4, §§ 791, 793 (Cum. Supp. 1977).

70. VT. STAT. ANN. tit. 13, § 7401 (1974).

71. See *Palmer v. Superior Court*, 114 Ariz. 279, 560 P.2d 797 (1977); *State v. Duncan*, 238 S.E.2d 205 (S.C. 1977).

72. The California Supreme Court stated: "Availability of appeal often falls short of sufficient protection [of a defendant's fundamental right to a fair trial], since 'the burden,

defendant with additional protection because of its unique structure. Under the Vermont system, lay judges do not alone preside over a criminal trial. Rather, they sit upon a mixed tribunal consisting of a presiding lawyer-judge and two assistant lay judges. Every other court which has been confronted with a constitutional challenge to its lay-judge system involved a single lay person presiding over a criminal trial. This distinction was summarily dismissed by the *Dunkerley* court. The court stated that because it was possible for the two assistant judges to form a majority, legal rulings could be made solely by lay persons.⁷³ By this analysis, the *Dunkerley* court treated the Vermont mixed tribunal no differently from a lay judge sitting alone. But the court did not consider the presence and impact of the lawyer-judge on the mixed tribunal.⁷⁴ When the two assistant lay judges rule on a question of law, they do so with knowledge of the law obtained through the assistance and supervision of the lawyer-judge.⁷⁵ Although two lay persons may rule together on

expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy.' " *Gordon v. Justice Court*, 12 Cal. 3d 323, 332, 525 P.2d 72, 77, 115 Cal. Rptr. 632, 637 (1974) (quoting *Maine v. Superior Court*, 68 Cal. 2d 375, 378, 438 P.2d 372, 374, 66 Cal. Rptr. 724, 726 (1968)).

73. 134 Vt. at 525, 365 A.2d at 132.

74. The presiding lawyer judge must be present on the tribunal at all times. This requirement was recently demonstrated when two assistant judges of the Rutland Superior Court held court without the presence of the presiding judge. Although the cases heard were all uncontested divorce cases, the Vermont Supreme Court ruled that the superior court cannot be legally constituted without the presence of the presiding lawyer-judge. Therefore, the decisions made by the two assistant judges acting alone were void. Order of the Vermont Supreme Court (Apr. 13, 1977).

75. Although the *Dunkerley* court recognized that the two assistant lay judges could inquire of the presiding lawyer-judge for the applicable law, it held that it would be "insufficient constitutional protection to say that it is improbable that the lay judges would fail to consult with their legal colleague. A defendant cannot be required to take that gamble." 134 Vt. at 526, 365 A.2d at 132. The *Dunkerley* court did not explicitly recognize a judicial obligation on the part of the lay judges to consult with the lawyer-judge before deciding questions of law. It can be argued, however, that such an obligation exists. As the Vermont Supreme Court ruled in its order of April 13, 1977, see note 74 *supra*, the superior court cannot be legally constituted without the presiding lawyer-judge. Presumably, the purpose of requiring the presence of the lawyer-judge is to ensure input by a legally trained individual. This requirement would be meaningless if it did not also imply a judicial obligation on the part of the assistant lay judges to consult with the lawyer-judge prior to ruling on questions of law. In *North*, the Supreme Court assumed that the lay judge would recognize his judicial obligation to inform the defendant of his right to a trial de novo. 427 U.S. at 335. Although the advisement of the trial de novo was critical to its holding, the Court determined that the defendant would not be taking any gamble of being advised of this right, because the lay judge had a judicial obligation to so advise the defendant. Arguably, the defendant

an issue of law, unlike a lay judge sitting alone they are doing so after consultation with a lawyer-judge.

Instead of attempting to analyze the unique character of the mixed tribunal, the *Dunkerley* court merely cited *Gordon v. Justice Court*⁷⁶ to support the proposition that the Vermont lay-judge system was unconstitutional.⁷⁷ The California Supreme Court in *Gordon*, however, was confronted with a lay-judge system different from the one presented to the *Dunkerley* court. In California, the proceedings before the lay judge were not on the record,⁷⁸ whereas the Vermont proceedings before the mixed tribunal are a matter of record and thus permit adequate review by a legally trained appellate court. Moreover, the *Gordon* court was faced with a single lay judge who was responsible for making every legal decision before the court. In contrast, the lay judges in *Dunkerley* were sitting on a mixed tribunal and unlike their counterparts in California, they were able to defer to the lawyer-judge on matters of law. Because of these important distinctions, the *Gordon* decision should not have been used as direct support for the court's holding that the Vermont lay-judge system was unconstitutional.

The *Dunkerley* court, in failing to find that the defendant was afforded sufficient protections, reached the second step of the *North* test—capability of the judge—and held that only a lawyer could meet the standard of capability required by the due process clause of the fourteenth amendment.⁷⁹ The basic support for its holding was *Gideon v. Wainwright*,⁸⁰ where the United States Supreme Court held that a defendant was constitutionally entitled to representation by a legally qualified attorney.⁸¹ The *Dunkerley* court held that the right afforded in *Gideon* would be meaningless if the judge were not held to the same standard as counsel.⁸² Rather than provid-

in *Dunkerley* was not taking a gamble that the lay judges would fail to consult with the lawyer-judge, because the assistant lay judges had a judicial obligation to consult with the lawyer-judge before ruling on questions of law.

76. 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), cert. denied, 420 U.S. 938 (1975).

77. 134 Vt. at 526, 365 A.2d at 132.

78. 12 Cal. 3d at 332-33, 525 P.2d at 77-78, 115 Cal. Rptr. at 637-38.

79. 134 Vt. at 526, 365 A.2d at 132-33.

80. 372 U.S. 335 (1963).

81. *Id.* at 344.

82. 134 Vt. at 526, 365 A.2d at 132-33.

ing any analysis for its conclusion, the *Dunkerley* court instead cited an Indiana Supreme Court decision and the dissent in *North* as support for its standard.⁸³ Neither decision, however, justified the lawyer standard imposed by the *Dunkerley* court. The Indiana Supreme Court in *In re Judicial Interpretation of 1975 Sen. E.A. No. 441*⁸⁴ required that all judges in the state must be lawyers. The court's decision was not premised on the United States Constitution, as was the *Dunkerley* opinion, but rather on the Indiana State Constitution.⁸⁵ Similarly, the dissent in *North* did not advocate a *per se* requirement that all judges must be lawyers; rather it believed that legal training would be sufficient to meet the standard of capability.⁸⁶

Instead of answering the question of capability by referring to other decisions, the *Dunkerley* court should have carefully examined the Vermont lay-judge system. The unique aspect of the mixed tribunal may satisfy the standard of capability element of the *North* two-step test. The presiding lawyer-judge is present on the tribunal at all times and is able to share his legal knowledge and experience with the assistant lay judges.⁸⁷ In effect, the assistant lay judges are

83. *Id.* at 525-26, 365 A.2d at 132-33.

84. 263 Ind. 350, 332 N.E.2d 97 (1975).

85. *Id.* at 98.

86. See note 47 *supra*.

87. A second due process argument which has been asserted for the proscription of lay judges centers on the probable bias of such judges. It has been argued that due to the lay judge's lack of legal training, he will be unable to remain independent, impartial and detached from the proceedings, thus depriving the defendant of a fair trial. See *North v. Russell*, 427 U.S. 328, 344 (1976) (Stewart, J., joined by Marshall, J., dissenting); Note, *The Constitutionality of Nonattorney Judge Statutes*, 55 B.U.L. REV. 827, 839-41 (1975); Note, *The Right to a Legally Trained Judge: Gordon v. Justice Court*, 10 HARV. C.R.-C.L. L. REV. 739, 755 (1975); Note, *The Right of the Accused to Trial Before a Lawyer Judge*, 51 NOTRE DAME LAW. 833, 840 (1976); Note, *Limiting Judicial Incompetence: The Due Process Right to a Legally Learned Judge in State Minor Court Criminal Proceedings*, 61 VA. L. REV. 1454, 1469-70 (1975). Opponents of the lay-judge system contend that when a sole lay judge encounters difficulty in understanding the legal arguments before him, or does not know what the applicable law should be, he will seek out legal advice from other sources to have his questions answered. It has additionally been argued that the lay judge will seek advice from the most familiar source, the local prosecutor. By seeking the advice of the prosecutor, an adversary of the proceedings, the lay judge is no longer remaining detached from the proceedings. *North v. Russell*, 427 U.S. at 344 (Stewart, J., joined by Marshall, J., dissenting).

Whatever merit this argument may have when applied to a lay judge sitting alone, the argument fails when applied to a lay judge sitting on a mixed tribunal. When the assistant lay judges encounter difficulties concerning the law, they have two alternatives: First, they

receiving a continuing legal education, transforming the mixed tribunal into a legally competent court.⁸⁸ As with the first step, the *Dunkerley* court failed to provide adequate analysis to support the lawyer standard it imposed and, therefore, never satisfactorily answered the question of whether the assistant lay judges are constitutionally prohibited from ruling on questions of law in criminal trials.

CONCLUSION

The Vermont Supreme Court in *State v. Dunkerley*, relying on the due process clause of the fourteenth amendment, held that the assistant lay judges of the Vermont Superior Courts can no longer participate in ruling on questions of law in criminal trials. In reaching its decision, the court failed to recognize the state policy favoring the retention of assistant lay judges. Furthermore, it failed to adequately consider the unique character of the mixed tribunal and the impact that the presiding lawyer-judge has upon the constitutionality of the Vermont lay-judge system.

The United States Supreme Court in *Shadwick v. Tampa*⁸⁹ and again in *North v. Russell*⁹⁰ stated that the United States Constitution recognizes that varied state procedures are the "key to national innovation and vitality."⁹¹ To achieve these goals, "[s]tates are entitled to some flexibility and leeway."⁹² Although a system of lay judges may appear to be undesirable to some, the Supreme Court has cautioned that "our federal system warns of converting desirable practice into constitutional commandment."⁹³ In failing to take

can inquire of counsel during the proceedings for a further explanation; and second, they can inquire of their legal colleague, the presiding lawyer-judge. This second alternative, which is not available to a lay judge sitting alone, permits the assistant lay judges to retain their neutral, detached and impartial position at all times, thus avoiding any potential conflict with the local prosecutor.

88. A possible solution for the continuance of the mixed tribunal after the *Dunkerley* decision would be to require that at least one of the assistant judges attend a mandatory legal training program. Thus a majority of the court would be legally trained, and there would also be lay input from the non-legally trained assistant judge.

89. 407 U.S. 345 (1972).

90. 427 U.S. 328 (1976).

91. *Id.* at 338 n.6 (quoting *Shadwick v. Tampa*, 407 U.S. 345, 353-54).

92. *Id.*

93. *Id.*

into account the importance of local experimentation in our federal system, the Vermont Supreme Court unnecessarily confined the use of assistant lay judges in state judicial proceedings.

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