County Judges and Cosmetologists: A Preliminary Inquiry into “Constitutional” County Courts

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*"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."*¹

Since at least the days of Prohibition there has been a discussion regarding the professionalism of the individuals involved in the American criminal justice system.² From the police officers being required to have some college education along with months of academy training in the law and procedures of the justice system to attorneys being mandated, after college, to complete a 3 year program of formalized academic training in the law and passing a state administered exam of competence, the requirements that determined competency have increased as society and the law have become more complex.³

Yet, in Texas, one aspect of the judiciary has been exempt from this development toward professionalization. Functioning as if major portions of Texas had yet to enter the twenty-first century, Texas fails to even require a high school diploma, let alone a college education or legal training, for a judge to sit on the “constitutional” county court bench and oversee criminal cases that may include capital murder. While a cosmetologist requires 1,500 hours of instruction in

¹ *Powell v. Alabama* 287 U.S. 45, 68-69 (1932) as quoted in *Gideon v. Wainwright*, 372 U. S. 335, 344 (1963).

² National Commission on Law Observance and Enforcement, *Report on the Enforcement of the Prohibition Laws of the United States*, <https://www.ncjrs.gov/pdffiles1/Digitization/44540NCJRS.pdf>.

³ Howard Abadinsky, *Law and Justice: An Introduction to the American Legal System* (Upper Saddle River, NJ: Pearson Prentice Hall, 2008), 91.

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Texas, the only education for donning a judicial robe is simply being “well informed in the law of the State”, whatever that may mean.⁴

The county courts were originally established during the existence of the Texas Republic in the early nineteenth century, in a time when Texas was comprised of small, rural communities with limited access to trained scholars of the law. The county courts, along with the justice of the peace courts, allowed for a prompt resolution of minor civil and criminal issues, recognizing that the county judge, though not necessarily formally educated in the law, had knowledge of the local community and an awareness of its immediate concerns.⁵ As part of the state’s eventual four-tiered judicial system, there was to be one county court for each county established in the state.⁶ Today that judicial authority is codified in Article 5 of the Texas Constitution.⁷

The responsibilities of the elected county judge are bifurcated under Texas law. First, and foremost, are the judge’s responsibilities as the chief administrator of the county Commissioners Court, working in conjunction with four elected county commissioners.⁸ Besides serving as the chief administrator for the county government, with all the administrative duties that entails (which may range from indigent healthcare to flood plain administration), the county judge is the budgeting officer of counties with a population under 225,000, handles numerous duties related to elections, serves as the ex officio county school superintendent in counties with less than 3,000 students, and heads emergency management within the county.⁹

Judicial Duties

In 210 of the 254 counties in Texas, the county judge also has a judicial responsibility. He (approximately 90 percent are men) may preside over a trial court of record for misdemeanors where the penalty is a jail sentence of up to one year, juvenile matters, mental health, various civil actions between \$200 and \$10,000, probate, and is responsible for appellate review (trial *de novo*) for cases tried by the justice (also known as the justice of the peace) and municipal courts.¹⁰

⁴ Texas Constitution, Article 5, Judicial Department, Section 15, <http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.5.htm#5.15>; Occupations Code, Title 9, Regulation of Barbers, Cosmetologists, and Related Occupations, <https://www.tdlr.texas.gov/cosmet/cosmetlaw.htm#1602254>.

⁵ David W. Neubauer and Henry F. Fradella, *America’s Courts and the Criminal Justice System*, 11th ed. (Belmont, CA: Wadsworth, 2014), 94, 96.

⁶ Constitution of the Republic of Texas (1836), <https://tarltonapps.law.utexas.edu/constitutions/texas1836>.

⁷ Texas Constitution, Article Five, Judicial Department, Section 15.

⁸ Texas State Historical Association, *Texas Almanac: 2014-2015* (Denton, TX: University of North Texas, 2014), 518.

⁹ Texas Association of Counties, “Guide to Texas Laws for County Officials, 2016,”

<https://county.org/member-services/legal-resources/publications/Documents/Guide%20to%20Texas%20Laws%20for%20County%20Officials.pdf>.

¹⁰ Office of Court Administration, *Annual Statistical Report for the Judiciary, Fiscal Year 2016*, xiv, <http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf>; Office of Court Administration, *Texas Courts: A Descriptive Summary*, 8, <http://www.txcourts.gov/media/10753/court-overview.pdf>. Note: Some county court jurisdictions vary depending on individual statutes that created other courts. In 36 counties, for example, the county courts also have concurrent jurisdiction in civil cases with the justice courts. In some counties, the appeals go to a county court at law or to the district court.

In the more populated counties in Texas, such as Harris (Houston), Bexar (San Antonio), Travis (Austin), Dallas, and El Paso, for example, the state legislature has deemed it prudent to exempt the county judge of judicial duties, having established county courts at law and probate courts to fulfill that responsibility. These courts, which require an attorney on the bench, allow the county's chief executive to focus solely on his administrative responsibilities.¹¹ Yet for 210 counties in Texas, the county judge is burdened with both executive and judicial responsibilities.

As the county judge is an elected position, selected by the majority of voters from across the county, the requirements are determined by state statute. As mentioned earlier, there is only one primary requirement specified – that the county judge “shall be well informed in the law of the State.”¹² Unlike district courts that handle felony cases or county courts at law in metropolitan areas, both of which mandate an attorney as judge, there is no requirement that the county judge be licensed to practice law in Texas.

As for the education of the county judge after election, they are governed by the Rules of Judicial Education which only require 30 hours of instruction to be completed before or within one year of taking office in the “administrative duties of office and substantive, procedural and evidentiary laws...and each fiscal year thereafter, complete at least 16 hours.”¹³ This is even less than is required for a newly elected justice of the peace, a local trial court judge whose trials are subject to appeal to the county court, who is required to “complete an 80-hour live course of instruction” along with 20-hour course the following year.¹⁴

Unlike the lower justice of the peace courts that handle traffic tickets with the penalty limited to a minor fine, the county courts handled 50,000 criminal cases in fiscal year 2016 nearly a quarter of which were drug related. Thirteen percent were for driving while intoxicated, with another 10 percent for theft. Assault cases approached another 10 percent, as did driving with an invalid or suspended license.¹⁵ The potential penalty in many of these cases was up to one year in confinement (for any class A misdemeanor offense).¹⁶

For 15,000 of these cases, the defendant's representation was divided almost evenly between appointed and retained counsel. For the other 35,000 cases, the defendant had to rely on the prosecutor or the county judge to protect their constitutional rights.¹⁷ With 3 percent of all criminal cases handled by a bench trial and less than 1 percent by a jury trial, the legal knowledge of the county judge can be crucial to protecting a defendant's civil rights and liberties.¹⁸

¹¹ Texas State Historical Association, *Texas Almanac: 2014-2015*, 528.

¹² Texas Constitution, Article 5, Judicial Department, Section 15.

¹³ Court of Criminal Appeals, Rules of Judicial Education, <http://www.txcourts.gov/media/1438132/rules-of-judicial-education.pdf>.

¹⁴ *Ibid.*

¹⁵ Office of Court Administration, *Report for the Judiciary, Fiscal Year 2016*, Court-Level-28.

¹⁶ Texas Penal Code, Title 3, Chapter 12, Punishments, <http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.12.htm>.

¹⁷ National District Attorneys Association, “National Prosecution Standards § 1-1.2,” <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>; American Bar Association, *ABA Standards for Criminal Justice Special Functions of the Trial Judge*, 3rd ed. (Washington, DC: American Bar Association, 2000), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/trial_judge.authcheckdam.pdf.

¹⁸ Office of Court Administration, *Report for the Judiciary, Fiscal Year 2016*, Court-Level – 29.

But the power and authority of the county judge extends beyond the criminal docket. Almost 6,000 civil cases were filed in county courts in FY 16 along with over 18,000 probate and guardianship cases. Juveniles accounted for another 1,800 cases, running the gamut of violations from conduct in need of supervision (CINS) to delinquent conduct that varied from capital murder to contempt of court with almost 600 of them classified as felonies.¹⁹ Mental health cases included over 7,000 applications with over 2,400 final commitment hearings held leading to 1,400 commitments for temporary mental health services with almost 100 persons committed for extended mental health services. With 6,000 protective custody orders signed, over 1,000 orders to authorize psychoactive medications were also granted.²⁰

Catechumen Court

Texas is a state that has not historically hesitated at regulating any profession that has the ability to harm its citizens. A cosmetologist, for example, requires 1,500 hours of instruction, a plumber four years of apprenticeship.²¹ Attorneys practicing law must be licensed by the state.²² Judges serving on appellate or district courts are also required to establish a level of proficiency in their profession beyond simple licensure.²³ Yet county judges can commit someone to jail or to a mental health facility with absolutely no training in the law during their first year on the bench and *less than four days of training* prior in their second year of service as a judge.

Courts are entrusted to play a variety of roles in society. From assessing culpability and punishment to deciding disputes over property, those on the bench are expected to have knowledge of not only the law (and the philosophy behind it) but also of the substantive legal procedures involved in determining a just outcome.

As federal district judge Charles E. Wyzanski, Jr. explained, a trial judge has “scope to use a judge’s initiative and discretion” not only in the “width of choice in sentencing defendants” but to “help lawyers frame the issues and develop the facts so that there may be a meaningful and complete record” as well as to “help counsel develop uncertain points of law.” Wyzanski further commented that “by instruction to juries, and in appropriate cases, by comment on the evidence he may help the juries better understand their high civic function,” maintaining that “his conduct of a trial may fashion and sustain the moral principles of the community.” With little to no legal training, a county judge may be unable to effectively fulfill any of those concerns.²⁴

With the Supreme Court’s historical focus on individual rights and equality under the Constitution, lower courts have been tasked, more than ever, with the protections of individual

¹⁹ Ibid., Detail – 33-35.

²⁰ Ibid., Detail – 36.

²¹ Occupations Code, Title 9, Regulation of Barbers, Cosmetologists, and Related Occupations, <https://www.tdlr.texas.gov/cosmet/cosmetlaw.htm#1602254>; Occupations Code, Title 8. Regulations of Environmental and Industrial Trades, Chap. 1301, Plumbers, <http://www.statutes.legis.state.tx.us/Docs/OC/pdf/OC.1301.pdf>.

²² Texas Board of Law Examiners, “Rules Governing Admission to the Bar of Texas,” <https://ble.texas.gov/rules>.

²³ The Texas Constitution, Article 5. Judicial Department, <http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.5.htm#5>.

²⁴ Charles E. Wyzanski, Jr. to Leverett Saltonstall, 1959, in *Courts, Judges, & Politics: An Introduction to the Judicial Process*, 6th ed., edited by Walter Murphy and others (New York: McGraw Hill, 2006), 112.

liberties.²⁵ Without a foundation in constitutional law the nuances involved in determining their applicability may be easily lost on the layman. Whether involving a search that brings into question the competency of the detaining officer or the voluntariness of the defendant's oral consent, an educational foundation in constitutional law is considered appropriate for any arbitrator serving on the bench. Yet for many a county judge, only four days of legal training and a couple of days a year in continuing education is considered acceptable for protecting the constitutional rights of those defendants who appear before the court. And though judges have resources available to assist them in fulfilling their responsibilities, including communication with other judges, the prosecutor's office or the defense bar, these may be of little avail in the middle of a trial, hearing or plea.

There are competent county judges serving their communities across the state. A small percentage (approximately 17 percent of all 254 county judges) are attorneys.²⁶ Another group are knowledgeable thanks to their initiative in reading the law coupled with their numerous years of service on the bench. Yet for those recently elected or with a low case docket, that expertise has little opportunity to develop, let alone reach any level of acceptable proficiency as "an arbiter of facts and law for the resolution of disputes."²⁷

Prosecuting attorneys also inclined to prefer a judge who has been educated as an attorney. One prosecutor recalled an instance where a non-attorney justice resolved a traffic offense and commented that since he (the justice) did the same violation all the time, he was dismissing the case.²⁸ Another told of questioning a witness only to have the defense object. When the justice announced "overruled," the prosecutor continued with the question, only to have the justice inform the prosecutor "I overruled you" failing to recognize the difference between sustaining an objection and overruling one.²⁹ The premise of deferring a legal decision to someone who has no training in the law seems an anathema to many prosecutors (the principal legal expert in almost all county courts).

Yet one of the fundamental reasons to eliminate judicial duties from the responsibilities of the county judge is simply the perception of a conflict of interest. As chief administrator of the county, the county judge carries the responsibility of balancing a rural budget. As county judge, he has the opportunity to supplement the positive side of the ledger with imposed fines in cases that he may have presided over and determined guilt. He can also, by the power of his judicial position, influence the "going rate" within his jurisdiction for any penalties agreed to by the prosecuting office when a plea bargain is accepted. Further, in many cases, the county judge's salary is partially paid for by court fees.³⁰ By a judge simply claiming that 40 percent of the workload of his position will be judicial, the state of Texas supplements his county salary with a stipend of \$25,000, a

²⁵ Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1995), 277.

²⁶ Office of Court Administration, "Profile of Appellate and Trial Judges," <http://www.txcourts.gov/media/1435986/judge-profile-sept-16.pdf>.

²⁷ Texas Code of Judicial Conduct, http://www.txcourts.gov/media/514728/TXCodeOfJudicialConduct_20020822.pdf.

²⁸ Personal communication with author, June, 2016.

²⁹ Personal communication with author, July, 2017.

³⁰ Eric Dexheimer, "How a modest proposal turned into a big pay raise for county judges," *Austin American-Statesman*, December 15, 2016, <http://www.mystatesman.com/news/public-affairs/how-modest-proposal-turned-into-big-pay-raise-for-county-judges/XArJW7zX9LEjfcBAZwmbjl/>.

portion of which is drawn from court fees. In rural counties that have a low caseload a county judge may be perceived to have a financial incentive to “milk” or manipulate the docket to justify the stipend. In those counties that already have a county court at law (with an attorney serving as judge), the county judge may force himself into the judicial process by claiming a portion of the court at law casework to justify his salary “bonus.”³¹

Solution

Few states continue to allow an individual uneducated in the law to serve in a judicial capacity and the few that do generally limit that service to the justice of the peace, probate or municipal courts while also limiting the power of the court.³²

For Texas, the solution is already in the hands of the state. In many locations a county court at law has replaced the judicial functions of the county judge, the state itself having confirmed that an educated attorney is not only more appropriate for the bench but also should be *required* to fulfill the court’s responsibilities. With 243 county courts at law in 92 counties already in place, their further growth would address many of the faults of the current county court system.³³ In the days of the horse and buggy, the proximity of the county seat – and its courts – was critical to the needs of the local community. Today, thanks to the auto and the state highway system, that need is all but nonexistent – and Texas concurs, having already established some multicounty courts at law to handle the casework of multiple counties.

The Supreme Court, in *Gideon v. Wainwright* (1963)³⁴, determined that the right to counsel for a defendant in a criminal case was critical to obtaining a fair trial and was a fundamental right under the Fourteenth Amendment. In that decision, Justice Black quoted an earlier decision, *Powell v. Alabama* (1932):

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. (p. 69).

Yet, in Texas, the judge the defendant will face may be as uneducated in the law as that “intelligent and educated layman” Justice Black describes, if the defendant is appearing in front one of the state’s 210 “constitutional” county courts that hears cases. If the defendant requires

³¹ Eric Dexheimer, “For Texas county judges, a \$25,000 bonus with no questions asked,” *Austin American-Statesman*, December 15, 2016, <http://www.mystatesman.com/news/public-affairs/for-texas-county-judges-000-bonus-with-questions-asked/jr8gzdMNZDLdBvnPFZNnyM/>.

³² National Center for State Courts, “Methods for Judicial Selection: Limited Jurisdiction Courts,” http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state=.

³³ Office of Court Administration, *Report for the Judiciary, Fiscal Year 2016*, iv.

³⁴ *Gideon v. Wainwright*, 372 U. S. 335, 345 (1963).

the “guiding hand of counsel” at every step of the proceedings against him, is it no less applicable for the referee of the proceedings to have the same “skills and knowledge” as counsel? Shouldn’t the judge actually be trained in the law he enforces? Texas requires more training for a deputy serving as a jailer than it does for the judge who sentences an individual to that jail.³⁵ One would suspect that is not, from Justice Black’s perspective, quite just.

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³⁵ Texas Commission on Law Enforcement, “Course Curriculum Materials and Updates, Courses for Licensure, 2011 Basic County Corrections,” <https://www.tcole.texas.gov/content/course-curriculum-materials-and-updates-0>