District Courts of Massachusetts

REPORT OF THE SPECIAL COMMITTEE ON TRIAL DE NOVO TO THE CHIEF JUSTICE OF THE DISTRICT COURTS

Special Committee on Trial de Novo

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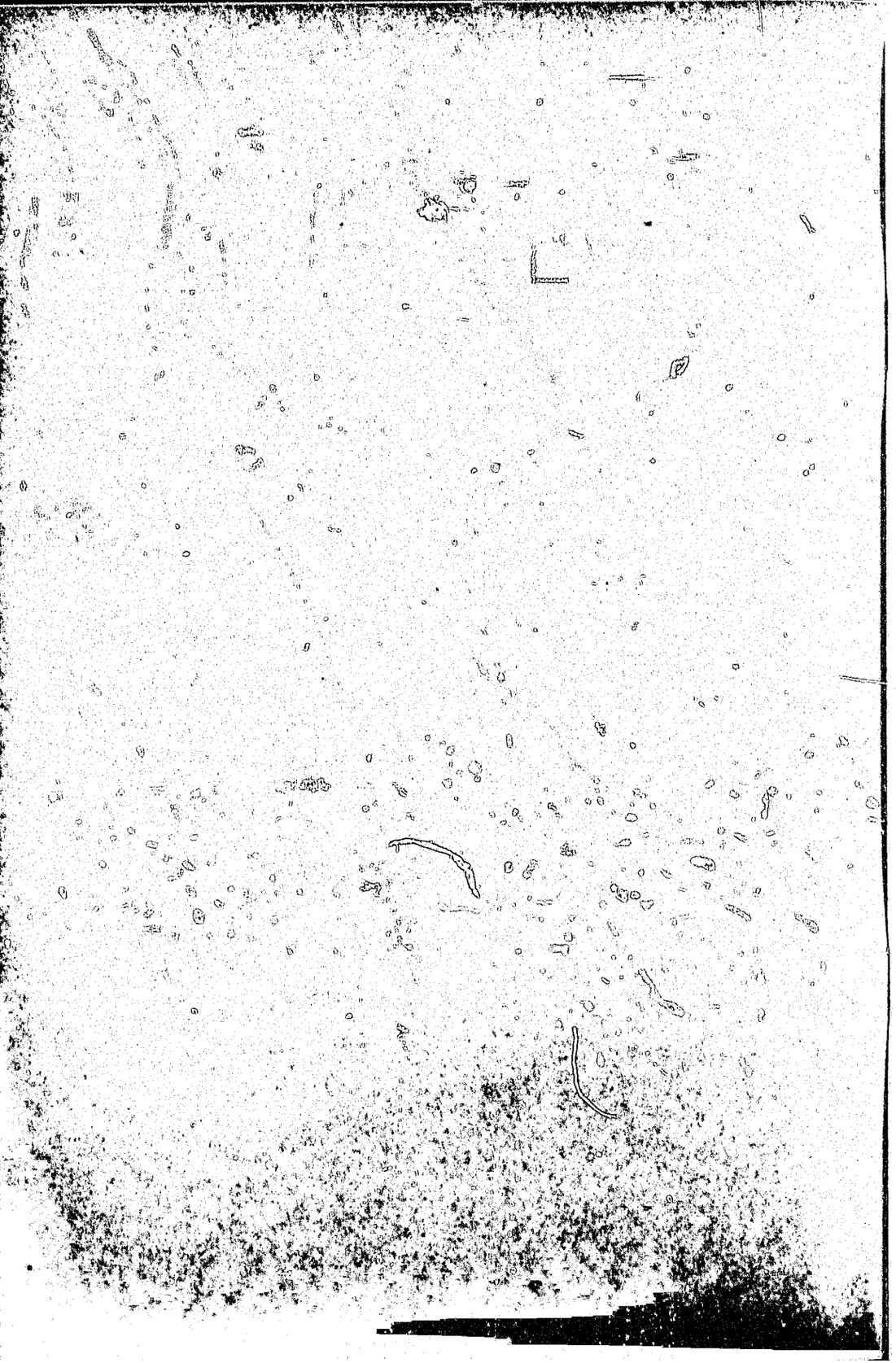

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Introduction

Every criminal trial in the District Courts[1] is held initially by a judge without a jury. However, it is generally assumed that all persons charged with crime in Massachusetts have a constitutional right to a trial by jury.[2] The District Court defendant exercises this right, if he chooses to do so, only after the first trial has taken place.[3] If he is dissatisfied with the decision of the District Court judge he may appeal to Superior Court where he will have the right to be retried before a jury of twelve, or in most counties he may also appeal to a jury of six session of the District Courts.[4] In either event the defendant obtains an entirely new trial. This second trial or retrial of the offense is referred to as trial de novo or appeal de novo.

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[1] References herein to the District Courts include the Boston Municipal Court unless otherwise stated.

[2] See *Jones* v. *Robbins*, 8 Gray 329 (1857); Smith, *Criminal Practice and Procedure*, *Massachusetts Practice*, vol. 30, at 443, and Article XII of the Declaration of Rights of the Massachusetts Constitution. With regard to the Federal Constitution, "[f]ive Members of the Court out of the eight participating . . . agreed [in *Baldwin* v. *New York*, 399 U.S. 66, 90 S. Ct. 1886 (1970)] that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months." *Codispoti* v. *Pennsylvania*, ____ U.S. ____, 94 S. Ct. 2687, 2691 n. 4 (1974). Apart from constitutional provisions, G.L. c. 263, § 6, and c. 278, §§ 18 and 18A, read together, provide every criminal defendant with this right.

[3] G.L. c. 218, §§ 26, 27A; c. 278, §§ 18, 18A.

[4] In the Boston Municipal Court the appeal is to a jury of twelve. See G.L. c. 278, § 18A.

Ultimately it may not take place before a jury if the defendant pleads guilty or waives the jury.

The trial de novo procedure also applies to cases of juvenile delinquency.[5] These cases are heard in the first instance by District Court judges, except in the areas served by the Boston, Worcester, Springfield and Bristol County Juvenile Courts. All juvenile appeals are heard de novo in the Superior Court, except for the alternative availability of a similar procedure in the Boston Juvenile Court. While this report discusses the trial de novo problem in terms of adult criminal cases, the considerations have equal application to cases of juvenile delinquency.

In July, 1975, Franklin N. Flaschner, Chief Justice of the District Courts of Massachusetts, established a Special Committee to examine the trial de novo procedure in an effort to understand its effect on the quality of the judicial process in Massachusetts, particularly in the District Courts. The five District Court judges and one Boston Municipal Court judge appointed to the committee, representing diverse experience in urban, suburban and rural courts, met for several months and this report is the result of their work.[6]

The committee's report is merely a first step in an analysis of trial de novo. It presents a consideration of the strengths and weaknesses of the existing system and it discusses some alternative modifications of it, but it does not recommend a particular solution. Nor is the report intended as a comprehensive study of the problem. The committee, for example, made no attempt to deal with the constitutional issues of whether the trial de novo procedure violates the Sixth Amendment right to

[5] In juvenile cases this is not a constitutional but a statutory right. The consequences are the same, however. See *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976 (1971).

[6] The report expresses the views of each of the committee members individually and not as a representative of a particular court.

a trial by jury or the Fifth Amendment double jeopardy provisions.[7] Nor did the committee attempt to obtain extensive statistics with regard to the operation of the trial de novo procedure.

The committee did, however, have the advantage of some statistics for its study, including the annual statistics of the District Courts and the Superior Court. In addition, the results of two surveys were utilized in preparing the report. The first survey is referred to in the report as the "District Court Study" and consisted of a questionnaire completed by the probation officers in the courts represented by the committee members and by the probation officers of several other District Courts.[8] The second is referred to as the "BMC [Boston Municipal Court] Study" and was conducted in the BMC as part of a thesis presented by Michael S. Kaufman in March, 1975 to the Department of Government at Harvard College as partial fulfillment of the requirements for the Bachelor of Arts degree with honors.[9] To the extent that

[7] These issues were raised in the recent United States Supreme Court case of *Costarelli* v. *Commonwealth of Massachusetts*, ____ U.S. ____, 95 S. Ct. 1534 (1974), although the Supreme Court eventually dismissed the appeal for want of jurisdiction. The same questions are raised again in *Ludwig* v. *Commonwealth of Massachusetts*, No. 75-377, in which the Supreme Court noted probable jurisdiction on November 11, 1975. See also *Whitmarsh* v. *Commonwealth*, 1974 Mass. Adv. Sh. 1403, 316 N.E. 2d 610.

[8] The following courts participated in the District Court Study: Brookline, Newton, Roxbury, Salem, South Boston, Orleans, Springfield and Great Barrington.

[9] A follow-up study of cases appealed from the Cambridge District Court was conducted by Michael S. Kaufman and Johanna Resnick, the results of which are contained in a paper written by Mr. Kaufman entitled "Trial de Novo in the Cambridge District and Middlesex Superior Courts" (hereafter referred to as the "Cambridge Study"). The paper, dated December, 1975, was made available to the committee after the preparation of its report. In the only respect in which the conclusions of the Cambridge Study vary from those in this report, that discrepancy is noted. See n. 30, *infra*.

statistics are used, the report relies more heavily upon BMC than District Court figures because the BMC Study is undoubtedly more accurate than the informal study conducted within the District Courts. However, the statistics of both studies are used only to supplement the experience and observations of the judges on the committee.

In undertaking this project the committee was aware of the movement away from trial de novo in other states and of the general trend toward change in this area.[10] For example, in the New England area Connecticut recently abolished trial de novo by statute[11] and Rhode Island modified the procedure somewhat by court decision.[12] Oregon, too, recently abolished trial de novo.[13] Only nine states retain the two-tier trial system in criminal cases.[14] The Report on Courts of the National Advisory Commission on Criminal Justice Standards

[10] Current literature on the subject is also concerned with changes in the procedure. For example, the committee reviewed the following: Robertson and Walker, *Trial de Novo in the Superior Court: Should It Be Abolished? — Two Views*, 56 Mass. L.Q. 347 (1971); Note, *The De Novo Procedure — Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment*, 55 B.U. L. Rev. 25 (1975); and *De Novo Juries, Misdemeanor Counsel and Other Problems: Changes Ahead for the Maine District Courts?* 23 Me. L. Rev. 63 (1971).

[11] See Sec. 54-82, Conn. Gen. Stat.

[12] *State* v. *Holliday*, 109 R.I. 93, 280 A.2d 333 (1971).

[13] Ch. 451, Oregon Laws, 1975.

[14] Alabama, Arkansas, Massachusetts, Minnesota, New Hampshire, Maine, North Carolina, Pennsylvania and Virginia. Note, *The De Novo Procedure — Assessment of its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment*, 55 B.U. L. Rev. 25, 26-7 n. 6 (1975).

and Goals recommends the abolition of trial de novo and the availability of an appeal on questions of law in all cases.[15]

Calls for reform have come from within the Massachusetts court system and legal community as well. As early as 1909 Judge Henry T. Lummus, later Associate Justice of the Supreme Judicial Court, in a report entitled "The Failure of the Appeal System," criticized the trial de novo system and called the need for reform "great and pressing."[16] On various occasions since that time the Judicial Council, committees and individual judges have called attention to the defects of the system.[17] In 1970, after thirty years of relative silence on the subject, the Lawyers Committee for Civil Rights Under Law published a provocative report[18] highly critical of the system. The Annual Report on the State of the Judiciary to the Massachusetts Bar Association delivered on June 14, 1975 by G. Joseph Tauro, Chief Justice of the Supreme Judicial Court, recommends the consideration of some changes in our two-tier system and calls for an end to the frustration of "the efforts of district court judges to render substantial justice by subjecting their decisions to de novo appeals."[19]

It is hoped that the committee's report will serve as the basis for intensified public discussion of this very important issue.

[15] See Standard 8.1 at page 164, and the commentary at page 166.

[16] Henry T. Lummus, *The Failure of the Appeal System* (Massachusetts Prison Association, 1909), p. 29.

[17] BMC Study, 42-51.

[18] Bing and Rosenfeld, *The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston* (Lawyers Committee for Civil Rights Under Law, 1970).

[19] Tauro, *The State of the Judiciary — Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court*, 60 Mass. L.Q. 241, 261 (1975).

The Impact of Trial de Novo on Law Enforcement

In analyzing the trial de novo process, a major concern is whether the public interest in law enforcement is adequately served by the present system.

Massachusetts communities face a serious problem of rising crime, particularly the type of crime that makes people insecure on the streets and in their homes. For example, from 1968 to 1973 the percentage increase in all serious crimes in Massachusetts was approximately 55 percent. The percentage increase in property crimes during the same period was approximately 74 per cent for larceny, 54 per cent for burglary and 36 per cent for auto theft.[20]

The judicial system is criticized for failing to cope effectively with this increase in criminal activity. The criticism stems from a variety of theories regarding the philosophical basis for judicial action in dealing with criminal cases. Some view the goal of the judicial system primarily as rehabilitation of the offender; others see the goal as incapacitation of the offender so that he may, temporarily at least, be prevented from committing other crimes. Some urge deterrence as the major purpose, and still others — a growing number perhaps — urge a goal of punishment or retribution. Without analyzing the relative merits of the various theories, there should be consensus on one proposition: the public interest in reducing crime is best served by the courts when they can impose final dispositions, promptly, after fair trials.[21] The relative value of any aspect of the organization of the court system should be measured against this standard.

[20] These statistics are based upon the FBI's Uniform Crime Reports. Figures for 1973 are estimated because the larceny definition was changed from "larceny over $50" to "all larceny." See *Commonwealth of Massachusetts 1976 Comprehensive Criminal Justice Plan, Volume 5: Crime in Massachusetts 1973* / (Massachusetts Committee on Criminal Justice, 1975), pp. 14, 16.

At first glance the present system has appeal. It permits a resolution of ". . . the great majority of misdemeanor cases . . . and perhaps half of all felony cases within a week or two of arrest."[22] It is an effective device for screening out a large percentage of the criminal cases for prompt disposition while at the same time preserving the right to trial by jury. Upon closer analysis, however, the picture becomes more complicated and reveals that these benefits are achieved at a high cost to law enforcement.

Defaults. First, many defendants default after taking an appeal for a de novo hearing and thus may escape punishment altogether. For example, in the BMC Study 25 per cent of the defendants who appealed to Superior Court defaulted at their Superior Court hearing.

Delay. Of utmost concern, however, is the fact that those cases that are appealed are usually heard after a significant delay, a delay in many cases of more than a year.[23] In Berk-

[21] See in this regard the address by Attorney General Edward H. Levi to the International Association of Chiefs of Police 82d Annual Convention, Second General Session, September 16, 1975.

[22] Robertson and Walker, *Trial de Novo in the Superior Court: Should It Be Abolished? — Two Views*, 56 Mass. L.Q. 347, 359 (1971).

[23] In the BMC Study the length of time from the date the case was entered in Superior Court to final disposition was considered, and only 5 percent of the cases were still pending in the Superior Court after one year. Nevertheless, the average length of time for disposition of cases appealed from the BMC to Superior Court was roughly five months. BMC Study, 63-4. Five months is a considerable period of time, especially in view of the fact that the average time it takes to complete criminal proceedings in the BMC is 2½ weeks. *Id.* at 60. Delay is considerably worse in certain counties outside of Suffolk County.

With regard to District Court cases appealed to the Superior Court during the period of the District Court Study, over one-third of such cases

shire County there were no de novo appeal sessions at all in Superior Court for almost two years, from December, 1973, until October, 1975.

The consequences of such delay are devastating from a public interest viewpoint. If deterrence is a legitimate law enforcement objective, the more delayed the final disposition of a defendant's case the less the deterrent effect. Moreover, those defendants who require incarceration for rehabilitative purposes or merely to punish them remain on the street between the District Court disposition and hearing in Superior Court. Those who could be rehabilitated in the community in drug, alcoholic or other programs remain unsupervised. They are free for months or years to commit further crimes before a final disposition of their original offense. Although the defendant must "recognize," personally or via money bail, he is not under any type of court supervision that might prevent him from committing further crimes.

It is sometimes believed that the period between taking the appeal and ultimate disposition is, in practical effect, a period of unsupervised probation with the defendant striving to stay out of trouble and change his life style, hoping for a more favorable disposition in the Superior Court. This may happen in some cases. However, more typical is the case of a defendant who commits multiple offenses while his appeal is pending

were still pending in the Superior Court one year after the appeal had been taken. It is possible that a substantial percentage of these cases may even be pending after two years. (A definite determination of the true delay involved cannot be made because the period studied is too recent.)

Although District Court criminal cases may be appealed either to the Superior Court or, in counties where they exist, to a District Court jury of six, G.L. c. 278, § 18; c. 218, § 27A, this section of this report is concerned only with those cases appealed to the Superior Court. Appeals to Superior Court represent the great majority of all criminal cases appealed from the District Courts and virtually all criminal cases involving non-motor vehicle offenses.

so that when the appeal is finally heard the original case is one of several dealt with together. Every District Court judge encounters all too frequently the situation where a defendant is arrested, tried and found guilty in the District Court at the same time that he is awaiting trial in Superior Court on an appeal — often several appeals — from previous District Court guilty findings. By dealing with these appeals together when the first one comes to hearing in Superior Court the distinctive nature of each offense is blurred and the group of offenses tends to become merged into a packaged disposition for the sake of expediency.

In addition, as time passes interest in the event declines. The diminishing public interest has two effects. It is increasingly difficult to prove a case as witnesses disappear, their memories fade or they become disillusioned or frustrated after repeated court appearances. Additionally, the public perception of justice being accomplished diminishes or is lost altogether. The criminal process eventually loses its meaning and the victim and all affected by the initial crime perceive the entire system as unresponsive and ineffectual. Delay, in short, is undesirable from the perspective of public interest in law enforcement. No valid public interest exists for delays in resolving the disposition of a criminal case.

Results on appeal. In examining the consequences of a system that rapidly and finally disposes of most of its criminal cases, those cases which are appealed and whose outcomes are substantially delayed must be scrutinized in order to determine the consequences of the delay and the relative importance of the cases involved.

Some individuals are found not guilty on appeal. The BMC Study indicated that of all defendants who appealed to Superior Court approximately one-fifth have their cases terminated favorably. But for the remaining defendants — the vast majority of the total who appeal — the sentence on appeal

generally represents a substantial *reduction* of the sentence that had been imposed in the District Court. Of those convicted on appeal from the BMC, substantially all received a lesser sentence. In fact, of the 35 defendants in the BMC Study who had received jail terms of more than 12 months in the BMC, 26, or 74 per cent, were freed from any incarceration at all upon appeal. Of the 23 defendants sentenced to over 18 months in jail in the BMC, 16, or 70 per cent, received no jail term in the Superior Court.[24]

Moreover, the defendants who do receive jail sentences in District Court, and thus comprise the bulk of appellants, are those considered by District Court judges to be the most serious offenders. Typically District Court judges try to dispose of criminal matters with dispositions not involving incarceration. A first offender, upon a determination that there are sufficient facts to warrant a finding of guilty, is likely to have his case continued without a finding, sometimes with a requirement of restitution, court costs or supervision. "Instead of imposing jail sentences District Courts tend, or should tend, to explore and utilize every sentencing alternative in the community consistent with protecting the community."[25] A jail sentence is the most severe penalty available to a District Court judge and is usually imposed only upon a repeater of serious and harmful misconduct.

Perhaps in some cases a reduction in a District Court sentence may appear to be appropriate. Yet the statistics as well as the experience of the District Court judges demonstrate that sentences are systematically and substantially reduced in Superior Court to a degree far in excess of what could be deemed

[24] BMC Study, 71, 74.

[25] Flaschner, *The District Courts of Massachusetts: The Office of the Chief Justice and Five Precepts of Judicial Administration*, 58 Mass. L.Q. 115, 123 (1973).

reasonably necessary. Moreover, with respect to those defendants found guilty on appeal to Superior Court and placed on probation there, the relative effectiveness of Superior Court probation is probably less in comparison to District Court probation which is typically in the defendant's community, under the supervision of the local District Court judge.

The serious offender. It is the opinion of the committee that, apart from those defendants genuinely maintaining innocence or legitimately aggrieved by an unduly harsh sentence, or suffering loss of license, it is usually the "career criminal" — the recidivist — who utilizes the de novo system to avoid incarceration. He knows the advantages to him of the appeal process: long delay in the execution of the sentence imposed and, ultimately, a reduction in that sentence.[26] Other defendants who frequently appeal are those who have something to lose by accepting the District Court sentence, that is, those defendants already serving another suspended sentence or on parole. The acceptance of the District Court finding would jeopardize their freedom on the other sentences.[27] Because this is at least their second conviction, these individuals may be en route to becoming career criminals. The conclusion is inescapable that the system is used most frequently by precisely those persons from whom society most wants protection.

The fact that the system ultimately provides the opportunity for a jury trial in Superior Court cannot be used to justify the existing procedure. While defendants have the right to a jury trial[28] and the opportunity for one must exist at some level, in reality a jury trial on an appeal de novo from the District Court to the Superior Court rarely occurs. According to the BMC Study there was a jury trial in less than 4 per cent of the

[26] See BMC Study, 133.

[27] See pp. 15-16, *infra*.

[28] See n. 2, *supra*.

cases appealed.[29] The large majority of cases appealed to the Superior Court are disposed of on guilty pleas, often to reduced charges, by prosecutors after considerable delays.[30]

In summary, because the District Court defendants presenting the most serious danger to society comprise the large majority of those who appeal to the Superior Court, and because those appeals generally produce mild dispositions after unreasonable delays, the public interest in effective law enforcement may be ill-served by the de novo system despite its function as a useful screening mechanism.

Trial de Novo and the Defendant's Rights

Another area of concern in analyzing the trial de novo process is the extent to which the present system is fair from the point of view of the defendant's rights. As mentioned in the Introduction, these rights will be considered from a pragmatic rather than a constitutional perspective.

[29] BMC Study, 65.

[30] *Id.* at 71. If a jury trial is in fact all the defendant wants, rather than delay, a speedy jury trial is usually available in the District Court before a jury of six. Statistics indicate, however, that relatively few defendants choose to appeal to the jury of six. It should be noted that the Cambridge Study concluded that the difference in delay between the jury of six sessions and the Superior Court of Middlesex County was negligible. Cambridge Study, 11. This conclusion was inconsistent with that of the District Court Study, however.

In addition, the figures used in the Cambridge Study are from the period April through October, 1973. Although this was the same time span used in the BMC Study, it should be noted that there has been a significant decrease since 1973 in the age of cases pending for disposition at the jury of six session in Cambridge. In September, 1973 at the time of the Cambridge Study there were 176 defendants with cases over six months old awaiting disposition. In December, 1975 there were only 12 defendants with cases over six months old awaiting disposition.

Advantages to the defendant. Again, the trial de novo process superficially appears to be of great benefit to the defendant. He receives a rapid and inexpensive trial in the District Court. Absent delay at the defendant's request, the District Court proceedings frequently begin within ten days after the filing of the complaint and generally are completed, once brought to trial, in one court day.[31] Moreover, the speed and the relative informality of the District Court trial tend to minimize the costs of defending the charge.

The de novo system also offers the defendant the advantage of extended discovery of the state's case against him at the District Court level without requiring the defendant to reveal his own case. The defendant has the opportunity to expose the state's witnesses to cross-examination and to solidify their testimony for impeachment purposes at the Superior Court trial.[32]

The appeal often insures that the defendant will not suffer adverse consequences as a result of the District Court proceeding. By simply saying "I appeal" he effectively nullifies the sentence imposed by the District Court judge.[33]

The mechanics of the appeal procedure also function to the defendant's advantage. Once he claims his appeal, the defendant, in effect, assumes control of the future course of the litigation. He may obtain continuances for bona fide reasons or for self-serving reasons such as trying to select a judge who might be lenient. Up until the time of the Superior Court trial the defendant may also withdraw his appeal to the Su-

[31] Brief for Massachusetts Defenders Committee as Amicus Curiae at 8, *Costarelli* v. *Commonwealth of Massachusetts*, ___ U.S. ___, 95 S. Ct. 1534 (1975).

[32] *Id.* at 10.

[33] See G.L. c. 278, § 18, and *Mann* v. *Commonwealth*, 359 Mass. 661, 271 N.E. 2d 331 (1971). See also St. 1975, c. 459 relative to suspended sentences.

perior Court and either elect to appeal to the jury of six in the District Court[34] or simply accept the sentence originally imposed. Coupled with the long delay that is usually available, the system is of great value to the career criminal.

But most beneficial to the defendant, perhaps excessively so, is the fact that the system offers him two chances at acquittal. At the Superior Court trial the entire proceeding starts anew with the defendant again assuming the presumption of innocence and the burden once more upon the Commonwealth to prove guilt beyond a reasonable doubt. This creates a peculiar anomaly in that defendants charged with serious felonies lack a second chance for acquittal. Their original trial is in Superior Court, with appeal only on questions of law. Thus the system provides greater rights to defendants charged with larceny, auto theft, housebreaking, assault and battery or even motor vehicle offenses than to those charged with murder or rape.

Delay of the right to jury trial. The main reason for the de novo system is to preserve the defendant's right to a trial by jury.[35] The de novo process, however, delays this right. By so doing the advantages that a jury trial offers are also delayed. It is generally agreed that a jury trial rather than a non-jury trial may be preferable to many defendants for several reasons. It is said that a jury tends to be more sympathetic. Judges may tend to become case-hardened or prosecution-minded after sitting on criminal cases in a particular community for a substantial period of time. In many District Courts the judges soon know the police by name; they see the same faces every day and there is strong pressure to begin to think of themselves as members of the "Commonwealth's team." The jury is the time-honored, fair system for impartially deciding questions of fact. It is the backbone of our

[34] See G.L. c. 218, § 27A.

[35] See n. 2, *supra*.

system of justice. Six or twelve of the defendant's peers are considered best able to determine credibility issues. Thus the de novo process, although theoretically providing the defendant with the benefits of a jury trial, merely serves to delay these benefits, with all of the disadvantages that such delay entails.

The expense of the de novo system. The right to a jury trial may be obtained only by bearing the expense and anxiety of two trials. The defendant obtains his second trial only by submitting twice to the strenuous preparation involved in defending a lawsuit: securing witnesses, consultations with an attorney, development of trial tactics and ultimately a potentially lengthy trial. If the defendant is indigent the state or county must assume the cost of defending the defendant twice. Defendants with low incomes who do not qualify for court-appointed counsel may well find the extra cost of two trials prohibitive. Defendants who have been found guilty but who strongly proclaim their innocence may, because of financial considerations or otherwise, be encouraged to accept probation or a suspended sentence rather than face an appeal. Perhaps if tried by a jury in the first instance some of the defendants accepting relatively mild dispositions would have been found innocent.

Pending the appeal, the defendant must live with the fact of conviction. Although the District Court sentence is effectively nullified when the defendant claims an appeal, severe personal and financial consequences result from the conviction. A conviction may disrupt or curtail an individual's employment, drain his financial resources, create adverse publicity, injure his reputation and create anxiety in him, his family and his friends.

The fact of conviction may also trigger other undesirable consequences. The conviction may affect a defendant's probation or sentence on an earlier charge. It is always a condi-

tion of probation that a defendant not commit another crime. If he is found guilty in the District Court of committing an additional crime, notwithstanding his having appealed he may still be subject to being surrendered for a probation violation which could lead to the imposition of the sentence in the earlier case.[36] Conviction may also hinder his right to be released on bail in the immediate case or in subsequent cases.[37] Action in these other areas is not suspended pending an appeal. In tangible terms the District Court conviction may cause the defendant to suffer severe administrative consequences, such as the loss of his driver's license.[38] He may become ineligible for a firearms identification card[39] or be subject to other unanticipated administrative consequences.[40]

Thus, upon close scrutiny, the surface appeal of the de novo system for the defendant is in many respects outweighed by the burdens the system imposes upon him, except for the career criminal who gains the most merely from the delay the process provides. To the extent that the system provides two separate trials, for the career criminal it provides excessive benefits against the public interest; for the others the burdens associated with two trials result in unfairness. The requirement of fairness would be satisfied by one opportunity for trial, before a jury if so desired, and an appeal on errors of law, if any.

[36] See Standard on Surrender of Probationer Who has been Found Guilty and Appealed, or Been Held for the Superior Court Following Probable Cause Hearing, promulgated by the Commissioner of Probation, July 15, 1971.

[37] See G.L. c. 278, § 18.

[38] See G.L. c. 90, § 24(1)(b), and *Lowenstein v. McLaughlin*, 295 F. Supp. 638 (D. Mass. 1969).

[39] See G.L. c. 140, §§ 121, 122.

[40] See G.L. c. 140, § 9.

The Effect of the Trial de Novo System on the Quality of Justice

The existence of the trial de novo system has a negative impact upon the quality of justice in the District Courts.

The District Court judge is constantly aware that an appeal by the defendant will, in effect, eradicate whatever sentence the District Court imposes. This fact discourages the careful thought required in the delicate process of imposing reasoned and appropriate sentences. The District Court judge, for example, knows that an appeal will return the defendant to the street for months or years without any type of rehabilitative program, whether it be incarceration or supervised probation. In an attempt to avoid this undesirable result he may impose a sentence other than that called for by the facts of the particular case and the defendant's criminal record, if any. A lighter sentence than actually warranted may be ordered in the hope that the defendant will accept the sentence and not appeal. A sentence of incarceration may be imposed and then suspended, with probation, on the theory that because the defendant will avoid actual incarceration he will not appeal, and that if the probationary terms are violated sentence may then be imposed, from which no appeal lies.[41]

The possibility of a trial de novo may also result in a judge imposing a harsher sentence than the one actually deserved. The overly-harsh sentence may be the judge's response to community pressures, for he knows that the appeal de novo provides an escape for the defendant from the severity of the sentence. Or, because he knows that a jail sentence would be appealed, he may impose an unusually long suspended sen-

[41] Although there is no appeal, a due process hearing is required on probation revocation. See *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756 (1973).

tence when a jail sentence of short duration is all that is warranted. This is not to say that these practices are universal. Because of the de novo system, however, they exist to some degree and result in a contorting of the District Court sentencing process.

Apart from sentencing, the absence of any review of the District Court proceeding discourages adherence to rules of practice and procedure in the District Courts. There is subtle pressure for all trial participants to treat matters of practice and procedure as being relatively unimportant because, if the defendant is unsatisfied with the conduct of his trial, he can always appeal and render the trial a nullity. Without accountability through direct appeals for error, improper applications of substantive law or procedure, or neglect of due process, go uncorrected. Direct appellate review encourages the development of uniformity of procedure. Without it the District Courts are deprived of a corrective technique normally present in the judicial process. A system with appellate review inevitably results in a closer adherence to law and due process.

Arguably, of course, some benefits flow from the informal atmosphere of the District Courts. These benefits need not be lost, however, in a one-tier system, although it will take extra effort on the part of the judge to accommodate the need for an appropriate environment with the need for strict adherence to legal requirements. Judicial accountability would increase the care, precision and conscientiousness with which decisions are made in the District Courts. Binding legal precedent rather than scattered feedback would guide judicial conduct. Discretion, innovation and community orientation, particularly with respect to criminal dispositions, could still be retained.

Finally, a lack of public respect for the District Courts is inevitable if all of its actions can be rendered meaningless by the claim of an appeal. Considering the importance of the District Courts in terms of the number of citizens appearing

before them and the critical nature in human terms of the cases dealt with, the lack of public confidence is an extremely serious problem. The cycle is a vicious one. If the courts are not held accountable for error through direct review, occasionally they will act in a way not deserving of respect.

The existence of the trial de novo process also greatly affects the business of the Superior Court. At the present time there is an enormous backlog of criminal cases in the Superior Court, and an even greater backlog of civil cases. In fact, in 1974 six of the twelve counties in the country with the worst civil backlog were in Massachusetts.[42] The total Superior Court annual criminal caseload in fiscal year 1975 consisted of 17,330 cases started by indictment, plus 17,654 appeals from the District Courts. The current *backlog* of criminal cases in the Superior Court is 38,933, of which 19,100 are appeals from the District Courts.[43] If the Superior Court were relieved of the appeals from the District Courts, the overall backlog in the Superior Court could be appreciably reduced.

Alternatives to the Present Two-Tier System

It is the committee's conclusion that the trial de novo system is responsible for major failings in our system of criminal justice. They are failings born of structural and jurisdictional weaknesses in the court system and not of inattention to duty or unconcern on the part of District Court or Superior Court judges. Indeed a number of District Court judges sit in the

[42] *Calendar Status Study — 1974* (Institute of Judicial Administration, 1974), pp. ix-x.

[43] These figures represent the number of complaints in each instance. The number of individual defendants involved is roughly one-half the number of complaints. Superior Court of Massachusetts, "Criminal Statistics in the Superior Court for Fiscal Year 1975."

Superior Court de novo appeal sessions pursuant to the provisions of G.L. c. 212, § 14B.

Possible ameliorative changes range from minor administrative adjustments to complete abolition of trial de novo, with or without other fundamental structural changes such as court unification. Various modifications of the system would improve its functioning in some respects, but only elimination of the two-tier system with assurances that manpower and facilities are sufficiently available to avoid significant backlogs would completely eliminate the present problems.

The solution of choice, absent court unification, would be the establishment of a right to trial by jury in the first instance in the District Court,[44] subject to appeal only on questions of law. The District Court judiciary now has eleven years of experience successfully presiding over jury of six sessions.[45] There is virtually no backlog of criminal cases in the District Courts, and the District Court system as a whole presently has the capacity to assume additional work, although some individual courts are presently functioning at or near capacity.[46] As soon as all courts are equipped electronically to record testimony, the mechanism for creating a record for appellate review will exist.[47]

[44] No attempt is made herein to develop the details of a system that would establish a jury trial in the District Court in the first instance. Obviously jury sessions would have to be created in addition to those that presently exist in the District Court jury of six sessions, although jury sessions might not be necessary in all the District Courts. The number of sessions would depend upon the demand for juries and the existence of appropriate physical facilities.

[45] For the period July 1, 1974, through June 30, 1975, the thirteen authorized jury of six sessions disposed of 5,919 complaints or 3,378 defendants. District Courts of Massachusetts, "Statistics, Juries of Six, Criminal, for the period July 1, 1974 through June 30, 1975."

[46] The 1975 session of the General Court enacted legislation which assures that most of the 81 Special Justices of the District Courts will serve full-time by July 1, 1979. See St. 1975, c. 862.

The alternative solution of giving each defendant at arraignment a choice between a non-jury trial in the District Court and a jury trial in the Superior Court would exacerbate the existing situation in the Superior Court since it would increase the caseload, and therefore the backlog, of an already overloaded system.[48] Of course, District Court personnel and facilities could be assigned to a greater extent than at present to assist the Superior Court in disposing of these cases, but without unification of the two courts the administrative problems and confusion created would be substantial.

Careful consideration must be given to the possible consequences of abolition of trial de novo. Such a change should be made only if the resulting system functions better than the present one. Jury trials take more time than non-jury trials. A prediction would have to be made both as to the percentage of the cases now tried in the District Courts which would be claimed as jury trials and actually heard as jury trials. If either the claimed or actual jury trial rate were high and significant backlogs were to develop, the benefits inherent in the present system would be lost, plea-bargaining would be used excessively and the public interest in effective law enforcement would continue to suffer. Thus as a basis for a

[47] A bill has been filed with the 1976 legislative session to provide for the preservation of testimony in the District Courts and the Municipal Court of the City of Boston. Thirty District Courts, including the BMC, are presently equipped with electronic recording equipment. See S. 657.

[48] It is expected that such an alternative would increase the Superior Court backlog because all defendants, unaware of what the District Court disposition would be, would probably choose a Superior Court jury trial. Presently at least some defendants are satisfied with the result in District Court and therefore never claim their right to a jury trial.

realistic projection of the consequences of elimination of trial de novo a more complete study should be undertaken, including an analysis of experience in other jurisdictions as to the rate of election of jury trials.[49]

There are a number of steps that can and should be taken short of abolition of a two-tier system, pending the completion of such a study and pending a decision on the most effective procedure to replace the present one.

It might be possible to eliminate some delay by changes in case scheduling and management techniques used in the Superior Court.[50] Also administratively, a defendant placed on probation after being found guilty in a Superior Court de novo trial could be supervised by the probation department of the District Court in which he was originally tried or by the one nearest his home, rather than by the probation department of the Superior Court, distant from his home. In addition,

[49] The number of jury trials initially claimed would probably be high. Defense counsel, seeking to do the utmost for his client, would be likely to request a jury trial if for no other purpose than as an aid in plea-negotiation. The members of the committee were divided about the probable rate of actual jury trials. Those who felt the rate would be low cited the expectation and need of many defendants for speedy, efficient and inexpensive resolution of minor criminal matters (*e.g.* motor vehicle offenses and domestic problems), the familiarity of the defense bar with the present procedures for non-jury trials in the District Courts, and the likely problem for the accused of having to travel some distance from his local community to a regional courthouse to obtain a jury trial (*e.g.* cases arraigned in the Brookline court probably would go to Dedham for a jury trial). Those who believe the election rate would be high assume that a defendant will desire trial by a jury that will probably include at least one of his socio-economic peers.

[50] The Committee met with Hon. Kent Smith, Associate Justice of the Superior Court, on September 24, 1975. At that time he suggested that priority might be given to new cases, requiring them to be set for early trial in the Superior Court.

greater use could be made of the statutory authority to the effect that a defendant who defaults on appeal has waived his claim for a jury trial.[51]

By statute the right to a trial by jury could be eliminated for certain minor offenses, such as traffic violations carrying no possible jail term, as suggested in the *Proposed Criminal Code of Massachusetts* published by the Massachusetts Criminal Law Revision Commission in 1972. A number of states have taken this step. New York State, for example, has removed the trial of minor traffic violations to an administrative setting.[52] In Maine and Oregon, as a result of recent legislation, traffic violations are tried in court but they have been decriminalized and there is no right to a jury trial.[53]

By statute, all appeals from District Court convictions and Juvenile Court proceedings could be required to be heard in District Court jury sessions. Legislation to accomplish this has been under consideration for several years.[54] The District Court jury sessions are presently underutilized and have the capacity to handle expeditiously considerably more work, probably all the appeals from the District Courts.

None of these suggested interim changes, the list of which is not intended to be exhaustive, would eliminate all of the problems presently caused by the trial de novo system. None of them, for example, would affect the considerations previously mentioned regarding the quality of justice in the Dis-

[51] G.L. c. 278, § 24.

[52] See Ch. 1074 and Ch. 1075, N.Y. Laws, 1969.

[53] Ch. 430, Maine Public Laws, 1975 and Ch. 451, Oregon Laws, 1975.

[54] See, for example, S. 831 of the 1975 legislative session. A similar bill, S. 658, has been filed in the 1976 session.

trict Courts, particularly those resulting from the absence of appellate review for error[55] or from the sense of futility which descends upon a District Court judge who recognizes the limits imposed on him by the de novo system. As a result, the elimination of trial de novo is necessary as a matter of public policy.

[55] To some extent introduction of electronic equipment for recording testimony can be expected to improve the quality of courtroom proceedings, but not as effectively as if it were combined with appellate review.

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