

CHAPTER 1

A Student Perspective

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A MODEST PROPOSAL FOR COURT REFORM

The judge hearing criminal cases in the Massachusetts district court is virtually autonomous in his courtroom. His autonomy is a consequence of his freedom from supervision and evaluation. Two factors contribute to the independence of the district court judge. The first is the structure of the Massachusetts judicial system, and the second is the social context of the district court.

Under the current judicial structure in Massachusetts, the district court judge's procedural and substantive rulings are not subject to appellate review. Upon entry into the criminal court system, a defendant can waive his right to a first instance jury trial in favor of a bench trial in the district court. A convicted defendant who is dissatisfied with the verdict at his bench trial can appeal, but instead of having the decision reviewed by an appellate court, the defendant receives a *de novo* trial.¹ Immediately upon appeal, the judgment of the first instance trial is vacated and the defendant goes to the jury session, where the second trial judge, with or without a jury, depending on the defendant's choice, retries the case based on whatever evidence is presented.

This *de novo* system was originally established in England in the seventeenth century when many towns and counties were without judges most of the year. Its purpose was to provide speedy resolution of minor criminal complaints by justices of the peace, who dispensed a kind of "rough justice," while at the same time not precluding each defendant's right to an eventual jury trial.² According to many critics, the original justification for the *de novo* system has disappeared in Massachusetts, and now the

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¹ REPORT OF THE COMMITTEE ON JURIES OF SIX TO THE CHIEF JUSTICE OF THE DISTRICT COURT DEPARTMENT, ELIMINATION OF THE TRIAL *DE NOVO* SYSTEM IN CRIMINAL CASES 12 (1984) [hereinafter cited as REPORT].

² See G.L. c. 278, § 18, which provides: "Notwithstanding any other provision of law, a defendant after a finding of guilty, jury waived in a district court, or the municipal court of Boston, may appeal therefrom and shall thereafter be entitled to a trial *de novo* in a jury of six session"

system serves only to shield the abuses of autocratic district court judges.³ Under the *de novo* system, as seen by those who would abolish it, the "ideals of due process and reform in the district courts are maintained by force of personality, blue smoke and mirrors."⁴

The lack of accountability built into the *de novo* trial system is not remedied by any other form of review. Massachusetts is one of only three states where a district court judge is appointed for life, with no provision for regular review.⁵ Although the district courts are technically under the supervision of the Supreme Judicial Court, only transgressions of major proportions are brought to the attention of the Court.⁶ The Supreme Judicial Court will only review "patterns of disregard or indifference which warrant discipline."⁷ Errors of fact or law must be addressed by appellate review.⁸ Because there is no appellate review of the first instance trial in district court, errors of fact and law remain uncorrected.

In addition to the isolation the formal court system provides, the district courts are insulated from review or accountability by the social context in which they operate. The defendants and victims are primarily poor people with little or no political power and influence.⁹ For the most part, lawyers who practice in the district courts are district attorneys, public defenders, and court-appointed lawyers. Privately retained lawyers rarely appear in the district court.¹⁰ Moreover, very little research and scholarly writing focuses on this level of the judicial system.¹¹ Consequently, the law as administered in the district court hardly ever comes to the attention of

³ See generally REPORT, *supra* note 1; S. BING AND S. ROSENFELD, *THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON* (1970) [hereinafter cited as BING].

⁴ Testimony of former District Court and Superior Court Judge Gordon L. Doerfer on behalf of the Administration of Justice Section of the Boston Bar Association in Support of Reform of the *De Novo* Two Trial System in the District Courts Senate Bill Number 1736 (April 1985) [hereinafter cited as Doerfer].

⁵ Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 179 (1980).

⁶ The Chief Administrative Justice of the District Court Department has administrative authority over district court judges and can report a failure to comply with any order of the administrative justice to the Chief Administrative Judge of the trial court, who is responsible to the Supreme Judicial Court. See G.L. c. 211C, § 10. The Supreme Judicial Court generally only reviews matters forwarded by the Commission on Judicial Conduct. See G.L. c. 211C, § 2. See, e.g., *In the Matter of Margaret C. Scott*, 377 Mass. 364, 365-67, 386 N.E.2d 218, 219 (1979).

⁷ *In the Matter of Margaret C. Scott*, 377 Mass. 364, 367, 386 N.E.2d 218, 220 (1979).

⁸ *Matter of Troy*, 364 Mass. 15, 40-41, 306 N.E.2d 203, 218 (1973).

⁹ See BING, *supra* note 3, at 124-29.

¹⁰ *Id.* at 109, 117.

¹¹ Berg and Flynn, *Voter Participation in Municipal Court Elections in Los Angeles County*, 2 LAW & POL'Y Q. 161, 161 (1980); see also Hurst, *The Functions of the Courts in the U.S. 1950-1980*, 15 LAW & SOC'Y REV. 401, 407 (1980).

those people who could insure that defendants receive the due process rights that have evolved under our system of justice.¹²

Contrary to current practices, the district court judge should be made accountable by some system of review. As it now stands, defendants are often deprived of their due process rights; the judge often develops his own independent policy regarding criminal justice; and the public, lacking understanding of the workings of, and constraints on, the district court, incorrectly blames the judicial system for what is perceived as frightening crime rates.

Defendants' due process rights are in theory protected by the federal and state constitutions, federal and state case law, the state rules of evidence, and, in Massachusetts, by the recently enacted Rules of Criminal Procedure.¹³ In reality, district court judges have been known to gloss over a defendant's constitutional rights,¹⁴ and rules of evidence and criminal procedure are often loosely enforced.¹⁵ Because of the lack of review procedure, however, no one has been able to measure the precise extent to which district court judges violate these rules of substantive and procedural due process. In addition, the many judges who do accomplish the Herculean task of enforcing the law in the chaos and obscurity of the district courts also go unrecognized.

The two areas where the abuse of legal standards is most egregious are in applying the standard of proof required to find a defendant guilty, and in sentencing. First, numerous observers of the district criminal courts have seen judges decide, even explicitly, that a defendant was guilty because it was more likely than not that he committed the crime.¹⁶ Use of a "more likely than not" standard is a clear violation of the criminal defendant's right to be presumed innocent unless and until proven guilty beyond a reasonable doubt. Under Massachusetts case law, where the evidence is not in dispute, but the defense and the prosecution are drawing different, equally probable inferences from the same set of facts, the judge is required to give the defendant the benefit of the doubt and find that the prosecution has failed to meet its burden of proof.¹⁷ The district court

¹² See Doerfer, *supra* note 4, at 4.

¹³ The Rules of Criminal Procedure were first codified in 1971. The rules were redrafted as District Court Department Supplemental Rules of Criminal Procedure, and promulgated by the Supreme Judicial Court, October 19, 1978, to take effect on July 1, 1979. Commonwealth of Massachusetts Rules of Criminal Procedure. Order, Supreme Judicial Court.

¹⁴ BING, *supra* note 3, at 82-84.

¹⁵ *Id.* at 78-81.

¹⁶ *Id.* at 83.

¹⁷ See *Commonwealth v. Wooden*, 13 Mass. App. Ct. 417, 433 N.E.2d 234 (1982) (citing *Commonwealth v. O'Brien*, 305 Mass. 393, 400, 26 N.E.2d 235 (1940)). "When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." *Id.* This is because "in choosing among the possible inferences from the evidence presented, a jury necessarily would have to employ

judge, however, often ignores this judicial mandate regarding the application of the proper standard, and reaches a verdict based on his estimation of the probable or even possible facts, or his impression of the witnesses' character.¹⁸

Second, in sentencing, where the defendant admits to sufficient facts as a result of plea bargaining, the district court judge often omits the mandatory colloquy with the defendant to determine if he fully understands the consequences of his plea.¹⁹ Merely asking a defendant if he understands what he is doing may not be sufficient, particularly where the defendant is only marginally literate.²⁰ The district court judge typically listens to a recitation of selected facts by a district attorney or a police officer and assumes that, because the defendant has admitted to a crime, he has in fact committed all the statutorily defined elements. This assumption, however, overlooks the considerable pressure that is put on the defendant to forego a trial. The district attorney will nearly always offer to recommend a lighter sentence if the defendant admits to sufficient facts than if

conjecture. This is insufficient to sustain the burden on the Commonwealth." *Id.* (quoting *Commonwealth v. Croft*, 345 Mass. 143, 145, 186 N.E.2d 468, 469 (1962)).

¹⁸ A mock trial exercise conducted as part of a criminal process course at Boston College Law School graphically illustrated how judges apply their own intuitive assessment of the defendant's character in arriving at verdicts and sentencing decisions in cases where there is no dispute about the evidence. Ten pairs of students were given the identical fact pattern to litigate in ten separate mock trials. Each pair consisted of one district attorney and one defense attorney. According to the fact pattern, the arresting officer observed the defendant handle a box of marijuana in the presence of a third person, but could not hear their conversation. The policeman, based on his observations, charged the defendant with the possession of marijuana with intent to distribute. In each trial, the defendant testified and acknowledged that she had done what the policeman witnessed, but explained that she was merely returning the marijuana to the person who owned it. The defendant gave a plausible explanation of her actions by introducing into evidence the conversation that the policeman had not been able to hear. A different "judge" presided over each trial but in each case the facts introduced into evidence were generally the same. The verdicts ranged from not guilty to guilty of possession with intent to distribute, and the dispositions ranged from probation to incarceration. One judge justified his sentence of eighteen months probation and a fine by saying that in his opinion, the defendant was on the way to hard-core drug addiction.

The mock trial judges were not professional judges. They were prosecutors and defense attorneys who practice in the criminal district courts, and so it may be argued that actual judges would not differ so widely in their conclusions and sentencing. Nonetheless, to the extent that lawyers who constantly practice before a particular set of judges may be expected to assimilate (and given the opportunity, to reflect) the standards and practices of those judges, the mock trial experiment may provide a graphic illustration of district court reality.

¹⁹ See MASS. R. CRIM. P. 12(a)(3). See also *Ciummei v. Commonwealth*, 378 Mass. 504, 506-08, 510-12, 392 N.E.2d 1186, 1188, 1190 (1979); *Petition of Costarelli*, 378 Mass. 516, 517-19, 392 N.E.2d 1193, 1194 (1979) (rule made applicable to district courts).

²⁰ *Ciummei*, 378 Mass. at 508-10, 392 N.E.2d at 1189. "In this exchange, the judge will advise the defendant of his constitutional right to a jury trial, and will satisfy himself that any waiver by the defendant is made voluntarily and intelligently." *Id.*

he insists on going to trial.²¹ In situations where the defendant's credibility will be balanced against the credibility of the complainant, who is usually a police officer, the defendant may well choose to accept a more assured lighter sentence instead of investing his hopes in the unlikely possibility that his testimony will be more believable to the district court judge than that of the police officer. In calculating the risk, the defendant must evaluate the credibility of his story as well as the effect of his past record of criminal convictions, both of which are admissible into evidence for the purpose of discrediting him.²²

Sentencing is an area where the trial court judge has legitimately been given great discretion in hopes that he can fashion a disposition appropriate both to the crime and the defendant.²³ Other factors, however, often influence the district court judge. His predilections, background, and personality often affect his sentencing decisions.²⁴ In addition to his own idiosyncracies and the relevant facts, the district court judge may take into consideration the efficacy and cost of the various disposition alternatives.

Given the reprehensible conditions and limited available space in most prisons, many judges are reluctant to incarcerate any but the most serious criminals.²⁵ Many convicted defendants are therefore put on probation rather than sentenced to jail on the theory that a prisoner is likely to be released angrier and possibly more adroit in his criminal activities than before his incarceration.²⁶ The judge may also reason that the court will ultimately have more control over the defendant's sentence by initially putting him on probation. If a defendant is arrested while on probation, the judge can revoke probation and, without trying the second case, impose a sentence up to the maximum permissible for the first conviction. In contrast to the original sentencing decision, the sentence for violation of probation cannot routinely be appealed.²⁷ Probation, attractive to the judge for both these reasons, can often be a trap for the defendant because he is unlikely in fact to be supervised, and usually is on his own unless he

²¹ See STANDARDS OF JUDICIAL PRACTICE § 2:001 (District Court Department of the Trial Court 1981). Admitting to sufficient facts to warrant a finding of guilty allows the defendant to get a speedy disposition by not contesting the charge while preserving the right to appeal should the disposition prove unacceptable. *Id.* "The most important point is that the court's ultimate responsibility for deciding the issue of guilt in accordance with the standard of proof beyond a reasonable doubt is not altered when a defendant admits." *Id.*

²² See G.L. c. 233, § 21.

²³ Wice, *Realities of Urban Criminal Judging*, 14 SETON HALL L. REV. 229, 248 (1980).

²⁴ See generally *id.* at 247-48. See also Caldeira, *The Incentives of Trial Judges and the Administration of Justice*, 3 THE JUST. SYS. J. 163 (1977).

²⁵ Wice, *supra* note 23, at 235.

²⁶ *Id.* at 240.

²⁷ See G.L. c. 279, § 3.

is arrested for another crime.²⁸ Furthermore, fines and restitution ordered by the court are often so unrealistic in view of the defendant's economic resources that the defendant cannot meet the terms. As a result, the defendant is then imprisoned for failing to pay the amount due, often incurring a harsher sentence than he would have received had he originally been sentenced to prison rather than fined. Because the options available to the judge usually offer so little evidence of helping the defendant or protecting society, the judge may develop his own personal sentencing policy, independent of any guidance from the relevant statutes and without any explicit coordination with other judges.

Unaware of the problems and obligations confronting the district court judge, the public blames his perceived leniency for the high crime rate.²⁹ The public reacts by pressuring the Legislature to increase sentencing requirements and diminish judicial discretion.³⁰ The rationale is that longer, harsher sentences will reduce crime by deterring the criminal or by keeping him off the street. Unfortunately, this line of reasoning overlooks both the lack of space in the Massachusetts prisons, and the fact that incarceration often aggravates, rather than discourages, a defendant's criminal proclivities.³¹ If a shoplifter who is sentenced to jail emerges as a hardened, embittered criminal, it may be the penal and not the judicial system that is to blame. Unable to appreciate the conflicting pressures on the trial judge, the public blames the most visible, identifiable authorities, the courts and the judges, for the disturbing rate of crime.

The abuse of due process in the district courts, as well as the lack of uniformity in sentencing and the absence of information about the courts, are all problems stemming in part from the lack of review of the district court judges. These problems could be addressed by at least three possible types of reforms. The first would be to change the method of selecting judges; the second would be to abolish the *de novo* trial system; and the third would be to enact presumptive or determinate sentencing laws.

Throughout the United States, judges are selected in many ways, ranging from popular elections to lifetime appointments.³² Massachusetts uses the least democratic method of selection. Judges are appointed for life by the governor, and serve until the mandatory retirement age of seventy.³³ At present the governor acts with the advice of the Judicial Nominating

²⁸ Wice, *supra* note 23, at 235.

²⁹ *Id.* at 234.

³⁰ *Id.* at 237.

³¹ *Id.* at 235. Cf. Hennessey, *The State of the Judiciary: Third Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court*, 54 MASS. L. REV. 3, 8 (1979).

³² Berkson, *supra* note 5, at 178.

³³ See MASS. CONST. Pt. 2, art. 1.

Committee, a committee created by executive order, that exists at the will of the governor.³⁴ Although there are many intermediate methods of judicial selection short of popular elections that would be more democratic than the present system,³⁵ the basic choice is between election and appointment.

Arguably, some form of election would give greater popular authority and legitimacy to judicial decisions, and provide some rough measure of judicial accountability.³⁶ Any form of election, however, reduces the independence of a judge by making him answerable to a particular constituency.³⁷ Where the electorate is large, such as in big cities, the low visibility of the individual judges brings out a very small vote, and most incumbent judges remain in office, unless they provoke a scandal of some kind.³⁸ Thus, in big cities where the trial judge is most isolated from public view, elections would provide the least accountability.³⁹ In smaller cities, where the judge, the victims, and the defendants are better known, there is likely to be greater accountability, but also greater pressure to decide individual cases so as to maximize political support.

Another way to make the district court judge accountable would be to abolish the de novo trial and include the district court within the appellate system.⁴⁰ The Massachusetts Legislature is currently considering abolishing the de novo system.⁴¹ Under the new proposal, a defendant has the choice of either a bench or a jury trial.⁴² A defendant can plead guilty and, with or without the agreement of the prosecution, request a particular disposition.⁴³ The new proposal also requires the court to inform the defendant that it will not impose a disposition that exceeds the terms of the request without first giving the defendant the right to withdraw the plea.⁴⁴

Opponents of the reform argue that abolishing the de novo trial will not cure the major problems currently plaguing the district courts. The purpose of the trial de novo, according to dissenters, is both to permit and to alleviate the administration of "rough justice."⁴⁵ The value of the present

³⁴ See Michael S. Dukakis, Governor, Exec. Order No. 228, Mass. Register No. 356 (1983).

³⁵ Dubois, *Public Participation in Trial Court Elections: Possibilities for Accentuating the Positive and Eliminating the Negative*, 2 LAW AND POL'Y Q. 133 (1980).

³⁶ *Id.* at 133-34.

³⁷ *Id.* at 156.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See generally REPORT, *supra* note 1, at 12.

⁴¹ See Mass. H.R. 3438; Mass. S. 1736, General Court 1985.

⁴² See Mass. H.R. 3438, section 8, General Court 1985.

⁴³ *Id.* at section 19.

⁴⁴ *Id.*

⁴⁵ See Statement of Criminal Law Section in Opposition to House Bill 3640, Abolition of Trial De Novo, at 4.

system is that ninety-five percent of all criminal cases are quickly disposed of in the district court jury-waived session.⁴⁶ If defendants do not have the option of a de novo appeal, it can be expected that substantially fewer defendants will waive their right to a trial by jury, and the increased demand for jury trials will suffocate the courts.⁴⁷ More important is the questionable fairness of a system that would pressure the majority of defendants to give up their constitutional right to a jury trial. Currently, a defendant can elect a bench trial, and yet maintain his right to a jury trial and exercise it later if necessary. The de novo system arguably exists, then, not so much to protect defeated litigants, but to offer a quid pro quo for not standing upon the right to a jury trial in the first instance.⁴⁸

Under the proposed system, "review of both the bench and jury trials could be had directly by the [A]ppeals [C]ourt . . . in the same manner provided for trials of criminal cases in the [s]uperior [c]ourt."⁴⁹ The efficacy of the appeal system, however, depends in part upon the time and money the defendant and defense attorney realistically have available.⁵⁰ As a result, probably only a very small percentage of cases would be appealed.⁵¹ Also, appellate review would not protect the defendant from any unfair pressure to plea bargain. The bargaining process would remain as immune from review in the district court, where ninety-five percent of the criminal cases begin and end, as it is in the superior court, which disposes of the remaining five percent.

A third way to curb the discretion of the trial court judge is to enact presumptive or mandatory minimum sentencing. Under presumptive sentencing, the judge would be given a guideline range of sentences for each crime and would have to provide written justification for any deviation from those guidelines.⁵² Under mandatory sentencing, the judge would have no discretion to impose less than the mandatory minimum sentence.⁵³ The danger in enacting presumptive sentencing is that the Legislature may prescribe ranges in response to public demands for harsh sentencing, and ignore the experience of trial judges who have developed extensive criteria for sentencing over the years.⁵⁴ The disadvantage of

⁴⁶ See Memorandum from Arnold R. Rosenfeld, Chief Counsel to Members of the House Judiciary Re: The Governor's Anti-crime Bill, at 1 (March 19, 1985) (available Mass. H.R. Committee on the Judiciary).

⁴⁷ See Tinkering versus Change: Critique of the Report on Abolition of De Novo Trials, at 5.

⁴⁸ *Id.* at 2.

⁴⁹ Mass. H. R. 3438, section 8, General Court 1985.

⁵⁰ BING, *supra* note 3, at 27.

⁵¹ REPORT, *supra* note 1, at 39-40.

⁵² Hennessey, *supra* note 31, at 6.

⁵³ *Id.*

⁵⁴ *Id.* at 7.

mandatory sentencing is that it considers only the crime and not the defendant.⁵⁵ Strict guidelines allow little consideration for the differences among offenders, and unjust results would be inevitable,⁵⁶ unless judges continued to manipulate the statutes to achieve more "equitable" sentencing.

The defects and disadvantages inherent in election procedures, the appeals system, and in sentencing legislation do not mean these proposals should not be adopted individually or in combination. Some kind of review mechanism is desirable: (1) to ensure that the district court judge conforms to the rules of law that currently exist and that are enacted in the future to improve the legal system; and (2) to provide recorded information about the actual procedures of the district court for the benefit of the general public as well as the legal community.

One problem, however, is not addressed by any of these solutions. How do the users of the district court perceive the "rough justice" that is being dispensed? The users' opinions are important for at least two reasons. First, the court system can realistically only work effectively if the users support it enough to comply with its directives.⁵⁷ Second, no matter what system of review is introduced, the people directly affected by the courts have the only firsthand knowledge of all the unrecorded ways in which the various officers of the courts may manipulate or appear to manipulate the dispensation of justice. It is important, therefore, to find a mechanism of assembling and responding to the experiences and opinions of those people who are the consumers of the district court criminal justice system.

The consumers of the district court system are the victims of crime, their representatives, friends, relatives and witnesses, and the defendants' families, friends and witnesses. For the most part, these people are poor and often illiterate.⁵⁸ They are economically and politically disenfranchised. Despite their isolation from economic and political systems, however, the users of the district courts must continue to legitimize the authorities responsible for vindicating and protecting their rights.⁵⁹ If the people directly affected by the trial courts do not support the system, they can be expected increasingly to disavow the law, and to engage in vigilantism and other anti-social behavior.⁶⁰ Without public trust, the courts lose their ability to function.⁶¹ Recent surveys indicate a "crisis of confi-

⁵⁵ *Id.*

⁵⁶ *Id.* at 6.

⁵⁷ Tyler, *The Role of Perceived Injustice in Defendants' Evaluation of Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 51 (1984).

⁵⁸ J. KOZOL, *ILLITERATE AMERICA* 13-14 (1985).

⁵⁹ Tyler, *supra* note 57, at 52.

⁶⁰ *Id.*

⁶¹ *Id.* at 52-53.

dence'' in legal authorities, characterized by widespread citizen dissatisfaction with the police, courts, and lawyers.⁶² It is important, therefore, not only to review and oversee the actual process of the trial courts, but also to ascertain the participants' perceptions of that process and to enlist their support.

With those goals in mind, I propose an experiment for monitoring the district court judge without necessarily curtailing his legitimate independence and discretion. I propose that the people most directly affected by the rulings of the district court judge, the victims and the defendants, as well as their representatives, the attorneys, evaluate the judge.

Under this plan, the users of the trial courts would vote on their judges' performance. One mechanism for implementing this proposal would be to install a voting booth in each district court and require the victim, defendant, district attorney, arresting police officer where appropriate, and defense attorney to answer a short list of questions after each court proceeding.⁶³ The booth would be sealed off from public view to ensure complete privacy for each voter and someone with authority would have to be stationed to enforce the privacy of the booth. Each booth would contain a computer and a set of earphones. The person in charge of the voting booth would input certain information into the computer, including the case number and whether the participant was a victim, defendant, district attorney, police officer, or defense lawyer. Requiring people to give this information to the monitor would prevent efforts to skew the results by voting in the wrong category.⁶⁴ The computer would scramble the case number to make it impossible to retrieve the vote of specific people in a particular case. It would be very important to build in as many safeguards as possible to preserve anonymity and to assure people that their identity was really a secret.

Once inside the booth, the voter would find a computer screen, a keyboard, and a set of earphones. The earphones would be for those people who were not literate enough to understand the writing on the screen. People whose primary language is not English would have to tell the person in charge so that he could load the computer with the appropriate program. Each person would be asked a set of questions depending on whether he was a defendant, victim, defense attorney, police officer, or district attorney. One problem is that many of the crimes that are tried in district court are victimless. The general public, however, is theoretically

⁶² *Id.* at 52.

⁶³ Proceedings triggering the voting process would be those ending in a verdict of some kind. This would not include probable cause or surrender hearings.

⁶⁴ A court officer cannot monitor the booth because his presence would reduce the level of trust in anonymity. It would be better if someone not of the regular court personnel administered the voting.

a victim of all crimes, even if no one person is personally injured, and therefore a representative of the public would be asked to respond in the victim category for all crimes classified as victimless.⁶⁵ The attorneys would be asked questions about the legality of the proceedings. They would evaluate each other as well as the judge. The questions for the defendants and victims would be aimed at ascertaining whether they thought the proceedings they were evaluating had been fair. The questions would be designed so that the victims and defendants could distinguish between the result of the proceeding they were evaluating and the procedure itself. They would be asked to evaluate whether they thought the outcome was appropriate to the particulars of the situation, as opposed to whether they were personally pleased with the outcome, and how they thought the outcome compared to decisions in other similar proceedings. In addition, there would be questions relating to the judge's behavior, and the behavior of the lawyers and the police officers.⁶⁶ The police officers would be asked whether their reports had been adequately considered and whether they thought the outcome was fair and effective. Finally, the voters would be asked how they would have ruled if they had been the judge.

At the end of a set period of time, perhaps six months, all the votes would be tabulated. The results would be announced by category. The findings of this process would pinpoint persistent problems both actual and perceived. In addition, the results would be used to evaluate judges, who could also learn from this feedback on their own. If within a certain period of time a judge did not receive a majority of positive votes from each constituency, the Committee on Judicial Conduct would be required to monitor that judge and his court closely to ascertain the root of the problem.⁶⁷

This voting procedure could fill many of the gaps left by other methods of judicial review and supervision. User evaluation could produce the legitimization that is the virtue of electing judges, but avoid the problems of nonparticipation by those who actually use the courts, and of control by certain biased groups of voters. Whether or not the *de novo* trial is abolished, this system of evaluation could monitor the unrecorded activities of court officials. It would improve upon an appellate system

⁶⁵ The representative of the general public should be chosen randomly from a list of residents. That representative would have to serve for one day or for one trial. The district attorney would meet with the representative and explain the facts and the law of each case the representative would evaluate. The representative would then observe the entire proceeding and answer the series of questions designed for the victim.

⁶⁶ This type of questionnaire has already been devised by Tom Tyler for a study he did in Illinois. See Tyler, *supra* note 57, at 60-63.

⁶⁷ See G.L. c. 211C.

because many more decisions and behaviors could be examined. Finally, this evaluation mechanism could oversee and review the areas of discretion in the sentencing process.

In addition to providing a mechanism of review, the voting booth might encourage greater compliance with the directives of the court. If victims and defendants knew that their opinions and behavior could shape judicial conduct and procedure, they might develop a sense of investment in the system that would make them more inclined to support it.

Two of the most obvious objections to the proposed evaluation mechanism are that some users of the district courts arguably do not deserve to evaluate their judges, and that others are not competent to do so. Aristotle has already answered both those objections. In answer to the question, why "men of the sort who neither have wealth nor can make any claim on the ground of goodness — should properly exercise authority"⁶⁸ over magistrates, he answered, "There is a serious risk in not letting them have *some* share in the enjoyment of power; for a state with a body of disenfranchised citizens who are numerous and poor must necessarily be a state which is full of enemies."⁶⁹ In answer to the question whether people are equipped to evaluate judges without knowing anything about law, Aristotle answered that

... there are a number of arts in which the creative artist is not the only, or even the best judge. These are the arts whose products can be understood and judged even by those who do not possess any skill in the art. A house, for instance, is something which can be understood by others besides the builder: indeed the user of the house — or in other words the householder — will judge it even better than he does. In the same way, a pilot will judge a rudder better than a shipwright does; and the diner — not the cook — will be the best judge of a feast.⁷⁰

While Aristotle was obviously speaking about different people and different institutions, his words nonetheless apply to the Massachusetts district court system. There is a danger that the people who are the victims and the perpetrators of crimes do develop an enmity toward a system that offers them little respect. The police also feel their efforts and needs are ignored, and defense and district attorneys can feel frustrated with their efforts to serve their clients and the legal system. All these consumer groups often feel their time and their interests have been abused by the courts. They have legitimate complaints that will only be addressed if their voices are heard and can affect the tenure of an officer of the court. The prejudice that only experts, or at least law-abiding citizens, can evaluate the judicial system is unfounded. Studies of defendants' evalua-

⁶⁸ THE POLITICS OF ARISTOTLE, 124 (E. Barker ed. & trans. 1977).

⁶⁹ *Id.* at 124-25.

⁷⁰ *Id.* at 127.

tions of their day in court have shown that "they are sensitive to what happens to them; they do not simply blame others for their misfortunes; and they employ criteria not dissimilar to those that the rest of us would use."⁷¹ Moreover, these are the people, along with the "rest of us," whose investment in the process is perhaps most critical to its ultimate success.

In addition to providing a mechanism for participation and evaluation, the district court voting booth should also provide data that will provoke the general public and the legal community into taking an interest in what is happening in the district courts. Until the actual events and dilemmas of the criminal process in the district courts reach the attention of both the general and the legal communities, real change is unlikely to occur. New mechanisms of review and sentencing may be introduced, but as long as the district courts remain isolated from public view, criminal defendants will be at the mercy of judges who think they know best how justice should be administered.

⁷¹ Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 LAW & SOC'Y REV. 237, 240 (1978).

