

2019

## Visibility and Accountability: Shining a Light on Proceedings in Misdemeanor Two-Tier Court Systems

Binny Miller

*American University Washington College of Law*, [bmiller@wcl.american.edu](mailto:bmiller@wcl.american.edu)

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>

 Part of the [Law Commons](#)

---

### Recommended Citation

Miller, Binny (2019) "Visibility and Accountability: Shining a Light on Proceedings in Misdemeanor Two-Tier Court Systems," *Saint Louis University Law Journal*: Vol. 63 : No. 2 , Article 3.  
Available at: <https://scholarship.law.slu.edu/lj/vol63/iss2/3>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [erika.cohn@slu.edu](mailto:erika.cohn@slu.edu), [ingah.daviscrawford@slu.edu](mailto:ingah.daviscrawford@slu.edu).

## VISIBILITY AND ACCOUNTABILITY: SHINING A LIGHT ON PROCEEDINGS IN MISDEMEANOR TWO-TIER COURT SYSTEMS

BINNY MILLER\*

### INTRODUCTION

In 2011, Muhammad Abdul-Maleek was tried and convicted of misdemeanor theft in Maryland's District Court, the lower-tier court in a two-tier de novo system. These lower-tier courts are where the vast majority of misdemeanors are tried, along with some felonies. After Mr. Abdul-Maleek was sentenced to sixty days in jail, he exercised his statutory right to a de novo trial—a “second bite at the apple”—in circuit court, the upper-tier court. Without a single piece of new evidence or additional aggravating factors, the circuit court sentenced Mr. Abdul-Maleek to eight months. The judge admonished Mr. Abdul-Maleek for exercising his right to a new trial, and the prosecutor asked for increased jail time because Mr. Abdul-Maleek exercised this right.<sup>1</sup> Outcomes such as this one likely contribute to the fact that few defendants appeal their lower court convictions. In Maryland, for example, only 5.8% of guilty dispositions in the lower-tier courts were appealed for a new trial in the upper-tier courts in 2017.<sup>2</sup>

Until recently, scholars largely overlooked the importance of misdemeanors in the criminal justice system.<sup>3</sup> A new focus on misdemeanors is fueled by many

---

\* Professor of Law and Co-Director, Criminal Justice Clinic, American University Washington College of Law. I thank Shaley Williams and Jody Arenas Stafford for excellent research assistance, and Jamie Salazer for her expertise in cite checking and the Bluebook.

1. See *infra* notes 45–49 and accompanying text.

2. In 2017, just 1,537 of the total 26,421 convictions in the Maryland District Court were appealed de novo to the circuit courts. This equates to 5.8%. MARYLAND JUDICIARY, DISTRICT COURT OF MARYLAND – CRIMINAL CASE ACTIVITY REPORT (2017), <https://www.courts.state.md.us/sites/default/files/import/district/statistics/2017/2017stats.pdf> [https://perma.cc/9TDT-TX5U] [hereinafter REPORT].

3. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 278 (2011) (describing problems with the right to effective representation in the misdemeanor context); see also Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME (Apr. 24, 2014), <http://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/> [https://perma.cc/PVU3-VXRK] (discussing how misdemeanor convictions, even those without jail time, affect “housing rights, access to loans, family rights” and are “often called the secret sentence or the silent punishment”).

factors, including concerns about racial fairness in the criminal justice system,<sup>4</sup> the prevalence of police shootings of unarmed individuals, many of them people of color,<sup>5</sup> events in Ferguson, Missouri and other cities, and increased awareness of the importance of collateral consequences.<sup>6</sup> Features of the criminal justice system that once received little attention, including the use of bail and its impact on poor communities,<sup>7</sup> are now an important part of the conversation.

In this Article, I address another aspect of the system for prosecuting misdemeanors in the United States: two-tier court systems, often referred to as *de novo* systems. It is in these courts that a vast number of criminal cases are prosecuted in the United States. In these two-tier court systems, defendants charged with misdemeanors (and in some systems, minor felonies) have the right to a trial in a lower-tier court, and if they are convicted, a right to a second trial, sometimes before a jury, in an upper-tier court. In return for a *de novo* appeal, defendants forfeit their right to a direct appeal of their conviction to an appellate court.<sup>8</sup>

In a comprehensive and thoughtful law review article, David Harris discusses the *de novo* systems that in 1992 were used in twenty-four states.<sup>9</sup> He outlines the characteristics of the lower tier courts, including the unavailability of juries, the use of streamlined procedures, and the employment of judges without legal training.<sup>10</sup> Harris argues that these systems should be abolished because the lower court disposes of many cases “without the full range of costly due process protections,”<sup>11</sup> and these systems “discourage[] defendants from requesting new trials,” do not hold lower court judges accountable, “shift power

---

4. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

5. ANGELA DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (2018); *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/> [<https://perma.cc/BS8U-SGHH>] (last visited Apr. 23, 2018) (providing accounts of each of the 987 people shot and killed by the police in 2017).

6. Roberts, *supra* note 3, at 297–303; Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 171–73 (2017).

7. See Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (2018); Editorial, *Fixing the Unfair Bail System Is Worth the Costs*, WASH. POST (Sept. 9, 2017), [https://www.washingtonpost.com/opinions/fixing-the-unfair-bail-system-is-worth-the-costs/2017/09/09/ff3c5c4c-73eb-11e7-8f39-eeb7d3a2d304\\_story.html?utm\\_term=.bd908351751c](https://www.washingtonpost.com/opinions/fixing-the-unfair-bail-system-is-worth-the-costs/2017/09/09/ff3c5c4c-73eb-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.bd908351751c) [<https://perma.cc/DD9Z-G5DP>]; Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

8. David A. Harris, *Justice Rationed in the Pursuit of Efficiency: De Novo Trials in the Criminal Courts*, 24 CONN. L. REV. 381, 383 (1992).

9. *Id.* at 385, n.19. Since Harris’s article was published, Massachusetts abolished its *de novo* system. See *infra* Part II.

10. *Id.* at 384–390.

11. *Id.* at 383.

away from [defendants] who are already least advantaged,” and squander the chance to keep first offenders from reoffending.<sup>12</sup>

My interest in de novo systems stems from my experience representing clients in the de novo system in Maryland over the past thirty years as a law professor supervising student attorneys.<sup>13</sup> Before beginning my career in clinical teaching, I practiced in the federal courts as a civil rights attorney with the United States Department of Justice. I, like many lawyers who practice criminal law, was not even aware that two-tier state court systems existed.<sup>14</sup> In Maryland, the District Court is the lower tier court of limited jurisdiction and the circuit court is the upper tier court of general jurisdiction.<sup>15</sup>

At first, I saw the de novo system as uniformly advantageous for the clients that the clinic represented. What client would not want an opportunity to go to trial once in the lower-tier court, and if dissatisfied with the outcome, get a second bite at the apple in the second-tier court? This was despite the fact that the District Court sometimes was not a good court for clinic clients. One of my clinic colleagues recounted a story from a suppression hearing in District Court in which the student attorney cited *Mapp. v. Ohio*,<sup>16</sup> a well-known United States Supreme Court case interpreting the reach of the Fourth Amendment. The judge responded, “I don’t follow Ohio law in my courtroom.” In two cases, clinic clients were convicted of crimes that were not charged. But these lapses were not as damaging as they might otherwise have been because the cases could be appealed to the circuit court, where the client could receive a new suppression hearing and a new trial, or the case might be resolved with a more favorable disposition.

As I gained experience in the system, I learned that the availability of a trial in the circuit court could not remedy the limitations of all District Court proceedings. Some prosecutors would comment that it was “ridiculous” that our clients had appealed their cases, when the prosecutors believed that the cases had little merit. The biggest risk of an appeal was that our clients could receive a more severe sentence on appeal than they had received in the District Court.<sup>17</sup> A clinic client with no previous criminal record—a single parent of two children—received a sentence of probation in the District Court on a disorderly

---

12. *Id.* at 383–84.

13. For a description of my clinic, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1995).

14. When I talk to colleagues who practice in states that do not have de novo systems, many express surprise that these systems exist.

15. MD. CODE ANN., CTS. & JUD. PROC. §§ 1-501, 4-201 (West 2019).

16. 367 U.S. 643 (1961).

17. This result is permitted under Maryland’s de novo statute, MD. CODE ANN., CTS. & JUD. PROC. § 12-401 (West 2019), and the United States Supreme Court has found that the possibility of an increased sentence on de novo appeal does not violate the Due Process Clause or Double Jeopardy Clause of the Constitution. *Colten v. Kentucky*, 407 U.S. 104, 117–19 (1972).

conduct charge. After she appealed her conviction, the circuit court sentenced her to six days of incarceration. Another client was sentenced to a year in jail in the District Court but received an eighteen-month sentence in the circuit court. In one extreme case, our client's jail time sentence was quadrupled.<sup>18</sup>

In other cases, errors in the District Court were remedied in the circuit court, but the results were the combination of some mix of hard work, luck and the right prosecutor. For example, one client, a former teacher with no prior criminal record, was convicted of assaulting her former boyfriend, and sentenced to jail time in the District Court. Our client posted bond and appealed her case to the circuit court. On appeal, we discovered evidence of her former boyfriend's drug use and previous assaults on her, including an assault charge that had been prosecuted in the District Court by the same prosecutor who was now pursuing charges against our client. When we presented this evidence the day before trial, the prosecutor agreed to dismiss the charges against our client, but that result might not have happened with a different prosecutor and a less diligent defense team.

Other clients did not take advantage of the rights afforded by a *de novo* appeal and suffered serious consequences. The case outcome for a client that the clinic represented on car theft charges more than twenty years ago still troubles me. Our client had been convicted as a juvenile of car theft, had been committed to a juvenile facility, and had recently turned eighteen. In our view, the prosecutor's case was factually weak, but even if the client was convicted, a trial in the District Court would help us better prepare for trial in the circuit court. Jail time seemed highly unlikely, but little was known about the sentencing practices of the judge, who had recently been appointed to the District Court bench. The judge found our client guilty, and to our shock and dismay, gave him a five-year sentence, three years in state prison, with two years of back up time should he violate probation.

Our client did not want to appeal his conviction and adamantly refused our efforts to persuade him to appeal. We worried that state prison was not a safe place for him. He was thin and frail and had significant cognitive limitations. We were confident that we could negotiate a plea with no jail time, with the worst-case scenario a sentence involving few months in the county jail. His sentence in the District Court was so far outside the norm that no circuit court judge would have enforced it. Still, our client refused to file an appeal, and since that decision is reserved for defendants, our hands were tied.<sup>19</sup>

---

18. That case reached an appellate court and is described *infra* in notes 39–49 and accompanying text.

19. Child clients, or clients with cognitive limitations or intellectual disabilities may be particularly at a disadvantage in *de novo* systems because these systems are complex, and the litigation strategies are difficult to understand. See Robert Dinerstein & Michelle Buescher, *Capacity and the Courts*, in A GUIDE TO CONSENT 95 (Robert D. Dinerstein et al. eds., 1999) (“[T]hose with [intellectual or cognitive disabilities] may or may not be capable of standing trial,

This essay expands upon one of Harris's observations—that the system is largely invisible and operates with little accountability because the actions of the judges in the lower tier court are insulated from judicial review. As Harris notes, “the actions of lower court judges seldom receive any scrutiny or review from higher courts,”<sup>20</sup> and thus the lower court judges “have no ongoing accountability for their decisions.”<sup>21</sup> My focus is not on the specific statutory or rule-based reforms that might make the system more accountable,<sup>22</sup> but instead on other measures that might shed light on the system and thus make legal reform more likely. These systems serve the states' interests in efficiency and cost-effectiveness,<sup>23</sup> thus states may be particularly resistant to change. For example, despite calls for abolition,<sup>24</sup> Massachusetts is the only state that has abolished its *de novo* system.<sup>25</sup>

I propose two means of making *de novo* criminal justice systems more visible and more accountable: (1) appeals addressing specific features of *de novo* statutory structures in order to call attention to their flaws; and (2) study and observation of these structures by courts and policy makers and by organized programs of citizen observers. The first type of study is reflected in the Massachusetts effort to abolish its *de novo* system. A model for the second type of study by citizen observers is the court watch program undertaken by Arch City Defenders in St. Louis County after the shooting of Michael Brown in Ferguson, Missouri.

#### I. APPEALS ADDRESSING SPECIFIC FEATURES OF DE NOVO STATUTORY STRUCTURES IN ORDER TO CALL ATTENTION TO THEIR FLAWS

Before I turn to one example of an appeal that addressed a feature of Maryland's *de novo* statutory structure, it is important to understand the context of earlier challenges to *de novo* statutory structures. Three cases decided by the Supreme Court in the mid to early 1970's, *Colten v. Kentucky*,<sup>26</sup> *Ludwig v.*

---

assisting in their own defense, testifying as witnesses, or acting as jurors.”); MODEL RULES OF PROF'L CONDUCT R. 1.14 (AM. BAR ASS'N 2018) (noting that a client's diminished capacity may play a role in legal decision making).

20. Harris, *supra* note 8, at 415. Alabama is an exception. ALA. CODE § 12-12-72 (2018) (allowing a defendant the option of a traditional appeal instead of a trial *de novo*).

21. Harris, *supra* note 8, at 416.

22. These include new trial requests staying convictions and consequences, optional traditional appellate review, a lower court record, legal education for all judges, limiting the authority of lower court judges, individualized advice of rights, sentencing guidelines, optional use of juries, the ability to opt out of the lower court and the availability of full discovery. *Id.* at 384, 424–30.

23. *Id.* at 387.

24. *Id.* at 384.

25. *See infra* Part II.

26. 407 U.S. 104 (1972).

*Massachusetts*,<sup>27</sup> and *North v. Russell*,<sup>28</sup> have seemingly foreclosed constitutional challenges to the key problematic features of de novo criminal court systems: the lack of adequate process in the lower tier courts, the fact that defendants' sentences could be increased on de novo appeal, the lack of a jury trial in the lower tier court, and the fact that the lower-tier courts allow lay judges. In *Colten*, the Court rejected the challenge to Kentucky's system on due process and double jeopardy grounds because a new trial was available in the upper-tier court.<sup>29</sup> This is tantamount to a finding that the fact that "defendants must go through less than constitutionally adequate lower court trials" is irrelevant.<sup>30</sup> The Court relied on *North Carolina v. Pearce*,<sup>31</sup> a case that dealt with the constitutionality of a sentencing structure that permitted sentencing a defendant to a harsher sentence on remand following a successful appeal. The Court noted that the due process concern expressed by the Court in *Pearce* did not apply to situations where a different judge was sentencing the defendant in the upper-tier court than had sentenced the defendant in the lower-tier court.<sup>32</sup>

Next, in *Ludwig*, the Court confronted a case arising from Massachusetts' de novo criminal court system where the defendant challenged the lack of a jury trial in the lower tier court as a violation of his right to be tried by a jury.<sup>33</sup> As it did in *Colten*, the Court focused on the procedures in the upper-tier court, noting availability of the jury trial in the upper-tier court, and discounting the lack of a jury trial below, and the attendant costs of seeking a jury trial in the upper tier court.<sup>34</sup> Noting that a jury is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,"<sup>35</sup> the Court found that the fact that the defendant had to undergo two trials and wait for a jury trial did not unconstitutionally burden his right to a jury trial. A similar delay might be experienced by defendants in a single-tier system, and the financial costs of undergoing two trials could be mitigated by other features of de novo systems.<sup>36</sup>

In *North*, the final chapter in the trio of cases dealing with the constitutionality of various features of de novo criminal court systems, a lay judge who was not a lawyer presided over the defendant's trial in the lower-tier

---

27. 427 U.S. 618 (1976).

28. 427 U.S. 328 (1976).

29. *Colten*, 407 U.S. at 119.

30. Harris, *supra* note 8, at 391.

31. 395 U.S. 711 (1969).

32. *Colten*, 407 U.S. at 115–17. The Court noted that a similar double jeopardy argument had been rejected by the *Pearce* Court. *Id.* at 119.

33. *Ludwig*, 427 U.S. at 619–21.

34. *Id.* at 625–26.

35. *Id.* at 625 (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

36. *Id.* at 626–29.

court.<sup>37</sup> The Court declined to resolve the defendant's due process claim and rejected his equal protection claim, noting that the defendant had been entitled to a trial in the upper-tier court by a judge who was a lawyer.<sup>38</sup>

Harris offers convincing criticisms of these three decisions, noting that the Court made "numerous [questionable] assumptions about the way de novo systems operate,"<sup>39</sup> by ignoring the many direct process barriers for defendants seeking a new trial in the upper-tier court, and failing to recognize that de novo systems are only efficient because these process barriers actually discourage defendants from seeking the relief that they are theoretically entitled to in de novo systems.

Despite failed constitutional challenges to de novo systems, advocates can successfully navigate the appellate process to bring the flaws in the de novo system to the attention of a higher court. In 2011, my clinic successfully litigated in Maryland's highest court the question of the appropriate scope of a sentence imposed in an upper tier court following a de novo appeal. In that case, the circuit court imposed a sentence that was four times greater than that imposed in the District Court.<sup>40</sup>

Our client, Muhammad Abdul-Maleek, was tried and convicted in the District Court of misdemeanor theft of a cell phone.<sup>41</sup> He returned the cell phone but had asked for money in exchange for the cellphone, an action that constituted theft in Maryland. In the District Court, Mr. Abdul-Maleek received a sentence of sixty days.<sup>42</sup> He appealed his case to the circuit court<sup>43</sup> and the clinic was assigned to represent him. Mr. Abdul-Maleek did not testify in the circuit court trial, and the complaining witness testified to sufficient facts to show that Mr. Abdul-Maleek was guilty of theft. Some criminal defense attorneys would describe this case as a "long, slow guilty plea," but Mr. Abdul-Maleek had had his day in court and nothing new or different was testified to in the circuit court from what had been testified to in the District Court.<sup>44</sup> Mr. Abdul-Maleek's personal circumstances had not changed, either. He had one prior misdemeanor conviction, but other than that, his personal circumstances were unremarkable.

---

37. *North v. Russell*, 427 U.S. 328, 330 (1976).

38. *Id.* at 334–39.

39. Harris, *supra* note 8, at 397.

40. *Abdul-Maleek v. State*, 43 A.3d 383 (Md. 2012). The story that I tell here is based on briefs filed in the case, along with personal recollections, and the published opinion of the court.

41. *Id.* at 385.

42. *Id.* at 386. ("The court sentenced [Mr. Abdul-Maleek] to eighteen months' incarceration, sixteen months suspended, with one year of supervised probation upon release, and a fine of \$500, \$350 of which was suspended.")

43. *Id.*

44. The transcript of the District Court proceeding, as well as the circuit court trial and sentencing hearing, are on file with the author.



Then, a bombshell hit during the short sentencing hearing. The prosecutor argued for a harsher sentence than the one the District Court judge imposed.<sup>45</sup> The prosecutor told the judge “[the District Court Judge][ ] gave the defendant 18 months, suspend[ing] all but 60 days. That is neither here nor there. It is a de novo appeal.”<sup>46</sup> Then, the prosecutor invited the judge to impose an enhanced sentence because “[t]he defendant had the opportunity to sort of let that lie, take responsibility for his actions. He did not do that. I would ask the Court for an executed incarceration above and beyond the 60 days. How far above and beyond, I will leave in the Court’s sound judgment.”<sup>47</sup> The court accepted the State’s invitation to impose a more severe sentence, making what appeared to be an explicit reference to punishing Mr. Abdul-Maleek for exercising his de novo appeal rights. The court admonished,

You ha[d] every right to go to trial in this case, which you did—*not once, but twice*. Ms. Monroy was victimized, and *then she had to come back again* and testify in the circuit court; and she had to do that *because you have every right to have all of those opportunities to put forth your position*.<sup>48</sup>

The Court then sentenced Mr. Abdul-Maleek to eight months of executed incarceration — a sentence four times greater than he received from the District Court judge.<sup>49</sup>

As Mr. Abdul-Maleek’s lawyers, the student attorneys and I saw this case as a clear instance in which a judge had punished a defendant for exercising his statutory right to a de novo trial. And if *Colten* is to be taken seriously, the possibility of an enhanced sentence on de novo appeal is only constitutional so long as the sentence is not the product of the defendant’s decision to file a de novo appeal. Following the circuit court’s harsh ruling, we filed a petition for a writ of certiorari to the Maryland Court of Appeals, the only “true” appellate right for a de novo defendant in Maryland.<sup>50</sup> A defendant “trades” his right to a direct appeal to an appellate court for the right to have two trials in the de novo system. In our writ, we argued that the court had sentenced Mr. Abdul-Maleek in violation of the de novo statutory scheme under state law<sup>51</sup> and violated his due process rights under both the United States Constitution and the similar state constitution provision.<sup>52</sup>

---

45. *Abdul-Maleek*, 43 A.3d at 386–87.

46. *Id.* at 386 (first alteration in original).

47. *Id.* at 386–87.

48. *Id.* at 387 (emphasis added).

49. *Id.*

50. MD. CODE ANN., CTS. & JUD. PROC. § 12-401 (West 2019).

51. A Maryland statute allowed the imposition of a more severe sentence following a de novo appeal (see MD. CODE ANN., CTS. & JUD. PROC. § 12-702(c) (West 2019)), but our argument rested on the fact that a sentence imposed because the defendant pursued his right to a de novo appeal would violate the clear intent of the legislature to provide a de novo appeal under section 12-401(f).

52. *Abdul-Maleek*, 43 A.3d at 392 n.1 (Bell, J., concurring).

We were not optimistic that the court would grant our petition. The writ is discretionary and attorneys in the appellate division of the Maryland public defender's office and court staff told me that typically only two or three petitions for certiorari from the de novo system are granted each year.<sup>53</sup> We liked our facts, though, and we hoped that the fact that our argument rested on language in a very small portion of the transcript might encourage the court to accept the case. The court did grant our petition,<sup>54</sup> vacated the sentence, and remanded the case to the circuit court for resentencing.<sup>55</sup>

In our petition and briefs, we relied on the holding in *Pearce* that “putting a ‘price on an appeal’ is unconstitutional.”<sup>56</sup> The Court in *Pearce* found that an increased sentence imposed on a defendant in a “traditional” appeal (from the trial court following sentence remanded to the same judge after a successful appeal) is presumptively unconstitutional, unless circumstances that have occurred since the initial sentence would warrant the increase in sentence.<sup>57</sup> The Court was concerned about the possibility that an increase of the sentence for the same defendant for the same crime would reflect vindictiveness on the part of the judge.<sup>58</sup> The Court in *Colten* did not adopt this prophylactic rule in the de novo context because it found that upper-tier courts are likely unaware of the sentence imposed below, and thus cannot enhance a sentence.<sup>59</sup> We argued that the judge in this case was aware of the sentence below, and that *Colten* “[was] not an invitation for a judge to punish a particular defendant for the very exercise of his right to a *de novo* appeal.”<sup>60</sup>

Our state law argument based on Maryland's de novo statute morphed into an argument focused on Maryland's common law governing impermissible considerations in sentencing.<sup>61</sup> Maryland law is clear that a defendant's sentence cannot be based on his exercise of his procedural rights<sup>62</sup> or “motivated by ill-will, prejudice or other impermissible considerations.”<sup>63</sup>

---

53. When we filed Mr. Abdul-Maleek's petition, the clinic had in the past twenty-five years sought certiorari for only two cases arising out of the de novo system, and both were denied. After Mr. Abdul-Maleek's appeal was resolved, the clinic filed two more petitions for certiorari, one was granted (*see Oku v. State*, 72 A.3d 538, 548 (Md. 2013) (holding that the defendant's due process rights were not violated when his incriminating testimony from his District Court trial was admitted in his de novo Circuit Court trial)), and one was denied.

54. *Abdul-Maleek*, 43 A.3d at 385.

55. *Id.* at 391.

56. Petitioner's Brief and Appendix at 9, *Abdul-Maleek v. State*, 43 A.3d 383 (Md. 2012) (No. 46), 2011 WL 5289760 at \*10 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969)).

57. *Pearce*, 395 U.S. at 724.

58. *Id.* at 725.

59. *Colten v. Kentucky*, 407 U.S. 104, 116–18 (1972).

60. Petitioner's Brief and Appendix, *supra* note 56, at \*11 (emphasis in original).

61. *Id.* at \*3–\*9.

62. *Johnson v. State*, 336 A.2d 113, 117 (Md. 1975).

63. *Jackson v. State*, 772 A.2d 273, 277 (Md. 2001).

The Court of Appeals accepted the impermissible consideration argument, holding that Mr. Abdul-Maleek was “entitled to resentencing because the court’s comments at sentencing could cause a reasonable person to conclude that the sentence was based in part on [Mr. Abdul-Maleek’s] exercise of his right to a de novo trial on appeal.”<sup>64</sup> The court noted that it was deciding the case on the grounds of an impermissible consideration in sentencing, and thus “need not determine whether there was a violation of any statutory or constitutional limitation.”<sup>65</sup> The court did observe that its ability to comment on the sentencing issue in the context of de novo appeal would “promote the orderly administration of justice.”<sup>66</sup>

The court explained that while it did not conclude that “the sentencing court *actually considered* the fact of [the defendant’s] exercise of his right to a de novo appeal and imposed a more severe sentence as punishment for having done so,” a reasonable person might infer that the judge had an impermissible motivation.<sup>67</sup>

The three concurring judges agreed with the result reached, but the author of the concurring opinion, Judge Bell, was harsher in his assessment of the sentencing judge’s actions.<sup>68</sup> Judge Bell asserted that “I do not believe that this is a close case and I certainly do not believe that it is an ‘appearance’ case. It is clear to me that the sentence imposed not only gave the appearance of being, but was, in fact, based on [Mr. Abdul-Maleek’s] exercise of his appeal right.”<sup>69</sup>

When the case was remanded to the circuit court for resentencing, Mr. Abdul-Maleek had already served his sentence and was on probation. To his credit, the circuit court judge *sua sponte* recused himself from resentencing Mr. Abdul-Maleek, and the judge to whom the case was assigned closed the case and released Mr. Abdul-Maleek from the jurisdiction of the court.

What does this case reveal about the fairness of de novo criminal justice systems? First, it shows that judges do in fact punish defendants for exercising their de novo appeal rights. It casts doubt on the assertion of the Court in *Colten* that the danger of vindictiveness is not as high in a de novo system, where two different judges sentence the defendant, as it is in resentencing by the same judge after the defendant’s case is reversed on appeal.<sup>70</sup> While the judge in the second-tier of a de novo system is not as likely to take the actions of the defendant personally, the judge could view the de novo action as a “waste” of time or the defendant as somehow taking unfair advantage of the system by going to trial twice, as the judge did here.

---

64. *Abdul-Maleek v. State*, 43 A.3d 383, 385 (Md. 2012).

65. *Id.* at 387 n.3.

66. *Id.* at 389.

67. *Id.* at 391 (emphasis in original).

68. *Id.* at 391 (Bell, J., concurring).

69. *Abdul-Maleek*, 43 A.3d at 394.

70. *Colten v. Kentucky*, 407 U.S. 104, 116–18 (1972).

Second, it demonstrates that most biased sentences would be undetectable and unreviewable by an appellate court. Few judges would be as forthright as the judge in Mr. Abdul-Maleek's case about their reasons for imposing a higher sentence on de novo appeal. And other judges might be motivated by an unconscious rather than an explicit bias.<sup>71</sup> In some cases, bias might not be a factor in sentencing. Two different judges might decide that a very different sentence was warranted.<sup>72</sup> In the absence of an explicit statement from a judge demonstrating that the de novo appeal was a factor in the sentence, appellate courts would have little recourse.<sup>73</sup>

Third, and perhaps more importantly, it is the fact of the *possibility* of an increased sentence on appeal that would likely deter most defendants from exercising their de novo rights, even if that possibility is remote. Take for example the typical misdemeanor defendant who is sentenced to some form of probation with a suspended sentence. That defendant would be deterred from pursuing a de novo appeal because of the possibility that the sentence on appeal would result in jail time. Thus, many defendants in theory, but never in fact, realize the actual advantages of the de novo system. In 2017, only 5.8% of District Court convictions were appealed to the circuit court.<sup>74</sup>

The defendants who are most likely to file appeals are those who receive jail time, face collateral consequences, or have strong personal reasons for filing an appeal, such as a belief in their innocence or anger at law enforcement. Perhaps there is some perverse logic in this result. The most "serious" cases get the attention of two courts, and those involving probation or other more minor consequences languish in the lower tier court. Given our increased awareness of the pernicious consequences of even the most "minor" criminal convictions,<sup>75</sup> however, this result means that in many states the vast majority of individuals convicted of criminal misdemeanors will never have experienced a court with full due process protections.

Yet advocates can seek opportunities to bring the flaws in the de novo system to the attention of the higher courts. This would shed some light on the

---

71. For a discussion of unconscious bias, see, e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Pamela M. Casey et al., *Helping Courts Address Implicit Bias*, NAT'L CTR. FOR ST. CTS. (2012), available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwIvIaa09\\_gAhWJ6oMKHR9MBXoQFjAAegQICRAC&url=http%3A%2F%2Fciteseerx.ist.psu.edu%2Fviewdoc%2Fdownload%3Fdoi%3D10.1.1.259.1089%26rep%3Drep1%26type%3Dpdf&usg=A0vVaw2BbXe3fZ-mCBCiib\\_CflX8](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwIvIaa09_gAhWJ6oMKHR9MBXoQFjAAegQICRAC&url=http%3A%2F%2Fciteseerx.ist.psu.edu%2Fviewdoc%2Fdownload%3Fdoi%3D10.1.1.259.1089%26rep%3Drep1%26type%3Dpdf&usg=A0vVaw2BbXe3fZ-mCBCiib_CflX8) [https://perma.cc/Y6L3-M6WD].

72. This reality explains why criminal defense attorneys (and prosecutors) judge shop for a judge who will take a favorable view of their position. See Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 33 (1994).

73. At oral argument in Mr. Abdul-Maleek's appeal, one of the judges told counsel "we wouldn't even be here" were it not for the explicit comments of the sentencing judge.

74. REPORT, *supra* note 2.

75. Roberts, *supra* note 3, at 297.

operation of existing systems and create the possibility that reforms might be enacted.

## II. THE ROLE OF POLICYMAKERS AND COURT WATCH PROGRAMS

Whether or not a state's existing *de novo* system should be abolished likely depends on the particulars of how these systems operate in each state and on the larger question of who wins and who loses under each of these systems. It would appear that the disadvantages of *de novo* systems fall most heavily on clients who cannot afford to pay lawyers and are represented by overburdened public defenders who may not have the time or the inclination to challenge "favorable" results obtained by a client in the lower-tier court. While this fact alone might suggest that, as a policy matter, these systems should be abolished, more information is needed about how these systems operate in different states.

Moreover, the massive increase in the number of collateral consequences, as well as our understanding of the importance of collateral consequences, means that the *de novo* system may actually provide opportunities for many criminal defendants that a one-tier system does not. The question of who wins and who loses in a *de novo* system is not as simple as it might seem. There are vast differences in *de novo* systems, with some providing—at least on paper—some of the procedural protections that Harris advocates for, while others offer fewer protections.<sup>76</sup> These systems should be examined in order to determine how they actually operate on the ground, not simply whether procedural protections exist in statutes and rules.

This assessment is challenging because these systems operate relatively invisibly and outside of the purview of most appellate review. Because a typical method of assessing court systems—legal scholarship—has not focused on *de novo* systems, other methods of study and observation are crucial. Appellate opinions are the bread and butter of much legal scholarship. Cases from *de novo* systems do not reach the appellate courts by direct appeal, and those that do reach the appellate courts through other means, such as through petitions for writs of certiorari, are few in number.<sup>77</sup> These systems operate underneath the radar, and most scholars are likely unaware of their existence. Thus, it is not surprising that beyond Harris' seminal article, only a handful of law review articles have explored the features of *de novo* criminal court systems, one describing Utah's justice courts in 2012 in the context of criminal cases and the

---

76. For example, Maryland has many of the features that Harris advocates for (Harris, *supra* note 8, at 422–30), including pretrial release pending appeal, (MD. R. 4-216), and the ability to "opt out" of the lower court. MD. CODE ANN., CTS. & JUD. PROC. § 4-302(e) (West 2019). See Harris, *supra* note 8, at 384–90 (describing general characteristics of *de novo* systems and including citations to many state statutes).

77. See *supra* note 53 and accompanying text.

other addressing the de novo court system for both civil and criminal cases in Virginia in 1985.<sup>78</sup>

A. *Abolition Not Reform: the Massachusetts Example*

In Massachusetts, a 1992 court reform law abolished the criminal trial de novo as of 1994.<sup>79</sup> Judge Samuel Zoll, the former Chief Justice of the District Court in Massachusetts, described his role in eliminating the de novo system as “my little contribution to history.”<sup>80</sup> This system was described as one where “waste and inefficiency reigned”<sup>81</sup> and as “[a]n antiquated and much-abused system of double trials for criminals.”<sup>82</sup> It appears that in contrast to Harris’ concern that few criminal defendants actually receive a “second bite of the apple” in de novo systems, at one point in time half of the defendants seeking jury trials in the superior court, the upper-tier court, had been convicted by judges in the District Court, the lower-tier court.<sup>83</sup> Even without knowing the percentage of de novo defendants who appealed their convictions, this statistic reveals a system in which defendants were actively utilizing the de novo system.

These statistics do not reveal which defendants were filing de novo appeals. A defendant who receives a lengthy jail sentence in the lower court, or whose conviction will violate probation in a case where a judge imposed a long period of backup time, has an incentive to file a de novo appeal. Similarly, a defendant who is convicted of a deportable offense has a strong incentive to file a de novo appeal. A defendant who lost his job following a lower court conviction, or who is likely to lose his job if his employer finds out about his criminal record, or who will find it difficult to find employment with a particular conviction on his record has a strong incentive to file a de novo appeal. And finally, the defendant who has strong belief in his innocence or strong feelings about the conduct of law enforcement is most likely to appeal.

---

78. Samuel P. Newton et al., *No Justice in Utah’s Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah’s Infamous Local Courts*, 1 UTAH L. REV. ON. L. 27, 43–65 (2012); J. R. Zepkin, *Appeal De Novo in Virginia: An Examination of Its Present Utility*, 42 WASH. LEE L. REV. 1149 (1985).

79. MASS. GEN. LAWS ANN. ch. 218, § 26A (West 2019); see also Eric Blumenson & Arthur B. Leavens, *District Court Trials in MASSACHUSETTS CRIM. PRAC.* §3.1, at 2 (Eric Blumenson & Arthur B. Leavens eds., 4th ed. 2012). The de novo system was abolished on an experimental basis in Hampden and Essex counties in 1987. *Id.* An article in Commonwealth magazine provides a fascinating account of the forces contributing to abolition and of the Massachusetts court system in general. Robert Keough, *Order in the Courts*, COMMONWEALTH MAG. (Winter 2000), <https://commonwealthmagazine.org/uncategorized/order-in-the-courts/>.

80. Keough, *supra* note 79. Judge Zoll has been referred to as “the redoubtable Samuel Zoll, a permanent fixture of the judicial system.” *Id.*

81. *Id.*

82. *Id.*

83. *Id.* It is not clear whether this statistic is from the Middlesex County Superior Court, where Boston is located, or is a statewide statistic. The timeframe is also unclear.

After the *de novo* system was abolished, Massachusetts retained the District Court as a limited jurisdiction court with jurisdiction over misdemeanors and minor felonies.<sup>84</sup> The result of this change was increased efficiency, but not increased procedural protections for criminal defendants. Six years after the *de novo* system was abolished, the superior court reduced its criminal case backlog by 1,700 cases, disposing of more cases than were filed that year.<sup>85</sup> The year before, Massachusetts ranked eighth in the country in its clearance rate for criminal cases. Similarly, the District Court also disposed of cases rapidly in a system where very few cases went to trial.

When Massachusetts abolished its *de novo* system, the broad availability of jury trials lessened the impact of abolishing the system on criminal defendants. One key feature of other states with *de novo* systems is that, for certain offenses, the right to a jury trial is only available for defendants that seek a *de novo* appeal from a lower tier court decision.<sup>86</sup> In these states, abolishing the *de novo* system would remove a critical right to a jury trial. This was not the case in Massachusetts, where the right to a jury trial is available in the lower-tier court and extends to all crimes regardless of the penalty imposed.<sup>87</sup>

Some decisionmakers were concerned that jury trials would increase in huge numbers in the District Court after the *de novo* system was abolished.<sup>88</sup> Those individuals who under the *de novo* system sought jury trials in the Superior Court, the upper-tier court, could now only seek jury trials in the District Court.

In response to the concern about increased jury trials, the court developed “Ten Principles of Case Management” to help judges dispose of cases without a trial.<sup>89</sup> These included changes in plea bargaining rules to adopt a “defense-capped plea” in which defense attorneys can offer a plea to a judge without the agreement of the prosecutor. The legislation also expanded the discovery

---

84. MASS. GEN. LAWS ANN. ch. 218, § 26 (West 2019) (describing original jurisdiction of the Massachusetts District Court). Minor felonies are defined as those punishable by a maximum sentence of thirty months. Keough, *supra* note 79.

85. Keough, *supra* note 79.

86. Even in Maryland, where defendants have a broad right to a jury trial, an individual charged with a crime with a sentence of less than ninety days can only receive a jury trial if she pleads guilty or goes to trial in the District Court, and then appeals to the circuit court. This procedure applies to many of the misdemeanors routinely charged in large numbers, such as disorderly conduct, trespass, and harassment. MD. CODE ANN., CTS. & JUD. PROC. § 4-302 (West 2019).

87. MASS. CONST. art. XII; MASS. GEN. LAWS ANN. ch. 218, § 18 (West 2019); MASS. R. CRIM. P. 19(a). This right extends even to juveniles charged with delinquency offenses, MASS. GEN. LAWS ch. 119, §§ 55A, 56 (West 2019), and minor traffic offenses. Blumenson & Leavens, *supra* note 79, at 3–4, nn.14, 15.

88. Keough, *supra* note 79.

89. *Id.*

available to criminal defendants in District Court,<sup>90</sup> and the rules of criminal procedure now match the discovery required by the statute.<sup>91</sup>

Implementing a single tier-system may also have resulted in more “honest” sentencing. Anecdotal evidence suggests that the *de novo* system may have incentivized some judges to impose excessively long sentences in the lower court. The former chief judge of the lower-tier court noted that judges could impose harsh sentences in the lower court knowing that these sentences would be reduced on *de novo* appeal.<sup>92</sup> The author paraphrased the phenomenon as “grandstand[ing] for the local crowd.”<sup>93</sup> While a judge might grandstand in a single-tier system, the motivation to grandstand is lessened because the judge cannot rely on the sentence changing on *de novo* appeal.

Are defendants in Massachusetts better or worse off after the legislature abolished the *de novo* system and the courts in turn adopted procedures to ensure that jury trials did not overwhelm the system? There is at least some evidence that the system was abolished because it was working too well for criminal defendants.<sup>94</sup> One statistic indicates that the courts accomplished the goal of reducing the number of jury trials. In one study of District Court cases, conducted after the *de novo* system was abolished, fewer than one percent of cases were heard by a jury.<sup>95</sup> William Leahy, Chief Counsel for the Committee for Public Counsel Services, described the single-tier system as “a case processing system rather than a tryer[sic] of fact system. To the extent that the system has avoided meltdown, it has done so by elevating efficiency over justice.”<sup>96</sup>

Yet for some actors in the system, the defense-capped plea has real advantages. Private defense attorneys who are appointed to represent indigent defendants generally like the plea bargaining changes that allowed for defense-capped pleas.<sup>97</sup> The then-president of a local bar association stated, “It’s a very good tool for defense lawyers. We like it.”<sup>98</sup> And not surprisingly, prosecutors

---

90. Blumenson & Leavens, *supra* note 79, at 2.

91. *Id.* at 9; compare MASS. R. CRIM. P. 14 (a)(1)(A) (mandatory discovery for the defendant), with MASS. GEN. LAWS ANN. ch. 218, § 26A (West 2019) (mandatory discovery upon motion).

92. Keough, *supra* note 79 (remarks of Massachusetts District Court Chief Justice Samuel Zoll). Justice Zoll also noted the opposite phenomenon, arguing that “other judges, anxious to settle cases once and for all, tried to avoid *de novo* appeals by low-balling dispositions.” *Id.* (quote taken from article).

93. *Id.*

94. See *supra* notes 79–82 and accompanying text.

95. This study was cited in Keough, *supra* note 79, published in 2000. Thus, the study would have been conducted some time during the six-year period after the *de novo* system was abolished statewide in January of 1994.

96. *Id.*

97. Keough, *supra* note 79.

98. *Id.* (quoting Rudolph Miller, President of the Roxbury Bar Association).



do not like the judge-brokered deals.<sup>99</sup> The prosecutor is cut out of the process in an arrangement described by the head of one prosecutor's office as "a bargain between the judge and the defendant" which he has "no power to stop."<sup>100</sup>

Perhaps a system in which different segments of the defense bar disagree about its fairness, and one in which prosecutors align with one segment of the defense bar, suggests that the system is a fair one. Often, the two sides of the criminal justice system disagree on questions of fairness. When there is common ground, it may suggest that a system appropriately balances the many competing goals of the criminal justice system from a variety of perspectives.

On the other hand, the differing opinions in Massachusetts demonstrate that who wins and who loses in the aftermath of changes to a *de novo* system is a complicated analysis. Prosecutors are unlikely to support a plea bargaining process in which they are not to a large degree in control of outcomes, or at least key participants in the process. Yet prosecutors might not prefer to return to the *de novo* system, where the prosecutor's office dealt with many cases twice – first in the District Court and then in the superior court.

And it may be that members of the private defense bar appointed to represent indigent clients like the speedier dispositions and certainty attached to defense-capped pleas in the District Court. If reimbursement rates of court-appointed lawyers were low in 2000, then private counsel might favor speedier dispositions than were available during the days of the *de novo* system. It might be worth losing "two bites at the apple" in return for a system with a much greater degree of certainty. Cynicism aside, this might be a fair trade off for defendants in the current system who no longer have the opportunity to seek a *de novo* appeal, but whose counsel have at least in theory more control over plea bargaining outcomes.

The answer to the question of whether defendants are better off as a group would depend on whether the defense-capped pleas are substantively better (meaning less jail time, fewer conditions of probation and fewer collateral consequences) than the outcomes available in the now defunct *de novo* system. Any effort to gather this information by comparing dispositions under both systems would encounter huge obstacles. In some sense, the comparison is between apples and oranges. The composition of the bench may change from year to year, so if the outcomes overall are more favorable to criminal defendants as a group in the now single-tier system, causality cannot be established. Are the outcomes better because of the change in the system, or are outcomes better because the judges impose more lenient sentences?

Causality is particularly difficult to determine in a system like Massachusetts, at least as it existed in 2000, where the Chief Judge of the District

---

99. *Id.*

100. *Id.* (quoting Sussex County Assistant District Attorney Viktor Theiss, head prosecutor at the Roxbury Court).

Court had the ability to move judges between different districts to accomplish different results. One anecdote from the Brockton District Court in 1994, the first year that the single-tier system was implemented statewide in Massachusetts, is particularly telling. The first justice of that court, Justice Nagle, soon faced a backlog of 3,000 criminal cases, some of which took more than a year to get to trial.<sup>101</sup> Justice Nagle asked the Chief Judge of the District Court to give him a “team” of judges interested in “case management.”<sup>102</sup> By 1996, the author notes that the Chief Judge assigned a “SWAT team of case wranglers” to the Brockton court, “disposition-minded judges” who rotated through the court.<sup>103</sup> After only six months, only 150 cases remained on the trial docket.<sup>104</sup>

Four years later, cases went to trial two-and-a-half months after arraignment.<sup>105</sup> This makes for quick dispositions because attorneys are no longer able to delay trial dates. The dark underside of this focus on case management is that defense counsel may not have the time to prepare for trial and may opt for a speedy disposition that does not allow for the full exploration of law and fact that a trial would accomplish.<sup>106</sup> These factors weigh in favor of efficiency and against the interests of justice.

The Massachusetts example demonstrates that reform of de novo systems is messy, complicated, and difficult to assess empirically in terms of the impact on affected constituencies. Yet studies can provide a more complete picture of how these systems operate.

#### *B. Court Observation as a Tool for Reform: St. Louis County and ArchCity Defenders*

As we have seen, traditional appellate courts never review proceedings in the lower-tier courts and rarely review proceedings in the upper-tier courts. When the upper-tier courts do hear cases on de novo appeal, these cases represent only a fraction of the cases that are eligible for appeal,<sup>107</sup> and even then, the upper-tier court is not reviewing the proceedings in the lower court.<sup>108</sup> How then do we assess the fairness of the proceedings in the lower-tier courts?

---

101. *Id.*

102. Keough, *supra* note 79.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.*

107. *See* REPORT, *supra* note 2.

108. *Hardy v. State*, 369 A.2d 1043, 1045 (Md. 1977); *see also* *Garrison v. State*, 138, 711 A.2d 170, 173, 175 (Md. 1998) (stating that a de novo trial grants a defendant a “brand new bite at the apple” and is “treated as a wholly original [circuit court] proceeding as if the charges had not been heard before and no decision had been rendered”) (quoting *State v. Jefferson*, 574 A.2d 918, 921 (Md. 1990); MD. R. 7-112 (circuit court rule)).

Organizations that conduct court watches provide one important model for monitoring the lower courts and ensuring that individuals are treated fairly by the courts. ArchCity Defenders has monitored the municipal court system in St. Louis County in the wake of Ferguson and uses a model that is applicable to examining the fairness of lower-tier criminal court proceedings in de novo systems.<sup>109</sup> ArchCity defenders practices holistic representation in both criminal and civil matters and represents clients in criminal cases as a means of improving their access to housing, job training, and treatment.<sup>110</sup> Many of their criminal cases involve infractions for traffic-related offenses.<sup>111</sup> ArchCity notes that “[o]ur direct representation of clients in these courts and the stories they shared of their experiences prompted us to conduct a court watching program to more closely observe the impact the municipal court system has on our clients’ lives.”<sup>112</sup>

For this report, ArchCity observed sixty different municipal courts in St. Louis County.<sup>113</sup> They observed major problems in approximately one-half of the courts, particularly in the municipalities of Ferguson, Bel-Ridge, and Florissant.<sup>114</sup> Because the ArchCity report blends court observation with statistics, secondary sources, and anecdotal evidence, it is sometimes difficult to discern which data is gathered from court observation and which from these other sources. Regardless of the source, the data gathered provides important insights into the functioning of the municipal courts in St. Louis County.

The court systems in St. Louis County are difficult for defendants to navigate. In the municipality of Pine Lawn, ArchCity observed that while the court accepted partial payments of fines, there was a sign outside the courthouse saying they required full payments of fines, confusing defendants.<sup>115</sup> Minor

---

109. Organizations that address how victims of domestic violence are treated by courts represent another model for court observations. See, for example, Court Watch Montgomery, an organization that monitors lower court proceedings in civil domestic violence cases in a single county in Maryland. LAURIE DUKER & JUDY WHITON, COURT WATCH MONTGOMERY, PROTECTING VICTIMS OF DOMESTIC VIOLENCE IN MONTGOMERY COUNTY: CHALLENGES AND OPPORTUNITIES WITH PROTECTIVE AND PEACE ORDERS, 1, 12 (2011), <http://courtwatchmontgomery.org/wp-content/uploads/2015/06/CWM.report1-Oct.-2011.pdf>.

110. THOMAS HARVEY ET AL., ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 1 (2014), available at <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [https://perma.cc/37GQ-KPGY].

111. *Id.*

112. *Id.*

113. *Id.* at 3. There are eighty-one municipal courts in St. Louis County. JOSHUA FEINZIG ET AL., IT’S NOT JUST FERGUSON: MISSOURI SUPREME COURT SHOULD CONSOLIDATE THE MUNICIPAL COURT SYSTEM 1, 15 (2015), available at <http://www.archcitydefenders.org/wp-content/uploads/2014/07/Its-Not-Just-Ferguson-Consolidate-the-Municipal-Courts.pdf> [https://perma.cc/5LAD-LA6Z].

114. HARVEY, *supra* note 110, at 3.

115. FEINZIG, *supra* note 113, at 11.

traffic violations often resulted in excessive fines (as much as three times a defendant's monthly income) that poor defendants were unable to pay and often resulted in their becoming homeless.<sup>116</sup> Some defendants were forced to wait almost an hour for a judge to arrive, only to find out that their hearings were cancelled.<sup>117</sup> For low-income residents, this practice encourages them to distrust courts and choose to go to work instead of attending court.

Distrust of the courts and other actors was widespread. Many residents believed the cities' motivation for ticketing for failure to subscribe to the municipality's trash collection service was simply to make money. One defendant is quoted as stating that the courts are "searching to find something wrong. If you dig deep enough, you will always find dirt."<sup>118</sup> He was referring to the widespread practice of the courts issuing warrants for failure to pay minor traffic tickets and then sending residents to jail for failure to pay those tickets.<sup>119</sup> A group of defendants waiting outside a courtroom discussed the prevalence of racial profiling in issuing tickets for minor infractions such as expired inspections, expired tags, or driving without insurance.<sup>120</sup> One commented, "You go to all of these damn courts, and there's no white people," and another noted, "If you're black, they're going to stop you."<sup>121</sup>

It is not clear how systematically the observers sought to gather this information about police practices and the court system. In St. Louis County, there was a substantial statistical basis for the beliefs of black residents facing minor traffic charges, so the lack of systematic observation does not detract from the quality of these individual anecdotes.<sup>122</sup> The anecdotes provide compelling individual stories to add flesh to the statistics and corroborate long-term data.

In addition, the court watching focused more on the views of residents, rather than observing what judges and other court actors did in performing their jobs. The views of residents should not be discounted, but observations of what courts actually do, rather than opinions of what they do, can provide more objective data. An example of this type of data is provided when a bailiff was observed announcing, "No children, only the people on the docket come in unless you're a witness."<sup>123</sup> This practice, if widespread, has an obvious negative impact on defendants, many of whom cannot afford child care and might have to choose between coming to court and caring for their children.

The report nonetheless makes a valuable contribution to understanding a confusing array of municipal court systems that for years went unstudied. It also

---

116. HARVEY, *supra* note 110, at 10, 29.

117. FEINZIG, *supra* note 113, at 12.

118. HARVEY, *supra* note 110, at 16.

119. *Id.* at 21.

120. *Id.* at 16.

121. *Id.*

122. *Id.* at 17.

123. HARVEY, *supra* note 110, at 21.

demonstrates the value of individuals who practice in a particular court system taking that knowledge, blending it with other data, including court observation, in order to make on-the-ground observation of how court systems in fact operate.

ArchCity has pointed out major areas of concern, and suggested reforms that can provide participants and stakeholders with a fairer court system. For example, after the release of the ArchCity White Paper, “a number of municipalities . . . implemented measures” to alleviate some of the problems observed.<sup>124</sup> For example, one municipal court transferred unpaid fines to a civil debt collector, eliminating the possibility of incarceration for unpaid fines.<sup>125</sup> Ultimately, ArchCity recommended that St. Louis County consolidate its eighty-one municipal courts into a single regional court system.<sup>126</sup>

Court observations also could lead to de novo system reform. De novo systems are complex, but no more complex than the patchwork array of municipal court systems in St. Louis County.

#### CONCLUSION

Many individuals charged with misdemeanors (and some felonies) are prosecuted and convicted in de novo criminal court systems. These systems were unsuccessfully challenged in Supreme Court litigation in the early and mid-seventies. Since then, scholars have called for abolition and, in lieu of abolition, reform of these systems. There is evidence that these systems do not operate as promised, and that the assumptions on which the Court based its decisions in the 1970s were not accurate.

Yet these systems remain largely invisible and lack accountability when compared to traditional single-tier systems. Further study of these systems is needed in order to determine their viability today. Despite limited appellate review, flaws in the system can in some circumstances be brought to the attention of appellate courts. So too can the work of policymakers and organized programs of citizen observers shed light on the inner workings of de novo systems.

---

124. *Id.* at 5 n.2.

125. FEINZIG, *supra* note 113, at 16 n.88.

126. *Id.* at 15.