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2016

Post-Ferguson Social Engineering: Problem-Solving Justice or Just Posturing?

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ESSAY

“Post-Ferguson” Social Engineering: Problem-Solving Justice or Just Posturing

MAE C. QUINN*

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INTRODUCTION

In 1929, Howard Law School Dean Charles Hamilton Houston urged lawyers to serve as “social engineers” to actively apply the United States Constitution to help solve “problems of local communities” and “better conditions of underprivileged citizens.”¹ His re-

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1. See *About the School of Law*, HOW. U. SCH. L., <http://www.law.howard.edu/19> (last updated Mar. 12, 2016) [hereinafter *Howard’s History*] (“As stated by Charles Hamilton Houston, ‘A lawyer’s either a social engineer or . . . a parasite on society[. . .] A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the underprivileged citizens.’”).

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marks were primarily intended for attorneys of color,² to inspire them to come together to work to dismantle racially oppressive systems and institutions in society.³ But much like the insights offered by the contemporary #BlackLivesMatter movement, they served as a revolutionary call to action for all.⁴

Yet today some are cloaking themselves in some version of Houston's proclamations while deploying their own personal agendas relating to youth, criminal justice, and court reform. Rather than truly speaking truth to power and digging into the root causes of much of what ails our criminal and juvenile justice systems, too many are simply papering over—and in some instances exacerbating—long standing networks, institutions, and systemic issues that have worked to reduce the life chances of minority youth across America.

2. Charles H. Houston, *The Need for Negro Lawyers*, 4 J. OF NEGRO EDUC. 49, 52 (1935) (“The lines are drawn however, and neither the law schools nor the lawyers can retreat. The great work of the Negro lawyer in the next generation must be in the South and the law schools must send their graduates there and stand squarely behind them as they wage their fight for true equality before the law.”).

3. But Dean Houston also collaborated with non-minority advocates. For instance, he counseled racial justice rights matters with Marian Wynn Perry, a white woman and NAACP attorney. See Brief for Petitioners, *McGhee v. Sipes*, 331 U.S. 804 (1947) (No. 87), 1947 WL 30427. He also hosted Clarence Darrow at Howard Law School to teach students about challenges they might face while undertaking civil rights litigation. Douglas O. Linder, *Before Brown: Charles H. Houston and the Gaines Case*, UMKC SCH. L., <http://law2.umkc.edu/faculty/projects/ftrials/trialheroes/charleshoustonessayF.html> (Mar. 29, 2016). Similarly, Dean Houston's protégé, Thurgood Marshall, worked side by side with Jack Greenberg and Jack B. Weinstein, both white and then young attorneys, on *Brown v. Board of Education* and its companion cases to deploy Dean Houston's legal theories to win desegregation of American public schools. See NAACP LEGAL DEF. & EDUC. FUND, EXCERPT FROM THE WINDING ROAD TO BROWN: AN LDF CHRONOLOGY (2004), <http://www.naacpldf.org/files/Excerpt%20From%20The%20Winding%20Road%20to%20Brown.pdf>. Both Jack Greenberg and Jack Weinstein became Columbia Law School professors. *Columbians Who Played a Role in Brown v. Board*, COLUM. L. SCH., <https://www.law.columbia.edu/focusareas/brownvboard/bvbcolumbians> (Mar. 29, 2016). Weinstein, for whom this author had the great privilege of clerking from 1997–98, was later appointed to the federal bench.

4. This year, Brittany Packnett, Executive Director of St. Louis Teach for America, member of the Ferguson Commission, and a powerful presence at St. Louis protests following Michael Brown's death, wrote this about the #BlackLivesMatter movement for TIME magazine on Dr. Martin Luther King Jr. day:

Who are we? While we are mostly black, we are diverse in belief, experience and practice. We are thankful to the generations that toiled before us, though at times, we experience the intergenerational challenges that have been repeated throughout history. We reject the notion that dressing, speaking or acting in less confrontational ways will save us—because respectability and accomplishment won't protect us from the perils of blackness in America. We are Jews, Gentiles, Muslims and the non-religious. We are cisgender, transgender, and non-binary; straight and LGBTQ. We are college graduates and high school dropouts. Some of us have been trained as professionals; we have all trained by protest. We are many colors and full of dedicated, consistent allies who stand with us.

Brittany Packnett, *Black Lives Matter Isn't Going Anywhere*, TIME (Jan. 18, 2016), <http://time.com/4178280/black-lives-matter-2016>.

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In our current “post-Ferguson” frenzy⁵—where it is now fashionable for allies to be associated with the #BlackLivesMatter movement⁶ and doing better and being better on the question of race⁷—too many alleged advocates are appropriating Houston’s directives for their own motives. While purporting to act in the interest of minority children and their families, some emerging activists fail to sufficiently surface, name, and address many of the real problems facing court-involved youth of color in the United States today.

Indeed, countless individuals and institutions seem to be stepping forward to claim they stand for change. Frequently, however, they are doing so without confessing their own prior complicity, honestly addressing the problematic practices of their own institutions, or admitting the history of racial oppression in their own communities. Others are attempting to lead the charge with little in the way of actual knowledge or expertise about policing, prosecution, court practices—or even the Constitution. And too much of what is being floated as “fixes” are shallow, surface-level, feel-good “innovations” that steer

5. Let me acknowledge there are many problems with the term “Post-Ferguson.” First, Ferguson still exists. So it is wrong to engage in a post-mortem on a community where people live and seek to thrive. The term also suggests the entire town and all of its inhabitants somehow deserve our scrutiny or disdain. This, too, is far from the truth. In addition, it minimizes the breadth and depth of the problem of racial injustice in this country that has publically shown its ugly head in recent months in many American cities and towns, including Charlotte, Cincinnati, Chicago, and my own home town of Staten Island, New York. However, as it has been so widely embraced as a modern meme, I will use it here while acknowledging its limits and issues.

6. *Id.* (“[T]he Black Lives Matter movement has gone from an unpopular effort to a cause célèbre.”).

7. In his end of 2014 reflections to campus, following student protests and calls for greater engagement with racial justice issues, Washington University’s Chancellor Mark Wrighton offered these sentiments:

I thank all of you for what you are doing to make Washington University great, and there is much to celebrate in that regard. But we have fallen short in creating an environment where everyone feels respected, honored and safe. We must acknowledge these shortcomings and work together toward a future where “Black lives matter” is more than a slogan and where racial inequality is something to be studied in a history course. Our community can be a force for positive change. Together, we can do better and be better.

Mark S. Wrighton, *End of Year Reflections*, WASHU VOICES: FERGUSON & BEYOND (Dec. 10, 2014), <https://voices.wustl.edu/message-chancellor-wrighton-3/>; *see also* Mark S. Wrighton, *Doing Better and Being Better, There is Much We Agree On*, WASHU VOICES: FERGUSON & BEYOND, <http://voices.wustl.edu/much-agree/> (Mar. 29, 2016) (acknowledging demands of student protestors and admitting: “This is a time when the university must make a meaningful difference and help bring about necessary change”); *cf.* *Do Something*, WASHU VOICES: FERGUSON & BEYOND, <http://voices.wustl.edu/do-something/> (last visited Jan. 23, 2016) (“The St. Louis region has the opportunity to become better and stronger through the response to events in Ferguson. Washington University must do our part. We must share, learn, and act. The following are ways to engage on our campuses and throughout the community. Please join us: *No events found for this month.*”) (emphasis added).

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clear of constitutionally-rooted, critically race-based, fundamental rethinking.

Potentially squandering the power of this historic moment, some self-proclaimed reformers may be the kind of problematic legal actors Dean Houston spoke about in contrast to legitimate reformers—professional “parasites” who feed on societal ills for their own benefit.⁸ Thus using the platform of juvenile, criminal, and racial justice to advance their own interests many claimed “change agents” are part of the problem.⁹

This essay, therefore, encourages careful assessment of today’s supposed social engineers, their proffered legal theories, and proposed plans for reforms. It further urges resistance in the face of inauthentic and insufficient commitment to meaningful change. And while it surely does not have all of the answers, I hope it offers sentiments that align with the late Dean Houston’s insistence upon remaining alert, speaking truth to power, and giving no less than our all to fight for “true equality before the law”— including for youth of color.¹⁰

I. INTERROGATING NEW CHANGE AGENTS, CORRECTIVE AGENCIES, AND THEIR AGENDAS

In the days, weeks, and months since the press shined its white-hot light on the wide-spread problem of inhumane and racially biased policing and prosecution of young people of color in this country, we have heard much about race and justice. Countless legal experts and institutions have now published papers, hosted panel discussions, and convened committees to talk about issues like racially disparate crimi-

8. See Howard’s History, *supra* note 1.

9. See Sally Kohn, *This is What White People Can Do to Support #BlackLivesMatter*, WASH. POST (Aug. 6, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/06/this-is-what-white-people-can-do-to-support-blacklivesmatter/> (#BlackLivesMatter leader, Malia Cyril, warns that some people who claim to support racial justice and criminal law reforms may be “fighting to retain white privilege in different ways.”); See also Agyei Tyehimba, *How to Identify Compromised or Fraudulent Black Leaders*, MY TRUE SENSE (July 21, 2015), <http://mytruesense.org/tag/fake-black-leaders/> (referencing Dr. Martin Luther King, Jr.’s “Drum Major Instinct” sermon and warning: “do not assume that wide popularity, a full schedule of speaking engagements, or recognition in social or traditional media makes a person authentic or effective as a leader or activist”).

10. *NAACP History: Charles Hamilton Houston*, NAACP, <http://www.naacp.org/pages/naacp-history-charles-hamilton-houston> (Mar. 29, 2016) (“All our struggles must tie in together and support one another . . . We must remain on the alert and push the struggle farther with all our might.”).

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nal proceedings, targeted pedestrian and traffic stops, municipal governance problems, and racial justice more generally.¹¹

This wave of words is exciting and historic. And it is easy to get swept up in all of the podium presentations and purported promises of our post-Ferguson world. But we should remember that talk is surely cheap.¹² More importantly, caution may be in order as we consider recent developments in the name of the cause.¹³ Because as Thurgood Marshall so presciently pointed out when he spoke to a St. Louis audience nearly 50 years ago, “success [of any] reform scheme” is “directly related to the quality of the people, especially the lawyers, who become active in it.”¹⁴

Thus as new juvenile and criminal justice reformers step into leadership roles following the deaths of LaQuan McDonald, Tamir Rice, and Michael Brown it is important to ask where many of these people and institutions were in the days, weeks, months and years

11. See, e.g., Julie Hail Flory, *New Committee to Help Shape Diversity and Inclusion Strategy*, WASH. U. ST. LOUIS SOURCE (March 9, 2015), <http://news.wustl.edu/news/Pages/diversity-inclusion-committee.aspx> (describing “robust conversations” at Washington University’s February 2015 “Day of Discovery and Diversity,” subsequent appointment of law school leadership to a committee to “turn ideas into action,” and commitment to “make good” on the institution’s “promise to . . . do better and be better” in the days ahead); Chris King, ‘Color of Debt’ Scrutinized, ST. LOUIS AM. (Nov. 12, 2015, 7:15 AM), http://www.stlamerican.com/business/local_business/article_1e85f63a-88c5-11e5-a405-b7c94277b853.html (reporting on law school’s “spirited public forum” and panel discussion regarding long-standing racially disparate debt collection practices in St. Louis); see also Courtney Humphries, *New Harvard Law School Program Aims for ‘Systemic Justice’*, BOS. GLOBE (Feb. 6, 2015), <https://www.bostonglobe.com/ideas/2015/02/06/new-harvard-law-school-program-aims-for-systemic-justice/PeGBqIenWhqqCuJ37Y20kJ/story.html> (discussing Harvard Law School’s Systemic Justice class); *The Critical Race Studies Symposium: Race and Resistance Against Police Violence*, UCLA L. SCH. (Oct. 2015), <https://law.ucla.edu/centers/social-policy/critical-race-studies/events/annual-symposium/> (displaying the flyer for UCLA Law School’s eighth annual critical race studies symposium and its purpose to integrate racial justice and practice).

12. See Darnell L. Moore, *9 Things #BlackLivesMatter Activists Need to See Presidential Candidates Do Now*, MIC (July 24, 2015), <http://mic.com/articles/122776/9-things-black-lives-matter-activists-need-to-see-presidential-candidates-do-now#.dSC5Fqs4o> (“Talk is cheap, but action and commitment are commendable. This is no time for platitudes. Activists want candidates who are committed to truly transformative policy platforms.”); see also Jamil Smith, *What Black Lives Matter Made Clear to Hillary Clinton*, NEW REPUBLIC (Aug. 19, 2015), <https://newrepublic.com/article/122572/what-black-lives-matter-made-clear-hillary-clinton> (reporting on confrontation with Hilary Clinton resulting in her acknowledging the problem of merely giving “lip service” to the Black Lives Matter movement).

13. See Kara Brown, *In the Aftermath of Ferguson, Stay Angry and Stay Woke*, JEZEBEL (Aug. 15, 2014, 4:10 PM), <http://jezebel.com/in-the-aftermath-of-ferguson-stay-angry-and-stay-woke-1622364931>; see also Bill Wylie-Kellermann, *Exorcising an American Demon*, in SOJOURNERS MAG. 7, 8 (1998), https://sojo.net/sites/default/files/wysiwyg/DG_racialjustice.pdf (urging Christian activists to approach the project of racial justice not just with faith but discernment).

14. Thurgood Marshall, *Law and the Quest for Equality*, 1967 WASH. U. L. Q. 1, 9 (1967) (published remarks of Thurgood Marshall, delivered as the Solicitor General, at Washington University School of Law’s Tyrrell Williams’ Memorial Lectureship).

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before those young people were senselessly gunned down. Some attorneys and advocates were fighting hard in courts and communities to call out racially biased, due-process starved, and unduly harsh systems of policing and prosecution before these incidents. And for this, many of these activists suffered the political backlash that comes with speaking up and out about injustice when those around them remain silent.¹⁵

Others, however, helped to build, perpetuate, and sustain the very structures and practices they now claim to disclaim. For instance, in Missouri where the state public defender's system ranks 49th in the country for funding, countless adults and children negotiate legal proceedings in our criminal, juvenile, and municipal courts without the assistance of counsel.¹⁶ The vast majority of these unrepresented individuals are people of color.¹⁷ This shameful situation has gone on for years.¹⁸

Yet before Michael Brown's killing, a miniscule number of legal professionals stepped in to offer legal assistance. Worse, fewer yet did anything to actively surface or challenge the deplorable situation—despite the fact that the Show Me State is home to countless practicing lawyers, hundreds of law professors, and four different law schools—two in Michael Brown's community alone.¹⁹ And even

15. Mae C. Quinn, *The Other Missouri Model: Systemic Injustice in the Show Me State*, 78 MO. L. REV. 1193, 1220–21 (2013); see also CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT 10, n.17 (2015) [hereinafter INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT] (describing how juvenile justice system actors appeared to take negative actions against Washington University's legal clinic after the Department of Justice launched its investigation, which was lauded by this author).

16. Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2205, 2212 (2014); see also Monica Davey, *Budget Woes Hit Lawyers for the Indigent*, N.Y. TIMES (Sept. 9, 2010), <http://www.nytimes.com/2010/09/10/us/10defenders.html?pagewanted=all>.

17. Michael Barrett, *Missouri: Letter to the Governor from the Director of the Public Defender System*, NAT'L ASS'N FOR PUB. DEF. (Aug. 11, 2015), <http://publicdefenders.us/?q=node/862> (describing how the public defender crisis disproportionately impacts Black defendants in the state's criminal and juvenile courts); see also Alex Stuckey, *In Missouri, Public Defenders Describe Mountains of Work, Low Pay*, ST. LOUIS POST-DISPATCH (Oct. 19, 2015), http://www.stltoday.com/news/local/crime-and-courts/in-missouri-public-defenders-describe-mountains-of-work-low-pay/article_c46b8f10-4f97-5a19-932e-c4c229a3b722.html (describing the heavy caseload for Missouri's public defenders).

18. See Stuckey, *supra* note 17.

19. Missouri is home to two private law schools, Washington University School of Law and St. Louis School of Law, located just miles from the location where Brown was killed. It also hosts two public law schools, University of Missouri in Columbia and University of Missouri at Kansas City. But sadly, as is the case across the country, few of the faculty members at these law schools are currently licensed to practice law in any state—much less in Missouri. See, e.g., Brian Clarke, *Practice Experience: A New Facet of Faculty Diversity?*, FAC. LOUNGE (July 14, 2014, 8:00 AM), <http://www.thefacultylounge.org/2014/07/a-new-facet-of-faculty-diversity.html>

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those who work in and around the courts did so largely without actively addressing the ongoing dehumanization and rights deprivations endured by clients of color. Rather they mostly stepped over the carnage, day in and day out, contributing to injustice with their apathy.²⁰ Some of these same individuals and institutions have suddenly declared themselves spokespersons for impacted communities, deeply concerned change agents, and social engineers with bright ideas for reforming our justice systems.

To be sure, following the recent shooting deaths by police, some who were previously uninformed or unconvinced²¹ have emerged with new understandings of the plight of youth of color in this country. This is one small silver lining in the recent tragedies of kids gunned down on our streets—that greater insight and true desire for reform has occurred.²² In addition, some people were legitimately frightened to speak out and needed communal cover of thousands of protestors to feel safe to share their truths.²³ It seems impacted communities and

(describing how the legal academy has historically been biased against experienced practitioners when hiring faculty).

20. Tyrone Forman & Amanda Lewis, *Racial Apathy and Hurricane Katrina: The Social Anatomy of Prejudice in the Post-Civil Rights Era*, 3 DU BOIS REV. 175, 188, 195–96 (2006) (describing wide-spread indifference and “strategic avoidance” on the part of white Americans as having contributed to the tragic circumstances that devastated Black communities during Hurricane Katrina); see also JOHN FOSTER, *WHITE RACE DISCOURSE: PRESERVING RACIAL PRIVILEGE IN A POST-RACIAL SOCIETY* 9 (2013) (acknowledging the power of Forman and Lewis’s thesis, but suggesting ignorance is frequently a “pretext” as many whites are actually “aware of such injustices but cast them away in defense of white privilege”); cf. Elizabeth Vasco, *Beyond Apathy: A Theology for Bystanders* (2015) (urging white Christians to own and take account of their own apathy and “unethical passivity” in the face of Black suffering in this country).

21. I must confess that over the last year-and-a-half my own thinking has shifted. I have now become firmly convinced of the need for race-based reparations in this country, a concept I previously met with skepticism. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

22. *NPR’s Interview with President Obama*, NPR (Aug. 10, 2015, 11:31 AM), <http://www.npr.org/sections/itsallpolitics/2015/08/10/431244020/full-video-and-transcript-nprs-interview-with-president-obama> (declaring “there has been an awakening around the country to some problems in race relations,” which provides an opportunity for change); see also Rev. Geoffrey A. Black et al., *A Pastoral Letter on Racism: A New Awakening*, UNITED CHURCH CHRIST (Jan. 16, 2015), http://www.ucc.org/pastoral_letter_new_awakening_01162015 (suggesting the possibility of further awakening).

23. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 27–28 (2d ed. 2001) (acknowledging the very real concern that “it may be physically dangerous to talk back” to racially biased speech and actions). In fact, as this author participated in the NAACP’s Journey for Justice march across the state of Missouri in December 2014, the bus on which participants rested had its window shattered by an unknown projectile. Some believe we were the targets of a shooting. See Jeff Haldiman, *Marchers Endure Counter-Protest in Rosebud*, NEWS TRIBUNE.COM (Dec. 4, 2014), <http://www.newstribune.com/news/2014/dec/04/march-now-bigger-cause/>; see also Kohn, *supra* note 9 (“Black folks are never safe, so it’s important for white

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long-time advocates should embrace such new voices who genuinely want to help stop over-policing and prosecution of Black and Brown children, even as they may need to be fully educated about the depths and nuances of the issues.

But for those lawyers, law professors, and legal professionals—of all races—who for years chose to keep their heads in the sand to avoid inconvenient truths²⁴ or more affirmatively contributed to the status quo, we should demand greater accountability.²⁵ This is not to say that individuals who directly and indirectly maintained morally bankrupt structures should never again have a place at the table. But it strikes me that some confession of their complacency and complicity—along with affirmative renunciations—must occur before they can be seen as seriously committed to the cause. Only through such acknowledgment of their hand in maintaining racially oppressive systems can they truly begin to make amends.²⁶

Even then it seems such contributing forces and their ideas must be met with some level of distrust. For what has changed with regard to their prior political commitments and personal agendas?²⁷ What of

co-conspirators or comrades to think about the level of comfort—safety—that is assumed to them by sitting on the sidelines and not actively engaging in the movement for black lives because it seems ‘too risky.’”)

24. Cf. ‘Stand Up, Speak Out’ Derrick Bell Told Law Students, NPR (Oct. 7, 2011, 11:33 AM), <http://www.npr.org/2011/10/07/141152319/stand-up-speak-out-derrick-bell-told-law-students> (Derrick Bell called it “comfortable and convenient” but “not necessarily accurate” when legal professionals embrace elite positions claiming they are changing oppressive structures from within). Indeed, some of my own students took to Twitter to call out what they saw as problematic actions—and inactions—on the part of our law school faculty and administration in the days following Michael Brown’s death. See generally @WUL4racialjusti (WULaw4RacialJustice), TWITTER (Nov. 10, 2014, 10:07 AM–Nov. 14, 2014, 8:34 PM), <https://twitter.com/WUL4racialjusti>. After these posts, it appeared that some faculty and institutional leadership took somewhat different and more public positions relating to the need for change in our courts and community. See e.g., *id.* at Nov. 19, 2014, 3:16 PM. Some continued to remain silent. See FOSTER, *supra* note 20. Worse, some apparently warned the students about the possibility of legal and other sanctions for expressing their opinions.

25. Cf. Conor Friedersdorf, *The Corrupt System that Killed LaQuan McDonald*, ATLANTIC (Nov. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/11/protesting-the-corrupt-system-that-killed-laquan-mcdonald/417723/> (“There is no doubt that Officer Van Dyke acted badly. As he faces murder charges, there remains a need to demand accountability for the Chicagoans complicit in the injustice he perpetrated.”). Such complicity takes many forms, including hosting events to laud individuals actively violating individual rights, disregarding the dignity of persons in our courts, or profiting at the expense of vulnerable populations.

26. As one example, white Methodist Pastor Wylie-Kellerman suggests such amends might occur by way of a formal baptismal ceremony. Wylie-Kellermann, *supra* note 13, at 11. He lifts up the work of the Detroit Catholic Worker where adult members are asked to publicly “renounce racism, nationalism, sexism, and all other barriers to human unity” and reject “the idols of money and property, race and class.” *Id.* at 10–11.

27. For instance, Alicia Garza, one of the acknowledged founders of the #BlackLivesMatters movement says: “I want white people to do the work of pushing Democratic darlings to take

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their own skin do they have in these efforts?²⁸ Indeed for some of the most vocal voices right now who are taking up the front pages of our newspapers and sounding out on the radio, their ties to racially-biased structures, connections to people who have abused power, and maintenance of corrupt systems continue unabated.²⁹

In fact, much of what is being rolled out as supposed responses to deeply entrenched injustices belie commitment to broad-based change. For instance, following recent events in Ferguson—including weeks of protests and activism by the #BlackLivesMatter movement—Governor Jay Nixon appointed a Commission tasked with the job of “unflinchingly” examining the range of causes that contributed to dissatisfaction, discord, and unrest in the region.³⁰ Many of us met this development with hope and optimism, believing in the good faith of the people appointed to serve as its volunteer staff. And the Commission’s final report did squarely call out the structural racism and injustice that infects so much of Saint Louis life.³¹

Nevertheless, it seems performance and politics still bled their way into both the process and content of the Ferguson Commission’s

more seriously the impact of structural racism Beyond saying #BlackLivesMatter, I want to hear more about what each of them *will do* to ensure a world where #BlackLivesMatter.” Kohn, *supra* note 9 (emphasis added). Similar need for discernment applies to some emerging Black voices, too. See LOIS BENJAMIN, *THE BLACK ELITE: STILL FACING THE COLOR LINE IN THE TWENTY-FIRST CENTURY* 281–86 (2d ed. 2005) (describing the class divide in Black America and perception that some affluent Blacks are not committed to equality for all); see also Tyehimba, *supra* note 9.

28. CHRISTOPHER PRAMUK, *HOPE SINGS, SO BEAUTIFUL: GRACED ENCOUNTERS ACROSS THE COLOR LINE* xxiii (2013) (challenging traditional notions of who has “skin in the game” when it comes to racial justice, calling for all of us to see it as a “personal and urgent” issue and rethink daily efforts and engagements to ensure a “radically inclusive way” forward); William Barber II, *Grief at the Heart of a Moral Movement*, *NATION* (Jan. 4, 2016), <http://www.thenation.com/article/grief-at-the-heart-of-a-moral-movement/> (calling for a “moral revolution” and agreeing with Pope Francis that we all must “become painfully aware” and “dare to turn what is happening in the world into our own personal suffering”); see also Houston, *supra* note 2, at 49 (“[E]xperience has proved that the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually himself profits as an individual by that very exploitation of the Negro which, as a lawyer, he would be called upon to attack and destroy.”).

29. I acknowledge here the work of Steve Martinot, which points out it is impossible for non-racist whites to dismantle racist structures through abandonment of individual privileges largely attributable to skin color. But in the concrete and non-theoretical world in which we live, I see such efforts as more than a “cry in the wilderness” but a form of personal resistance and acknowledgment that we need “an alternative politics and political culture.” STEVE MARTINOT, *THE RULE OF RACIALIZATION: CLASS, IDENTITY, AND GOVERNANCE* 200–208 (2003).

30. *Exec. Order No. 14–15*, OFF. OF MO. GOVERNOR JAY NIXON (Nov. 18, 2015), <https://governor.mo.gov/news/executive-orders/executive-order-14-15>.

31. FERGUSON COMMISSION, *FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY* (Sept. 2015), <http://forwardthroughferguson.org/report/executive-summary/> [hereinafter *FORWARD THROUGH FERGUSON*].

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findings,³² leaving many fearful that it did little to disrupt the status quo.³³ While the Commission sought input from impacted community members who had been touched by racially biased policing, overly punitive prosecution practices, and criminal punishment based upon poverty, the Commission spent much of its time listening to specially-invited testimony and considering select input from subject matter experts.³⁴ To be sure, I was one of those subject matter “experts.”³⁵ And at the time I was grateful for the opportunity to respond to the Commission’s request to provide significant testimony about the treatment of young defendants by our region’s police and in our municipal courts.

However, I was somewhat concerned at that early stage in the Commission’s work, and have become even more convinced now, that the full range of experiences and voices of youth and families of color in the region were not given enough time, attention, or platform.³⁶ In addition it seemed I was being intentionally steered away from talking about certain issues—in particular, the significant problems that continue to plague our juvenile court system. And research I provided to the Commission about juvenile justice issues in Missouri was not being shared with or considered by all of its members.

In fact, despite the fact that the local Juvenile Court system had been under investigation by the United States Department of Justice since November of 2013—nearly a year before Michael Brown was killed—somewhat remarkably not a single working group, subcommittee, or public hearing was dedicated to testimony from the community

32. The Commission hired public relations consultants, meticulously managed webpages, carefully constructed its messages through social media, and began each Commission meeting with high-tech polling exercises to collect audience demographics. See Mariah Stewart, *Will the Ferguson Commission’s Final Report Just Collect Dust on a Shelf?*, HUFFINGTON POST (Sept. 8, 2015 3:07 PM), http://www.huffingtonpost.com/entry/ferguson-commission-report_us_55e72afe4b0aec9f3557584 (describing strategizing behind the Commission’s work and meetings); see also STL POSITIVE CHANGE, www.STLPositiveChange.org (last visited Mar. 29, 2016); FORWARD THROUGH FERGUSON, *supra* note 31.

33. Steven W. Thrasher, *The Ferguson Commission Won’t Bring Social Change. Black Lives Matter Will*, GUARDIAN (Sept. 15, 2015, 7:26 AM), <http://www.theguardian.com/commentisfree/2015/sep/15/the-ferguson-commission-wont-bring-social-change-black-lives-matter-will> (lauding the Ferguson Commission for acknowledging the impact of race and racism in St. Louis, but lamenting that its findings and report unrealistically promote “‘positive change’ with catchy, optimistic phrases and a happy hashtag (#STLFwdThru)”; see also Stewart, *supra* note 32).

34. Stewart, *supra* note 32.

35. Jason Rosenbaum, *Ferguson Commission Eyes Overhaul of Region’s Municipal Courts*, ST. LOUIS PUB. RADIO (Dec. 16, 2014), <http://news.stpublicradio.org/post/ferguson-commission-eyes-overhaul-regions-municipal-courts> (reporting on author’s youth justice-related testimony before the commission).

36. Stewart, *supra* note 32.

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about problems in our juvenile courts and how they impacted children and families in the region. And although the Department of Justice issued its investigative findings about the Missouri juvenile court system on July 31, 2015,³⁷ weeks before the Commission wrapped up its work, it did not include any such information in its final report, findings, or continually updated website.³⁸

In the end, the Commission issued a nearly 200-page report declaring its “findings” and offering a range of specific suggestions for law reform.³⁹ Many involved in drafting the report were diligent, well-intended citizens who gave their time and energy at great personal expense—even if without subject matter or professional expertise to carry out the jobs with which they were tasked. Others, however, appeared at times to use the process as a platform for their own personal or professional advancement,⁴⁰ including taking credit for results that many believe are attributable to Ferguson protestors and advocates—not the Commission as a quasi-governmental body.⁴¹ And some with little knowledge about applicable laws, practices, or proceedings in our local legal system—or with their own agendas in mind—had a hand the Commission’s final Calls to Action.⁴²

For instance, the St. Louis Municipal Court system was addressed in great detail, with its local appointed judges openly taken to task.⁴³

37. See INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT, *supra* note 15.

38. See, e.g., FORWARD THROUGH FERGUSON, *supra* note 31. To this day the website says nothing about the Juvenile Court findings.

39. *Id.*

40. See, e.g., Stewart, *supra* note 32 (noting that one attendee called out the Commission’s leadership for advancing an agenda to create a lasting privatized entity, rather than serving as an arm of the public). See generally Vonn New, *Note to Self: White People Taking Part in #BlackLivesMatter Protests*, AM. FRIENDS SERV. COMMITTEE (Jan. 22, 2015), <http://www.afsc.org/friends/note-to-self-white-people-taking-part-blacklivesmatter-protests> (“Don’t use the Black Lives Matter actions to push your own agenda . . .”).

41. See Thrasher, *supra* note 33.

42. For instance, Commission members with training in areas such as religion, social work, and medicine drafted provisions relating to youth law, criminal procedure, and municipal court practice, as did lawyers who had never before worked in or challenged municipal courts and their practices. See, e.g., Christian Gooden, *Ferguson Commission Group Meets to Eke Stronger Recommendations*, ST. LOUIS POST-DISPATCH (July 9, 2015), http://www.stltoday.com/news/multi-media/ferguson-commission-group-meets-to-eke-stronger-recommomendations/image_7b9e7224-6a4d-5561-b865-27a0f092e8f2.html (photo of private group of three individuals, including Professor Karen Tokarz, meeting to draft the “final wording changes” for the Municipal Court Working Group of the Ferguson Commission); Susan Block, *St. Louis Attorneys, Judges Join New Commission on Racial and Ethnic Fairness*, 53 ST. LOUIS L. 8, 8 (2014), http://c.yimcdn.com/sites/www.bamsl.org/resource/resmgr/St_LouisLawyerPDFs/DEC-15Lawyer.pdf (crediting Professor Karen Tokarz as editor of the Ferguson Commission Report).

43. Jason Rosenbaum, *On the Trail: Ferguson Commission Banks on Enthusiasm for Implementation as Work Winds Down*, ST. LOUIS PUB. RADIO (July 19, 2015), <http://news.stlpublic>

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But not a single Call to Action expressly addressed Missouri's Juvenile Courts—a more politically-powerful system run by elected judges,⁴⁴ and staffed probation officers with a significant state lobby.⁴⁵ Rather, on the last day it took testimony the Commission finally invited this author along with another juvenile justice advocate, Reverend Dr. Dietra Wise Baker, to present concerns about the Department of Justice's findings about our juvenile court system to the Commission.⁴⁶ But we were given only four minutes to address the issue.

Many have begun to question how, if at all, the racial and criminal justice reforms proposed by the Commission will be meaningfully implemented.⁴⁷ Indeed, rather shockingly, in his January 2016 final state of the state address, Governor Nixon did not even mention Ferguson or the very Commission he created.⁴⁸

radio.org/post/trail-ferguson-commission-banks-enthusiasm-implementation-work-winds-down (referring to municipal courts as “low hanging fruit” that still may evade extensive reform).

44. Tara Kulash, *St. Louis Judge Receives National Recognition*, ST. LOUIS POST-DISPATCH (Aug. 5, 2013), http://www.stltoday.com/news/local/metro/st-louis-judge-receives-national-recognition/article_8402cbe1-705a-5528-a449-eabf321c2322.html (lauding St. Louis City Juvenile Court Judge as being among the most progressive in the country). *But see* CHRISTINE PATTERSON, RECOMMENDATIONS FOR REDUCING DISPROPORTIONALITY AND DISPARITY IN MISSOURI CERTIFICATION DECISIONS (2013), <http://law.wustl.edu/news/documents/DMCCRB5-RecommendationsFINAL.pdf> (finding St. Louis City is one of three Missouri juvenile court systems statewide that has disproportionately certified Black youth to adult court, resulting in a phenomenon referred to as “justice by geography”).

45. *See generally* Mary Kay O'Malley, *Chapter 1: The Juvenile Office*, in MISSOURI BAR JUVENILE LAW DESKBOOK (4th ed. 2011), <http://www.mobar.org/esq/publications/juvenile.pdf> (acknowledging without critical analysis that “the juvenile officer” is provided with “such wide-ranging authority and functions that the office can truly be said to be the focal point of Missouri's juvenile justice system”).

46. Transcript of Ferguson Commission Record of Proceedings at 33–36 (Aug. 24, 2015), <http://stlpositivechange.org/sites/default/files/082415%20Transcript.pdf> (limiting testimony on the issue of juvenile justice reform to a total of four minutes).

47. Chris King, *Details ‘Fuzzy’ on Enty to Implement Ferguson Commission Calls to Action*, ST. LOUIS AM. (Dec. 8, 2015, 8:58 AM), http://www.stlamerican.com/news/local_news/article_150150d0-9dbc-11e5-b818-23ffdaa98ca9.html; *see also* *Political Eye: Ferguson Commission Applicant Trained Ferguson Mayor in Leadership*, ST. LOUIS AM. (Nov. 11, 2015, 11:38 AM), http://www.stlamerican.com/news/local_news/article_f7b2d17e-889a-11e5-99f0-332a9c9f1724.html (outlining the many problems plaguing implementation of the Ferguson Commission's findings and calls to action, including potential conflicts of interest inherent in the St. Louis City-based entity selected to carry on its work).

48. For instance, as the Commission wrapped up its work in September 2015, Governor Nixon stated he would “use his last year in office to push for some of the commission's recommendations” because “lessons learned from the past year are too important to ignore.” Jason Rosenbaum, *We Have Not Moved Beyond Race: Ferguson Report Details Course for a Divided St. Louis*, ST. LOUIS AM. (Sept. 14, 2015, 12:45 AM), http://www.stlamerican.com/news/local_news/article_d3988bf0-5aa3-11e5-934a-0b844963eaca.html. Yet, during his state of the union address in January 2016, the Governor said almost nothing about the Commission or Ferguson-related reform efforts. Danny Wicentowski, *Gov. Nixon Ignores the Ferguson Commission He Created in Final ‘State of the State,’* RIVERFRONT TIMES (Jan. 22, 2016, 10:25 AM), <http://www>

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Recent actions on the part of the Missouri Supreme Court, purporting to take on racial justice issues in our courts raise similar concerns about true commitment to change. In October 2015, following the United States Department of Justice’s findings relating to Missouri’s Juvenile and Municipal Court systems, the Court appointed nearly 50 individuals to serve on what it has dubbed a Commission on Racial and Ethnic Fairness.⁴⁹ In a letter to the Court, this author previously commended its apparent admission there are problems in need of attention.⁵⁰ But installing yet another hand-selected group of judges and lawyers—many political insiders who helped build and maintain the current system—to conduct a four-year study of something so readily apparent hardly seems like a recipe for meaningful response and reform.⁵¹

What is more, the Racial Fairness Group has been divided into various subcommittees each with its own focus including criminal courts, civil courts, municipal courts, and juvenile courts.⁵² But again, many asked to offer their views on how to improve juvenile court practices have absolutely no prior juvenile court knowledge or experience. Instead, to date the juvenile court subcommittee has been held numerous non-public meetings without opportunity for meaningful input by reformers or impacted persons.⁵³ Perhaps worse, some of the group’s key members seem to have already decided there is no problem of racial injustice worth addressing.

.riverfronttimes.com/newsblog/2016/01/22/gov-nixon-ignores-the-ferguson-commission-he-created-in-final-state-of-state-speech.

49. Press Release, Missouri Supreme Court, Chief Justice Announces New Supreme Court Commission on Racial and Ethnic Fairness (Oct. 13, 2015), <https://www.courts.mo.gov/page.jsp?id=93102>.

50. See Letter from Missouri Association of Criminal Defense Lawyers to Chief Justice Breckenridge (Nov. 16, 2015) (on file with author).

51. Jennifer S. Mann, *Missouri Supreme Court Committee Will Study Racial Issues in the State’s Justice System*, ST. LOUIS POST-DISPATCH (Oct. 13, 2015), http://www.stltoday.com/news/local/crime-and-courts/missouri-supreme-court-committee-will-study-racial-issues-in-the/article_da262b91-6805-5581-a231-aa6fff824ce0.html; see also Anne Fisher, *How to Make Sure Nothing Gets Done at Work*, FORTUNE MAG. (Sept. 30, 2015, 11:35 AM), <http://fortune.com/2015/09/30/workplace-bureaucracy-simple-sabotage/> (noting that endless committee work can ensure sabotage of impactful new ideas); Editorial, *Another Commission to Study Another Problem with an Obvious Solution*, ST. LOUIS POST-DISPATCH (Oct. 16, 2015), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-another-committee-to-study-a-problem-with-an-obvious/article_210bd278-cc67-5cbe-aa92-c40cc51e6c91.html.

52. See Press Release, *supra* note 49.

53. Sadly, this mode of operating is all too common in Missouri. The Missouri Auditor’s Office recently issued a report calling for greater access to government and more open meetings around the state. Mike Lear, *Missouri Auditor Lists Top Violations of Open Records and Meetings Laws*, MISSOURINET (Nov. 25, 2015), <http://www.missourinet.com/2015/11/24/missouri-auditor-lists-top-violations-of-open-records-and-meetings-law/>.

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On July 31, 2015, the very same day the United States Department of Justice issued scathing findings about the extent of racial bias and disproportionality in St. Louis County, former St. Louis County Family Court Judge Susan Block, one of the leaders of the Missouri Supreme Court's juvenile court working group took to the media to suggest the United States Department of Justice got it wrong.⁵⁴ Specifically Judge Block stated: "I have never had a case where I felt that a child was being discriminated [against] because of their color."⁵⁵ Instead, when asked about the "poor and Black" children brought before the court, she broadly generalized that all of the children suffered from mental health and substance abuse problems.⁵⁶ "Their parents," she further asserted, "need help too."⁵⁷ Thus given the juvenile court's rehabilitative goals, it was suggested there should be no cause for concern.

Of course, taken to their extremes, such claims about "just helping" and "for their own good" were used to justify all manner of eugenics-based efforts that have mostly been abandoned in our modern society.⁵⁸ And these very same paternalistic and overly-inclusive sentiments about juvenile courts, in particular, were criticized nearly fifty years ago when the United States Supreme Court decided *In Re Gault*.⁵⁹ In holding youth were entitled to appointed counsel and other due process rights, it acknowledged the problem of overreaching and non-evidence based practices that needed to be kept in check.⁶⁰ Such attitudes have also been repeatedly unpacked to disclose imbedded false assumptions and negative implications for youth of color.⁶¹

It is, therefore, puzzling at best why such outmoded views would be allowed to shape the future of our courts.⁶² More fundamentally, it demonstrates that government actions and claimed commitments to

54. Associated Press, *DOJ Report Critical of St. Louis County Family Court*, KSDK (July 31, 2015, 7:39 PM), <http://www.ksdk.com/story/news/local/2015/07/31/doj-report-critical-of-st-louis-county-family-court/30938291/>.

55. *Id.* (quoting former St. Louis County Family Court Judge Susan Block).

56. *Id.*

57. *Id.*

58. See Mae C. Quinn, *From Turkey Trot to Twitter: Policing Puberty, Purity, and Sex Positivity*, 20 N.Y.U. REV. L. & SOC. CHANGE 51, 79 (2014).

59. *In re Gault*, 387 U.S. 1, 14 (1967).

60. *Id.* at 15–20.

61. See, e.g., Jyoti Nanda, *Blind Discretion: Girls of Color and Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1530–31 (2012); Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 660 (2013).

62. See Press Release, *supra* note 49.

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change must be continually subjected to scrutiny and inquiry.⁶³ And lawyers as public citizens have an express duty and professional obligation to engage in such efforts, even when it gets uncomfortable or involves calling out friends, colleagues, and the politically popular and powerful.⁶⁴

II. PROBING PROFFERED THEORIES: RESTORATIVE, PROCEDURAL AND THERAPEUTIC JUSTICE

In too many instances more effort is going into managing conversations—putting up window dressing to make it look like change is taking place—than trying to get to the truth of where the problems lie and meaningfully move forward. This can also be seen in the ways that, post-Ferguson, system actors are redirecting attention away from concrete, constitutionally-rooted reforms towards friendly, trendy-sounding ideas.⁶⁵

Rather than digging in to find that current practices violate constitutional norms and demand such protections, many of today’s claimed change agents are offering up softer “solutions” to side step the issue. One term that I have repeatedly heard offered as somewhat of a magic bullet in recent days is: “restorative justice.” While the idea of restorative justice may be defined differently depending upon the speaker, audience, or context⁶⁶—at its core it is obviously inter-

63. See Block, *supra* note 42 (announcing commitment to address issues of racial bias within the justice system).

64. See MODEL RULES OF PROF’L CONDUCT pmb1. (AM. BAR ASS’N 1983); see also Mae C. Quinn, *Teaching Public Citizen Lawyering from Aspiration to Inspiration*, 8 SEATTLE J. SOC. JUST. 661, 661 (2010) (describing the ethical role of lawyer as public citizen who should address systemic issues); see also, e.g., VERA INST. JUST., <http://www.vera.org/about-us> (last visited Mar. 4, 2016) (“We pride ourselves on asking difficult questions, entertaining unconventional answers, and reckoning with any uncomfortable truths which our research and practice may reveal.”).

65. See generally Gabriel Rubin, *Big Problems, Fake Solutions*, WASHU VOICES: FERGUSON & BEYOND (last visited Mar. 4, 2016), <https://voices.wustl.edu/big-problems-fake-solutions/>.

66. According to the YMCA, a leading proponent of such efforts: “Restorative justice is a theory or set of beliefs that informs how communities can resolve problems that have caused harm or damaged relationships. Restorative justice prioritizes accountability and community healing over punishment, shifting the focus from what rules were broken and what punishment is deserved to what harm was done and what needs to be done to repair the harm.” See *Restorative Justice Program*, YMCA MADISON (last visited Mar. 4, 2016), http://www.ywcamadison.org/site/c.cuIWLiO0JqI8E/b.7968327/k.87EF/Restorative_Justice_Program.htm. Others have said restorative justice has “been described in such far-reaching terms as a revolution in criminal justice . . . fueled by commitment and passion not unlike that of a revival meeting” and an “entirely new framework for understanding and responding to crime and victimization within American society.” MARK UMBREIT & ROBERT COATES, OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., MULTICULTURAL IMPLICATIONS OF RESTORATIVE JUSTICE: POTENTIAL PITFALLS AND DANGERS 3 (2000), https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176348.pdf.

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ested “RE-storing” a situation to the way it was before.⁶⁷ Thus applying this thinking, many now suggest that we might stem the tide of youth being shuttled into our criminal justice and school discipline systems if we just apply some kind of informal, REstorative, non-legal process. This will help restore the alleged wrongdoer, the victim, and the community to some position they held previously.⁶⁸

While in theory this sounds benign and benevolent enough, it overlooks the fundamental problem that prior to accusation many youth of color were not in a position that we should want to RE-store.⁶⁹ In the eyes of the larger community all too frequently they are seen as unworthy of dignity and respect in the first place.⁷⁰ Thus any return to the prior state of affairs—whether it is within a neighborhood court or classroom community—likely involves a march back to a power and value imbalance embedded in a system of oppression.⁷¹

What is more, restorative justice projects too frequently are based on the assumption that a wrongdoing worthy of correction has oc-

67. “Restorative justice needs something to restore, and one key thing it is very often said to restore is, in some formulation or other, ‘community.’” Robert Weisberg, *Restorative Justice and Dangers of Community*, 2003 UTAH L. REV. 343, 343 (2003).

68. See, e.g., Fania E. Davis, *Interrupting the School to Prison Pipeline Through Restorative Justice*, HUFFINGTON POST (Oct. 5, 2015, 10:54 AM), http://www.huffingtonpost.com/fania-e-davis/interrupting-the-school-t_b_8244864.html (espousing restorative justice efforts like alternative restorative justice-based schools that use “circle sessions” led by students—rather than teacher or administrative actions—to “make things right”); *Creative Courts and Caring Communities*, RESTORATIVE JUST. CTR. (last visited Mar. 4, 2016), <http://restorativejusticecenter.org/RTF1.cfm?pagename=Leadership> (noting that the Atlanta Community Court’s “Restorative Boards put volunteer neighborhood leaders front and center in the sentencing and restorative process” to develop a “course of action that the defendant will take to ‘right the wrong’ his/her actions have created”).

69. See GERRY JOHNSTONE, *RESTORATIVE JUSTICE: VALUES, IDEAS AND DEBATES* (2001) (describing concerns about restorative justice efforts including “making weak parties weaker” and imposing harsher sanctions on those deemed least desirable in a particular community).

70. See, e.g., MELVIN DELGADO, *NEW ARENAS FOR COMMUNITY SOCIAL WORK PRACTICES WITH URBAN YOUTH* 5 (2000) (noting that urban youth of color are rarely seen as “an asset” but instead framed as a “dangerous liability” and “drain on national resources” by politicians and others in leadership roles); Stephanie Goldberg, *TV Can Boost Self-Esteem of White Boys*, *Study Says*, CNN, <http://www.cnn.com/2012/06/01/showbiz/tv/tv-kids-self-esteem/index.html> (last updated June 1, 2012, 12:06 PM) (reporting on ways in which children’s perceptions of themselves and others in society are shaped by television, which overwhelmingly depicts white boys in a more positive light than other children).

71. As powerfully stated by Stanford University’s Robert Weisberg: “[C]ommunity’ is a very dangerous concept because it sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse, and because sometimes the sunny harmonious sound of the very word ‘community’ masks the conflict and uncertainty underlying legal issues, and because sometimes ‘community’ turns out to refer to something very concrete but which is actually very bad for justice.” Weisberg, *supra* note 67, at 343.

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curred.⁷² But such supposition fails to account for the ways in which many ordinary adolescent behaviors, particularly on the part of youth of color, are unnecessarily surveilled and criminalized.⁷³ What might be seen as horse play or “kids’ stuff” for some is regulated by written and unwritten rules that work to ensnare minority youth in criminal and disciplinary systems.⁷⁴ Thus whether met with arrest or a school-based restorative community circle, framing and naming normal missteps of children as harms or actions in need of formal address and correction may send the wrong message.

Similarly, by focusing on the accused as the central harm generator who has done wrong but should be met mercifully by a forgiving community, restorative justice fails to take to task systemic racism, unequal distributions of wealth, and other contributing societal dysfunctions.⁷⁵ Indeed, quite remarkably, some who propose using restorative justice sanctions to deal with children accused of crime acknowledge that unfair social conditions may well be the cause of the action in question.⁷⁶ Yet, they still call for holding children accountable and requiring them to make amends to alleged victims.⁷⁷

72. Indeed, even while warning about false binary assumptions that might bleed into restorative justice efforts, proponents talk about such processes in black and white terms such as “put[ting] right the wrongs.” See UMBREIT & COATES, *supra* note 66, at 3.

73. See generally Kristin Henning, *Criminalizing Ordinary Adolescent Behaviors in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 435 (2013).

74. *Id.* at 420 (what might be seen as “cute” behavior for non-minority youth may be seen as dangerous conduct on the part of youth of color); see also David Leanord & J Love Calderon, *Everyone But Us (Sobering Thoughts on Ferguson & Racial Justice)*, HIP HOP & POL. (Dec. 1, 2014), <http://hiphopandpolitics.com/2014/12/01/everyone-us-sobering-thoughts-ferguson-racial-justice/> (“In a culture that seemingly ignores white riots as “kids being kids” or “black Friday” and that seeks to understand and explain white behavior, there has been little effort to hear and listen to the statements emanating from the streets of Ferguson.”).

75. PATRICIA HUGHES & MARY JANE MOSSMAN, *RETHINKING ACCESS TO CRIMINAL JUSTICE IN CANADA: A CRITICAL REVIEW OF NEEDS, RESPONSES, AND RESTORATIVE JUSTICE INITIATIVES* 114–15 (2001) (“A related concern is whether the concept of ‘community’ which underlies restorative justice, particularly conferencing and circles, is meaningful in urban settings. Do these programs acknowledge and provide ways of addressing internal community power differentials and possible conflicts between the goals of victims and the community.”).

76. Hon. T. Bennett Burkemper, Nina Balsam & May Yeh, *Restorative Justice in Missouri’s Juvenile System*, 63 J. MO. B. 128, 134 (2007).

77. *Id.* at 128 (Under a restorative juvenile justice regime, “[t]he offender takes responsibility for the harm he/she caused and makes amends. The community supports the victim while holding the offender accountable for the harm. Communities examine the conditions that might have caused the harm and then find ways to change those conditions so that the likelihood of harm is reduced in the future.”); see e.g., Steven Verberg, *Race Bias in Dane County Legal System to be Fought in Special Courts*, WISC ST. J. (Oct. 29, 2013), http://host.madison.com/wsj/news/local/crime_and_courts/race-bias-in-dane-county-legal-system-to-be-fought/article_0d29d854-09b9-550a-ab63-b7ad8e6e8b75.html (“Some of Dane County’s troubling problems with inequality in the criminal justice system could be offset by new initiatives to funnel more African-American

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Deployed in this way, restorative justice serves as an amoral apologist for existing unjust arrangements.⁷⁸

Many restorative justice models also fail sufficiently to consider the confidentiality of personal information like mental health diagnoses, proportionality principles, and power imbalances baked into the system. For instance, most children's school disciplinary and special education records are private documents subject to disclosure only upon a threshold showing of need.⁷⁹ Thus, laying bare for an entire classroom the details of a particular incident—much less a child's medical condition or “past record”—runs the risk of violating state and federal law.⁸⁰

Similarly, if not familiar with or regulated by normative assessments of appropriate sanctions and discipline,⁸¹ children and community members may seek to impose sanctions that have improper shaming components or seem unduly harsh in an individual case when compared to other matters.⁸² And, of course, any restorative project where the majority-vote prevails or highly flexible processes are dominated by persons who come from different backgrounds or social groups from the “accused” youth, may work to replicate the very system it seeks to displace.⁸³ Thus without sufficient rooting in critical

suspects into special courts aimed at rehabilitation, officials say. ‘Community courts’ would take 17- to 25-year-olds from neighborhoods with high concentrations of racial minorities and place them in a restorative justice program where they can make amends for minor offenses without getting criminal records that would hurt them when looking for jobs and housing.”).

78. HUGHES & MOSSMAN, *supra* note 75, at 115–22 (warning that restorative justice projects may not be sufficiently attentive to race and class inequality).

79. *See, e.g.*, Thomasin Hughes, *Releasing Student Information: What's Public and What's Not*, SCH. L. BULL. 13 (2001).

80. *Id.* at 22–23; *see also* Ramona Gonzales & Tracy Godwin Mullins, *SELECTED TOPICS ON YOUTH COURTS: A MONOGRAPH* 17 (2004) (describing the legal and ethical problems of monitoring and managing “sensitive . . . information that may be revealed about the youth and his or her family” during peer-driven school discipline processes).

81. Indeed, many restorative practices—like those purportedly rooted in procedural justice or therapeutic jurisprudence—seem to have a kind of “anything goes” approach that embrace all procedural and substantive possibilities. *See, e.g.*, *Restorative Justice*, INST. FOR DEMOCRATIC EDUC. AM., http://www.democraticeducation.org/index.php/solutions/restorative_justice/ (“There is no one clear set of practices, but there are a variety of high-quality resources and approaches to Restorative Justice that can be implemented in districts and schools, large and small.”)

82. Sharon J. Zehner, *Teen Court*, FBI (Mar. 1997), <https://www2.fbi.gov/publications/leb/1997/mar971.htm> (talking about “the tendency” of some teen volunteer jurors to “impose harsh sentences” in Teen Courts); Tim Hrenchir, *Teens on Trial*, TOPEKA CAP.-J. (Oct. 21, 2003), http://cjonline.com/stories/102103/tee_court.shtml#.Vre9P1JNrFJ (reporting that in one evaluation of a peer-punishment initiative, “two of the three defendants said they thought their punishments were too harsh, though their parents thought the sanctions were reasonable”).

83. Indeed, too much of the restorative justice literature is focused on a singular injured party without acknowledging that the line between defendants and victims in our society is often

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race theory, due process norms, and a meaningful rights regime, restorative justice efforts do not provide a real alternative to the status quo at all.⁸⁴

The same can be said for the similar popular projects of procedural justice and therapeutic jurisprudence, different but related theories that have also received increased attention in the wake of the killings of kids of color at the hands of police.⁸⁵ Procedural justice focuses on the feelings of court-involved persons, suggesting beliefs about how they are treated are more important than the actual fairness of the process or outcome of their cases.⁸⁶ Therapeutic jurisprudence amorphously claims that we should adopt justice system policies and practices that seem “therapeutic” in nature, and avoid ones that are “anti-therapeutic,” in part by drawing lessons from the field of psychology.⁸⁷

Taken together, with their emphasis on the perceptions of those processed through our courts rather than protection of individual rights, constitutional principles, or delivery of substantive justice, these concepts can—and this author believes do—provide cover for

quite grey, and that a process could also revictimize the accused. *See, e.g.*, Mark S. Umbreit, *Restorative Justice, Victim-Offender Mediation*, OFF. FOR VICTIMS CRIME (July 2000), https://www.ncjrs.gov/ovc_archives/reports/rjbulletin1/files/ncj20180301.txt (“Often the cultural backgrounds of victim, offender, and program staff member are different from one another, sometimes leading to miscommunication, feelings of being misunderstood, or even revictimization.”).

84. HUGHES & MOSSMAN, *supra* note 75, at 122 (arguing that with so many minor “offenses” diverted to restorative processes, “[t]here is a real danger of increased criminalization of activities which would not otherwise be the subject of a criminal charge with a disparate impact on the poor and members of vulnerable groups”).

85. Matthew J. D’Emic, *Justice in America: Diverting the Mentally Ill*, CUNY L. REV. (Dec. 26, 2015), <http://www.cunylawreview.org/justice-in-america-diverting-the-mentally-ill-2/> (calling for greater use of therapeutic jurisprudence principles and problem solving courts to help “bolster trust” in the criminal justice system following a “rough year” that involved many “[r]acially charged confrontations”).

86. *See generally* TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (suggesting that lawmakers and law enforcers would do much better to make legal systems worthy of respect than to try to instill fear of punishment and finding that people obey law primarily because they believe in respecting legitimate authority); *see also* Emily Gold & Melissa Bradley, *The Case for Procedural Justice: Fairness as a Crime Prevention Tool*, 6 COMMUNITY POLICING DISPATCH (Sept. 2013), http://cops.usdoj.gov/html/dispatch/09-2013/fairness_as_a_crime_prevention_tool.asp (“Procedural justice (sometimes called procedural fairness) describes the idea that how individuals regard the justice system is tied more to the perceived fairness of the process and how they were treated rather than to the perceived fairness of the outcome.”).

87. David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Practices and Procedures*, 7 ARIZ. SUMMIT L. REV. 463 (2014) (Professor Wexler, one of the founders of the Therapeutic Jurisprudence—“TJ” as its adherents call it—claims Therapeutic Jurisprudence seeks “to look at the law in a richer way by pondering the therapeutic and antitherapeutic impact of ‘legal landscapes’ (legal rules and legal procedures) and of the ‘practices and techniques’ (legal roles) of actors such as lawyers, judges, and other professionals operating in a legal context.”).

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problematic activities. This is because under such theories the main concern is whether a person believes or feels like they were treated politely or dealt with therapeutically while prosecuted.⁸⁸ This is so even if they were targeted by police in the first instance based on their race, searched and arrested in violation of the Fourth Amendment, never read their *Miranda* rights when a confession was obtained, prosecuted under a provision of law that should be struck from the books for chilling protected First Amendment conduct, and made to address the court personally instead of through a court-appointed attorney as required by the Sixth Amendment.

Proponents of these approaches quite remarkably laud them for their ability to encourage greater compliance with “the law” and orders of the court in the days ahead without any critical analysis of what that actually means.⁸⁹ But unless we are affirmatively seeking to advance the status quo, we should not encourage complacency and blind adherence to underlying laws and orders that may be racially biased, criminalize ordinary adolescent behaviors in communities of color, or simply unconstitutional. It is difficult, therefore, to square such efforts with the #BlackLivesMovement or substantive justice more generally. Yet, many of today’s emerging social justice engineers are calling for broader embrace of such principles as a “Post-Ferguson” means of reforming the justice system—in particular through the creation of specialized “problem-solving courts.”

III. CRITICALLY CONSIDERING “PROBLEM-SOLVING” COURTS AS THE SOLUTION

Numerous voices have now suggested the use of “problem-solving courts” as a means of responding to many of the concerns expressed by activists—and the United States Department of Justice—

88. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 2015 PROCEDURAL JUSTICE SITE SOLICITATION 1 (2015), <http://www.courtinnovation.org/sites/default/files/documents/PJ%20Site%20Assessment%20Solicitation.pdf> (According to one recent Request for Proposals put out by the Center for Court Innovation and federal Bureau of Justice Assistance, the four core concerns of a court operating consistently with Procedural Justice teachings are: “(1) *voice* (litigants’ perception that their side of the story has been heard); (2) *respect* (litigants’ perception that the judge, attorneys, and court staff treat them with dignity and respect), (3) *understanding* (litigants’ comprehension of the language used in court and the decisions that are made); and (4) *neutrality* (litigants’ perception that the decision-making process is unbiased and trustworthy).”) Thus, it seems perception could easily trump reality; yet, a court would score high on the Procedural Justice scale.

89. *Id.* (“Research shows that when litigants believe the court process is fair, they are more likely to comply with court orders and the law generally.”).

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regarding policing, prosecution, and court practices in the St. Louis region. In particular, some involved in “post-Ferguson” justice reform efforts have called for the creation of specialized “community courts.” However, like the underlying theories they allegedly apply—restorative, therapeutic, and procedural justice principles—such institutions do not work to disrupt the status quo in any significant way. Instead, they largely overlook, and thus implicitly permit and perpetuate, a wide range of problematic practices—including racially bias policing, unconstitutional searches and seizures, prosecution under overbroad laws, and the criminalization of poverty, addiction, and ordinary adolescent behaviors. Therefore, it is hard to see such institutions as actually solving problems facing already at-risk youth.

Shortly after Michael Brown’s death, attorneys and advocates who actually practice in St. Louis County municipal courts—including this author—called for complete overhaul of the system, which is comprised of 90 different venues that have been engaging in a range of unconstitutional practices.⁹⁰ Such calls for action, which included culling local ordinance codes to remove unconstitutional provisions, requests for consolidation of the courts, and provision of court appointed counsel, were consistent with complaints from our clients and demands by protestors for robust reform of a fragmented system without sufficient oversight or protections.⁹¹

Yet these efforts were directly and indirectly resisted by some members of the Ferguson Commission and a number of lawyers in the region.⁹² For instance, I was disappointed to learn that one of my own colleagues, Professor Karen Tokarz, worked to rally significant

90. Jennifer Mann & Jeremy Kohler, *Activists Call for Consolidation of Municipal Courts at St. Louis Hearing*, ST. LOUIS POST-DISPATCH (Nov. 12, 2015), http://www.stltoday.com/news/local/crime-and-courts/activists-urge-consolidation-of-area-municipal-courts-at-st-louis/article_498c0c55-1fa9-5e8e-ace2-c0cae41b68c9.html; see also Rosenbaum, *supra* note 35 (reporting on the invited testimony before the Ferguson Commission of this author, Thomas Harvey of ArchCity Defenders, and Dave Leipholtz of Better Together) (quoting St. Louis Law School professor John Amman, who also called for consolidation of the region’s municipal courts).

91. Chris King, *Please Consolidate the Municipal Courts*, ST. LOUIS AM. (Nov. 18, 2015, 2:18 PM), http://www.stlameric.com/news/local_news/article_9140ff00-8e31-11e5-8c48-3b6979641da6.html; Mann & Kohler, *supra* note 90; see also MISSOURIANS ORGANIZING FOR REFORM AND EMPOWERMENT, *TRANSFORMING ST. LOUIS COUNTY’S RACIST MUNICIPAL COURTS* 4 (2015), [http://populardemocracy.org/sites/default/files/publications/Transforming%20St.%20Louis%20County’s%20Racist%20Municipal%20Courts%20\(2\).pdf](http://populardemocracy.org/sites/default/files/publications/Transforming%20St.%20Louis%20County’s%20Racist%20Municipal%20Courts%20(2).pdf) (calling for consolidation of the municipal courts under the umbrella of four existing county traffic courts).

92. See Jennifer Mann, *Ferguson Commission Seeks Complete Overhaul, Shrinking of Municipal Courts*, ST. LOUIS POST-DISPATCH (June 23, 2015), http://www.stltoday.com/news/local/crime-and-courts/ferguson-commission-seeks-complete-overhaul-shrinking-of-municipal-courts/article_14b97058-ac3f-537d-9616-1378ed0e0cae.html (reporting on resistance by Commission Member T.R. Carr and local attorney and municipal court judge Frank Vatterott, while Muni-

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support for a more-trendy sounding but softer and less radical approach—that is, the maintenance of our current municipal court system with the creation of an “innovative” “community court” overlay—focusing primarily on leniency and treatment for youth.⁹³

In offering her alternative proposal, Professor Tokarz concedes that consolidation of the 90 municipal courts in the St. Louis region would not only be more cost-effective, but would also help protect against corruption and bias.⁹⁴ Professor Tokarz acknowledges that provision of counsel could also ensure a more professional and ethical system.⁹⁵ Yet, without any supporting evidence or concrete reasons why we should assume defeat, she claims such rethinking is unrealistic.⁹⁶ Instead, she posits, “[t]rue reform could be accomplished through the development of innovative, problem-solving, community justice, municipal courts that might serve as a model for the rest of the country.”⁹⁷

But in suggesting we simply rename the existing system and “re-vamp” it with a range of feel-good specialized “problem-solving” features, it seems Professor Tokarz is looking to avoid the harsh realities that would be involved in a real accountability effort in St. Louis and the hard work that would go into delivering fundamental reforms for the region. Moreover, the “problem-solving” features she proffers not only paper-over problematic policing and prosecution practices, they actually work to blame the victims of structural and systemic oppression—including youth—and may exacerbate the manifold problems they already face.⁹⁸

pal Court Working Group member Brendan Roediger called for consolidation and other fundamental reforms).

93. Karen Tokarz & Sam Stragand, *Community Justice Courts Can Be an Innovative Reform*, ST. LOUIS POST-DISPATCH (May 5, 2015), http://www.stltoday.com/news/opinion/community-justice-courts-can-be-an-innovative-reform/article_96a59f74-f1cd-5aff-802e-014955831e69.html.

94. *Id.* (“Almost inevitably, such a court would be better run, more available to the public, less beholden to outside pressures—and, in the end, less costly and more efficient than the current system of multiple part-time courts, with part-time employees, some with arguable conflicts of interest, that meet a couple of evenings a month.”).

95. *Id.*

96. *Id.* (claiming “it seems unlikely” that such things “will come to fruition”). And, sadly, since this press statement was issued another Missouri Supreme Court Working Group, which was appointed to look at the possibility of consolidation of the municipal courts, has similarly accepted the status quo. *See generally* REPORT OF THE MUNICIPAL DIVISION WORK GROUP TO THE SUPREME COURT OF MISSOURI (Mar. 1, 2016), <https://www.courts.mo.gov/file.jsp?id=98093>.

97. *Id.*

98. *See* Leon Neyfakh, *The Custom Justice of ‘Problem Solving Courts,’* BOS. GLOBE (Mar. 23, 2014), <https://www.bostonglobe.com/ideas/2014/03/22/the-custom-justice-problem-solving-courts/PQJLC758Sgw7qQhiefT6MM/story.html> (“[A]s specialty courts have proliferated, their

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For instance, Professor Tokarz argues that by processing youthful defendants through a community justice court we are actually helping to solve their problems and those of the community.⁹⁹ That is because such venues use “alternative sentencing options” that not only help defendants “avoid future violations” but protect “public safety.”¹⁰⁰ As an example, Tokarz offers that young people facing low-level ordinance violations and traffic charges could be given a case worker and then access to things like group counseling or mental health services through the court. And apparently believing that a lack of financial know-how “not infrequently underlie[s] traffic and other municipal violations,” she suggests “credit counseling services” might also be part of the sanction in such courts.¹⁰¹

The problem with such an approach is that it utterly fails to interrogate how or why young people are being stopped, arrested, and/or charged by local police for low level ordinance violations in the first place.¹⁰² For instance, playing a loud “boom box,” walking in groups, and failing to provide identification to officers upon demand are all prohibited by St. Louis County local ordinances. But this is not because they present major public health concerns or safety risks. Instead their policing and prosecution results in social control over particular populations—usually kids of color. And in my experience it is not bad credit or mental health challenges that underlie such “crimes”—it is the unchecked use and abuse of power.

In fact, many such charges should not exist in municipal codes because they are unconstitutionally overbroad, prohibit protected activity, and chill legitimate actions. Moreover, even where such code

rapid adoption has caught the attention of legal experts who worry that an immense shift in the American justice system has taken place almost totally ad hoc, with relatively little thought given to its potential pitfalls.”).

99. Tokarz & Stragand, *supra* note 93. In this way, Professor Tokarz’s call mirrors some other recent suggestions to “funnel” the cases of minority youth into rehabilitation-based courts. See, e.g., Verberg, *supra* note 77 (“Some of Dane County’s troubling problems with inequality in the criminal justice system could be offset by new initiatives to funnel more African-American suspects into special courts aimed at rehabilitation, officials say. ‘Community courts’ would take 17- to 25-year-olds from neighborhoods with high concentrations of racial minorities and place them in a restorative justice program where they can make amends for minor offenses without getting criminal records that would hurt them when looking for jobs and housing.”).

100. Tokarz & Stragand, *supra* note 93. *But see* Rubin, *supra* note 65 (warning that “elites have co-opted municipal court reform” and are offering “watered down versions” of demands made by community groups like the Millennial Activists and Organization for Black Struggle).

101. Tokarz & Stragand, *supra* note 93.

102. See Erin Collins, *Status Courts*, 105 *GEORGETOWN L.J.* (forthcoming 2016) (warning about the ways in which problem solving courts as release valves may fail to hold the criminal justice system accountable for its failings); see also, e.g., Verberg, *supra* note 77.

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provisions might be legitimate, they are disproportionately used to target and stop minority youth. But in a problem-solving system that focuses on the defendant as the one in need of correction, such injustices go largely unquestioned and unaddressed.¹⁰³

What is more, Professor Tokarz contemplates imposing a broad range of alternative sanctions upon youth in her community court model without also offering court appointed counsel to help them negotiate the legal process, consider their options, or challenge unconstitutional conduct. Instead, her proposal would provide all municipal court litigants with “limited legal advice on how to avoid future violations.”¹⁰⁴ Not only does this conflict with basic constitutional standards, it again frames youth as the cause of the problem. That is, they are the ones who need to change and somehow have the capacity to make such change happen. But this does not account for the wrongdoings of system actors or the structural impediments—like race-based policing or poverty—that might make avoiding future contact with law enforcement impossible.

To be sure, Professor Tokarz is correct to note that some young people in our courts may be struggling with a lack of permanent housing or mental health issues. But here, too, by erroneously suggesting that *all* youth passing through our courts—primarily kids of color—will benefit from case workers and wrap-around services runs the risk of returning to overly paternalistic practices and pathologizing many ordinary adolescent behaviors. It also begs the question of why a young person needs to become a criminal justice statistic—presumably in a public courtroom¹⁰⁵—to access basic services when they are

103. As a further example of this “papering over” phenomenon, consider the following recent statement offered by another problem-solving court proponent when asked his views on how specialty courts might work to address community concerns about racial bias in the system:

I think, a lot of times, just for judges and court staff and prosecutors and defense attorneys to realize that they have implicit bias is an important factor. Then, controlling that with tools, to make sure they can overcome those natural biases that exist. I think that’s number one, the training behind that is really important. Then number two, really trying to overcome that by making sure that we have things like community courts and drug courts.

Race, Data, and Procedural Justice: A Conversation with David Slayton, CTR. FOR CT. INNOVATION (Jan. 13, 2016), <http://www.courtinnovation.org/research/race-data-and-procedural-justice-conversation-david-slayton-0>.

104. Tokarz & Stragand, *supra* note 93.

105. In fact, both Professor Tokarz and the Ferguson Commission findings fail to sufficiently account for the fact that children as young as 15 years old may be prosecuted in our municipal courts—yet they are provided with no special privacy protections and have their cases heard in the same public courtrooms as adult defendants. See Mae C. Quinn, *In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Pro Se Adolescent Advocacy—Ferguson and Beyond*, BYU L. REV. (forthcoming 2016).

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appropriate. That is, if we are truly committed to change, we should not accept the proposition that arrest or a court date is needed to obtain meaningful care and support.

Finally, Professor Tokarz’s community court proposal fails to cite or reference a single one of the thoughtful critiques offered by countless practitioners and researchers over the years relating to the growing cottage industry of “problem-solving” courts in this country.¹⁰⁶ These analyses have long warned about the ethical and constitutional issues presented by such institutions, which in many cases financially benefit certain service providers and technical assistance agencies at the expense of legal rights and protections.¹⁰⁷ It seems to be no coincidence that while the state of Missouri is 49th in country when it comes to funding public defenders,¹⁰⁸ we are a national leader when it comes to creating “problem-solving” courts that provide treatment in exchange for waiving constitutional and other protections—including representation by counsel.¹⁰⁹

106. See, e.g., Mae C. Quinn, *The Modern Problem Solving Court Movement: Domination of Discourse and the Untold Stories of Criminal Justice Reform*, 31 WASH. U. J. L. & POL’Y 57 (2009); Jane Spinak, *Reforming Family Court: Getting it Right Between Rhetoric and Reality*, 31 WASH. U. J. L. & POL’Y 11, 18 (2009); Anthony Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J. L. & POL’Y 63, 79 (2002); see also Tamar Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007); Eric Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004). Consistent with this one-sided framing, the Ferguson Commission Report, for which Tokarz apparently served as the editor, also fails to cite the work of any of these well-respected researchers and scholars who have been studying these issues for years. Instead, Tokarz appears to be the only cited legal academic now speaking and writing about juvenile and criminal justice and “problem solving” courts in the wake of Ferguson and its press coverage. See FORWARD THROUGH FERGUSON, *supra* note 31, at 102. Most of the rest of what is cited is work written by or for the Center for Court Innovation, an organization that creates and perpetuates problem-solving courts—and stands to gain financially by providing “technical assistance” to such institutions. *Id.*

107. Indeed, Professor Tokarz’s op-ed and the Ferguson Commission Report she apparently edited entirely leaves out the fact that the last “community court” that operated in St. Louis was shut down following a constitutional challenge by some of her colleagues. See *Clinic Wins Legal Victories for the Homeless*, WASH. U. SCH. L., <https://law.wustl.edu/m/content.aspx?id=4339>.

108. See Davey, *supra* note 16; see also Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Right to Counsel*, 99 IOWA L. REV. 2185 (2014).

109. *Missouri’s Chief Justice Delivers State of the Judiciary Address*, YOUR MO. CTS. (Jan. 27, 2016), <http://www.courts.mo.gov/page.jsp?id=96693> (“Missouri is a national leader in treatment courts. As you know, our adult, juvenile and family drug courts change the trajectory of lives from addiction and crime to being productive citizens, while saving money by reducing the prison population.”).

Despite such enthusiastic assertions that “they work,” the very claim that specialized treatment courts are effective at treating addiction remains deeply contested. See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786 (2008) (“[C]ompulsive addicts are not the only ones who do comparatively badly in drug courts. Studies have shown that other historically disadvantaged groups—for example minorities, the poor, the uneducated and the socially disconnected—are also likelier to fail.”); Mae C. Quinn, *Time for an Intervention: Rethinking*

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Thus, continuing down the primrose path of assuming problem-solving courts are the answer—particularly at this historic moment with all of its opportunities—is contrary to Dean Houston’s call for radical social engineering by committed, knowledgeable lawyers who are mindful of constitutional rights and equal justice under the law.

CONCLUSION

While we continue to mourn and rage against the senseless killings of so many youth of color at the hands of police in this country, we stand at an important crossroads. Harnessing the power of grief and outrage, we can demand—and make—amends for a history of shameful second-class treatment visited upon persons of color. We can insist upon dismantling structures and practices that have worked to perpetuate inhumanity and injustice against vulnerable populations generally—and Black and Brown youth in particular. And, in their wake we may begin to reconstruct systems absolutely faithful to individual rights, equal opportunity, dignity, and hope.

This will not be easy work; it requires accountability, integrity, and courage. And for lawyers, it further demands constitutional know-how, professional skill, sensitivity, and perception. Thus, it is important to remain vigilant at this time. In the days ahead it will be important to protect against disingenuous allies hijacking reform efforts, vacuous theories from being deployed to maintain the status quo, and feel-good fixes from getting in the way of more radical rethinking. It is time for truly committed social engineers to drive the movement—and to ensure the parasitic individuals and institutions Dean Hamilton warned about do not thwart success in the “fight for true equality before the law” in the 21st century.¹¹⁰

Drug Treatment Courts, 4 WASH. U. L. MAG. 49 (2010), <https://law.wustl.edu/magazine/spring2010/endpaper-maequinn.pdf> (“Recent estimates also suggest that between one-third and one-half of all defendants actually ‘fail out’ of drug court. For these defendants, their efforts at treatment are ultimately rewarded with lengthy prison terms.”).

Indeed, the most recent findings around juvenile drug courts find that they are actually counterproductive to youth rehabilitation and success. See LESLI BLAIR, CARRIE SULLIVAN, EDWARD LATESSA & CHRISTOPHER J. SULLIVAN, U.S. DEP’T OF JUSTICE, OFFICE JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE DRUG COURTS: A PROCESS, OUTCOME, AND IMPACT EVALUATION 1 (2015), <http://www.ojjdp.gov/pubs/248406.pdf> (“[T]here is still cause for concern about whether these [juvenile drug] courts follow evidence-based practices and how they may lead to counterproductive outcomes, such as increased referral and detention rates.”). Thus Missouri’s efforts to roll out even more of such institutions, particularly at this historic moment, raise real questions about the State’s commitment to justice reform.

110. Houston, *supra* note 2.