

## AGAINST PROFESSING: PRACTICING CRITICAL CRIMINAL PROCEDURE

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I love teaching Criminal Procedure. But part of me believes that by doing so I am simply part of a giant charade. This past year, more than ever before, I felt this conflict as I tried to make sense of law, legal teaching, and life during—and in the wake of—recent horrific events from my hometown of Staten Island, New York<sup>1</sup> to Ferguson, Missouri,<sup>2</sup> just down the road from where I live and work today.

On this very day, as I start to write this Article, I very much continue to grapple with this dichotomy as a child in McKinney, Texas recovers from her traumatic physical restraint effectuated by an officer who threw her bikini-clad Black body to the ground in front of a community pool;<sup>3</sup> as Chuck Grassley, chairman of the United States Senate Judiciary Committee, just openly admitted that “[t]he Supreme Court’s Sixth Amendment decisions are violated thousands of times every day;”<sup>4</sup> and as a government agent called my fourteen-year-old juvenile clinic client at home yesterday, asking to speak with him directly, after the child had previously invoked his constitutional right to silence and the presence of counsel.

I love criminal procedure because it energizes and inspires me to think about our Constitution as providing all of us, regardless of our station in life, with protections against government actions—including the general right to go about our business undisturbed, to keep personal and private matters to

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1. Mollie Reilly, *Justice Department to Investigate Eric Garner’s Death*, HUFFINGTON POST (Dec. 3, 2014), [http://www.huffingtonpost.com/2014/12/03/justice-department-eric-garner\\_n\\_6264928.html](http://www.huffingtonpost.com/2014/12/03/justice-department-eric-garner_n_6264928.html) [<http://perma.cc/U2K3-9FRD>].

2. Alan Scher Zagier, *Ferguson, Missouri Teen Shot Dead by Police Prompts Community Backlash*, HUFFINGTON POST (Oct. 9, 2014), [http://www.huffingtonpost.com/2014/08/09/ferguson-police-shooting\\_n\\_5665274.html](http://www.huffingtonpost.com/2014/08/09/ferguson-police-shooting_n_5665274.html) [<http://perma.cc/DVG2-GGAM>].

3. Kim Bellware, *Cop Placed on Leave After Video Emerges of Brutal Arrests at Teen Pool Party*, HUFFINGTON POST (June 8, 2015), [http://www.huffingtonpost.com/2015/06/07/mc-kinney-police-pool-party\\_n\\_7530164.html](http://www.huffingtonpost.com/2015/06/07/mc-kinney-police-pool-party_n_7530164.html) [<http://perma.cc/M8RT-4JWF>].

4. Gary Feuerberg, *Constitution Violated ‘Thousands of Times Every Day’*, EPOCH TIMES (May 18, 2015), <http://www.theepochtimes.com/n3/1359404-constitution-violated-thousands-of-times-every-day/> [<http://perma.cc/S8PY-KU3K>].

ourselves, to decline an invitation to answer government questions, and to have legal representation when facing criminal accusation. I enjoy the analytical exercise of working with students to piece together the puzzle-like doctrinal rules that have evolved under the Fourth, Fifth, and Sixth Amendments. And I am excited by the possibility of arming young advocates with tools to assist clients and engage systems of justice.

But I hate to feel like I am part of a well-orchestrated farce. Where we focus on constitutional United States Supreme Court decisions as if they present coherent and self-implementing rules that serve as governmental gospel to bring about swift “justice.” Where at times I believe I am working to preserve a deeply flawed and inhumane legal system that too frequently perpetuates vulnerabilities and inequality. And where law school faculty, directly and indirectly, through what we teach and how we teach it, feed the elitism and superiority fiction of “the law,” lawyers, and systems of justice—suggesting such individuals and institutions deserve more respect and reverence (and revenue) than they probably do.

My conflicted feelings about teaching Criminal Procedure also stem from my somewhat dual existence within the legal academy—where, when I am not at the podium “teaching” large “doctrinal” courses, I run a Juvenile Law Clinic that directly represents youth in conflict with the law in St. Louis, Missouri—including within our now very famous municipal and juvenile court systems. The latter surely provides me with important and timely real-world examples to enhance my teaching of the former. But it also serves as a constant reminder of the vast differences between the aspirational platitudes and doctrines set forth by the United States Supreme Court, and the law as actually lived and lamented—particularly by communities of color—in twenty-first century America. It also troubles me that so little of the legal academy’s time and efforts are dedicated to naming and surfacing these issues—and even less of its energy and resources are directed towards actually doing something about them.

Given this tension—where I believe deeply in the potential and promise of constitutional criminal procedural rules, particularly when in the hands of thoughtful and zealous advocates for indigent and otherwise marginalized populations, but am deeply disappointed by much of Supreme Court rights rhetoric, its failure to directly take on issues of race in the administration of criminal justice, and limited commitments of existing legal institutions and structures to address these concerns—I have frequently considered leaving the legal academy. I do not want to be a complacent beneficiary serving as a living apologist for ongoing and overlapping structures of inequality.

But, as of today, I am still here. And I continue to “teach” Criminal Procedure as one of my core courses. I do so while trying my best to stay true to my values and commitments, surfacing the tensions and deficits I have described, and using concrete examples to drive home the many disparities and

dysfunctions that still exist in this country despite the development of decades of criminal procedure doctrine. I try to encourage students to embrace their roles and responsibilities both as representatives of clients and change agents in this deeply imperfect system—urging them to consider what it might take to be an effective advocate for individuals and communities within current structures while still working towards fundamental reform. I try to engage in these efforts through a variety of means—from the way in which I set forth expectations at the start of the semester, to creating norms for our community of learning, to the materials I include in our readings, to the ways in which I attempt to have students grapple with the applications and implications of constitutional doctrinal principles and other concepts—both inside and outside of our classroom.

Of course, I do not purport to be pedagogically perfect. There are surely students who might prefer a different take on the course. And all of this does not resolve my internal dilemma or absolve me of some level of responsibility for the state of the world today, particularly as I continue to enjoy a relative position of privilege in an exclusive and elite institution of higher learning. But thus far it has provided somewhat of a middle path where I try to contextualize criminal procedural rules and consider current doctrinal principles while also questioning them. Where I push students to ask hard questions, speak truth to power, and encourage them to embrace their roles as the next generation of advocates who can continue to try to impact and improve institutions to ensure equal justice for all.

And, to date, despite my internal struggle, a good number of students have reported that they appreciate my approach to the course. An approach I would characterize as different from professing or theorizing about the law—but instead practicing a form of critical criminal procedure. What follows are a few specific thoughts about, and examples from, this ongoing effort (and impasse).

#### I. CREATING COMMUNITY AND SAFE SPACES FOR CRITICAL CONVERSATIONS

From the first day in my course, I try to set expectations around self-awareness, collaborative inquiry, and professional engagement. I try my best in my syllabus to lay out class norms as clearly as I can. I also talk about my professional training, background, and work as a criminal and juvenile defense attorney—which will likely inform my approach and thinking about a range of topics. Thus, I acknowledge the reality that none of us come to legal interpretation and application without some personal experiences, biases, and/or leanings. But I also usually note aloud—and in my syllabus—that while many of us will disagree throughout the semester, demonstrations of disrespect are not acceptable. And, without trying very hard, pretty quickly I usually model imperfection—hopefully making room for error and risk-taking as well.

I further explain the course will cover a range of topics—beyond the words of the Constitution. I let students know early on that we will not shy away from

challenging topics—race, class, gender, sexual orientation, domestic violence, and police brutality, just to name a few. To further ensure a safe space for such open and sometimes personal conversations where we all show support for one another, I do not videotape my classes, or allow the use of laptops or other electronic devices. For students who are absent, I always make myself available to meet with them one-on-one to walk them through my class notes and any discussion they missed.

Students in my class are not graded on final exam alone but both on their class participation and professionalism, too. Thus, I explain it is not just the quantity of information that might be shared during class conversations that counts—but the quality, including tone and empathy for others. We talk about how prosecutors and defense lawyers frequently disagree in the course of litigation but that does not call for personal attacks or raised voices in the courtroom setting. Instead, part of the goal of the course is to help students become effective and professionally responsible advocates.

## II. SAYING IT: CHALLENGING THE GOSPEL

In seeking to advance my focus on considerations of equality without undue divides or hierarchies, I do my best early on to remove the justices of the Supreme Court from their usual law school pedestal. I am clear that the course is not intended to feed the fetishization of the High Court and cult around personalities on its bench. Rather, we quickly begin to deconstruct the Court's decisions to surface what might be seen as less than tight analysis, inconsistencies across decisions, and even some poor writing. Again, this is not to be unnecessarily critical but instead to humanize the entire criminal justice process—Supreme Court and all. It is also intended to drive home the imperfection of the system.

I also encourage students to share honest reactions to the Court's language, framing, and decisions—not just recite rules or parrot previously taught principles. While I can assure you the course does not devolve into a free-for-all, I do want students to know that lawyers are allowed to have personal and emotional responses. And much of what our Supreme Court has done—and not done—may generate some very strong feelings. For some students, such feelings may be rooted in personal values or beliefs. For others, they may relate to their own experiences, or experiences of family members negatively impacted by crime or policing. In my mind, making space for such individualized assessments and life lessons—beyond marching through and mastering the canon—is important for the entire class. Every semester, I am enriched by stories shared by my students, which frequently challenge my assumptions about the strength, impact, and/or influence of the Court's pronouncements.

In fact, whenever I can I try to turn our attention away from the Great and Powerful Court and towards trial courts, communities, and local cops on the

beat. Because it is there, of course, the reality of contemporary constitutional criminal procedure is seen and felt. Beyond the stories shared by students, I also contribute experiences from my own life and legal practice—which has focused for nearly twenty years on the representation of indigent criminal and juvenile defendants.

From fact patterns in those cases, to actual suppression motions my clinic students and I have litigated, to video recordings showing my young clients publically shamed by officers on the side of the road, I try to make undeniably real what prosecution and criminal procedure look like today in America. That very frequently poverty and race are front and center in such snapshots. But also that many police—one of the most important professions in this country—are overworked, underpaid, and insufficiently trained to deal with the manifold challenging and life-threatening circumstances they face in small towns and large cities across America.

Through the inclusion of these materials—beyond the words of Supreme Court decisions—we can also drill down into what I refer to as the “procedure of procedure.” That is, unpacking who has the burden of proof at suppression hearings, what goes into suppression motions, how difficult it is to meaningfully get behind a warrant, and how easy it may be in practice for police to claim a statement was lawfully obtained. Through examination of the process of process—and working through some actual on-the-street and trial level litigation scenarios—students frequently conclude that in reality many fewer suppression motions are granted than perhaps should be.

### III. EXPANDING THE CANON GENERALLY: VIDEOS, NEWS, AND ONLINE RESOURCES AS TEXT

I also seek to expand the canon by drawing from contemporary sources. For instance, when covering probable cause, I have assigned materials relating to the Federal Bureau of Investigation’s use and recruitment of informants.<sup>5</sup> We then read news coverage of the 2008 Republican National Convention and watched the documentary *Better This World*, which offered insights into how two idealistic youths from Texas found themselves at the center of federal terrorism conspiracy charges based largely on the word of a single informant who had befriended them.<sup>6</sup>

I have used press accounts, court documents, and footage from a recent Missouri warrant execution case—*State v. Jonathan Whitworth*.<sup>7</sup> The powerful

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5. See, e.g., OFFICE OF THE INSPECTOR GEN., CHAPTER THREE: THE ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (Sept. 2005), <http://oig.justice.gov/special/0509/chapter3.htm> [<http://perma.cc/UTF3-DTAY>].

6. BETTER THIS WORLD (Loteria Films 2011).

7. See, e.g., Brennan David, *Family Questions SWAT Drug Search That Led to Dog’s Death*, COLUMBIA TRIBUNE (Feb. 23, 2010), <http://www.columbiatribune.com/news/crime/>

and troubling video shows SWAT team-clad officers breaking into a family home—shooting two dogs and sending a child crying onto the front yard in the middle of the night—all to yield some drug paraphernalia.<sup>8</sup> Walking students through litigation, they discover how no suppression motion was granted, Whitworth was threatened with child endangerment allegations, and ultimately pled guilty to the misdemeanor charge. And while his lawsuit against the police was also dismissed,<sup>9</sup> activists who were outraged by this conduct were successful in drawing attention to the issues surfaced by the case and generating some changes in local police practices.<sup>10</sup>

Similarly, I use actual court documents and footage from the troubling case of *Commonwealth v. Nga Truong*, where a teen mother was accused of killing her child.<sup>11</sup> Through these materials, we consider the realities of Fourteenth Amendment voluntariness doctrine, *Miranda* warnings, and the extent to which the Reid technique of questioning is still alive and well—despite the Court’s critiques of the practice nearly fifty years ago. We also explore the potential impact of gender, age, culture, and language on one’s ability to understand rights and meaningfully invoke constitutional protections.

#### IV. CONSIDERING RACIAL AND SOCIAL JUSTICE ISSUES IN REAL TIME

Because constitutional criminal procedure is around us every day and still very much evolving as we speak, the news is frequently filled with breaking stories that I feel must be added to my previously planned course materials and discussions. For instance, two years ago, as litigation unfolded around New York City stop-and-frisk practices, I amended my syllabus to add new readings relating to that case.<sup>12</sup> In addition, I was also able to share my own experiences

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family-questions-swat-drug-search-that-led-to-dog-s/article\_306f3455-a16b-5d80-b9eb-5a467af-f891c.html [http://perma.cc/7FHE-LLTR]; Radley Balko, *A Drug Raid Goes Viral*, REASON.COM (May 11, 2010), <http://reason.com/archives/2010/05/11/a-drug-raid-goes-viral> [http://perma.cc/Y9RZ-9AZS].

8. *SWAT Narcotics Raid in Columbia, Missouri*, YOUTUBE (May 9, 2010), <http://www.youtube.com/watch?v=24tYWMWVEto> [http://perma.cc/A5HT-JCZA].

9. Brennan David, *Judge Dismisses Lawsuit Over SWAT Raid*, COLUMBIA TRIBUNE (Nov. 21, 2011), [http://www.columbiatribune.com/news/local/judge-dismisses-lawsuit-over-swat-raid/article\\_46a9845f-d9d2-5caa-a68d-5a42d34948bf.html](http://www.columbiatribune.com/news/local/judge-dismisses-lawsuit-over-swat-raid/article_46a9845f-d9d2-5caa-a68d-5a42d34948bf.html) [http://perma.cc/ZX4B-3LNS].

10. Brennan David, *Procedure for SWAT Changing*, COLUMBIA TRIBUNE (May 6, 2010), [http://www.columbiatribune.com/news/local/procedure-for-swat-changing/article\\_5e8c116a-1856-5b5c-9ace-1b6e21542bd4.html](http://www.columbiatribune.com/news/local/procedure-for-swat-changing/article_5e8c116a-1856-5b5c-9ace-1b6e21542bd4.html) [http://perma.cc/BKF9-U5ZL].

11. David Boeri, *How a Teen’s Coerced Confession Set Her Free*, NPR (Dec. 30, 2011), <http://www.npr.org/2012/01/02/144489360/how-a-teens-coerced-confession-set-her-free> [http://perma.cc/SKY9-6S76].

12. See, e.g., Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 13, 2013, at A1, <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [http://perma.cc/HG6S-MWLU]; *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

as a public defender who saw first-hand how street and hallway sweeps negatively impacted the quality of life of many poor persons of color living in the Bronx—as well as their impressions of police. And we lifted up the experiences of native New Yorkers and others in the class who also knew about—and lived through—such practices.

Similarly, last year, I diverted from my planned hypotheticals and simulation work to incorporate materials from the prosecution of Pedro Hernandez for his alleged abduction of young Eton Patz back in the 1970s. Together, the students and I considered the motions and transcripts relating to the defense's effort to suppress Hernandez's statements, based in part on Mr. Hernandez's history of mental illness as well as how the jury—as is generally the case—was given the opportunity to reconsider the weight, if any, to be given to the confessions after the motions were denied.<sup>13</sup>

Similarly, last year, I tried my best to be thoughtful and responsive both in and out of the classroom as tragic and historic events unfolded—from Staten Island, New York to Ferguson, Missouri—with lives needlessly lost to police shootings in communities of color, people took to the streets to declare that #BlackLivesMatter, and a range of related reform movements took form.<sup>14</sup>

For instance, in class we studied the 1985 United States Supreme Court case of *Tennessee v. Garner*,<sup>15</sup> placing restrictions on the use of deadly force by police officers, and questioned whether it was meaningfully followed by Darren Wilson when he shot unarmed Michael Brown numerous times on a public street in August 2014.<sup>16</sup> The day before the Department of Justice's Ferguson Commission Report was released, I had students read the *Washington Post*'s coverage of the problems of municipal policing and prosecution—including advocacy efforts undertaken by my clinic.<sup>17</sup> Then, when the report was released, we further considered the Department of

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13. James C. McKinley, Jr., *Patz Jury Revisiting Confession and Video*, N.Y. TIMES, Apr. 18, 2015, at A15, <http://www.nytimes.com/2015/04/18/nyregion/jury-in-etan-patz-case-focuses-on-confession-and-video.html> [<http://perma.cc/4MPQ-ZCSL>]; see also James C. McKinley, Jr., *Confession in Patz Murder Case Can Be Used at Trial, Judge Decides*, N.Y. TIMES, Nov. 25, 2014, at A20, <http://www.nytimes.com/2014/11/25/nyregion/confession-in-etan-patz-case-can-be-used-at-trial-judge-rules.html> [<http://perma.cc/UDU9-5CDN>].

14. See, e.g., Marsha Levick & Mae C. Quinn, *Reflections on Justice After Ferguson, MO: When Will Youth of Color Receive the Same Due Process as Officer Darren Wilson?*, HUFFINGTON POST (Nov. 2, 2014), [http://www.huffingtonpost.com/marsha-levick/reflections-on-justice-af\\_b\\_5748592.html](http://www.huffingtonpost.com/marsha-levick/reflections-on-justice-af_b_5748592.html) [<http://perma.cc/9VPY-5FUW>].

15. *Tennessee v. Garner*, 471 U.S. 1 (1985).

16. See, e.g., Aaron Lewis, *Don't Shoot!*, SBS NEWS (Aug. 26, 2014), <http://www.sbs.com.au/news/dateline/story/dont-shoot> [<http://perma.cc/SC6K-3HBN>] (interviewing this author about Michael Brown's death).

17. Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/> [<http://perma.cc/CJ6X-QZCK>].

Justice's findings around racial disparities in traffic stops and searches—and related policing and prosecution practices.<sup>18</sup> I also created hypotheticals that sought to apply doctrine to the questions raised by the criminalization of poverty in low-level municipal court matters,<sup>19</sup> including how the right to counsel rules of *Shelton v. Alabama*<sup>20</sup>—and other doctrines—ought to apply to such scenarios.

Here, too, our conversations did not merely focus on the law on the books—but what my students were actually feeling in the moment as individuals, as family members, as parts of communities, and as lawyers to be. But I must admit that many times my own humanity—and anger—overtook my role as faculty member—particularly on the day footage hit the press from Charleston, South Carolina. After seeing the video depicting yet another unarmed Black man—Walter Scott—gunned down, this time shot from behind and what appeared to be the planting of evidence at the scene, my rage and sadness overtook my ability to facilitate any kind of conversation about Mr. Scott's senseless shooting.<sup>21</sup> And for that I believe I may owe my students an apology for failing to acknowledge that horrific event in our nation's history, and sit with them in the injustice and bear witness to the tragedy of that moment.

#### V. ACKNOWLEDGING CHALLENGES FACING TODAY'S LAW ENFORCEMENT

I should probably also apologize for drawing so much from my own experiences as a defense attorney in the classroom. But I try to be as honest and transparent as possible by noting my own leanings and not passing myself off as being without perspective<sup>22</sup>—which has been done for decades by other law schools and legal actors. I also try hard to drive home the very real dangers so many law enforcement professionals face on a daily basis as well as their humanity.

For instance, I have used breaking news coverage of officers shot during routine traffic stops to consider whether the Supreme Court is correct to sometimes trump privacy in favor of officer safety during side-of-the-road

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18. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<http://perma.cc/MQM5-PVNB>].

19. *See infra* app. A.

20. *Alabama v. Shelton*, 535 U.S. 654, 667 (2002).

21. Matt Apuzzo & Timothy Williams, *Citizens' Videos Raise Questions on Police Claims*, N.Y. TIMES, Apr. 9, 2015, at A1, <http://www.nytimes.com/2015/04/09/us/video-of-fatal-shooting-of-walter-scott-reignites-debate-on-police-use-of-force.html> [<http://perma.cc/7NKF-HYY8>].

22. *See* Dr. Michael P. Roche, *A Pedagogy of Compassion and Hope*, 45 S.D. L. REV. 105, 113 (2000) ("There is no escaping the truth that every teacher has a pedagogy and every pedagogy teaches both about how we know and about how we should live in the world.").



police-citizen interactions.<sup>23</sup> I have also shared videos demonstrating the dangers officers face when serving warrants.<sup>24</sup> And, through powerful police officer accounts, I have tried to surface other stresses of the job, including inadequate pay for many new recruits in the Saint Louis area.<sup>25</sup>

We also talk about the sheer number of hours dedicated to law school study of criminal procedure rules and doctrine—which usually still leaves all of us with more questions than answers—compared to what a rookie officer might receive coming out of training. But I also try to lift up acts of police compassion and kindness in the line of duty. On one occasion, I personally reached out by telephone in front of the entire class to offer my gratitude to Officers Jason Pavlige and James Hodges of Norton Shores, Michigan,<sup>26</sup> who purchased a baby car seat for a poor family instead of issuing a traffic ticket.<sup>27</sup> As a class, we also sent donuts to the station house as a further thanks.<sup>28</sup>

I have even Skyped in my Uncle Leo,<sup>29</sup> now retired as a police sergeant from a police force in Florida, to share with my class his real-life experiences on the force around interrogation practices and the like. And hopefully by the end of this class session, my students came to see that while we might fundamentally disagree about many things, we both also very much respect the role of the other.

#### VI. LOOKING AND LEARNING OUTSIDE OF THE TOWER: PREPARING FOR DEPLOYMENT

Beyond trying to expose my students to the nuances and realities of contemporary criminal procedure in the classroom, I require my students to experience it, too. Borrowing the idea from my good and great colleague

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23. *E.g.*, *Boston Police Officer Shot, Suspect Killed During Traffic Stop*, CBS NEWS (Mar. 27, 2015), <http://www.cbsnews.com/news/boston-police-officer-shot-suspect-killed-during-traffic-stop/> [<http://perma.cc/7J2R-KZ8L>].

24. Jed Boal, *Training for the Unknown: How Officers Prepare to Serve Drug Warrants*, KLS.COM (Feb. 9, 2012), <http://www.ksl.com/?sid=19176662> [<http://perma.cc/K4TL-UTUP>].

25. Seth F. Wessler, *Police Pay Gap: Many of America's Finest Struggle on Poverty Wages*, NBC NEWS: IN PLAIN SIGHT (Oct. 26, 2014), <http://www.nbcnews.com/feature/in-plain-sight/po-lice-pay-gap-many-americas-finest-struggle-poverty-wages-n232701> [<http://perma.cc/4G4M-D7HN>].

26. Katie Kindelan, *Michigan Police Officers Buy Family a Car Seat Instead of Issuing Ticket*, YAHOO! (Mar. 30, 2015), <http://gma.yahoo.com/michigan-police-officers-buy-family-car-seat-instead-203217907.html> [<http://perma.cc/EVT7-S7UK>].

27. *Cf.* *Atwater v. City of Lago Vista*, 532 U.S. 318, 323–34 (2001) (upholding an officer's arrest of Gail Atwater in conjunction with the fine-only crime of driving without properly securing her children with a seatbelt).

28. Pam at Goober's Bakery in Norton Shores, Michigan also deserves thanks for kindly assisting with this effort.

29. No, that is not a pseudonym for "Law Enforcement Officer." His name really is Leo.

Emily Hughes,<sup>30</sup> many years ago, I began taking students to court to observe criminal court proceedings.<sup>31</sup> Now, however, I send them on their own with little in the way of instruction or direction. I want them to feel what it is like to be overwhelmed by a confusing system, try to make sense of court proceedings without special treatment, and begin to see just how infrequently the Supreme Court's pronouncements can be seen and identified in the course of a run-of-the-mill case processed through our many assembly-line, low-level courts in this country.

I also invite students who are interested in further deploying these ideas to join with me outside of the large classroom to continue puzzling through how to improve our system of justice through practice and otherwise—whether it is in my clinic, a prosecution placement, or even a law firm *pro bono* opportunity many years post-graduation.

Thus, as a teacher, I do not purport to “profess” anything—other than to be struggling like many of them with making sense of the role of our Constitution, the supposed “rules” handed down by our Supreme Court, comparing these concepts and pronouncements with the realities in our streets, and figuring out the best way forward while committed to compassion and equal justice for all. That is, to practice critical criminal procedure—whether in the classroom, a courtroom, the community, or with clients.

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30. Emily Hughes, *Taking First-Year Students to Court: Disorienting Moments as Catalysts for Change*, 28 WASH. U. J.L. & POL'Y 11, 11 (2008).

31. Mae C. Quinn, *Teaching Public Citizen Lawyering: From Aspiration to Inspiration*, 8 SEATTLE J. SOC. JUST. 661, 671 (2010).

## APPENDIX A

### MUNICIPAL COURT RIGHT TO COUNSEL PROBLEM

Defendant Justin Town, a Kansas City resident, is a seventeen-year-old high school student and foster youth who came to St. Louis County on January 14, 2015 to visit its University of Missouri campus (UMSL) before applying. During his visit, he received a citation for riding the Metro—the local train system—without having his ticket properly validated. The citation provides that he must come to the South Hills Community Court on February 15, 2015 to address the municipal infraction.

Justin went to the South Hills Court on February 15, but he was not given a lawyer and never saw a judge. Instead, he was permitted to speak with a prosecutor who indicated that Justin could resolve his ticket by paying a \$75 fine. Under the local municipal ordinance, a train fare violation carries a penalty of up to three months in jail, a \$300 fine, or both. The Missouri Supreme Court has characterized such municipal cases as “civil” matters, which do not carry the stigma of a criminal conviction “record.”

Justin agrees to pay the fine and is told he must send his money to the court by March 15, 2015, which is when the collection docket cases will be reviewed. If he pays before then, he does not have to come back to court. If he does not pay, he must come back to court or a warrant will be issued. It is unclear to Justin what will happen if he can’t pay but appears on March 15.

At the start of March, Justin was moved to a new foster home in Kansas City. With everything going on with his move, he forgot to pay his fine on March 15. But he had no money to pay the fine anyway. And he never told his guardians—at the old foster home or new foster home—about the case. On March 15, a warrant is issued for Justin’s arrest. He did not receive notice of the warrant.

On August 15, Justin returns to St. Louis County to start school at UMSL on a full need-based scholarship. While walking to campus one day, he is encountered by an officer who asks to see Justin’s identification. When Justin provides it, the officer runs his name in the computer and finds the open warrant. Justin is arrested and taken to the South Hills Community Jail, which is connected to the police station. While there, he speaks to the commanding officer who tells Justin he can do these things:

Post a \$200 bail to assure his return to court and receive a new court date;

Pay the original \$75 fine, a \$100 fee for warrant processing, and a new \$200 fine for the new charge of failing to appear; or

Wait two weeks in jail for the new court date to take his case up before the judge.

*Does Justin have a right to counsel?*

*If he does, when did it attach?*

*In any event, what should he do?*