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Other Missouri Model: Systemic Juvenile Injustice in the Show-Me State, The

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The Other “Missouri Model”: Systemic Juvenile Injustice in the Show-Me State

Mae C. Quinn *

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I. INTRODUCTION: COMPETING REALITIES OF JUVENILE JUSTICE FOR THE SHOW-ME STATE

For years Missouri has been touted as a model for juvenile justice. Stakeholders and commentators continually declare that the Show-Me State – with its “Missouri Model” – employs the most modern and innovative approaches when it comes to treatment of court-involved youth. This account is reflected in press coverage, television news shows, and agency white papers. But this is only part of the picture; there is much more happening in Missouri when it comes to juveniles. However, this “other” part of the story seldom has been openly discussed – until now.¹

From failing schools, to deeply conflicted court structures, to a shortage of free representation, Missouri’s most vulnerable children must contend with outdated and deficient systems of support as they make their way to adulthood. As was discussed at the University of Missouri School of Law’s recent symposium relating to the Supreme Court of the United States’ decision in *Miller v. Alabama*,² this reality stands in stark contrast to a commitment to evolving standards of decency of a modern society. For too many Missouri youth daily life includes ongoing indignities, deprivation of legal protections, and denial other basic rights – including one of the most fundamental features of our shared human experience – that is, the right to hope.³ In fact, as this

1. As this Article goes to press, one recent event is unfolding that may help shed greater light on the “other” Missouri Model and lead the way to the kinds of reforms called for in this paper. On November 18, 2013, the United States Department of Justice announced that it launched an investigation into the workings of Missouri’s largest juvenile court system, the St. Louis County Juvenile Court. That investigation is focused on two main issues – potential due process deprivations and racial disparities within the system. *Department of Justice Announces Investigation of the St. Louis County Family Court*, U.S. DEP’T JUST. (Nov. 18, 2013), <http://www.justice.gov/opa/pr/2013/November/13-crt-1232.html>. See also David Carroll, *US DOJ Investigating St. Louis Family Courts*, SIXTH AMENDMENT CENTER, (Dec. 2, 2013), <http://sixthamendment.org/us-doj-investigating-st-louis-family-courts/> (suggesting that the investigation will have state-wide implications given the structure of Missouri’s juvenile courts and the pervasive nature of due process and other problems documented in recent reports).

2. Remarks and papers delivered at the symposium, entitled *Bombshell or Baby Step*, sought to address a wide range of issues relating to the Supreme Court of the United States’ decisions in *Miller v. Alabama* and *Jackson v. Hobbs*, 132 S. Ct. 2455 (2012), and are contained in this special symposium issue. See generally Symposium, *Bombshell or Baby Step*, 78 MO. L. REV. 3 (2013).

3. See *Vintner & Others v. United Kingdom*, [2013] ECHR 645 (09 July), available at <http://www.bailii.org/eu/cases/ECHR/2013/645.html>, (holding that life without parole sentences violate the European Convention on Human Rights and that all prisoners deserve the right to have to some possibility of release); see also *id.* (Judge Power-Forde, concurring) (“Article 3 [of the European Convention on Human Rights] encompasses what might be described as ‘the right to hope’. . . hope is an

Article goes to press eighty-four of Missouri's young people – some as young as fourteen years old – have been mandatorily sentenced to die in Missouri's maximum security prisons.⁴

This Article seeks to contrast the rosy picture painted on the national level – one that suggests a model system of juvenile justice from top to bottom – with the more troubling day-to-day problems facing youth in Missouri's communities, courts, and institutions of confinement. This examination is rooted in my own recent experiences. Like others who attended the symposium, I am an academic who teaches about the theories underlying Supreme Court decisions like *Miller*. However, I also run a youth advocacy clinic in the real world of St. Louis, Missouri.

Thus what follows is not a theoretical analysis of the implications of *Miller*. Rather, it is an account of the law as lived by Missouri's most vulnerable youth – from kids in Missouri's local trial courts to individuals serving mandatory juvenile life sentences without any opportunity for parole. It is informed by the work of Washington University School of Law's Juvenile Law and Justice Clinic (JLJC), a law school clinic engaged in youth advocacy efforts in St. Louis, Missouri.⁵ And it argues it is time to shed light on the "other" Missouri Model of juvenile justice – and fundamentally reform the system.

Part II of this Article examines some of the most well-known claims about the Missouri Model of juvenile justice, clarifying that the positive press to date actually describes only one small component of the larger juvenile justice structure: Missouri's system of residential correction for state-placed adjudicated youth. And while that system has much to admire and replicate, it also has room for improvement.

important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change."); Transcript of Oral Argument at 34, *Jackson*, 132 S. Ct. 2455 (No. 10-9647), 2012 WL 928360 (Justice Sotomayor asked, "What hope does he have?").

4. See Ed Pilkington, *Jailed for Life at Age 14: US Supreme Court to Consider Juvenile Sentences*, GUARDIAN, (Mar. 19, 2012), <http://www.theguardian.com/law/2012/mar/19/supreme-court-juvenile-life-sentences> (describing the case of Quantel Lotts, a St. Louis, Missouri youth sentenced at age fourteen to a mandatory death behind bars sentence).

5. JLJC was launched five years ago by this author with the assistance of Lecturer in Law Kathryn Pierce and our colleague, Professor Annette Appel, who now runs a separate child welfare clinic. While the course has been offered under different names, its mission has remained the same: to have student attorneys engage in a wide range of innovative advocacy efforts on behalf of St. Louis youth. See *Juvenile Law and Justice Clinic Information*, WASH. U. L., <http://law.wustl.edu/civiljustice/pages.aspx?id=8878> [hereinafter JLJC Website] (last visited Feb. 8, 2014). Employing a holistic approach, our advocacy takes place not only in juvenile courts, but schools, the child welfare system, administrative proceedings, municipal, criminal and appellate courts, and in post-dispositional and post-conviction proceedings. *Id.*

In Part III, this Article fills in what has been left out of most public and press stories about Missouri's larger youth justice system. That is, despite mostly glowing media accounts, Missouri's at-risk youth are poorly served by several overlapping broken entities. It focuses first on Missouri's failing education system, which is made worse by punitive policing and push-out practices. It then examines Missouri's conflicted and outdated juvenile court system, a structure that appears to be unconstitutional in its entirety. It describes Missouri's nearly non-existent indigent juvenile defense system, a system that has resulted in young people all too frequently defending themselves in Missouri's courts. Finally, it explains how children are too easily sent to Missouri's adult prisons – many banished to die there without anyone ever hearing their stories.

Part IV calls upon stakeholders to move beyond the rhetoric and own up to the ways in which the state is failing its most needy children. By meaningfully implementing *Miller's* evolving standards mandate for every child – no matter when, where, or to whom they were born – we can begin to deliver true juvenile justice. And in the days that follow Missouri might actually become a model system, one that is committed to a single vision of common decency – and hope – for all of its children.

II. THE “MISSOURI MODEL” – DIVISION OF YOUTH SERVICES AS PART OF THE STORY

A Google query with the words “the Missouri Model” yields over 80,000 results.⁶ These include a *New York Times* article,⁷ a piece on CNN.com,⁸ and coverage by ABC's Primetime.⁹ Indeed, most of the entries paint a picture of a juvenile justice system that is kinder, gentler, and far more innovative than others around the country.¹⁰ It is a system that has been

6. In .22 seconds, on May 23, 2013, a Google search for “the Missouri Model” produced 80,100 “hits.” See GOOGLE, <http://www.google.com/#q=%22the+Missouri+Model%22> (last visited May 23, 2013).

7. See Solomon Moore, *Missouri System Treats Juvenile Offenders with Lighter Hand*, N.Y. TIMES, March 27, 2009, at A23, available at http://www.nytimes.com/2009/03/27/us/27juvenile.html?pagewanted=all&_r=0.

8. See Stephanie Chen, *Teen Offenders Find a Future in Missouri*, CNN.COM/CRIME (Aug. 27, 2009, 10:18 AM), <http://www.cnn.com/2009/CRIME/08/25/missouri.juvenile.offenders/>.

9. See Joseph Diaz, *Missouri Sets New Standard for Juvenile Detention*, ABC NEWS (Sept. 9, 2009), <http://abcnews.go.com/Primetime/missouri-sets-standard-juvenile-detention/story?id=8510425&singlePage=true>.

10. See, e.g., Thomas Lee, *The Old Way vs. The “Missouri Model”*, W. HAYWOOD BURNS INST. FOR JUV. JUST. FAIRNESS & EQUITY (July 16, 2009), <http://www.burnsinstitute.org/article.php?id=138> (comparing a traditional youth correctional facility in California with one based on the Missouri Model).

called a "guiding light,"¹¹ a national model,¹² and even "the Missouri Miracle"¹³ given its dedication to helping youth succeed.¹⁴

But it is important to take note of what is really being described by these accounts – it is Missouri's Division of Youth Services (DYS). DYS is an executive branch agency, part of the state's larger Department of Social Services, which provides care for young people found guilty of wrongdoing who have been placed in the state's custody by court order.¹⁵ In other words, DYS is the state's "juvenile corrections agency."¹⁶ With all of the press and attention, it is easy to overlook the fact that only a small part of Missouri's justice system for youth is actually considered a model in its features – a part that impacts only a minor percentage of court-involved youth.

The DYS Missouri Model was established in the 1980s under the leadership of then-Executive Director Mark Steward.¹⁷ At that time, the agency decided to rethink its approach to state-placement, which was seen as the mere "warehousing" of youth in grim facilities without much in the way of treatment – and without regard for their futures.¹⁸ Missouri was not alone in

11. RICHARD A. MENDEL, *THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS* 4 (2010), available at <http://www.aecf.org/upload/publicationfiles/MOSummarywebfinal.pdf> [hereinafter MENDEL, REINVENTING REHABILITATING].

12. AMANDA PETERUTI ET AL., *THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE* 9 (2009), available at http://www.justicepolicy.org/images/upload/09_05_REP_CostsofConfinement_JJ_P.pdf.

13. See Marian Wright Edelman, *Juvenile Justice Reform: Making the "Missouri Model" an American Model*, CHILD. DEF. FUND (Mar. 12, 2010), <http://www.childrensdefense.org/newsroom/child-watch-columns/child-watch-documents/juvenile-justice-reform-mo-model.html>; Robert Winters, *Back to the Future: New Attempts to Implement a Proven Model in Juvenile Justice*, CORRECTIONS.COM (Jan. 28, 2013), <http://www.corrections.com/news/article/32385-back-to-the-future-new-attempts-to-implement-a-proven-model-in-juvenile-justice>.

14. MO. APPROACH, <http://missouriapproach.org> (last visited Nov. 13, 2013) (declaring that "[i]n Missouri, we now operate on the belief that all youth desire to do well and succeed").

15. *Who We Are*, MO. APPROACH, <http://missouriapproach.org/approach> (last visited Nov. 13, 2013).

16. MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 5.

17. *Our Staff*, MO. YOUTH SERVICES INST., <http://mysiconsulting.org/staff.php> (last visited Nov. 13, 2013). Notably, as will be discussed further below, Steward now runs a non-profit that helps to export the concept of the "Missouri Model" to other jurisdictions. See *infra* note 31.

18. See generally DOUGLAS E. ABRAMS, *A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI 196-207* (2003); see also MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 15 (describing how the notoriously problematic Boonville Training School for Boys was ultimately closed in Missouri and replaced by smaller facilities run by DYS).

its use of such practices as many other jurisdictions did the same – or worse.¹⁹ But Missouri took the lead in establishing smaller, dormitory-style residential treatment facilities across the state.²⁰

Contrasted with old-fashioned, workhouse-like facilities or youth correctional centers with concrete cells for sleeping spaces, many of today's DYS facilities have outdoor spaces for youth residents to explore, comfortable living areas with bunk beds and furniture, and little in the way of barbed wire.²¹ Given the greater number of facilities, children can remain closer to family and friends in the community.²² This arrangement ideally allows for more contact and visits.²³ The entire living experience is intended to be more youth-friendly, humane, and future-focused.²⁴

DYS also embraces a kind of milieu therapy to modify the negative behaviors of its residents. For instance, it now deploys group-based therapeutic interventions – often led by youth residents – rather than harsh individualized punishments, such as shackling or solitary confinement, to address negative actions on a day-to-day basis.²⁵ It has become well-known for its “circle up” sessions, during which teens come together to address the alleged wrongdoing.

19. RICHARD MENDEL, JUVENILE JUSTICE REFORM IN CONNECTICUT: HOW COLLABORATION AND COMMITMENT HAVE IMPROVED PUBLIC SAFETY AND OUTCOMES FOR YOUTH (2012), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_juvenile_justice_reform_in_ct.pdf (describing poor conditions for children in Connecticut's juvenile justice system prior to the 1990s); *Juvenile Justice*, EVERY CHILD FOUND., <http://everychildfoundation.org/policy-advocacy/current-focus-areas/> (follow “Juvenile Justice” dropdown box) (urging California lawmakers to improve juvenile corrections centers to “not simply warehouse [youth] under minimally tolerable conditions”) (last visited Nov. 13, 2013).

20. MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 15 (comparing Boonville with 650 beds to more modern DYS cottages that generally house fewer than fifty residents).

21. DYS's immediate past Executive Director, Tim Decker, has noted that “[v]isitors to Missouri DYS facilities are inevitably surprised by the calm and home-like nature of the programs Safety and security is enhanced by creating a humane culture of care. This is ultimately what keeps young people safe, not hardware, fences, or cameras.” TIM DECKER, TESTIMONY TO THE PRISON RAPE ELIMINATION ACT (PREA) PANEL 2-4 (June 3, 2012), available at http://www.ojp.usdoj.gov/reviewpanel/pdfs_june10/testimony_decker.pdf. Hogan Street, the state's maximum security facility located in the middle of the City of St. Louis, does have barbed wire fences.

22. ABRAMS, *supra* note 18, at 205 (stating that most youth placed with DYS are “treated within thirty to fifty miles of their homes so their families and other sources of community support can remain involved in their lives”).

23. See MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 15.

24. *Id.*

25. *Id.* at 9 (describing the “mechanical restraints” and “isolation” techniques used in other jurisdictions to address behaviors of youth in state correctional centers).

ings of their DYS peers.²⁶ Under this model, youth are empowered to deploy behavior modification strategies within the community.²⁷ Rather than having staff members use pepper spray or mechanical restraints on misbehaving youth, residents are called upon to diffuse problem situations and engage in physical holds of their peers where necessary.²⁸

These practices are now replicated across the country, with policy-makers and juvenile justice professionals calling for an even greater embrace of the "Missouri Model." For instance, in Texas and California officials are testing similar practices within their own programs to reduce the number of young people in prison-like settings.²⁹ Youth advocacy organizations like the Annie E. Casey Foundation and the Children's Defense Fund are urging adoption of Missouri's kinder approach to youth confinement.³⁰ And even DYS continues to work on exporting its practices to other states.³¹

While breaking new ground with many of its approaches, some DYS methods and claims are not without controversy. For instance, many youth and their families question the program's use of residents to administer discipline and physically restrain each other.³² Others wonder about the depth of

26. See Moore, *supra* note 7 (teenage girl recounts use of "circle-up" methods in her DYS unit).

27. Tim Decker, Panel Presentation on Trauma Informed Care at the Council of Juvenile Correctional Administrators (CJCA) Winter Meeting in San Antonio, Texas (Jan. 29, 2011), available at http://missouriapproach.org/storage/documents/mo-dys_ppt_20110129_cjca_trauma_informed_care.pdf (describing DYS efforts of "therapeutic intervention, youth development, and social-emotional competence through group 'circles'" and other techniques).

28. Moore, *supra* note 7 ("Pepper spray is banned, and youths are taught to de-escalate fights or apply grappling holds, a form of restraint.").

29. *Id.*

30. See Edelman, *supra* note 13; MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 2.

31. See, e.g., *Texas & Cayman Islands Visit*, MO. APPROACH, <http://missouriapproach.org/presentations/texas-cayman-islands-visit.html> (DYS presentations delivered in Kansas City to the State of Texas and the Cayman Islands) (last visited Nov. 13, 2013); *Press Room*, MO. YOUTH SERVICES INST., http://www.mysiconsulting.org/press_room.php (MYSI Executive Director Mark Steward, a former head of DYS, describes his mission now as being "a passionate advocate and systems change agent to support and develop the best juvenile justice system that is sustainable and based on promising/effective practices.") (last visited Nov. 13, 2013).

32. Mary Moloney, *Youth Facility Delmina Woods Uses Group Restraint to Calm Students*, KSPR ABC 33 NEWS (Apr. 20, 2012), http://articles.kspr.com/2012-04-20/facility_31380391 (family member of DYS resident shares that "I think that asking a child to participate in another person's punishment is . . . beyond cruel and unusual punishment"). In addition, our JLJC clients have asked us why restraining other youth is a part of their treatment program and complain that some young people abuse the power they are given under such a model, "pushing limits" of other youth in order to bring on a physical intervention.

the program's therapeutic offerings³³ and its reportedly high rate of success in preventing recidivism.³⁴ In addition, as a largely self-contained entity, courts³⁵ and juvenile defense attorneys³⁶ do not play a regular role in oversight or post-dispositional proceedings for youth under DYS's jurisdiction.

However, DYS attempts to take stock of possible shortcomings.³⁷ By statute it is required to seek ongoing input about its programs from an advisory board.³⁸ And the administration does engage informally with others about

33. Dugan Arnett & Mark Morris, *Maryville Case Puts Missouri Juvenile Justice System Under the Microscope*, KAN. CITY STAR (Dec. 8, 2013), <http://www.kansas.com/2013/12/07/4677557/maryville-case-puts-missouri-juvenile.html>.

34. MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 8 ("Some observers have questioned Missouri's results, citing the fact that nearly half of the youth in the DYS population do not have a felony as their committing offense."); *see also* AMY KORENSTEIN, A CLOSER LOOK AT THE MISSOURI MODEL: AN ANALYSIS OF THE MISSOURI MODEL IN COMPARISON TO THE OHIO DEPARTMENT OF YOUTH SERVICES 6 (2006), available at http://legis.wisconsin.gov/lc/committees/study/2008/JUVE/files/Missouri_final_report.pdf ("The definition [of recidivism] being used by MDYS in their annual reports considers the percent of commitments that are recommitments. . . . [T]his definition is a fairly limited definition of recidivism; it does not track what happens to a cohort of youth after they are discharged.").

35. Once a child is ordered into DYS care, the juvenile court is generally divested of jurisdiction over the child. MO. REV. STAT. § 211.041 (2012); § 219.081 (2000). Therefore, the judge, prosecution, and child's attorney do not participate in ongoing placement review hearings, as in the case in some other jurisdictions, or have the ability to seek recourse from the dispositional court if things are not going well. Rather, the duration of a child's stay is entirely determined by the DYS staff, which also has the ability to move the child from facility to facility, create the child's plan of service, and impose disciplinary sanctions – all without regular oversight or input by advocates for the youth. *See* MO. CODE REGS. ANN. TIT. 13 § 110-2.110 (2013).

36. As a recommended best practice, JLJC offers to remain on client cases through placement and re-entry. *See* Sandra Simkins, Marty Beyer, & Lisa M. Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241 (2012). However, JLJC is one of the few groups in Missouri to offer such post-dispositional services. *See* JLJC Website, *supra* note 8. Thus DYS initially was confused by our continuing legal representation of state-placed youth.

37. *See, e.g.*, MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 8 (describing how DYS has considered and counters questions about recidivism statistics).

38. Missouri law requires DYS to maintain a bipartisan advisory board of fifteen members appointed by the DYS director. MO. REV. STAT. § 219.046(1) (2000). By statute it must be composed of "public officials, professionals, and representatives of the general public who possess knowledge and experience in health, education, social, correctional, or legal services for children." § 219.046(2) (2000). Notably, the current Board is "comprised of judges, former legislators, civic officials, and concerned citizens." *Division of Youth Services: DYS Frequently Asked Questions*, MO. DEP'T SOC. SERVICES, <http://www.dss.mo.gov/dys/faq/genopt.htm> (last visited Nov. 13, 2013). As will be further discussed, *infra*, it does not appear to include a single member of the juvenile defense bar – an attorney specially trained in providing quality

how to maintain successes and improve in the future.³⁹ This picture stands in stark contrast to the startling historic deficits and dysfunction that plague other components of Missouri's youth law and justice systems and that are largely ignored by the press and other accounts.⁴⁰

As noted, DYS is merely a single part of the state's complex of governmental branches and units intended to deal with at-risk youth and those in conflict with the law.⁴¹ Its services and programming reach just a "small minority of youth offenders who must be removed from the community to protect public safety."⁴² Indeed, in fiscal year 2011 only 951 Missouri youth were ultimately committed to DYS.⁴³ This number reflects just a fraction of the nearly 35,000 delinquency and status offense matters that were referred to Missouri's juvenile courts in 2011 and the 6,953 youth housed locally in Missouri's prison-like secure detention centers during the same year.⁴⁴ This limited snapshot also overlooks the nearly 2,000 youthful offenders presently incarcerated in Missouri's adult prisons,⁴⁵ including eighty-four youth sentenced to mandatory life without parole prison terms⁴⁶ – sen-

representation for juveniles and knowledgeable about emerging best legal practices. See *Missouri Division of Youth Services Advisory Board*, MO. APPROACH, <http://missouriapproach.org/dys-advisory-board> (last visited Nov. 13, 2013).

39. For instance, over the past five years Tim Decker, DYS's immediate past Executive Director, and his administration have repeatedly assisted JLJC by attending conferences, participating in trainings, and sharing information with our faculty and student attorneys. See, e.g., *Evolving Standards of Justice: Symposium Explores Past, Present, and Future of Juvenile Justice*, WASH. U. L., <http://law.wustl.edu/news/pages.aspx?id=9131> (last visited Feb. 25, 2014) (noting DYS participation in the clinic's juvenile justice symposium).

40. See *infra* Part III.

41. See *supra* notes 15-16 and accompanying text.

42. MENDEL, REINVENTING REHABILITATING, *supra* note 11, at 5.

43. MO. DEP'T OF SOC. SERVS., DIVISION OF YOUTH SERVICES: ANNUAL REPORT FISCAL YEAR 2011 I (2011), available at <http://www.dss.mo.gov/re/pdf/dys/youth-services-annual-report-fy12.pdf> [hereinafter DYS ANNUAL REPORT FISCAL YEAR 2011].

44. See MO. OFFICE OF STATE COURTS ADM'R, MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT CALENDAR 2011 7, 30 (2011), available at <http://www.courts.mo.gov/file.jsp?id=4133> [hereinafter MJFD ANNUAL REPORT 2011]. Note that while the Missouri Office of State Court administration maintains juvenile justice data by calendar year, the Missouri Division of Youth Services reports such data for the fiscal year. See *supra* note 43.

45. MO. DEP'T OF CORRECTIONS, LIST OF OFFENDERS IN PRISON UNDER AGE 17 AT THE TIME OF THEIR OFFENSE (on file with author).

46. See, e.g., Meghann Mollerus, *Ruling Could Free 84 Juveniles Serving Life Without Parole*, KOMU (Nov. 12, 2012, 1:39 PM), <http://www.komu.com/news/exclusive-ruling-could-free-84-juveniles-serving-life-without-parole-37606/>.

tences that are now unlawful under the Supreme Court of the United States' decision in *Miller v. Alabama*.⁴⁷

Thus the vast majority of Missouri youth who come in contact with law enforcement or juvenile justice officials do not experience DYS's famous Missouri Model. Instead, DYS operates side-by-side with state education, juvenile court, attorney appointment, and criminal justice programs that offer far less in the way of exemplary practices.⁴⁸ In fact, as the account below suggests, these features of Missouri's juvenile justice system are arguably some of the worst in the country when it comes to respecting the rights of youth and improving their life chances.⁴⁹

What follows is a description and analysis of the operations of these deficient systems, based in part on my experiences running the JLJC clinic. These on-the-ground observations have convinced me that these units – both separately and together – too often serve as pathways to imprisonment for Missouri's young people, rather than bridges to empowerment. This phenomenon has an acute impact on Missouri's minority youth in particular. These lesser-known features of Missouri's juvenile justice system are what I refer to as the “other” Missouri Model.

III. THE “OTHER” MISSOURI MODEL

A. *Collapsing Schools and Criminalizing Childhood*

1. Educational Inadequacies

Missouri's education system has a long history of failure. Despite the fact that the state's constitution – unlike many others – provides young people with a fundamental right to education,⁵⁰ this promise is shallow at best. Fifty years after *Brown v. Board of Education*, Missouri schools remain some of the most segregated in the country.⁵¹ They are also some of the most poorly performing in the nation on a range of measures, with some of the worst educational experiences afforded to poor and minority youth in Missouri's inner cities.⁵²

47. 132 S. Ct. 2455 (2012).

48. See discussion *infra* Part III.

49. See discussion *infra* Part III.

50. See MO. CONST., art. IX, § 1(a).

51. See, e.g., Kimberly Jade Norwood, *Minnie Liddell's Forty-Year Quest for Quality Public Education Remains a Dream Deferred*, 40 WASH. U. J.L. & POL'Y 1, 58 (2012) (documenting that more than eighty percent of St. Louis City public school students are African-American).

52. See, e.g., SHOW-ME INSTITUTE ANNUAL REPORT, 2012 14 (2012), available at http://showmeinstitute.org/document-repository/doc_download/439-show-me-institute-annual-report-2012.html (stating that Missouri ranks in the bottom half of states for educational achievement).

For instance, according to a Center on Education Policy study, during the 2010-2011 school year Missouri ranked forty-ninth in the country in terms of satisfying No Child Left Behind Act (NCLB) requirements.⁵³ By the state's own figures, eighty-eight percent of its schools did not satisfy NCLB yearly progress measures.⁵⁴ In raw numbers, that means 1,916 of the state's 2,088 public schools were considered educationally substandard.⁵⁵ Only Florida had a higher percentage of educationally deficient schools, with eighty-nine percent of its schools failing NCLB requirements.⁵⁶

While NCLB has been criticized for possibly exacerbating the problems facing poor school districts,⁵⁷ many of Missouri's public schools are failures by even the state's own performance standards. In 2011 Kansas City Public Schools lost accreditation from the Missouri Department of Elementary and Secondary Education (DESE).⁵⁸ Thereafter two school districts near St. Louis – Normandy and Riverview Gardens – also joined the failure list.⁵⁹

Reminiscent of the desegregation strategies of the 1960s, children in these unaccredited districts – mostly poor, black youth – must now contend with great challenges to simply try to avail themselves of basic educational rights.⁶⁰ This includes getting up before sunrise to be bussed to dif-

53. See ALEXANDRA USHER, CTR. ON EDUC., POLICY, AYP RESULTS FOR 2010-11 4-7 (2011), available at <http://www.cep-dc.org/displayDocument.cfm?DocumentID=386> (follow "Report" hyperlink).

54. *Id.* at 6.

55. *Id.*

56. *Id.* at 5. A report released last year found Missouri is ranked forty-seventh in terms of similar student performance rankings. MATTHEW LADNER & DAVE MYSLINSKI, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, REPORT CARD ON AMERICAN EDUCATION: RANKING STATE K-12 PERFORMANCE, PROGRESS AND REFORM 66 (18th ed. 2013), available at http://www.alec.org/docs/ReportCard_18_Edition.

57. See Sarah Jane Forman, *Ghetto Education*, 40 WASH. U. J.L. & POL'Y 67, 113 (2012); Mae C. Quinn, *The Fallout from Our Blackboard Battlegrounds: A Call for Withdrawal and a New Way Forward*, 15 J. GENDER RACE & JUST. 541, 549-50 (2012).

58. Chris Blank, *Kansas City Schools Lose State Accreditation*, HUFFINGTON POST (Sept. 9, 2011, 9:57 PM), http://www.huffingtonpost.com/2011/09/21/kansas-city-schools-lose-_n_973770.html; see also Ben Wieder, *School Accreditation Explained: Does a Seal of Approval Matter?*, STATELINE (Oct. 13, 2011), available at <http://www.pewstates.org/projects/stateline/headlines/school-accreditation-explained-does-a-seal-of-approval-matter-85899375290>.

59. MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., ACCREDITATION CLASSIFICATION 14 (2012), available at <http://dese.mo.gov/divimprove/sia/msip/documents/qs-si-msip-accreditationclassification10162012.pdf>.

60. See, e.g., John Eligon, *In Missouri, Race Complicates a Transfer to Better Schools*, N.Y. TIMES, Aug. 1, 2013, at A10, available at http://www.nytimes.com/2013/08/01/us/in-missouri-race-complicates-a-transfer-to-better-schools.html?page=wanted=all&_r=0 (One Normandy parent lamented, "When I saw them

ferent school districts, often over the objection of students and parents in the receiving schools.⁶¹

As this Article heads to press, eleven other Missouri school districts have only provisional status as accredited.⁶² But DESE recently rolled out a new evaluation system for school districts which may result in even more failures announced in the future.⁶³ Under the new system, which assesses performance in a more nuanced way than the fourteen-point scale previously used, numerous additional districts will likely move into the provisionally-accredited or failing range.⁶⁴

The St. Louis City Public School District, which only recently received provisional accreditation after repeatedly falling short of prior requirements, will likely receive failing scores again under the new standards.⁶⁵ In fact, St. Louis Public Schools have been so problematic that the state took over operations in 2007.⁶⁶ This was after the district in four years cycled through six superintendents who collectively drove the district into \$25 million of debt.⁶⁷ This is further proof of the struggles facing poor and minority urban youth in

screaming and hollering like they were crazy, I thought to myself, ‘Oh my God, this is back in Martin Luther King days.’”).

61. See, e.g., Jessica Bock, *Long, Exhausting Day for 11-Year-Old Normandy Transfer Student*, ST. LOUIS POST-DISPATCH (Aug. 9, 2013, 10:30 AM), http://www.stltoday.com/news/local/education/long-exhausting-day-for--year-old-normandy-transfer-student/article_edc091ee-91fb-5c84-8d74-40b38245dc08.html.

62. Jessica Bock, *Mehlville, Parkway, Pattonville and Rockwood: About Those Perfect Scores...*, ST. LOUIS POST-DISPATCH (Jan. 11, 2013, 1:00 AM), http://www.stltoday.com/news/local/education/mehlville-parkway-pattonville-and-rockwood-about-those-perfect-scores/article_006a088f-5c56-530a-be2b-b23d16cefb20.html [hereinafter Bock, *About Those Perfect Scores*].

63. *Id.*; see also Jessica Bock, *New Ratings for Missouri Public Schools Offer Broader Picture of Student Performance*, ST. LOUIS POST-DISPATCH (Aug. 23, 2013, 3:30 PM), http://www.stltoday.com/news/local/education/new-ratings-for-missouri-s-public-schools-offer-a-broader/article_7d3487e6-699b-552b-9348-0ef73bb5818a.html (For instance, “state officials previously scored schools on their overall attendance rate, or the percentage of students in school daily[,]” but “[n]ow, the state looks at what percentage of students are in school 90 percent of the time.”).

64. Bock, *About Those Perfect Scores*, *supra* notes 62.

65. Jessica Bock, *State Education Board Grants St. Louis Schools Provisional Accreditation*, ST. LOUIS POST-DISPATCH (Oct. 26, 2012, 4:02 PM), http://www.stltoday.com/news/local/education/state-education-board-grants-st-louis-schools-provisional-accreditation/article_259d84db-ab24-5f2a-8838-01be312b2a7e.html; see also Marshall Griffin & Maria Altman, *St. Louis Schools Score in “Unaccredited” Range Under New Grading Scale but Won’t Lose Accreditation*, ST. LOUIS PUB. RADIO (Aug. 23, 2013, 12:01 AM), <http://news.stlpublicradio.org/post/st-louis-schools-score-unaccredited-range-under-new-grading-scale-wont-lose-accreditation>.

66. Malcolm Gay, *State Takes Control of Troubled Public Schools in St. Louis*, N.Y. TIMES (Mar. 23, 2007), http://www.nytimes.com/2007/03/23/us/23missouri.html?_r=0.

67. *Id.*

Missouri, as these students are continually placed in some of the worst educational systems in the state.⁶⁸

2. Safe Schools Act Problems

Although behind the curve on most educational quality measures, Missouri schools are ahead of other jurisdictions in at least one way: punishment and policing under Missouri’s ever-expanding Safe Schools Act practices. Following a 1980s movement spurred by a promise of federal funding, nearly every state in the nation now has some form of a Safe Schools Act to address school-based violence.⁶⁹ Today, both the laws enacted under the Act and the ways in which they are enforced in Missouri reflect a commitment to punitive measures and push-out practices. The application of the laws has resulted in a spectrum of overwhelmingly negative direct and indirect consequences for youth, both as a result of the express legislative provisions that have been amended over time, as well as the outgrowths of the tough-on-crime energy that the laws generated. As with Missouri’s substandard educational offerings, these practices disproportionately impact poor students of color.

Starting in the late 1980s, a powerful narrative about the dangers of youth possessing of drugs and guns began to fill the nation’s airwaves.⁷⁰ At about the same time the federal government stepped up its efforts to encourage local policing and punishment in the country’s public schools.⁷¹ Congress passed the Safe and Drug-Free Schools and Communities Act (SDFSCA), which became the first in a long line of laws providing financial

68. *Id.* (recounting that St. Louis City schools were supposed to be serving many homeless and poor youth); Children’s Educ. Alliance of Mo., *Map of Failing School Districts*, CEAMTEAM.ORG (June 11, 2013), <http://www.ceamteam.org/map-of-failing-districts/> (mapping demonstrates that “failing school districts are not only a problem in Missouri’s urban centers, but that they are present all over the state of Missouri”).

69. See Quinn, *supra* note 57, at 543.

70. See Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 290-92 (2012) (describing how the nation’s war on drugs and crime focused on poor, minority communities in the 1980s).

71. See Edith Fairman Cooper, *The Safe and Drug-Free Schools and Communities Program: Background and Context*, in SAFE AND DRUG-FREE SCHOOLS 41, 43 (Patricia Noble ed., 2002) (recounting that federal government’s legislative actions during the 1980s and 1990s were intended “to assist schools in providing a disciplined learning environment free of violence and drug use, including alcohol and tobacco”); RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICES (2000), available at <http://www.indiana.edu/~safeschl/ztze.pdf> (“Growing out of Reagan-Bush era drug enforcement policy, zero tolerance discipline attempts to send a message by punishing both major and minor incidents severely.”).

incentives to states that follow federal suggestions for policing and punishing public school students.⁷²

As the “superpredator” myth spread across the country during the 1990s, federal efforts to police public school youth expanded.⁷³ Troubled urban teens – mostly youth of color – were painted as a common threat that needed to be controlled and contained.⁷⁴ In 1994 alone the legislature passed at least four new federal school safety laws, which created more grant programs to further entice states to ramp up anti-drug and school policing efforts.⁷⁵ Although many of these programs allowed funds to be used for “curriculum-based” prevention and education programs, heightened security and aggressive school discipline became touchstones of this era and mantras for those states seeking federal financial support.⁷⁶

The federal Safe Schools Act of 1994 declared in its statement of purpose that “by the year 2000, every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning, by ensuring that all schools are safe and free of violence.”⁷⁷ The related Gun-Free Schools Act of 1994 (GFSA) required states to punish any student found carrying a firearm to school with a presumptive one-year expulsion.⁷⁸ Taken

72. Drug-Free Schools and Communities Act of 1986, § 5101, Pub L. No. 100-297, 102 Stat. 130 (1986); see also Laura Beresh-Taylor, Comment, *Preventing Violence in Ohio’s Schools*, 33 AKRON L. REV. 311, 315, n.23 (2000).

73. Moriearty & Carson, *supra* note 70, at 293-300 (recounting how the development of the black “super-predator” teen evolved in the 1990s, largely through press accounts); see also Robin Templeton, *Superscapegoating: Teen “Superpredators” Hype Set Stage for Draconian Legislation*, FAIR: FAIRNESS & ACCURACY REPORTING (Jan. 1, 1998), <http://fair.org/extra-online-articles/superscapegoating> (cataloging extreme press references to “teenage timebomb(s)” and “superpredators” that were based in part on the claims of Princeton professor John Dililio).

74. Moriearty & Carson, *supra* note 70, at 295-96 (recounting how press and other accounts painted youth of color as out of control, uncivilized, and wild). See generally STEVE MACEK, *URBAN NIGHTMARES: THE MEDIA, THE RIGHT, AND THE MORAL PANIC OVER THE CITY* (2006).

75. See Alexander Volokh, *A Brief Guide to School-Violence Prevention*, 2 J.L. & FAM. STUD. 99, 103 (2000) (noting that the Safe Schools Act, the Safe and Drug-Free Schools and Communities Act, the Family Community Endeavor Schools Act, and the Community Schools Youth Services and Supervision Grant Programs were all passed in 1994 and provided money to qualifying states).

76. *Id.* at 104. Notably, however, some jurisdictions and school districts began their own crackdown efforts even before federal financial incentives encouraged such actions. For instance, California, New York and Kentucky were ahead of the federal curve in mandating lengthy expulsions for “violent” activity, such as fighting, as early as 1989. SKIBA, *supra* note 71, at 2; see also UCLA INST. FOR DEMOCRACY, EDUC. & ACCESS, *SUSPENSION AND EXPULSION AT-A-GLANCE 1* (2006), available at <http://idea.gseis.ucla.edu/publications/files/suspension.pdf>.

77. Safe Schools Act of 1994, 20 U.S.C. § 5961 (2006) (noting that this promise would help local schools achieve national education goals).

78. Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (2000) (repealed 2002).

together, this series of legislative actions further fueled a powerful, punitive movement across the country⁷⁹ – one that ran alongside press accounts that perpetuated the “superpredator” myths and fears about young men of color.⁸⁰

Missouri initially resisted the tough-on-youth rhetoric. By the time the federal government started moving forward with its various safe schools provisions, Missouri lawmakers were already grappling with appropriate local solutions for student misconduct.⁸¹ No comprehensive legislation had been adopted, as competing approaches to the “safe schools” theme were debated throughout the 1980s and 1990s. The discussions considered a range of options – from imposing severe sanctions on misbehaving youth to engaging in more preventative measures.⁸² And this conversation was, of course, taking place on the heels of the highly successful launch of DYS’s Missouri Model, which eschewed harsh, punitive treatment for youths.⁸³

Consistent with its attempts to achieve a middle ground, when the Missouri General Assembly finally complied with the GFSA it did so in a less punitive way than many other states.⁸⁴ It passed a law that required a presumptive one-year suspension for students found possessing weapons on school property, but created a case-by-case review process overseen by school superintendents and permitted long-term suspended students to continue to receive alternative educational services.⁸⁵ It did not institute requirements on the courts and corrections side of the ledger; that is, the law

79. Dennis Cauchon, *Zero-Tolerance Policies Lack Flexibility*, USA TODAY (Apr. 13, 1999, 12:33 AM), <http://www.usatoday.com/educate/ednews3.htm> (“Zero-tolerance policies started sweeping the country in 1994 after Congress required states to adopt laws that guaranteed one-year expulsions for any student who brought a firearm to school.”); SKIBA, *supra* note 71, at 2 (“This tide swept zero tolerance into national policy when the Clinton Administration signed the Gun-Free Schools Act of 1994 into law.”).

80. See, e.g., Judge Steven Teske, *Judge Steven Testke on the Politics of Fear: Debunking the Superpredator Myth*, JUV. JUST. INFO. EXCHANGE (Apr. 5, 2011), <http://jjie.org/judge-steven-teske-on-politics-of-fear-debunking-superpredator-myth/12835> (arguing that the “superpredator myth,” preying on community fears, has helped fuel “tough on kids” law enforcement and legislative agendas).

81. See Deborah Peterson, *Ashcroft Seeks Public Support for Safe-Schools Legislation*, ST. LOUIS POST-DISPATCH, Mar. 25, 1988, at 6A, available at 1988 WLNR 318843 (describing Ashcroft’s proposed “Crime-Free Schools Program” which ultimately was not passed).

82. L. Megan Humphries, *School Violence Tops Education List*, MO. DIGITAL NEWS (Dec. 14, 1995), <http://www.mdn.org/1995/STORIES/EDADVAN.HTM>.

83. See *supra* notes 19-22 and accompanying text.

84. See SKIBA, *supra* note 71, at 2; see also Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1074 (2001).

85. See MO. REV. STAT. § 160.261(5) (2000 & Supp. 2012); see also H.B. 345, 88th Gen. Assem., 1st Reg. Sess. (Mo. 1995), available at <http://www.house.missouri.gov/content.aspx?info=/bills95/bills95/hb345.htm>.

did not mandate that school officials report weapons violations to law enforcement as contemplated by federal law.⁸⁶

This all changed, however, in the wake of a tragic incident in the St. Louis area. In January 1995, a fifteen-year-old McCluer North High School freshman was sexually assaulted and killed in the girls' bathroom while out on a hall pass.⁸⁷ Her attacker, a fifteen-year-old special education student with serious mental health issues, had transferred to the school just one day before, after he was suspended from another Missouri school.⁸⁸ McCluer North officials did not know about his pending disciplinary sanction – which was allegedly imposed because he was found in the girls' restroom at his prior school – or his prior juvenile arrest record.⁸⁹ The youth was sentenced to life imprisonment for his actions.⁹⁰

Following this incident, the late Governor Mel Carnahan and the Missouri General Assembly moved quickly to create a more expansive set of provisions to try to prevent similar incidents.⁹¹ In June 1996, Governor Carnahan signed into law the Missouri Safe Schools Act.⁹² One of the Act's key

86. See MO. REV. STAT. § 160.261(5); Mo. H.B. 345; see also 20 U.S.C. § 8922 (2000) (repealed 2002).

87. William C. Lhotka, *Taylor is Guilty of Rape, Murder – Teen Attacked, Drowned Girl in High School Restroom – Life in Prison Is the Only Option*, ST. LOUIS POST-DISPATCH, Feb. 15, 1998, at A1, available at 1998 WLNR 940718.

88. William C. Lhotka, *Trial Set in Slaying at School – Judge Finds Defendant Mentally Competent*, ST. LOUIS POST-DISPATCH, July 9, 1997, at 1B, available at 1997 WL 891907 [hereinafter Lhotka, *Trial Set in Slaying*].

89. Tim O'Neil, *Principal: "We Didn't Know Anything About this Kid"*, ST. LOUIS POST-DISPATCH, Feb. 24, 1995, at 13A, available at 1995 WLNR 731000; see also Tim O'Neil & Bill Lhotka, *Jurors Are Selected in Killing at McCluer North – Girl Was Raped, Drowned in McCluer North Restroom*, ST. LOUIS POST-DISPATCH, Feb. 11, 1998, at B1, available at 1998 WLNR 946922.

90. Although the youth had been found competent to stand trial as an adult and receive a life sentence, he was later diagnosed as suffering from severe paranoid-schizophrenia. See Lhotka, *Trial Set in Slaying*, *supra* note 88; Chris Blank, *Court Rejects 1 Death Sentence, Upholds Another*, ASSOCIATED PRESS, Aug. 27, 2008, available at Westlaw. He was ultimately convicted of strangling his prison cellmate, who he believed he had to send to "father" on the "dark side" and sentenced to death. *Id.* Horrifically abused as a child by family members who tried to exorcise demons from him, the young man had tried to commit suicide at age ten. *Id.* He was granted a new sentencing in the second homicide matter because his lawyers failed to present sufficient evidence of his serious mental health problems. *Id.*

91. Kim Bell, *Schools Bill Rushed Through, Lawmakers Say*, ST. LOUIS POST-DISPATCH, Mar. 21, 1996, at 12A, available at 1996 WLNR 781291.

92. See Susan Anderson, *The Safe Schools Act Protects Missouri Students*, 55 J. MO. B. 264, 264 (1999); Stanley Matthew Burgess, Note, *Missouri's Safe Schools Act: An Attempt to Ensure a Safe Education Opportunity*, 66 UMKC L. REV. 603, 603 (1998); Cathi M. Kraetzer, Law Summary, *Does the Missouri Safe Schools Act Pass the Test? Expelling Disruptive Students to Keep Missouri Schools Safe*, 67 MO. L. REV. 123, 124 (2002).

features is enhanced information sharing among the state actors interested in youth. Thus, like the draft of federal safe schools legislation passed two years before, the Missouri Safe Schools Act impacted two government units – both schools and courts – with the goal of bringing them closer together.

Perhaps due to the strong emotional reaction to the tragic McCluer North incident, the Missouri Safe Schools Act's provisions went far beyond what federal law required.⁹³ Indeed, in some respects the Missouri Safe Schools Act is among the most expansive in the country.⁹⁴ Its interconnected web of protective features linking juvenile court and school administrators has created an almost seamless network between the two systems, making it easier to label youths and push them from school into the courts and corrections systems.⁹⁵

As for the juvenile court side of the ledger, the Missouri Safe Schools Act's provisions threw open the gates to require courts and law enforcement officials to share a great deal of information with school officials in the name of "assuring that good order and discipline is maintained in the school."⁹⁶ For instance, the Act mandates disclosure to school officials if and when a student is charged in juvenile court with any one of several crimes, ranging from first degree murder to property damage to simple weapon possession.⁹⁷ No matter the location of an alleged offense – on school grounds or elsewhere in the community – the juvenile court must report this information to school officials within five days of a petition being filed.⁹⁸ Thus, even when

93. Bell, *supra* note 91.

94. Somewhat ironically, Missouri's Safe School Act is remarkably progressive in one respect – its creation of an alternative school model for long-term suspended and expelled students. However, as will be further discussed *infra*, some school districts have liberally accessed these alternatives. They have moved perceived problem children out of traditional educational placements and into alternative school settings without first determining that sufficient evidence exists, following a full-blown due process hearing, to support suspension or expulsion. See *infra* Part III.A.3.

95. Although the relationship between courts and schools is now seamless, the Safe Schools Act itself was hastily adopted and is near incomprehensible in parts, with some provisions seeming to conflict with others. See Bell, *supra* note 91.

96. MO. REV. STAT. § 167.115(1)-(3) (2000).

97. *Id.* § 167.115(1). The original version of the Act listed eighteen different alleged crimes subject to disclosure. H.B. 1301 & 1298, 88th Gen. Assemb., 2d Reg. Sess. (Mo. 1996). In 2000, the Act was amended to add four sex-related crimes to the list schools would learn about. S.B. 944, 90th Gen. Assemb., 2d Reg. Sess. (Mo. 2000). Now there are twenty-two offenses juvenile court officers or law enforcement officials are required to report to the superintendent of schools. MO. REV. STAT. § 167.115 (1).

98. MO. REV. STAT. § 167.115(1)-(2). Pursuant to these sections of the Missouri Safe Schools Act there are twenty-two offenses ranging from property damage in the first degree to first degree murder that require the juvenile officer or law enforcement official to report to the superintendent of the school district when a petition has been filed alleging that a youth in her district has committed such an offense. *Id.*

a child asserts his innocence, the school is provided “a complete description of the conduct the pupil is alleged to have committed and the dates the conduct occurred.”⁹⁹

Since the Act’s initial enactment, it has been amended to require further disclosures on the part of juvenile court officials to school officials.¹⁰⁰ After disposition the court is required to provide the child’s school with access to the findings of facts in the matter – even if the child was found not guilty.¹⁰¹ Although such information is provided to schools with the understanding that it is “received in confidence,” the information may be shared with any teacher or school district employee the superintendent believes has “a need to know.”¹⁰² This destroys the general cloak of confidentiality that youths are promised in juvenile court, creating a class of court-involved students who have a scarlet letter for the rest of their academic careers.¹⁰³

Even worse, although this same set of provisions provides that “[t]his information shall not be used as the sole basis for not providing educational services to a public school pupil,”¹⁰⁴ another part of the Act, codified in a different section of the law, empowers school officials to bar students from attending school if they are charged with any one of eleven delineated offenses.¹⁰⁵ Thus a young person who merely has a petition filed against him for certain offenses – even if those offenses are alleged to have occurred nowhere near a school – may still face the collateral consequence of being removed from school in districts that read the provisions broadly.¹⁰⁶

99. *Id.* § 167.115 (2).

100. MO. REV. STAT. §167.115(1)-(2) (2000) (previous version amended by S.B. 944, 90th Gen. Assemb., 2d Reg. Sess. (Mo. 2000)).

101. *Id.* § 167.115(2).

102. *Id.* § 167.115 (3).

103. *See, e.g.*, MO. REV. STAT. § 211.321 (2000 & Supp. 2012); *see also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 526-30 (2004); RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS’N ZERO TOLERANCE TASK FORCE, *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 8-9* (2006) (discussing the stigmatization of youth identified as “at-risk of violence” and various studies by national law enforcement agencies which have found that is “impossible to construct reliable profiles that can be of assistance in promoting school safety”).

104. MO. REV. STAT. § 167.115(3). Beyond this apparent inconsistency in the text, the numbering of this set of provisions adds to their incoherence.

105. MO. REV. STAT. § 167.171 (3) (2000 & Supp. 2012). As originally enacted this part of the Act listed nine offenses that allowed for a child’s removal from school. H.B. 1301 & 1298, 88th Gen. Assemb., 2d Reg. Sess. (Mo. 1996). In 2004, the Act was amended to add two additional charged crimes precluding continued school attendance – both were sex related offenses. S.B. 969, 92nd Gen. Assemb., 2d Reg. Sess. (Mo. 2004).

106. MO. REV. STAT. § 167.171(3). Additionally in Missouri a youth who no longer is subject to the juvenile court’s jurisdiction either due to certification to adult

Missouri's Safe Schools Act does provide that if a child is acquitted of the charges against him in juvenile court, or if the charges are dismissed, he may seek to be readmitted or reenrolled at school.¹⁰⁷ However, the Act provides no guidance for such a process. Moreover, in practice it appears that such readmission is not always sought. Many children, families, and court personnel operate under the false assumption that a child may never be readmitted to his home school once charged with a "Safe Schools Act violation," as these charges are often called. And attempting to have such children accepted back into their home schools can amount to a Sisyphean task.¹⁰⁸

On the school side of the ledger, although the Missouri General Assembly did not initially embrace the mandatory law enforcement requirements contemplated by the GFSA, it did so in passing the Missouri Safe Schools Act.¹⁰⁹ And like some other states, Missouri has gone substantially further in its legislatively-required police reporting. Thus, since its inception the Act has required school administrators to notify law enforcement not only for school-related gun offenses and various violent felonies, but also for other lesser weapons violations, drug possession, and even school fights.¹¹⁰ But in a series of amendments the list has been expanded to include other acts, such as alleged stalking, harassment, and drug and weapons possession not just at school but also at school-related activities.¹¹¹

There are well over thirty alleged acts requiring mandatory police intervention for accused students.¹¹² Admittedly, many of these are serious crimes for which law enforcement intervention might be expected. But under the Act, Missouri students face the direct consequence of school discipline as

court or aging out of the system can be removed from school if charged, admits to, or is found guilty of a felony in a "court of general jurisdiction." MO. REV. STAT. § 167.161(3) (2000 & Supp. 2012).

107. MO. REV. STAT. § 167.171(3).

108. During our clinic's first semesters of operation, our student attorneys reported that this issue was one of the most frustrating and difficult tasks they encountered as attorneys for youths. *See infra* Part III.B.

109. *See* MO. REV. STAT. § 167.117(1)-(2) (2000 & Supp. 2012); *see also* H.B. 1301 & 1298, 88th Gen. Assemb., 2d Reg. Sess. (Mo. 1996).

110. *See* MO. REV. STAT. § 167.117 (guns, weapons, controlled substances, and assaults); MO. REV. STAT. § 160.261 (2000 & Supp. 2012) (various violent felonies). Notably, the Missouri Safe Schools Act also created a new crime, "assault while on school property," a class D felony. *See* MO. REV. STAT. § 565.075 (2000). Therefore, most school fights in Missouri now qualify as felonious conduct. The Safe Schools Act does contemplate the possibility of school districts entering into agreements with local law enforcement for special reporting of third degree assaults. It is unclear, however, what kind of agreements were considered or intended by this provision. *See* MO. REV. STAT. § 167.117(1).

111. *See* MO. REV. STAT. §§ 160.261, 167.117 (2000 & Supp. 2012); *see also* S.B. 944, 90th Gen. Assemb., 2d Reg. Sess. (Mo. 2000).

112. *See* MO. REV. STAT. §§ 160.261, 167.117.

well as the collateral consequences of arrest and prosecution.¹¹³ For many students this means a proceeding in the juvenile justice system.¹¹⁴ However, because the age of majority for criminal charges is seventeen in Missouri, many youths may find themselves answering a felony indictment in adult criminal court for a schoolyard scuffle.¹¹⁵

The Missouri Safe Schools Act also requires that school administrators notify local juvenile courts of suspensions of ten days or more for any child who the district “is aware is under the jurisdiction of the court.”¹¹⁶ Under state and federal law, such educational information would ordinarily remain confidential and protected from disclosure absent the child’s consent.¹¹⁷ Moreover, the suspension reporting requirement is not expressly limited to those students who have serious pending court matters, which are delineated in Missouri Revised Statutes section 167.115.¹¹⁸ Rather, some believe the Act allows school officials to contact juvenile courts with information about the suspension of any child they know to be court-involved in any way – even if the student is merely part of a diversion or informal adjustment program.

It is easy to see how court officials may believe that school administrators should be made aware of all students under the jurisdiction of the court – even those not charged with Safe Schools Act violations.¹¹⁹ And school officials may take it upon themselves to over report internal disciplinary matters to juvenile courts in an abundance of caution. This reciprocal “open-file” relationship results in disclosure of what otherwise could not be shared, making the schools an extension of the juvenile officer and vice versa.¹²⁰ Here again, a perpetual cycle of back and forth reporting creates the impression that courts and schools are coextensive agents and joint actors in monitoring and penalizing students.¹²¹ With official records being shared back and forth, unofficial telephone calls taking place, and court officials showing up unin-

113. See MO. REV. STAT. § 160.261.

114. See MO. REV. STAT. § 211.031 (2000 & Supp. 2012).

115. MO. REV. STAT. § 211.041 (2000 & Supp. 2012).

116. MO. REV. STAT. § 167.115(4) (2000).

117. MO. REV. STAT. §§ 160.261(1), 210.150(1), 455.004 (2000 & Supp. 2012); see also 20 U.S.C. § 1232g(b)(1) (2012).

118. See MO. REV. STAT. § 167.115(4).

119. In 2000 the Safe Schools Act was amended to offer a further set of reasons for liberally sharing school records with juvenile justice authorities. See MO. REV. STAT. § 167.020(7) (2000 & Supp. 2012) (“School districts may report or disclose education records to law enforcement and juvenile justice authorities if the disclosure concerns law enforcement’s or juvenile justice authorities’ ability to effectively serve, prior to adjudication, the student whose records are released. The officials and authorities to whom such information is disclosed must comply with applicable restrictions set forth in 20 U.S.C. Section 1232g (b)(1)(E).”).

120. See MO. REV. STAT. § 167.020(7).

121. See *id.*

vited for school disciplinary hearings,¹²² the walls between the two entities have all but fallen away in Missouri. As a result, some youths become targeted, stigmatized, and labeled as problems in both forums – even when they may not have done anything wrong, or their wrongdoing was merely ordinary childhood misbehavior.

Indeed, extra-legislative safety activism can be seen in many of Missouri's school district policies that were revamped following the passage of the Missouri Safe Schools Act. For example, the Blue Springs School District – located in a suburb of Kansas City – has expanded the definition of prohibited weapons for disciplinary policies well beyond that provided by federal or state legislation.¹²³ Its rules ban anything that could be seen as threatening, even toy guns.¹²⁴ Under the school district's policies, a student found with any of the prohibited items may face a one-year expulsion and arrest.¹²⁵

3. Other Net-Widening Practices

In this environment, many schools have also engaged in aggressive policing activities in the name of actively enforcing both state laws and school district policies.¹²⁶ A wide range of ordinary adolescent behaviors, now prohibited under expansive codes of student conduct, are routinely met with school discipline and punishment.¹²⁷ In many ways these practices have turned schools into jail-like settings dominated by a culture of suspicion and surveillance.

For instance, while considered controversial and unusual just thirty years ago,¹²⁸ it is now commonplace for inner city students to pass through

122. This author was surprised to find that court-employed deputy juvenile officers sometimes appear at school disciplinary and individualized education plan (IEP) hearings in St. Louis County without an express invitation from the child or the family or prior notice to them.

123. See *Section 5 – Policies Relating to Students*, BLUE SPRINGS SCH. DISTRICT, at 5-44, 5-45, http://www.bluesprings-schools.net/bluesprings/gen/blue_springs_generated_bin/documents/basic_module/Section_5_Policies_Relating_to_Students.pdf [hereinafter *Blue Springs Policy*].

124. *Id.*

125. *Id.*

126. It should be noted that some Missouri schools are on the extreme opposite side of the spectrum, in that they fail to provide any kind of environment conducive to teaching and learning. For instance, this author recently spoke with a teacher who fears for her safety and the safety of her students because of the extreme lack of discipline and order in her unaccredited school district.

127. See Henning, *supra* note 103, at 610-11.

128. Joan Little & Phyllis Brasch Librach, *Schools on Guard Against Violence; Metal Detectors, ID Cards, Bus Cameras Will Greet Area Students*, ST. LOUIS POST-DISPATCH, Aug. 28, 1994, at 1A.

metal detectors and endure invasive searches of their persons and belongings before they attend their first class.¹²⁹ Yet such practices have not been proven to increase school safety.¹³⁰ Instead, these searches may work to foster resentment and fear in students subjected to such ongoing indignities.¹³¹

In addition to entering schools through search checkpoints, many students must contend with aggressive uniformed officers who monitor school doors, sweep school halls, and even enter classrooms. While some of these officers may be school employees, others are armed law enforcement officers brought in from the outside to police public schools.¹³² Working together, they perpetuate an “us against them” culture in schools. For example, St. Louis-area youths have recounted feeling intimidated and oppressed by school staff and security officers.¹³³ They report that they are treated like common criminals by school staff and police officers who work as part of a team, shouting orders at them in the halls and routinely imposing out-of-school suspensions on the spot for simply answering back or swearing.¹³⁴

In addition, many Missouri schools routinely deploy drug-sniffing dogs to search students and their lockers, school bags, and books on a regular basis. While some searches involve dogs walking the hallways to sniff lockers while students are in class, others involve forced evacuation of classrooms so that the dogs can riffle through the belongings that students leave behind. In fact, such practices were recently challenged before the Eighth Circuit Court of Appeals by parents of a Springfield, Missouri high school student.¹³⁵ The panel upheld the search under the Fourth Amendment.¹³⁶ Despite these ongoing objections and concerns that such practices make all students feel like

129. For instance, while St. Louis City middle and high schools have their students enter through metal detectors, nearby suburban Kirkwood High School does not. See Nancy Fowler, *Local Schools Have Parent Alerts, Security Measures in Place*, BEACON (Dec. 14, 2012, 4:01 PM), https://www.stlbeacon.org/#!/content/28485/connecticut_shooting_reactions.

130. Abigail Hankin, Marci Hertz & Thomas Simon, *Impacts of Metal Detector Use in Schools: Insights from 15 Years of Research*, 81 J. SCH. HEALTH 100, 105 (2011), available at <http://www.edweek.org/media/hankin-02security.pdf>.

131. *Id.* at 104-05.

132. Mark Slavitt, *Police Visit Columbia Schools Daily to Stop Violence*, CONNECT MID-MO. (Jan. 17, 2013, 5:26 PM), <http://www.connectmidmissouri.com/news/story.aspx?id=849190>.

133. Quinn, *supra* note 57, at 557.

134. *Id.*

135. *Burlison v. Springfield Pub. Sch.*, 708 F.3d 1034, 1036 (8th Cir. 2013).

136. *Id.* at 1041; see also *Appeals Court Upholds Use of Drug-Detection Dogs by Springfield Public Schools*, OZARKSFIRST (Mar. 6, 2013, 1:21 PM), <http://www.ozarksfirst.com/story/appeals-court-upholds-use-of-drug-detection-dogs-by-springfield-schools/d/story/tvbYtbf3zkWDjozum9RsQw>.

suspects,¹³⁷ other Missouri school districts are expanding the use of suspicionless dog searches to their schools.¹³⁸ All of this effort, of course, is in the name of rooting out potential drugs that may be hidden in student belongings – not enhancing educational services.

Charles E. McCrary, Sr., the former Chief of Security for St. Louis Public Schools who still uses the title "Lieutenant Colonel," describes many of these practices in his self-published book, *Urban School Security from Behind the Scenes*.¹³⁹ While his honest account reflects deep care for the well-being of St. Louis Public Schools, his methods suggest far less concern for the dignity, privacy, and education rights of at-risk students.¹⁴⁰ Such attitudes unfortunately appear to remain a part of the culture in many St. Louis Public Schools, which have an almost entirely African-American student body.¹⁴¹

In fact, large numbers of minority youth are pushed out of Missouri's schools each year in both direct and indirect ways.¹⁴² One recent development involves the "creative" use of unilateral transfers. Such practices move supposed problem students out of the regular school setting into alternative

137. Lisa Sullivan, *Drug-Sniffing Dogs in Schools Make Every Student a Suspect*, ACLU WASH. ST. (June 6, 2011), <http://aclu-wa.org/blog/drug-sniffing-dogs-schools-make-every-student-suspect>.

138. See, e.g., *Kirkwood High Considers Drug-Sniffing Dogs*, CBS ST. LOUIS (April 23, 2013, 7:34 AM), <http://stlouis.cbslocal.com/2013/04/23/kirkwood-high-considers-using-drug-sniffing-dogs/>; Carol Enright, *Drug Search: Parkway to Use Drug Sniffing Dogs*, NEWSMAGAZINE NETWORK (Nov. 26, 2012, 1:13 PM), <http://www.newsmagazinenetwork.com/2012112627851/drug-search-parkway-to-use-drug-sniffing-dogs/> (during drug dog searches middle and high school "students will remain in the classrooms during an intruder lockdown drill").

139. Quinn, *supra* note 57, at 558; LT. COL. CHARLES E. MCCRARY, SR., URBAN SCHOOL SECURITY FROM BEHIND THE SCENES: VIEWS FROM A RETIRED URBAN SCHOOL SECURITY DIRECTOR 59-78 (2007). McCrary currently heads up "McCrary Security Consultants, Inc.: Home of the B.O.S.S. Force," which claims to specialize in "research and development of Successful Urban School Security Operations" and teach the "B.O.S.S. Force" approaches he claims to have successfully deployed in St. Louis. *About the Firm*, MCCRARY SECURITY CONSULTANTS, INC., http://www.boss-force1.com/about_firm.html (last visited Nov. 15, 2013).

140. Quinn, *supra* note 57, at 558; see also, e.g., MCCRARY, *supra* note 139, at xiv (recounting an "unannounced locker search" for narcotics, undertaken by school administrators and police officers together); *id.* at 11-12 (describing collaboration with city police to help collect evidence against students that ordinary law enforcement could not, and then sharing such information for use in juvenile court prosecutions).

141. See Norwood, *supra* note 51, at 58.

142. *Discipline of Students Without Disabilities: More Than One Out-of-School Suspensions*, DEPT. OF ED. CIVIL RIGHTS DATA COLLECTION, <http://ocrdata.ed.gov/Page?t=d&eid=28024&syk=5&pid=564> (last visited Nov. 15, 2013); *LEA Summary of Selected Facts*, DEPT. OF ED. CIVIL RIGHTS DATA COLLECTION, <http://ocrdata.ed.gov/Page?t=d&eid=28024&syk=5&pid=119> (last visited Nov. 15, 2013).

school placements for long periods of time.¹⁴³ For instance, rather than providing alternative education to already long-term suspended or expelled students who were afforded due process proceedings – as contemplated under the Missouri Safe Schools Act¹⁴⁴ – in some instances schools have skipped full evidentiary due process hearings to simply transfer youth after an informal conference with the child and his or her parents.¹⁴⁵

Despite substantial financial support for these alternative programs,¹⁴⁶ many of these alternative schools provide just a few short hours of educational services each day.¹⁴⁷ Some do so by way of simplistic self-taught computerized lessons covering basic topics.¹⁴⁸ And nearly all of these programs fail to provide gym classes, team sports, or other ordinary school activities that could benefit at-risk youth.¹⁴⁹ Thus, while St. Louis Public Schools may not be reporting such transfers to alternative programs as long-term suspensions or expulsions, some youth advocates, students, and families believe they are tantamount to such actions.¹⁵⁰

143. See Jane Coaston, *Suit Sheds Some Light on Makeup Work*, ST. LOUIS POST-DISPATCH (March 9, 2010, 12:00 AM), http://www.stltoday.com/news/local/education/suit-sheds-some-light-on-makeup-work/article_89227588-81b9-5d79-8954-85a74b0a992f.html; see also *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (requiring due process protections before a child's property and liberty interests in education can be infringed).

144. See 1301 & 1298, 88th Gen. Assemb., 2d Reg. Sess. (Mo. 1996); see also MO. CONST., art. IX, § 1(a).

145. See Jane Coaston, *Transferred Students, District Settle: St. Louis Public Schools Will Clear Records of Suspension, but Students Cannot Immediately Return to Soldan*, ST. LOUIS POST-DISPATCH (May 8, 2010, 12:00 AM), http://www.stltoday.com/news/local/education/article_a0d11e48-f3fe-5deb-81f0-66ed9172b7e3.html.

146. See Burgess, *supra* note 92, at 625 (citing to the Missouri House of Representatives Interim Committee Report on Safe Schools and Alternative Education (1995)); 1301 & 1298, 88th Gen. Assemb., 2d Reg. Sess. (Mo. 1996) (for further legislative history of the Safe Schools Act and its creation of alternative school systems, intended for suspended and expelled youth).

147. See Coaston, *supra* note 145.

148. *Id.*

149. See *id.*

150. During one such proceeding during the 2012-13 school year, the convening school official repeatedly referred to her decision as required under the District's "zero tolerance" policies. But she also claimed the unilateral transfer over objection was not a suspension or expulsion. In addition, when it was pointed out that the District recently adopted policies that required the use of least restrictive means and positive behavioral supports prior to harsh discipline action, she appeared completely unaware of this change. She requested that our clinic's student attorneys share with her the policies that we brought to the meeting. See ST. LOUIS PUB. SCH. DIST., 2013-2014 PARENT INFORMATION GUIDE AND STUDENT CODE OF CONDUCT, available at <http://www.slps.org/cms/lib03/MO01001157/Centricity/Domain/70/CodeofConductHandbook1314.pdf> [hereinafter PARENT INFORMATION GUIDE]. Fortunately, in one more recent hearing in which JLJC participated, the process was greatly improved. In

Interestingly, in St. Louis City such transfers are never accompanied by the assignment of what can only be described as a probation officer.¹⁵¹ These officers inform unilaterally-transferred students that they will be routinely visited at their new alternative school setting and monitored for continued good behavior. This officer is also the person who will ultimately make a determination as to whether the child is ready to return to his or her home school. During this process there are other conditions that need to be satisfied by the child before they can seek permission to reapply to attend their regular school. Yet such probationary monitoring and review is not expressly described in any St. Louis City School District Policy.¹⁵²

Other school districts more officially make such practices known to the public. For instance, Blue Springs School District policies provide that students may be required to satisfy conditions prior to their return.¹⁵³ They may be asked to demonstrate that they have "maintained a drug and alcohol free lifestyle for the duration of their absence,"¹⁵⁴ "had no arrests or charges brought against them by any law enforcement agency,"¹⁵⁵ and/or had "been in drug or alcohol rehabilitation."¹⁵⁶ Thus, consistent with the theme of the Missouri Safe Schools Act – where schools and courts appear to have become one entity – educators take on a continuing supervisory and surveillance role of student activity outside the schoolhouse doors, a job usually held by law enforcement personnel, probation officers, and judges.¹⁵⁷

While no lawsuit has been brought to challenge these ancillary conditions of return, the requirements appear to violate the constitutional dictates of *Goss v. Lopez*, which requires a due process hearing before the imposition of school discipline.¹⁵⁸ What is more, the ever-more capricious nature of school disciplinary practices in Missouri recently inspired the creation of a lampooning cartoon video that was posted on YouTube last year and has

addition, it appears computer-based alternative placements are now being replaced by improved alternative education services.

151. During our last experience with the school district we were informed this person's official title is "Transition Specialist."

152. See PARENT INFORMATION GUIDE, *supra* note 150.

153. *Blue Springs Policy*, *supra* note 123, at 5-40.

154. *Id.*

155. *Id.*

156. *Id.* at 5-41.

157. MO. REV. STAT. § 167.171 (2000 & Supp. 2012).

158. 419 U.S. 565, 581 (1975). This kind of ongoing and extended supervisory scheme that visits a burden on children to prove that they are worthy of continuing their education was never contemplated under the due process hearing procedures set out in *Goss v. Lopez*. See *id.* And it may be even more unlawful under Missouri's more expansive Constitutional provisions, which provide children with a fundamental right to education. See MO. CONST., art. IX, § 1(a).

since garnered thousands of views.¹⁵⁹ It depicts incompetent school administrators who make up evidence against a student and impose arbitrary sanctions for a fight that never happened.¹⁶⁰

B. Juvenile Courts and Due Process Failures

Although the cartoon described above makes light of a serious situation, the failure of Missouri's public school systems is no laughing matter. Nor are the related problems that plague the state's juvenile courts. Despite DYS serving as a model for the country, Missouri's juvenile courts, the Juvenile Code under which they operate, and the practices that persist in Missouri's anachronistic juvenile court culture are long outdated, unlawful, and in need of change. This is yet another part of the Missouri Model that has largely escaped national attention – at least until now.¹⁶¹

1. Conflicts in Court Structure

Indeed, as described by my colleague Professor Josh Gupta-Kagan in his important symposium article, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, Missouri's juvenile courts are inherently conflicted in their structure.¹⁶² Professor Gupta-Kagan accurately and compellingly explains that Missouri juvenile court judges are directly and indirectly involved in the charging, processing, prosecuting, adjudicating, and sentencing of Missouri's youth.¹⁶³ Not only does the arrangement present professional conflicts of interest, it is very likely unconstitutional for a number of reasons.

Juvenile officers,¹⁶⁴ who serve in a range of roles including probation officers and the prosecutors who represent those officers (known as attorneys for the juvenile officers),¹⁶⁵ are all considered part of the judge's own staff. While these actors may state that their day-to-day work is quite separate, there is no official requirement for – or check on – maintaining this separation. At the end of the day, Missouri juvenile court judges have the power to hire and fire the very people who bring cases in front of them – the attorneys

159. SpecialEducationMo, *Missouri School Discipline*, YOUTUBE (Mar. 30, 2012), http://www.youtube.com/watch?v=p780VeA-_Zo.

160. *Id.*

161. *See supra* note 1.

162. Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, 78 MO. L. REV. 1245 (2013).

163. *Id.* at 1264-66.

164. *Id.* at 1249 n.31 (describing the role and legal status of the juvenile officer).

165. *Id.* at 1251 n.45 and accompanying text (describing the role of attorneys for the juvenile officer and their legal status).

for the juvenile officers – and those who are repeat parties – the juvenile officers themselves.¹⁶⁶

While Professor Gupta-Kagan's groundbreaking work primarily focuses on how such an ethically-challenged system impacts child abuse and neglect cases, I will focus on the implications for children facing prosecution in such courts. The consequences of the court's conflicted structure and its related unconstitutional practices are similarly troubling when young people face losing their liberty at the hands of these state actors. As will be described below, these problems manifest themselves in three different ways in Missouri juvenile prosecutions: through the roles of the judge, the juvenile officer, and the attorney for the juvenile officer.

First, as a well-settled constitutional matter, the judiciary may not serve both as the investigating or prosecuting agent and as the fact finder.¹⁶⁷ The Supreme Court of the United States has long held that serving in such dual roles violates due process norms of impartiality,¹⁶⁸ as well as separation of powers principles that require prosecutorial and judicial roles to be distinct.¹⁶⁹ When a judge wears both hats in issuing or upholding warrants she may also violate the Fourth Amendment rights of a defendant.¹⁷⁰ This is why judges are not permitted to personally gather evidence that they plan to consider in

166. *See id.*

167. *In re Murchison*, 349 U.S. 133, 136 (1955) (“[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.”).

168. *Id.* at 141 (finding due process violation based on personal bias of judge and his involvement in prior related proceedings); *Tume v. Ohio*, 273 U.S. 510, 523 (1927) (violation of due process for judicial officer to have a “direct, personal, substantial pecuniary interest in reaching a conclusion against” the defendant in a case).

169. *Town of New Town v. Rumery*, 480 U.S. 386, 296 (1987) (“Our decisions . . . uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute . . . [b]ecause these decisions ‘are not readily susceptible to the kind of analysis the courts are competent to undertake,’ we have been ‘properly hesitant to examine the decision whether to prosecute.’”); *see also* *U.S. v. Doe*, 125 F.3d 1249, 1255 (9th Cir. 1997) (“separation of powers mandates judicial respect for the prosecutor’s independence”) (internal quotation marks omitted); Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 *YALE L.J.* 488, 496 (1988) (“Prosecution typically is an executive branch function, and allowing a judge the power of appointment, removal, or supervision over prosecutors threatens to diminish exclusively executive powers and augment the constitutionally limited role of judicial authority.”).

170. *Lo-Ji Sales v. New York*, 442 U.S. 319, 328 (1979) (finding Fourth Amendment violation where judicial officer played role in investigation and granted search warrant); *see also* *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (“the seizure and search . . . [could not] constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in [the] case”).

any matter, and in fact should seek to recuse themselves whenever there may be a doubt as to their impartiality in any case.¹⁷¹

Yet, this is exactly what occurs in Missouri's juvenile courts. From the court's approval of delinquency petitions that result in the temporary detention of youth, to issuing determinations at detention hearings for continued pretrial restraint of such young people, to rendering a final decision of guilt or innocence based on the evidence presented at an adjudication, Missouri's juvenile judges are making determinations about facts that were gathered and presented by their own staffs.

Judges may suggest that they are able to disregard the fact that those who prosecute cases before them are their very own employees. But at some point any good-faith presumption of impartiality must give way to the appearance of impropriety, the realities of juvenile court practices around the state, and common sense.¹⁷²

In the experience of our JLJC clinic, legal officers have stated that they cannot take certain actions – such as modifying the charges in the petition for purposes of resolving a case – because the presiding judge would not agree to such an action.¹⁷³ It is also a matter of common knowledge that both the legal officers and deputy juvenile officers frequently engage in *ex parte* conversations with juvenile judges while defense attorneys and their clients are not present.¹⁷⁴ It might be suggested that such conversations simply expedite matters and do not result in any harm to the youth. However, these practices all contribute to the inherent bias towards court staff and against others who

171. See, e.g., MO. S. CT. RULE 2-2.3 (“judge shall perform duties of office without bias or prejudice”); MO. S. CT. RULE 2-2.11 (“The judge . . . served in governmental employment, and in such capacity participated personally and substantially as a . . . public official concerning the proceeding. . . .”); see also *State v. Edman*, 915 A.2d 857, 867 (Conn. 2007) (“even though a judge personally believes himself to be unprejudiced, unbiased and impartial, he should nevertheless certify his disqualification where there are circumstances of such a nature to cause doubt as to his partiality, bias or prejudice”) (citing *Merritt v. Hunter*, 575 P.2d 623, 624 (Okla. 1978)).

172. *State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. 1997) (en banc) (“A judge should only be disqualified if a reasonable person, giving due regard to the presumption of honesty and integrity, would find an appearance of impropriety and doubt the impartiality of the court.”).

173. In one particular case, where substantial Fourth Amendment and other legal issues undermined the prosecution's case, the attorney for the juvenile officer indicated that she could not reduce the weapon charge against our client to the crime of possession of ammunition because the judge would be upset with her. We ultimately prevailed in having the case dismissed at a suppression hearing. Yet one of the police officers who testified in the case warned our client in the hallway – after the judge ruled in our favor – that he knew where our client lived.

174. This assertion is based on not only my own personal experience and experiences of my students, but confirmed by numerous conversations I have had with numerous juvenile defender colleagues in Missouri.

are not on the court's own "team." In addition, they create an insider's practice that is resistant to emerging best practices or new arguments.

As further evidence of this phenomenon, formal written motions and other zealous work of JLJC students repeatedly have been met with the following response: "That is not the way we do things here." In an extreme example, both my students and I were shouted at publically by a legal officer after we filed a petition to challenge ongoing policies of the court and a motion for reconsideration in a case the attorney was handling.¹⁷⁵ While these examples reflect the actions of individual actors in individual situations, they – and those that follow – demonstrate the inherent dangers of Missouri's current system, which allows judges, prosecutors, and probation staff to think of themselves as one team.

As noted, the amorphous role of the juvenile officer presents a second serious problem for the current court model. Again, such individuals are roughly equivalent to the probation officers that exist in juvenile courts around the country, but are also different given the many hats that they wear. The juvenile officers are referred to as the clients of the prosecutor; however, they can also serve as members of the prosecutor's investigative staff who assist in gathering information for use during the prosecution, law enforcement agents who effectuate arrests of youth, and, finally, as alleged advocates for the same youth.

For example, juvenile officers serve as intake screeners at the front end of a case to determine if charges should be brought.¹⁷⁶ Legal officers then oversee this assessment by reviewing and filing the delinquency petitions. But when a child is brought to court to answer for those charges, lines become blurred. Youths are informed both that the legal officer is the attorney for the juvenile officer – that is, that the juvenile officer is in essence the plaintiff bringing the suit against the child – and that the juvenile officer will be making recommendations to the court about pretrial detention and disposition at the end of the case. In this way, the juvenile officer serves as a double agent – he is both a represented opposing party in litigation, as well as the individual with whom the child and family is expected to share information that will be considered by the officer suggesting release or detention for the child.¹⁷⁷

175. Specifically, in this instance, my students were admonished by the juvenile prosecutor, "you don't piss where you eat."

176. *Delinquency and Clinical Services: Telephone List*, FAM. CT. ST. LOUIS COUNTY (May 2013) (on file with author) (listing deputy juvenile officers who serve in intake roles).

177. The recent case of *In re M.M.* paints a vivid picture of how the deputy juvenile officer may wear many hats – visiting with the child and family at home, collecting information, providing informal legal advice, and then making recommendations for detention and disposition. 320 S.W.3d 191, 192-94 (Mo. App. E.D. 2010). In *M.M.*, the Missouri Eastern District Court of Appeals allowed an unrepresented child to withdraw her plea when it seemed involuntary, in part because the DJO offered to

More than this, juvenile officers frequently suggest to young people that they are there to “advocate” for the child, creating further confusion in the minds of the children and family members who encounter these officers.¹⁷⁸ Indeed, in several of the cases the JLJC clinic has handled, after the juvenile officer interviewed the child upon his arrest, family members were left with the distinct impression that the officer was, in fact, the child’s defense attorney. This can be attributed to the fact that in St. Louis County, as in other counties, juvenile officers often conduct interviews with the children well before an attorney is provided.¹⁷⁹ In addition, some courts actually provide juvenile officers with the title “youth advocate,” adding to the confusion.¹⁸⁰ Either way, many children and family members become upset when these same officers – who were originally believed to be advocates of the youth – turn on the child, use information shared by the family against him or her, and recommend a child’s detention or placement.

Because the juvenile officer is, at times, treated like a represented party, this creates another problematic situation for defense attorneys seeking to effectively represent their clients. Some legal officers allow defense counsel to freely talk about pending cases with juvenile officers. Other legal officers claim that defense attorneys may not speak with juvenile officers without either their express permission or the presence of a prosecutor, treating the juvenile officer like a privately-represented litigant.¹⁸¹ However, the juvenile

change her recommendation from detention to release if the child pleaded guilty and was placed on probation. *Id.* at 195-97.

178. *Delinquency and Clinical Services: Telephone List*, *supra* note 176 (listing several deputy juvenile officers with title as “youth advocate”). In some cases, including ones handled by JLJC, families have been led to believe they should not seek representation as it will merely hurt the child by resulting in detention prior to disposition or otherwise slow down the case. *See, e.g., In re M.M.*, 320 S.W.3d 191. Similarly, several clients and their parents have now reported to JLJC that juvenile officers and other service providers affiliated with the juvenile courts have directly advised them against using JLJC’s services, claiming the clinic’s zealous defense work could negatively impact the child.

179. In fact, in our experience written reports with the recommendations of the juvenile officer are frequently finalized well before a defense attorney is able to interview the child or informally advocate with the juvenile officer or her attorney relating to release status.

180. *Delinquency and Clinical Services: Telephone List*, *supra* note 176. In our experience, assigned DJOs also visit accused youth in the detention center at least once a week prior to trial, engaging the youth in all manner of conversation, despite our written submissions invoking the child’s right to silence and presence of counsel during questioning.

181. *See* MO. RULES OF PROF’L CONDUCT R. 4-4.2 (2007) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”).

officer is a government agent like any other law enforcement officer; therefore, he or she should be accessible to defense counsel for investigative interviews.¹⁸² When such contacts are precluded as a matter of prosecutorial policy it skews the playing field even more against the accused child and in favor of the juvenile court team.

Yet the legal officers may still deploy the juvenile officer – again, a government actor – to gather evidence directly from the child as opposing party. They may then also claim that a child’s failure to speak with the juvenile officer reflects a lack of cooperation on the part of the child that should be used against them.¹⁸³ All of this seems even more procedurally perverse when considering that all of these people are actually employees of the judge who will hear and decide the case; in other words, such power plays are taking place with the express or implied consent of the court.

The above dynamic also points to the third problem created by the court’s structure: the manifold ethical challenges facing legal officers. These officers must operate in such conflicted systems while still trying to fulfill their ordinary professional responsibilities as attorneys, as well as their special duties as prosecutors. On one hand, attorneys generally must take care to represent their clients free of any conflicts that would impede their ability to achieve the client’s objectives.¹⁸⁴ This includes restrictions on accepting

182. See MO. RULES OF PROF’L CONDUCT R. 4-4.2, cmt.5 (2007) (“Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.”). In most situations, a juvenile officer would be free to decline an interview – but as a matter of due process should not be silenced by prosecutors. See, e.g., U.S. v. Cook, 608 F.2d 1175, 1180 (9th Cir. 1979) (“As a general rule, a witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial. Exceptions to this rule are justifiable only under the ‘clearest and most compelling circumstances.’”) (internal citations omitted); see also U.S. v. Carrigan, 804 F.2d 599 (10th Cir. 1986).

183. There are, of course, additional potential problems relating to *Miranda* violations, involuntary self-incrimination, and the formal and informal use of the information obtained during these screening interviews. These problems are seldom raised or addressed. But at least one court recently took the system to task for allowing juvenile officers to conduct detention center interviews while also acting as youth advocates. *State v. Bustamonte*, No. 09AC-CR03516 (Cir. Ct. Cole Cty. June 21, 2011) (order suppressing evidence), available at <http://www.connectmidmissouri.com/uploadedFiles/krcg/News/Stories/Order%20to%20Suppress%20revised.pdf>.

184. MO. RULES OF PROF’L CONDUCT R. 4-1.7 cmt.8 (2013) (“Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”).

payment from one place for purposes of representing a third party,¹⁸⁵ and restrictions on disclosure of professional relationships that may impact the client.¹⁸⁶ But in Missouri juvenile courts, legal officers necessarily have a duty to their employer – the court. However, this is not openly addressed in any meaningful way during the course of litigation. Moreover, legal officers are arguably receiving compensation from the court system for their representation of third party clients – juvenile officers – in a manner that raises serious questions. On the other hand, prosecutors have special duties beyond those of ordinary counsel. And regardless of what they are called – legal officers or attorneys for the juvenile officer – such individuals are juvenile court prosecutors. Therefore, like other prosecutors, their primary ethical obligation is to seek justice.¹⁸⁷ They may not simply pursue convictions or seek to achieve particular outcomes to satisfy individual persons.¹⁸⁸ Therefore, claiming that they represent the interests or objectives of juvenile officers above all else would appear to conflict with their express ethical duties to the public.¹⁸⁹

But this, too, happens on a regular basis in Missouri’s juvenile courts; that is, legal officers take positions to advance the desires of the juvenile officers, rather than to single-mindedly seek justice.¹⁹⁰ Indeed, on more than one occasion the JLJC clinic has been expressly told that legal officers may not advance certain arguments or reduce charges for purposes of a plea offer because it conflicts with the wishes of their clients, the deputy juvenile officers.¹⁹¹ This position is especially problematic when one considers that juvenile officers generally are not attorneys.¹⁹² Indeed, in June 2013 the Missouri Supreme Court issued a rule prohibiting such individuals from engaging in

185. MO. RULES OF PROF’L CONDUCT R. 4-1.7 cmt.13 (2013) (describing limits on representation for individual when attorney’s salary is paid by a third party).

186. MO. RULES OF PROF’L CONDUCT R. 4-1.7 cmt.10 (2013) (outlining conflicts that can arise out of employment relationships).

187. MO. RULES OF PROF’L CONDUCT R. 4-3.8 cmt.1 (2013) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

188. *See id.*

189. *See id.*

190. Of course one might take issue with amorphous parameters like “seek[ing] justice.” But this standard has been long applied and respected by prosecutors across the country. *See, e.g.*, ABA Criminal Justice Section Standards: Prosecution Function, Standard 3-1.2 (c) (1992), available at: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#1.2, (“The duty of the prosecutor is to seek justice, not merely to convict”). And whatever it might mean, it certainly is not defined by the aims of a singular client who is neither a victim of the alleged crime or an objective representative of the public.

191. In at least one case the legal officer sent a fax, reducing to writing her position that the juvenile officer’s wishes needed to be respected and, therefore, she could not reduce the charge to avoid a certification hearing (Fax on file with author).

192. Instead they have a bachelor’s degree in sociology or a related field, or four years of prior related experience. *See* MO. REV. STAT. § 211.361 (2000).

the unauthorized practice of law.¹⁹³ Therefore, allowing them to indirectly exert control in individual cases runs a great risk of misconduct and inappropriate abdication of the prosecutorial role.¹⁹⁴

Untangling these conflicting roles may be even more complicated in counties where the juvenile officer, while an employee of the judge, is actually considered the superior or supervisor of the legal officer. One example of such a structure can be seen in St. Louis County (see Diagram A¹⁹⁵). However, as Professor Gupta-Kagan persuasively argues, regardless of whether the juvenile officer and his attorneys are co-equals under the judge or whether one supervises the other, the Missouri juvenile court structure presents a picture of conflict and unconstitutionality from top to bottom.¹⁹⁶

2. Lack of Probable Cause Hearings

The structural issues presented above are exacerbated by Missouri's outdated, confusing, and conflicting juvenile court statutes and rules. Two main bodies of law control juvenile practice in Missouri: the Juvenile Code, codified at Chapter 211 of the Missouri Revised Statutes, and the Rules of Practice and Procedure in Juvenile Courts (Juvenile Court Rules).¹⁹⁷ As will be further discussed below, while the Juvenile Court Rules were recently rewritten and reorganized, the principles underlying the provisions still reflect an outmoded approach to juvenile justice. Moreover, in many ways the Juvenile Court Rules conflict with or undercut the statutory provisions found in the Juvenile Code. And the Juvenile Code, which has been modified in a piecemeal fashion over the course of many decades, is a confusing morass of provisions that fails to provide a clear and coherent picture of how cases should unfold in Missouri's courts. Finally, components of both bodies of law and the manner in which they are interpreted present serious constitutional questions.

One of the most problematic areas of Missouri juvenile law relates to detention hearings. In 1983, the United States Court of Appeals for the

193. 2013 MO. SUP. CT. ORDER 0006 (C.O. 0006). Somewhat remarkably this rule does not go into effect until January 2014.

194. Whether it is seen as improperly giving over responsibilities to a third person or ceding power to a member of their own prosecutorial team, the legal officer should be held responsible for actions that lead to improper collection of evidence or the prosecution of unsupported charges. *See, e.g.*, MO. RULES OF PROF'L CONDUCT R. 4-3.8 cmt.6 (2013) ("Like other lawyers, prosecutors are subject to Rules 4-5.1 and 4-5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office."); *see also In re M.C.*, 504 S.W.2d 641, 647 (Mo. App. 1974) ("The juvenile officer is not a prosecutor and if he functions as such he is striking at the very foundations of the juvenile justice system.").

195. *See* Diagram A *infra* note 316.

196. Gupta-Kagan, *supra* note 162 at 1261-69.

197. MO. REV. STAT., Ch. 211 (2000); MO. SUP. CT. R. PT. 1.

Eighth Circuit addressed the issue of Missouri's juvenile detention processes, seeking to disrupt a history of informality in the state's juvenile courts and impose greater protections for youth.¹⁹⁸ In *R.W.T. v. Dalton*, the court was presented with the specific question of whether the "practice of detaining juveniles without affording them a preliminary hearing before a neutral and detached judicial officer to determine whether there was probable cause to believe that the juveniles had committed the acts with which they were charged" violated their constitutional rights.¹⁹⁹

Relying heavily on the Supreme Court of the United States' decision in *Gerstein v. Pugh*,²⁰⁰ the Eighth Circuit held: "We agree with the District Court that juveniles who are detained because they are suspected of committing criminal acts must be afforded a prompt probable-cause hearing."²⁰¹ The court explained that "[a]lthough *Pugh* involved only the right of adults to a probable-cause hearing, we believe that the right must be extended to juveniles as well."²⁰² And after criticizing the widespread practice of behind-closed-doors, *ex parte* communications to support detention determinations for Missouri juveniles, the court upheld an injunction "forbidding all such unlawful detention in the future."²⁰³

But remarkably, thirty years later these constitutional directives still are not codified in Missouri's Juvenile Code.²⁰⁴ Instead, the Juvenile Code expressly provides for probable cause-based detention hearings for status offense cases only.²⁰⁵ And the Juvenile Court Rules relating to detention hearings, although rewritten just two years ago, also fail to mention hearings that allow for in-court probable cause inquiries.²⁰⁶ Juvenile courts and their staffs also continue to overlook this essential due process requirement – despite *R.W.T.*'s injunction, which has now been in place for three decades.²⁰⁷

198. *R.W.T. v. Dalton*, 712 F.2d. 1225, 1227 (8th Cir. 1983).

199. *Id.* at 1228.

200. 420 U.S. 103 (1975).

201. *R.W.T.*, 712 F.2d. at 1230.

202. *Id.*

203. *Id.* at 1234.

204. See MO. REV. STAT. § 211.061 (2012) (describing detention hearing processes for delinquency charges, suggesting that "a determination by the court that probable cause exists" may take place before the hearing).

205. See MO. REV. STAT. § 211.063 (2000) (describing detention hearing processes for status offense charges, which includes a "probable cause hearing"); see also *R.W.T.*, 712 F.2d at 1235 ("the District Court's declaration that probable-cause hearings are required, both for juveniles accused of criminal acts and for 'status offenders' as we have used that term in this opinion, is affirmed").

206. See MO. SUP. CT. R. 127.08.

207. When the JLJC students sought to challenge probable cause determinations at the detention hearing stage, they were generally met with surprise by system actors who seemed never to have heard of *R.W.T.* before. Again, it was suggested that the students' ideas of fairness were simply out of step with how things were done in the St. Louis County Juvenile Court. Similarly, in a recent St. Louis City Juvenile Court

Missouri's statutory disregard for meaningful probable cause determinations at the detention hearing stage is exacerbated by its failure to require probable cause determinations at the juvenile certification stage. Under the Juvenile Code, the court may consider, among other things, ten specific criteria when deciding whether a child should remain in juvenile court or have their case transferred to adult criminal court.²⁰⁸ Like many other states, Missouri derives its criteria primarily from the landmark Supreme Court of the United States case *Kent v. United States*.²⁰⁹ Along with setting forth certain due process requirements relating to transfer hearings, the Court included as an appendix the list of criteria established in the District of Columbia after *Kent's* case was handled.²¹⁰ This list of factors became a model adopted around the country.²¹¹

However, rather than adopting all of *Kent's* factors like most states, Missouri decided to adopt all but one of the factors – the factor that required a showing of “prosecutive merit” for the crimes charged.²¹² Therefore, under current practices in many of Missouri's juvenile courts, a teen's case may be transferred to adult criminal court without the prosecutor ever presenting basic information to support probable cause at an open hearing or adversarial proceeding. In fact, the Juvenile Court Rules now perversely prohibit presentation of evidence at certification hearings to demonstrate or challenge the strength of the charges.²¹³ Such a process would involve little more than is required at adult preliminary hearing proceedings to test the strength of the prosecution's case²¹⁴ – hearings that take place every day in Missouri's adult

detention hearing, when students presented arguments to demonstrate serious doubts as to the evidence against their client, based upon exculpatory statements of two witnesses the students provided to the prosecution, the prosecution argued such information was irrelevant to the detention hearing and could not be considered until the time of trial. The court agreed.

208. MO. REV. STAT. § 211.071 (2012).

209. 383 U.S. 541, 566-68 (1963); see ALEXANDRA RIECK, CIVIL JUSTICE CLINIC, A YOUTH ADVOCATE'S GUIDE TO MISSOURI'S JUVENILE CERTIFICATION STATUTE (2010), available at <http://law.wustl.edu/civiljustice/JR-REP/PLC/MissouriCertificationStatute.pdf>.

210. *Kent*, 383 U.S. at 566-68.

211. See Jarod K. Hofacket, *Justice or Vengeance: How Young Is Too Young for a Child to Be Tried and Punished as an Adult?*, 34 TEX. TECH. L. REV. 159, 168-69 (2002).

212. MO. REV. STAT. § 211.071. “Prosecutive merit” is the term used in the *Kent* factor addendum. See *Kent*, 383 U.S. at 567. It has been interpreted to mean probable cause. See RIECK, *supra* note 209 (noting that at least thirty-five states require probable cause showings during certification hearings).

213. See MO. SUP. CT. R. 129.04, cmt. (“Rule 129.04c does not require or permit a full hearing into the facts of the alleged offense”).

214. In fact the *Kent* appendix described the level of proof as being sufficient to support indictment. *Kent*, 383 U.S. at 567.

criminal courts.²¹⁵ Instead, Missouri's system – as a matter of codified law – allows for juvenile cases to be transferred to the circuit courts for adult criminal prosecution based on relatively weak evidence.

While apparently permissible under current state statutes and rules, such a practice lacks integrity and runs contrary to basic due process principles. Indeed it is fundamentally unfair for the prosecuting attorney to have a child sanctioned with the “death penalty” of juvenile court proceedings – juvenile transfer – without ever having to present some level of substantiating evidence in the light of day. Missouri is one of only a small minority of states that have failed to adopt the *Kent* probable cause factor.²¹⁶ It is part of an even smaller group in failing to provide for probable cause hearings at either the detention or certification hearing stage.²¹⁷ And it appears to be the only state that affirmatively bars any effort to address probable cause or a lack thereof at a waiver hearing.²¹⁸ This outlier status once again speaks volumes about the failure of Missouri's juvenile law system to adopt evolving standards that reflect a modern society, and suggests seriously viable constitutional challenges.

3. Informal Process as Punishment

Additional unfair juvenile court practices have managed to emerge where system actors have developed a range of informal processes that work to degrade, demoralize, and damage vulnerable youth.²¹⁹ For example, starting in 2006, Missouri began receiving funds under the Juvenile Detention Alternatives Initiative (JDAI) program sponsored by the Annie E. Casey Foundation.²²⁰ Under the program, St. Louis City, St. Louis County, and

215. *Cf.* MO. SUP. CT. R. 22.09 (describing the procedure for felony preliminary hearings).

216. *See* RIECK, *supra* note 209 (listing a number of states that have adopted probable cause requirement).

217. For instance, while California also fails to expressly provide for prosecutive merit determinations at certification hearings, it requires such findings at the detention hearing stage. *See* CAL. WELF. & INST. CODE § 635 (West 2000) (judicial officer must determine whether the prosecutor has proven a prima facie case that the child committed a crime in addition to other risk factors before ordering a child's pre-trial detention).

218. *See generally* PATRICK GRIFFIN, ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS (Dec. 1998), available at http://www.ojjdp.gov/pubs/trying_juvasadult/toc.html.

219. *See generally* MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

220. ANNIE E. CASEY FOUNDATION, JUVENILE DETENTION ALTERNATIVES INITIATIVE: 2011 ANNUAL RESULTS REPORT 1 (Feb. 25, 2013), available at <http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/JDAIResultsReport2011/JDAIResults2011.pdf> (“The Juvenile Deten-

other localities agreed to utilize risk assessment instruments to screen young people in order to determine who presented the highest probability for danger or reoffending.²²¹ Only those youths identified during the screening process were to have their liberty restricted by secure detention, which is a last resort intended only for the most dangerous or problematic youth.²²²

To facilitate these practices, in 2011 the Supreme Court of Missouri issued a rule of practice that requires counties to utilize risk assessment instruments during the intake process to help fight disproportionate minority pretrial detentions and unnecessary restraints on liberty.²²³ But in the three years that the JLJC clinic regularly practiced in the St. Louis County courts, we were never provided with a risk assessment instrument for a client. Furthermore, any requests we made for such documentation were never satisfied and not a single detention hearing involved presentation of or discussion about JDAI forms.

Beyond this, following the launch of the JDAI project, tremendous net widening appears to have occurred in Missouri. For instance, countless children arrested in both St. Louis City and St. Louis County are now released from detention with strict legal conditions imposed, such as continual house arrest, evening visits to their home by marked police cars, or having electronic monitoring devices attached to their bodies.²²⁴ But in our experience this has been the case for nearly every juvenile – from youths charged with non-violent crimes, to first time misdemeanants, to teens with no record of flight. Thus even low-risk youth are ordered to attach twenty-four-hour monitoring systems to their ankles.²²⁵ These are cumbersome devices that can be seen by

tion Alternatives Initiative (JDAI) is a nationwide effort of local and state juvenile justice systems, initiated and supported by the Annie E. Casey Foundation (AECF), to eliminate unnecessary and inappropriate use of secure detention for juveniles.”); MO. DEP’T OF PUB. SAFETY, 2011 ANNUAL REPORT TO THE GOVERNOR 5 (2012), *available at* <http://dps.mo.gov/dir/programs/jj/documents/2011AnnualReportGovernor.pdf>. [hereinafter 2011 ANNUAL REPORT TO GOVERNOR].

221. 2011 ANNUAL REPORT TO GOVERNOR, *supra* note 220, at 5 (when it began in Missouri, “[t]he JDAI was implemented in St. Louis City, and the Counties of St. Louis, Jackson, Buchanan, Greene, Cass, and Johnson”).

222. *See* St. Louis City JDAI Form (on file with author).

223. *See* MO. SUP. CT. OP. R. 28.01 (creating presumption of pre-trial release and requiring use of a juvenile alternative to detention risk assessment form prior to any hold in secure detention); *see also* *Missouri Taking JDAI to Scale*, ANNIE E. CASEY FOUNDATION: JDAI NEWS (Summer 2011), *available at* <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/Resources/JDAI/2011/Summer%202011/Feature%20Story/Missouri%20taking%20JDAI%20to%20scale.aspx>.

224. *See* ST. LOUIS FAMILY COURT: JUVENILE DIVISION, DETENTION ALTERNATIVES PROGRAM (2013), *available at* <http://www.stlcitycircuitcourt.com/juvenile/2013%20Juv%20docs/DAP.pdf> [hereinafter DETENTION ALTERNATIVES PROGRAM].

225. Some of these are global positioning systems; others are less modern versions of the same kind of technology.

others; beyond monitoring every move of the young person and being uncomfortable to wear, the devices serve to stigmatize youths without any prior finding of guilt. And, of course, these devices are attached almost exclusively to poor youth of color.²²⁶ If they fail to wear the monitor they will be held in Missouri's most secure detention centers, where they will sleep in cement cells while they await trial.²²⁷

A related under-the-radar outgrowth of injustice involves widespread re-arrest practices of youth alleged to have violated such conditions. Based on the experience of the JLJC, countless young people are rounded up from their homes and schools each year by Missouri juvenile officers and law enforcement agents who execute *ex parte* warrants and writs of attachment for children.²²⁸ Such warrants may be executed where youth allegedly failed to stay inside while on house arrest, did not answer when police knocked on their door at night, or failed to keep their monitoring devices properly charged with batteries.²²⁹

Rather than providing assigned counsel with notice of the alleged violations or humanely summoning the youths to address the new allegations, the assumption is that they must be guilty of the violations. Once in custody, children have faced further charges of "violation of a valid court order."²³⁰ If youth allegedly violate home detention rules on more than one day or in more than one way, they may be made to answer for several counts.²³¹

But use of arrest warrants and writs of attachment are appropriate only under extraordinary circumstances – not when the respondent is a child whose whereabouts are well known, and the issue under review is a technical violation of release terms.²³² In addition, Missouri law does not include a

226. In one case where JLJC's student attorneys argued that such a monitor was unnecessary and stigmatizing the juvenile court commissioner asked the child where he attended school. After hearing the child's response the commissioner indicated that all the kids there wear monitors, so it would not be a big deal for her to order our client to wear one, too.

227. This author was recently told by a juvenile officer that there is no such thing as "release on recognizance" for youth in her county. She had never heard of such a practice or seen an order where a child was released without conditions. These, she explained, usually included house arrest and/or body monitors. *But see* MO. SUP. CT. OP. R. 28.01 (authorizing the "release with or without conditions pending hearing").

228. In an appeal still in progress, JLJC is seeking to challenge such *ex parte* communications about youth on probation, which are actually set forth as a condition of a youth's probation in St. Louis County. (Conditions on file with author).

229. JLJC has represented young people who were arrested and/or faced sanctions for all of the above allegations.

230. *Cf.* MO. REV. STAT. § 211.063 (2000).

231. DETENTION ALTERNATIVES PROGRAM, *supra* note 224224 (listing possible sanctions for violating home detention rules).

232. *See, e.g.*, MO. REV. STAT. § 211.101 (2000) (describing limiting circumstances when court may issue an order to have a youth brought to court "at once" to respond to summons); MO. REV. STAT. § 211.131 (2000) (allowing for child to be

crime of “violation of a valid court order” nor does the Juvenile Code include such a charge as a status offense or otherwise.²³³ Indeed, in countless petitions the JLJC clinic has seen alleging such technical violations, most fail to cite any supporting provision of law or specific elements for the alleged charge.²³⁴ Moreover, allegations are in many instances premised on violations of terms and conditions that are vaguely written,²³⁵ contained in documents that were never addressed in open court, included in documents drawn up by the juvenile officer outside of court, or were never fully explained by the judge or court officer.²³⁶

Beyond all of this, young people who may be innocent of the initial charges can suddenly find themselves adjudicated delinquent based on the non-crime of violating their conditions of pretrial release and then be placed on formal probation. Again, these violations may be conditions that should not have been imposed in the first place because the youths were never candidates for secure detention and should have been released on their own recognizance without any terms of release.

Once placed on probation, such youths often find themselves running through a similar gauntlet. That is, with the court imposing bare-bones probation conditions but having its juvenile officers – off the record, outside the courtroom, and without any attorney present – issue additional conditions for the youth to follow. Indeed, in St. Louis County it was the ongoing practice of juvenile officers to draw up an additional set of conditions within fifteen days of dispositional hearings to be later submitted for approval by the judge.²³⁷ But in cases where youths were represented by the public defend-

taken into custody for violation of a law or ordinance or when in danger). In fact, many release contracts signed by youth make no mention at all of a new charge being brought in the case of a violation.

233. MO. REV. STAT. § 211.431 (2000). *Cf.* MO. REV. STAT. § 211.063 (2000) (providing that a child alleged to have committed a status offense may not be held in secure detention for more than twenty-four hours unless a probable cause hearing is held at which it is also shown the child is in violation of valid court order and at least one other aggravating factor exists).

234. Petitions on file with author.

235. In numerous cases handled by JLJC, the order issued in court suggests one set of rules or conditions but supplemental materials drafted by the juvenile officer after the fact include additional or different rules.

236. In one case JLJC learned from a court officer that when the juvenile officer visited a child’s home to set up the GPS system, she did not go over the rules of the program with him or adequately explain his movement restrictions. When he was later charged with violating those conditions, we subpoenaed that officer to testify at the “trial” on the new allegations of violation of a valid court order. Despite having been served with a subpoena by JLJC’s student attorneys, the officer was sent away from court on the day of trial to take care of court business a few counties away. We were never able to elicit his testimony on the record.

237. Sample Supplemental Conditions with 15-Day Instruction (on file with author).

er's office, the court also relieved the assigned attorney at the time of disposition.²³⁸ Thus, in essence, a second informal dispositional proceeding would take place without the involvement of attorneys for the youth.

The conditions imposed after the fact by juvenile officers generally are not merely technical or insignificant. In fact, the JLJC clinic brought to light a three-part set of conditions implemented by juvenile officers under the court's policies that likely violate not only the constitutional rights of impacted youth, but also state and federal criminal laws.²³⁹ Specifically, youth in St. Louis County are generally required to turn over all of their social media passwords to their juvenile officers so that the officers can sign on as the youths to monitor their online behaviors.²⁴⁰ The youths are also prohibited from sending pictures, videos, or messages involving drugs, alcohol, sex, nudity, or violence.²⁴¹ Finally, upon the request of the juvenile officer, such youths are required to make available for search and review all cellular telephones and electronic devices that they use.²⁴² Despite our efforts to have the court and its staff refrain from further imposing such unlawful conditions, and our national recognition for such advocacy,²⁴³ the conditions are still in use.

Given the lack of restrictions in Missouri's Juvenile Code, a court may keep a young person on probation for many months or even years.²⁴⁴ Throughout this period, it may force the child to comply with a range of conditions that are sometimes enhanced over time. When the child fails to fully satisfy the terms that were set, re-arrest is likely to occur, followed by the filing of a motion to modify disposition – essentially, a charge of violating probation. Thus the cycle continues; public arrest by law enforcement, followed by detention in secure facilities, and concluding with adjudication for non-crimes.²⁴⁵

238. See MO. REV. STAT. § 211.211(6) (2000) (allowing for removal of counsel at the time of disposition if no appeal will be taken); see also Sample St. Louis County Disposition Order (on file with author).

239. See EMILY PELLETIER, NAT'L JUVENILE DEFENDER CTR., 2012 JUVENILE DEFENDER RESOURCE GUIDE 28 (2012), available at http://www.njdc.info/pdf/2012_resource_guide/NJDC_ResourceGuide12.pdf (describing petition drafted by clinic students J. Benjamin Rosebrough and William Waller).

240. *Id.*; see also St. Louis County Social Media Probation Conditions (on file with author).

241. See St. Louis County Social Media Probation Conditions (on file with author).

242. *Id.*

243. See PELLETIER, *supra* note 239.

244. MO. REV. STAT. § 211.231.

245. It is difficult to ascertain the extent of this practice. But in St. Louis County a total of 1,750 juvenile court cases were filed last year. Of those, approximately 450 represented original delinquency and/or status offense filings. But 322 represented some kind of motion to modify. *Missouri Courts Supplement 2012: Table 41*, available at <http://www.courts.mo.gov/file.jsp?id=58747> (last visited Nov. 18, 2013). While not all of these were likely filed in delinquency matters – for instance, some

Each new arrest and adjudication for technical violations is added to the child's juvenile court record.²⁴⁶ Therefore, the child has soon amassed a long juvenile court rap sheet where each contact is counted against them and interpreted as disrespect for the court and a propensity for criminality. In reality, many of these violations stem from misunderstandings, lack of clarity in the rules, and youthful missteps associated with ordinary adolescent risk-taking and boundary testing. In this way, Missouri's juvenile courts are not addressing criminal activities but are largely engaging in morals policing and social control, primarily impacting youth in communities of color.²⁴⁷

One practice that results in numerous re-arrests and detentions of impoverished African-American youth on probation is drug testing for traces of marijuana. But suffering from addiction, as a matter of constitutional law, cannot be criminalized.²⁴⁸ And experimentation through sporadic marijuana use is little more than an ordinary adolescent behavior practiced by teens around the country.²⁴⁹ Thus, it appears that most youths who are being arrested and detained for positive marijuana tests – which may or may not be accurate²⁵⁰ – are being harshly and unduly punished for non-crimes or social misbehaviors. At the very least, as a matter of public policy the juvenile courts operating in one of our nation's most dangerous cities should have more important matters to address than teen marijuana use without further wrongdoing.

may stem from child welfare cases – this high proportion of modification motions raises a series question worth further research. Also worth further research is the number of motions to modify juvenile dispositions resolved without any attorney present in light of prevailing practices of relieving counsel at the time of disposition.

246. See MO. REV. STAT. § 211.063 (2000).

247. See, e.g., Christine Patterson, *Recommendations for Reducing Disproportionality and Disparity in Missouri Certification Decisions*, CERTIFICATION RESEARCH BRIEF NO. 5 – MISSOURI OFFICE OF STATE COURTS (2013), available at <http://law.wustl.edu/news/documents/DMCCRB5-RecommendationsFINAL.pdf> (finding race-based disproportionality in Missouri's juvenile detention and certification decisions).

248. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

249. See, e.g., Tom Ter Bogt et al., *Economic and Cultural Correlates of Cannabis Use Among Mid-adolescents in 31 Countries*, 101 ADDICTION 241 (2006) (finding that marijuana use is a normative behavior for teens across North America).

250. As this Article goes to press, JLJC is working on a case where a teen was accused of testing positive for marijuana based on a court-administered drug test. When tested at a certified laboratory, however, the client tested clean. See, e.g., Marilyn Huestes & Edward Cone, *Differentiating New Marijuana from Residual Drug Excretion in Occasional Marijuana Users*, 22 J. OF ANALYTICAL TOXICOLOGY 445, 451 (1998) (noting that some cannabis urinalyses may present false positive based on past rather than recent use); Robert DuPont & Werner Baumgartner, *Drug Testing by Urine and Hair Analysis: Complementary Features and Scientific Issues*, 70 FORENSIC SCIENCE INTERNATIONAL 63 (1995) (explaining unreliability of urine sample testing for marijuana use).

It is easy to see, therefore, how youth may fail to successfully complete probation in Missouri's juvenile courts and thus find themselves removed from their homes and placed in state custody. Of the nearly 1,000 youth ordered into DYS in 2011, only 103 were removed from their communities for the most serious felonies under the law.²⁵¹ The rest were accused of lower-level offenses – including what have been termed violations of valid court orders and probation violations.²⁵²

4. Impoverished Juvenile Defense System

Indigent defense representation services for Missouri's court-involved youth are also deeply deficient. Through severe restrictions on funding, a lack of support for specialized youth advocacy, and a culture of confusion in state courts regarding zealous delinquency representation, the role of the juvenile defender has been greatly weakened in Missouri. In fact, in some areas of Missouri it does not exist at all. As a result, young people are often forced to represent themselves. This, too, is a phenomenon that has largely escaped national attention. However, a recent National Juvenile Defender Center (NJDC) study is now helping to change that.²⁵³

After many years of reductions in its budget, the Missouri public defender system is currently ranked forty-ninth in the country for funding.²⁵⁴ Its extreme lack of resources has been widely reported by the media both locally and nationally, making Missouri somewhat of an example of what states should not do.²⁵⁵ The Missouri Office of State Public Defender recently

251. DYS ANNUAL REPORT FISCAL YEAR 2011, *supra* note 43, at vi.

252. *Id.*

253. MARY ANN SCALI ET AL., NAT'L JUVENILE DEFENDER CTR., MISSOURI: JUSTICE RATIONED, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF JUVENILE DEFENSE REPRESENTATION IN DELINQUENCY PROCEEDINGS 35 (2013), available at http://www.njdc.info/pdf/Missouri_Assessment.pdf.

254. Monica Davey, *Budget Woes Hit Defense Lawyers for the Indigent*, N.Y. TIMES, Sept. 9, 2010, at A15, available at http://www.nytimes.com/2010/09/10/us/10defenders.html?pagewanted=all&_r=0. The Missouri system ranks last in terms of financial eligibility standards, leaving some of the poorest adults and children in the country without court-appointed defense counsel. See CATHY R. KELLY ET AL., MO. PUBLIC DEFENDER COMM'N, FISCAL YEAR 2012 ANNUAL REPORT 7 (2012), available at <http://www.publicdefender.mo.gov/about/FY2012AnnualReport2.pdf> ("According to recent reports, Missouri ranks 50th out of 50 states in income eligibility standards for public defender services, leaving a wide gap of ineligible defendants who, in reality, still lack the means to retain private counsel in the market.").

255. See, e.g., Davey, *supra* note 254; Kathryn Wall, *Public Defender Fight Hits Supreme Court*, SPRINGFIELD NEWS-LEADER (Dec. 14, 2011), available at <http://www.news-leader.com/article/20111214/NEWS12/112140362/Missouri-Supreme-Court-public-defender>; see also Chris Dandurand, Note, *Walking Out on the*

turned to the Supreme Court of Missouri for assistance.²⁵⁶ The court ruled in favor of the defender system, recognizing the need for some offices to actually turn away potential clients because of the inability to effectively serve all assigned clients.²⁵⁷

In response, prosecutors around the state organized to support a legislative intervention viewed by some as retaliation.²⁵⁸ As initially proposed, the legislation threatened to entirely dismantle public defender offices and farm cases to the lowest bidder.²⁵⁹ A compromise was ultimately reached that keeps the statewide defender system running, albeit under conditions that continue to seriously restrict its ability to provide quality representation.²⁶⁰

Through all of this litigation and public debate about the lack of funding for Missouri's public defenders, almost nothing has been said about how the problem impacts juveniles in particular. But as described in the NJDC's study, Missouri previously had specialized juvenile defender offices that were staffed by lawyers trained in juvenile law and representation.²⁶¹ These offices were run by the state defender system.²⁶² However, as the system had to reduce its services under extreme budget cuts, the specialized youth advocacy offices were among the first things to go.²⁶³ As a result, the rationing of juvenile representation continues.

In some areas, like St. Louis, this has resulted in a single public defender being assigned to handle all cases filed in the local juvenile court system.²⁶⁴

Check: How Missouri Abandoned its Public Defenders and Left the Poor to Pay the Bill, 76 MO. L. REV. 185, 186 (2011).

256. *State ex rel. Mo. Pub. Defender Comm'n. v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012) (en banc).

257. *Id.* at 612.

258. See Brennan David, *Bill Aims to Alter Public Defender Caseload*, COLUM. DAILY TRIB. (Jan. 29, 2013, 2:00 PM), http://www.columbiatribune.com/news/local/bill-aims-to-alter-public-defenders-caseload/article_3291b91e-6a48-11e2-96f0-00127992bc8b.html (outlining Senator Stanley Cox's efforts to overhaul the public defender system).

259. *Id.*

260. See H.R. 215, 97th Leg., 1st Sess. (Mo. 2013); see also *Missouri Public Defenders Could See Caseloads Ease*, ST. LOUIS POST DISPATCH, May 31, 2013, available at http://www.stltoday.com/news/local/govt-and-politics/missouri-public-defenders-could-see-caseloads-ease/article_22fcbf5a-ef4e-55b0-a82e-b41288d79db7.html (describing compromise reached on overhaul).

261. See SCALI ET AL., *supra* note 253, at 54.

262. *Id.*

263. *Id.*

264. One such local court processed approximately 2000 delinquency and status case referrals in 2012. See FAMILY COURT ADMIN.: DIV. 30, CITY OF ST. LOUIS FAMILY COURT REPORT TO THE COMMUNITY 4 (2012), available at <http://www.stlcitycircuitcourt.com/juvenile/2013%20Juv%20docs/Report%20to%20the%20Community%202012.pdf>. Over 500 of those youth were detained. *Id.* In contrast, based on my own observations, the prosecution in that same courthouse is supported

In other counties, it appears that the public defender's office serves no youth at all.²⁶⁵ Volunteers and others, such as clinic students, are expected to fill the void when possible.²⁶⁶ In many instances, children facing prosecution in juvenile court have no lawyer at all.²⁶⁷ Juvenile defendants, like anyone else in conflict with the law, face threats to their liberty as a result of prosecution; they are, however, much less capable of understanding the system without a lawyer by their side.

Yet in this environment, the voice of the juvenile defender has been silenced. Unlike other states,²⁶⁸ Missouri has almost nothing in the way of an organized juvenile defense bar. Additionally, in recent years almost no trainings have been offered for those interested in serving as zealous advocates for youths prosecuted in juvenile court.²⁶⁹ Much of what is provided seems to fold the role of the guardian ad litem into the role of the defender, despite their very different roles and a youth's constitutional right to a meaningful defense.²⁷⁰ Even the materials produced by the Missouri Bar about juvenile court practice are primarily written by non-juvenile defenders.²⁷¹ Furthermore, important conversations impacting youth justice take place across the state each year without any trained juvenile defenders present. From the DYS advisory board,²⁷² to the Department of Public Safety's Juvenile Justice Advisory Group,²⁷³ to monthly meetings at St. Louis juvenile courts during

by four legal officers and numerous support staff, including DJOs. Even in the most collegial and open-minded court system such state-sponsored disparity in resources must be seen as unfair to children and families.

265. See, e.g., KELLY ET AL., *supra* note 254, at 87 (2012 caseload for Sedalia, Missouri included no juvenile cases).

266. See SCALI ET AL., *supra* note 253, at 33 n.185.

267. *Id.* at 35.

268. See, e.g., *About Us*, TENN. ASS'N CRIM. DEF. LAW., http://www.tacdl.com/index.php?option=com_content&view=article&id=46&Itemid=53 (providing information about the group's juvenile justice committee and juvenile defender listserv) (last visited Nov. 20, 2013); *Juvenile Division*, OFF. OHIO PUB. DEFENDER, http://www.opd.ohio.gov/Juvenile/Juvenile_Main.htm (last visited Nov. 20, 2013).

269. For instance, the Missouri Bar Association's CLE page indicates "juvenile law" is an area in which courses are offered. *CLE Programs*, MO. BAR, <http://www.mobar.org/pv/Core/Events/Events.aspx> (follow "Practice Area" hyperlink; then search "Juvenile Law") (last visited Nov. 20, 2013). However, the only options listed under juvenile law are the Bar Association's eight hour GAL Courses. *Id.*

270. See *id.* Here, too, some change may be afoot. While this Article was heading to press, the public defender system partnered with other groups, including JLJC and IVJDC, to host an important multi-day juvenile defense training program.

271. See, e.g., 21A MO. PRAC., FAMILY LAW, § 19:30 (3d ed.).

272. See *Missouri Division of Youth Services Advisory Board*, *supra* note 38.

273. This is a group that is mandated by federal law in order for the state to receive juvenile justice funding. *Missouri Juvenile Justice Advisory Group*, MO.

which administrative decisions are made,²⁷⁴ trained juvenile defense lawyers have not been invited stakeholders.

Finally, as demonstrated by some of the examples provided earlier in this Article,²⁷⁵ in many instances the voices of juvenile defenders are also silenced by the court system itself. In addition to operating without adequate funding, training support, or opportunities to participate in statewide stakeholder conversations, many youth advocates are met with resistance for engaging in zealous advocacy. Beyond my own experiences and those of my students, numerous juvenile attorneys across the state have shared with me their accounts of being privately or publically chastised by juvenile court staff and judges for fighting hard for their clients. In a system where juvenile judges – whose behaviors go largely unchecked – have tremendous power,²⁷⁶ both defenders and their clients are vulnerable to formal and informal judicial retaliation.²⁷⁷ It also leaves the entire system open to the kind of abuses that have damaged the reputations of other jurisdictions in recent years and ruined the lives of many youths.²⁷⁸

BOARDS & COMMISSIONS, <http://boards.mo.gov/userpages/Board.aspx?70> (listing Board members) (last visited Nov. 20, 2013).

274. This author asked to be included at such meetings but the request was denied.

275. See *supra* notes 173-175 and accompanying text.

276. Last year only three juvenile court appeals were opened by the State Office of the Public Defender. See KELLY ET AL., *supra* note 254254, at 65.

277. For example, I have heard of judges calling attorneys into chambers to tell them to withdraw particular motions or threatening to preclude them from practicing in the court if they do not abide by the court's wishes. The clinic has also experienced similar pushback in both direct and more subtle forms.

278. Eyder Peralta, *Pa. Judge Sentenced to 28 Years in Massive Juvenile Justice Bribery Scandal*, NPR ONLINE (Aug. 11, 2011, 11:29 AM), <http://www.npr.org/blogs/thetwo-way/2011/08/11/139536686/pa-judge-sentenced-to-28-years-in-massive-juvenile-justice-bribery-scandal> (describing the “kids for cash” kick-back scandal).

C. Imprisoning Youth

Ironically, in a state that purports to provide a kinder alternative to the harsh juvenile court placements used in other jurisdictions, Missouri has no problem shuttling high numbers of youth into Missouri's adult prison system. In fact, Missouri currently has more than twice as many youthful offenders in its adult prisons than DYS will serve in one full year.²⁷⁹ Most of these individuals are African-American males, and many were sentenced as children to die behind bars.

1. Race and Justice by Geography

Missouri prisons currently house almost 2,000 youthful offenders.²⁸⁰ In 2011 alone, seventy-four children under the age of seventeen were certified by Missouri's juvenile courts to stand trial as adults.²⁸¹ More than two-thirds of these youth were African-American boys,²⁸² and a high proportion came from the St. Louis area.²⁸³ In fact, over a period of several years St. Louis juvenile courts transferred no white children to adult courts – only African-American youth.²⁸⁴

While this phenomenon is not widely publicized, this year the Missouri Office of State Courts Administrator (OSCA) undertook a statistical study to examine racial inequity in the state's juvenile courts.²⁸⁵ Ultimately, it identified a problem of "justice by geography" across the state.²⁸⁶ That is, despite claims by its juvenile justice leaders that they are engaging in successful in-

279. See *supra* notes 43, 45 and accompanying text.

280. See *supra* note 45.

281. See MJFD ANNUAL REPORT 2011, *supra* note 44, at 62.

282. *Id.* (reporting that forty-nine African American boys and two African American girls were certified in 2011).

283. *Id.* at 62 (appendix of statistics demonstrates that twenty-two of the state's total of seventy-four transferred youth came from the St. Louis area; twenty were African-American males and two were African-American females).

284. For instance, in 2010 St. Louis County certified twenty youth while St. Louis City certified fifteen. MO. OFFICE OF STATE COURTS ADM'R, MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT CALENDAR 2010 62 (2010), available at <http://www.courts.mo.gov/file.jsp?id=48791>. All were African-American boys. *Id.* In 2009, the County sent twenty-three children to stand trial as adults, twenty-two were black males. MO. OFFICE OF STATE COURTS ADM'R, MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT CALENDAR 2010 71 (CY 2009), available at <http://www.courts.mo.gov/file.jsp?id=42581>. The City certified thirteen youth that year – also exclusively African American boys. *Id.*

285. See Patterson, *supra* note 247.

286. *Id.* at 1 (flagging "justice by geography" as a potential cause for the disparate certification of minority youth in St. Louis).

novations²⁸⁷ and working to reduce disproportionate minority contact with the penal system,²⁸⁸ youth of color remain disproportionately represented in St. Louis area juvenile courts.²⁸⁹ In fact, St. Louis City and County were identified as being responsible for the worst racial disparity statistics in the state.²⁹⁰ While some might claim that this is simply a function of the population in these urban areas, African Americans account for less than twenty percent of the St. Louis area population.²⁹¹ Rather, OSCA’s study suggests that the ways in which cases are reviewed and processed in these regions need to be more carefully reviewed to see how they may be contributing to such race-based outcomes.²⁹² In fact, many of the minority youth certified to stand trial presented a low chance of reoffending when screened under standardized risk assessment instruments.²⁹³

2. Forgotten and Unprotected

When these young people – many of whom are unlikely to reoffend – enter the adult court system, their lives are forever changed. First, in Missouri once a young person is certified to stand trial as an adult on one case – even a crime of drug possession – they will be forever treated as an adult by the state’s justice system.²⁹⁴ Beyond this, as their case is converted from one about juvenile delinquency to one about adult crime, they are often thrust into an even more scary environment than the one they encountered in the juvenile court system. On top of that, they must learn how to operate among an adult prison population.

287. *Judge Edwards Named One of People Magazine’s 2011 ‘Heroes of the Year’*, ST. LOUIS AM. (Oct. 28, 2011, 3:37 PM), http://www.stlamerican.com/news/local_news/article_53c7bb7c-01a5-11e1-8446-001cc4c03286.html (describing Judge Edwards’ establishment of an alternative school affiliated with his Juvenile Court); *School of Last Resort Helps Troubled Youth*, CBS NEWS (Nov. 18, 2011, 8:53 AM), <http://www.cbsnews.com/video/watch/?id=7388761n>. (claiming Judge Edwards took a “unique approach to turn young lives around” and would rather see kids “behind desks in schools rather than behind bars”).

288. NAT’L CONFERENCE OF STATE LEGISLATURES, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT 7 (Jan. 2009), available at <http://www.ncsl.org/print/cj/minoritiesinjj.pdf>.

289. See Patterson, *supra* note 247.

290. *Id.*; see also Kenneth J. Cooper, *Despite Law on Racial Disparities, Black Teens Are Overly Tried as Adults*, ST. LOUIS BEACON (May 10, 2011 10:20 AM), available at <http://law.wustl.edu/clinicaled/documents/CJC-JLJC/Beacon-051011-CertificationDisparities.pdf>.

291. See *St. Louis Area Population Demographics*, ST. LOUIS REGIONAL CHAMBER COM., <http://www.stlrcga.org/x1832.xml> (last visited Oct. 2, 2013).

292. See Patterson, *supra* note 247.

293. See *id.*

294. See GRIFFIN ET AL., *supra* note 218 (follow “Once an Adult/Always an Adult” hyperlink).

Notably, the period of time between when a child is transferred from juvenile court to adult court for criminal prosecution is a legal mystery in Missouri. It presents a kind of barren land with little in the way of express processes or procedures controlling the treatment of such youth. Instead, various informal practices have evolved over time, including the assumption that the child can be held in secure custody – including in adult jails – pending resolution of the charges.²⁹⁵

For example, as this Article goes to press a Sedalia child charged at age thirteen with allegedly killing his stepfather is being held in an adult jail.²⁹⁶ He has been there several years awaiting his trial.²⁹⁷ During this waiting period, many youths – including the Sedalia boy – are routinely denied educational services and other programs available to youths in juvenile detention centers.²⁹⁸ Such treatment is so unfair that it has even drawn protest from Missouri’s attorney general.²⁹⁹

Similarly, at the end of transfer hearings it is frequently assumed that appointed counsel has completed her work and that a new attorney must be appointed once the case is formally processed in criminal court. Finding themselves “between the cracks” during this sometimes significant period of time, many of Missouri’s most at-risk youth must contend with the criminal justice system without the aid of counsel.³⁰⁰ Indeed, at a moment when such

295. 21A MO. PRAC., FAMILY LAW, § 19:30 (3d ed.) (“If the child is certified, the juvenile petition is dismissed, and the child is turned over to the county”); see *In re ADR*, 603 S.W.2d 575, 579-80 (Mo. 1980) (“Once the juvenile court has relinquished jurisdiction, the juvenile is subject to criminal prosecution as an adult.”); *State v. Williams*, 922 S.W.2d 845, 848 (Mo. App. E.D. 1996) (describing appellants’ movement after juvenile court certification to the adult jail where he awaited trial on the charges against him).

296. Chelsea Wade, *Court Proceedings Continue in Capps County Case*, KMZU 100.7 FM (Apr. 5, 2012, 1:29 AM), <http://www.kmzu.com/court-proceedings-continue-in-capps-murder-case/> (noting that while the child’s competence to stand trial is questioned he faces the possibility of a sentence of life without parole).

297. *Id.*

298. See *State v. Bustamonte*, No. 09AC-CR03516 (Cir. Ct. Cole Cty. June 21, 2011).

299. Kevin Held, *Attorney General Chris Koster Says Alyssa Bustamante Has Right to Education in Jail*, KSDK (Oct. 19, 2010), <http://archive.ksdk.com/news/crime/story.aspx?storyid=222452> (describing Attorney General Koster’s support for Bustamonte’s request for educational services that were being denied by local officials).

300. See *State v. Williams*, 922 S.W.2d 845, 848 (Mo. App. E.D. 1996) (describing how one youth, after being certified to stand trial and housed at the local jail, was interviewed by a lawyer representing another defendant without the assistance of his own attorney to advise him against making statements); *State v. Wilson*, 826 S.W.2d 79 (Mo. App. E.D. 1992) (upholding police questioning of a youth who, after juvenile court certification, was in jail awaiting appointment of criminal court attorney in

juveniles may feel most desperate, Missouri’s “model” system of justice shamefully fails to provide them with meaningful legal protections or support. Sadly, such circumstances have led to tragedy – including suicide.³⁰¹

In one such tragic incident, sixteen-year-old Jonathan McClard took his own life while in his jail cell.³⁰² He had just been sentenced to a thirty-year prison sentence.³⁰³ Knowing that he was being transferred to a maximum security prison, he gave up all hope.³⁰⁴ His family, devastated by the loss and outraged by Jonathan’s treatment by the justice system, has established a non-profit organization called Families and Friends Organizing to Reform Juvenile Justice in Missouri (FORJ-MO).³⁰⁵ FORJ-MO, one of the few grassroots juvenile justice groups in the state, has worked hard to shed light on the problem of Missouri’s juvenile certification and transfer practices. Tracy McClard, Jonathan’s mother, successfully convinced legislators last year to expand the availability of juvenile justice services for court-involved teens by modifying Missouri’s dual jurisdiction standards.³⁰⁶

This was an important victory for Missouri youth advocates. But the fundamental problem of indiscriminate and racially disproportionate certification practices for youth under the age of seventeen remains. And for youth who are under seventeen at the time of their prosecution, we can at least access and track population data due to special juvenile court reporting standards. Other children in Missouri’s adult criminal court system remain largely under the radar. Although the Supreme Court of the United States has repeatedly held that seventeen year olds must be considered juveniles for purposes of due process standards and sentencing processes,³⁰⁷ Missouri continues to automatically prosecute such youth as adults. Therefore, in addition to any children who are waived into adult court, the state’s criminal and municipal courts prosecute countless “direct filed” seventeen year olds each year – automatically sentencing these young people as adults. Yet, their numbers are not contained in public reports or carefully monitored for issues of racial disparity. Instead, these children become almost invisible in a sea of adult criminal defendants, their youth essentially forgotten and erased.

murder case; the court found no violation of right to counsel as juvenile defense lawyer was considered an attorney on “a different matter”).

301. See *About Us*, FAMILIES & FRIENDS ORGANIZING FOR REFORM JUV. JUSTICE-MISSOURI (FORJ-MO), <http://www.forj-mo.org/Default.aspx> (describing the founding of FORJ by Missouri parent Tracy McClard, whose son committed suicide after being certified to adult court and denied dual jurisdiction sentencing) (last visited Nov. 20, 2013).

302. See *id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012); *Graham v. Florida*, 560 U.S. 48, 82 (2010); *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

3. Mandatory Death Behind Bars Sentences

Finally, despite its alleged ground-breaking model of juvenile justice, Missouri is one of several states that has denied young people the opportunity for a second chance by way of mandatory life without parole sentences for children. Under Missouri's first degree murder statute, judges must impose automatic death behind bars sentences on children without hearing any evidence relating to the facts of the crime, the developmental level of the youth, or their individual life circumstances.³⁰⁸

After the *Miller* decision, which struck down such mandatory sentencing schemes, the Supreme Court of Missouri heard the cases of two similarly situated youths – Ledale Nathan and Laron Hart – whose matters were pending at the time *Miller* was decided.³⁰⁹ In those decisions, handed down in August 2013, the Court found that their mandatory death behind bars sentences amounted to unconstitutional cruel and unusual punishment.³¹⁰ It thus ordered new sentencing hearings at which the youth may present evidence relating to their individual circumstances and youth.³¹¹ In addition, the Supreme Court of Missouri adopted the very high evidentiary standard of proof beyond a reasonable doubt for prosecutors who continue to seek juvenile life without parole sentences at such hearings.³¹² If the prosecution cannot meet this burden, the juveniles need to be resentenced within the second-degree murder sentencing range – ten to thirty years, or life with eligibility for parole.³¹³

But the court has not reached the cases of the eighty-four youthful offenders already serving death behind bars sentences, some of whom were only fourteen years old at the time of their crimes.³¹⁴ In fact, as this Article goes to press the habeas corpus petitions of those youthful offenders remain on the Supreme Court of Missouri's docket. These petitions tell stories that have never before been shared – this is because, as a matter of law, they could not be told. Missouri's sentencing laws precluded the courts from learning anything about these children – again only hearing one side of the story.

It is true that these are individuals who may have committed very serious crimes in their youth – some actually killing their victims, while others were merely present while other individuals committed homicidal acts. But many were children who were themselves violently abused at the hands of their parents, left unattended and unfed by drug addicted guardians, forced to

308. See MO. REV. STAT. § 565.020 (2000).

309. *State v. Nathan*, 404 S.W.3d 253, 270 (Mo. 2013); *State v. Hart*, 404 S.W.3d 232, 241-42 (Mo. 2013).

310. *Nathan*, 404 S.W. at 270; *Hart*, 404 S.W.3d at 242.

311. *Nathan*, 404 S.W. at 270; *Hart*, 404 S.W.3d at 242.

312. *Hart*, 404 S.W.3d at 242-43, 253.

313. *Nathan*, 404 S.W. at 270-271; *Hart*, 404 S.W.3d at 243.

314. See *Eastburn v. State*, 400 S.W.3d 770, 775 (Mo. 2013).

raise themselves in violent urban streets, or made to suffer from untreated mental health issues. They were still developing as persons and citizens, with moral compasses still under construction and a sense of right and wrong that was not yet fully formed. And nearly all of these eighty-four children were trying to negotiate these difficult life circumstances and the rocky terrain of adolescence while experiencing the widespread systemic societal neglect described above – a tragic network that has worked to the detriment of so many of Missouri's poor, African-American boys, fundamentally undermining their ability to find their way.

They are not asking to be absolved of all guilt, nor have they remained the children that they were at the time of their crimes. Many have already served long sentences of nearly twenty, twenty-five, and thirty years in maximum security prisons. They have educated themselves while behind bars, earning high school diplomas and college certifications, completed drug treatment programs, and undergone medication regimes not previously available to them. Some have turned to religion, while others have become community leaders, serving as positive role models for younger inmates new to the system. Their petitions seek nothing more than the opportunity for a second chance – the same opportunity provided to Ledale and Hart – and some reason to have hope.³¹⁵

IV. A SINGLE VISION: EVOLVING STANDARDS AND HOPE FOR THE DAYS AHEAD

Until recently, only a single account of Missouri's approach to juvenile justice was being shared and heard – one that suggested our state offers a model, modern system in all respects. Unfortunately, the naturalizing of this narrative has glazed over the stories of youth who are currently incarcerated in Missouri's prisons for the rest of their lives. Also missing are the experiences of children who may be placed in DYS despite very low-level charges, and those whose life chances may be reduced by Missouri's failing schools, conflicted juvenile courts, and impoverished system of youth advocacy. Their experiences tell the story of the "other" Missouri Model.

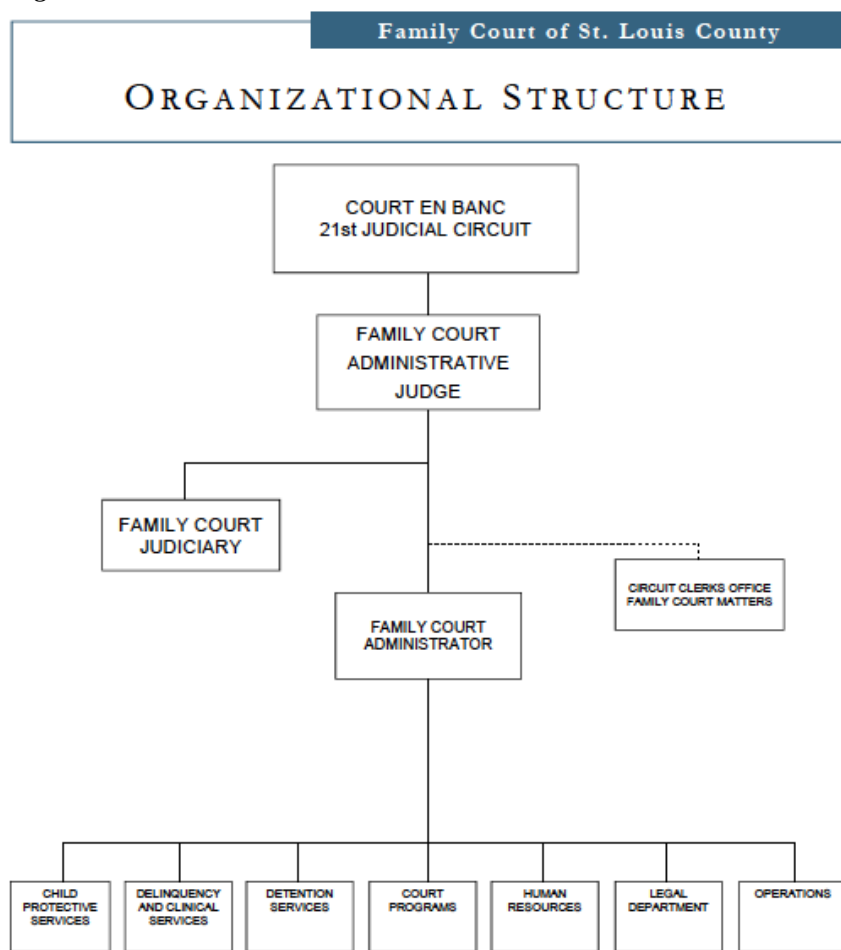
It is my hope that post-*Miller* implementation efforts, taken together with other recent events – including the release of the NJDC's assessment of Missouri's juvenile justice system, OSCA's studies on continuing racial disparity in the state, and now the investigation launched by the United States Department of Justice – will finally force us to come to terms with the whole story of Missouri's treatment of youth.

Only after we engage in such a full and honest accounting can we finally begin to develop a system of juvenile justice that improves the life

315. See *supra* note 4 (describing how the basic human right to hope has emerged as a concern on both the international human rights stage and in our own Supreme Court jurisprudence).

chances of Missouri’s most vulnerable children. Missouri cannot claim to be innovative in its treatment of adolescents while simultaneously pushing them out of school, capturing them in the juvenile court system, denying them meaningful assistance of counsel, and locking them behind bars until death without ever hearing their stories. Instead, Missouri needs to fully embrace the virtues it has been extolling for years if it wants to reap the benefits of being called a model of juvenile justice. The time is now for the Show Me State to meet its burden of developing more evolved standards of decency for its youth.

Diagram A³¹⁶



³¹⁶ *Guide to the Family Court*, FAM. CT. ST. LOUIS COUNTY, 5 (March 2002), <http://www.stlouisco.com/Portals/8/docs/Document%20Library/circuit%20court/Family%20Court/NewFamilyCourtGuide.pdf> (last revised Feb. 2010).