

# From Ferguson to the Future:

*Overview of the History and the Work of the Missouri Supreme Court Commission on Racial and Ethnic Fairness (CREF)*

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# HISTORY OF CREF

- ▶ Supreme Court of Missouri's Commission on Racial and Ethnic Fairness ('CREF') endeavors to fulfill our state's commitment to equitable justice in the courts
- ▶ In 2015, Missouri became the 34th state to join the National Consortium on Racial and Ethnic Fairness in the Courts when the Supreme Court established its Commission on Racial and Ethnic Fairness in the Courts

# CREATION OF CREF: FERGUSON, MO.







# FACTS

- ▶ In August 2014, the Ferguson police killing of Michael Brown threw our state and judicial system into the national and international spotlight
- ▶ Protests and public outcry amassed against the now bare inequalities exposed in the processing of cases in the local court and those in the surrounding jurisdictions of St. Louis County
- ▶ In its March 2015 Reports, the Justice Department called on Ferguson to overhaul its municipal justice system
- ▶ The report made a total of 26 recommendations
- ▶ The evidence presented left little room for alternative facts/interpretation

# Pattern or practice of:

- ▶ Conducting stops without reasonable suspicion and arrests without probable cause in violation of the Fourth Amendment;
- ▶ Interfering with the right to free expression in violation of the First Amendment; and
- ▶ Using unreasonable force in violation of the Fourth Amendment.

# Pattern or Practice of racial bias in both the FPD and municipal court:

- ▶ The harms of Ferguson's police and court practices are borne disproportionately by African Americans and that this disproportionate impact is avoidable.
- ▶ Ferguson's harmful court and police practices are due, at least in part, to intentional discrimination, as demonstrated by direct evidence of racial bias and stereotyping about African Americans by certain Ferguson police and municipal court officials.

# Ferguson Municipal Court has a pattern or practice of

- ▶ Focusing on revenue over public safety, leading to court practices that violate the 14<sup>th</sup> Amendment's due process and equal protection requirements.
- ▶ Court practices exacerbating the harm of Ferguson's unconstitutional police practices and imposing particular hardship upon Ferguson's most vulnerable residents, especially upon those living in or near poverty.
- ▶ Minor offenses can generate crippling debts, result in jail time because of an inability to pay and result in the loss of a driver's license, employment, or housing.

# Municipal Court Practices:

- ▶ Ferguson has allowed its focus on revenue generation to fundamentally compromise the role of Ferguson's municipal court
- ▶ The municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests
- ▶ City, police, and court officials for years have worked in concert to maximize revenue at every stage of the enforcement process, beginning with how fines and fine enforcement processes are established.
- ▶ This has led to court practices that violate the Fourteenth Amendment's due process and equal protection requirements. The court's practices also impose unnecessary harm, overwhelmingly on African-American individuals, and run counter to public safety

# FACTS

- ▶ In 2013 alone, the court issued over 9,000 warrants on cases stemming in large part from minor violations such as parking infractions, traffic tickets, or housing code violations.
- ▶ Jail time would be considered far too harsh a penalty for the great majority of these code violations, yet Ferguson's municipal court routinely issues warrants for people to be arrested and incarcerated for failing to timely pay related fines and fees.
- ▶ Under state law, a failure to appear in municipal court on a traffic charge involving a moving violation also results in a license suspension.

# Municipal Court Issues Continued

- ▶ Under state law, a failure to appear in municipal court on a traffic charge involving a moving violation also results in a license suspension.
- ▶ Ferguson has made this penalty even more onerous by only allowing the suspension to be lifted after payment of an owed fine is made in full.
- ▶ Further, until recently, Ferguson also added charges, fines, and fees for each missed appearance and payment. Many pending cases still include such charges that were imposed before the court recently eliminated them, making it as difficult as before for people to resolve these cases.

# Takeaways From the Reports

- ▶ “th[e] disproportionate burden on African Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather, our investigation has revealed that these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans”

A second Department of Justice report focused on the St. Louis County Family Court arrived at equally condemnatory conclusions:

- ▶ Stating, “[i]n short, Black children [in the St. Louis County Family Court system] are subjected to harsher treatment because of their race.”
- ▶ As both reports recommended, the systems had to change for the sake of *fairness* for all.

# CREF

- ▶ The Ferguson report came out calling for the establishment of CREF
- ▶ Although the Department of Justice reports were limited to no broader an area than St. Louis County
- ▶ Supreme Court Chief Justice Patricia Breckenridge recognized the right to a fair and impartial adjudication “in 100 percent of our courts” and that “[e]ven a perception of justice denied anywhere should concern us *all*, no matter who or where we are.”

# CREF

*“Systemic racial and ethnic inequality demands systematic action to reverse.”*

Appellate Judge Lisa White Hardwick, Missouri Court  
of Appeals, Western District

Tri-Chair of CREF

# GOALS OF CREF

- ▶ Identify any barriers to access and fairness in the judicial system and legal profession;
- ▶ Review the applicable constitutional provisions; statutes; ethical, procedural and court operating rules that may impact these issues; and such other materials as CREF believes would be helpful to its study and the development of its recommendations;
- ▶ Seek public input and engagement through written suggestions, public hearings or such other avenues as the commission believes helpful, as well as collaborate and participate in the “Minority Community Engagement” project with the National Center for State Courts and National Consortium on Racial and Ethnic Fairness in the Courts;
- ▶ Conduct, with the consent of the Court, surveys and study additional research regarding racial and ethnic equity in the justice system and in the legal profession.

# GOALS/FOCUS OF CREF

The Commission's focuses include, but are not limited to:

- ▶ The existence and impact of any racial and ethnic bias and/or disparities within the judicial system and the practice of law;
- ▶ Changes to court rules, regulations, laws and/or practices to improve meaningful access to or participation in the judicial system and the practice of law by racial and ethnic minorities;
- ▶ Measures to ensure that all persons within the judicial system and practice of law refrain from manifesting bias or prejudice, by words or conduct, based on race or ethnicity;

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- ▶ Measures to address any implicit or other bias within the judicial system and legal profession;
  - ▶ The availability of effective legal representation for racial and ethnic minorities within the judicial system;
  - ▶ Measures to enhance racial and ethnic diversity in the selection, retention and promotion of judicial officers, court staff and professionals in the legal community;
  - ▶ Measures to enhance understanding of the practices, procedures and proper role of the state's courts.

# Annual Reports

- ▶ Annual reports from CREF are required to keep the Supreme Court apprised of its work and have been published to maintain a public record
- ▶ The reports generally include recommendations for new policies or changes in judicial procedures, and the CREF is authorized to implement such initiatives as approved by the Supreme Court

- ▶ CREF was originally comprised of 56 members (“Commissioners”) appointed by the Supreme Court from across the entire state and from various roles within our judicial system and the legal profession
- ▶ CREF members are attorneys, judges, law enforcement, court personnel and representatives from academia
- ▶ A broad coalition is needed to make systematic changes within the courts to ensure racial and ethnic fairness for *all* Missourians

# Leadership Structure

- ▶ The Supreme Court authorized CREF to be “led by three co-chairs along with a steering committee” made up of subcommittee chairs
- ▶ The order identifies six subcommittees, each with a different focus on the broad range of barriers to equal access and full participation for racial and ethnic minorities in the judicial process and practice of law

# Subcommittees

- ▶ **The Civil Justice and Criminal Justice Subcommittees** address the practices, procedures, rules, and statutes that result in unfair treatment of diverse litigants and defendants in our trial and appellate courts

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- ▶ **The Juvenile Justice Subcommittee** focuses on measures to address the “preschool to prison pipeline” by working with school systems, law enforcement, the public to improve training and recommending greater protection for juveniles who make un-Mirandized statements to law enforcement officers.

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- ▶ **The Municipal Justice Subcommittee** provides recommendations on improved data collection and processes to eliminate racial disparities in municipal court matters, such as traffic tickets and driver's license suspension practices across the state.

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- ▶ The **Practice of Law Subcommittee** focuses on attorney interaction with our judicial system and training to eradicate biases that adversely affect the legal profession and case outcomes.
  - ▶ **Judicial Justice Subcommittee** focuses on the improvement of internal court practices, including the training of judges and court personnel, developing diverse jury pools, and revising rules and procedures that result in disparate treatment.

- ▶ CREF created the **Data Subcommittee** and the **Public Engagement Subcommittee** at the end of 2017
- ▶ CREF charged the Data Subcommittee with:
  - ▶ Reviewing and assessing other CREF subcommittees' requests for information and data, including assessments of feasibility
  - ▶ Identifying proposed changes to case management or other data collection methods used by the judiciary

Consistent with its name, the **Public Engagement Subcommittee** is charged with:

- ▶ (1) Responding to public inquiries.
- ▶ (2) Supporting CREF subcommittee public sessions.
- ▶ (3) Serving as a conduit for the exchange of information.
- ▶ (4) Communicating the mission, priorities and work of CREF.

# SYSTEMIC RACISM Workgroup

Most recently in 2020, CREF established its Systemic Racism Workgroup.

- ▶ With representatives from each subcommittee, the Workgroup plans projects and programs to address structural racism and the overarching issues of racial bias that impede fairness throughout our judicial system.
- ▶ The Workgroup actively partners with “educators, diversity experts, law firms, and legal organizers organizations to collect data and recommend institutional changes that will combat systemic racism.”

- ▶ In January 2021, our Supreme Court granted approval for CREF, in conjunction with the law firm of Shook, Hardy & Bacon and Missouri State University, to “conduct a statewide study of racial bias in the courts. The study was proposed by CREF’s Systemic Racism Workgroup
- ▶ The approved team of attorneys and academic researchers will review available court data and procedures, conduct surveys and interviews with judicial personnel, and solicit comments from court users and the general public on incidents involving disparate treatment.
- ▶ By year end, this investigative review will result in a report with recommendations to address disparities resulting from implicit and explicit bias.

- ▶ CREF recognizes that data collection and collaboration serve largely to identify and support corrective action, which is the true catalyst for change.
- ▶ Based on information gathered during the past five years, CREF has taken affirmative steps to promote racial and ethnic fairness by recommending new or revised procedural rules and practices for Missouri courts.

## **ACTION:** *Fair treatment involves ethical considerations that strike at the heart of these reforms*

CREF recommended now enacted revisions to Rule 4-8.4(g) of the Missouri Rules of Professional Conduct, which addresses bias in and prejudice in the practice of law.

- ▶ Specifically, the revision “identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice or constitute harassment against others based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status.”
- ▶ The new provision makes attorney bias or prejudice a direct violation of the Rules of Professional Conduct, creating accountability for unfair representation based on race or ethnicity.

- ▶ Consistent with the revised conduct rules for attorneys, CREF also recommended changes to the Rules of Judicial Conduct.
- ▶ As approved by the Supreme Court, Rule 2-2.3, which generally requires a judge to “perform the duties of judicial office without bias or prejudice,” now provides more clarity in defining bias, prejudice, harassment, and improper conduct

- ▶ epithets; slurs; demeaning nicknames;
- ▶ negative stereotyping; attempted humor based upon stereotypes;
- ▶ threatening, intimidating, or hostile acts;
- ▶ suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.
- ▶ Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.

CREF's reform efforts to end inequality in the courts reach into the jury pool as well

- ▶ As recommended by CREF, our Supreme Court has adopted anti-bias jury instructions for use in civil and criminal cases
- ▶ In civil matters, the revisions to the Missouri Approved Jury Instructions ("MAI") 2.00 and 2.03(A) require that the instructions be given *before* jury selection and then reread prior to the jury retiring for deliberation
- ▶ Likewise, in criminal matters, the revised instruction in MAI 4th 400.02 and 402.01 must be given before jury selection and also included in the final instructions that the jurors take into deliberations

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- ▶ **The Civil Justice Subcommittee** has professionally produced a jury instruction video on implicit bias. The video will be available to all Missouri trial courts for the juror orientation process and will feature a diverse group of judges explaining the prejudicial dangers of unconscious bias in jury deliberations and decision-making.
  - ▶ To improve juror diversity, CREF supported draft legislation that would lower the minimum age for jurors from 21 to 18.

**ACTION:** CREF has promoted uniformity, consolidation of services, and more equitable access to justice in our state's municipal court system:

- ▶ Implemented changes include the development of operating standards for the municipal divisions;
- ▶ regularly scheduled meetings between the presiding circuit judges and the municipal divisions in their circuits to ensure compliance with standardized procedures;
- ▶ and the provision of bench cards to all municipal judges outlining relevant state law and court rules.

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- ▶ Municipal divisions are also being brought onto the statewide case management system to facilitate the tracking of case filings and related data.
  - ▶ Uniform municipal court practices promote fairness and consistency in case outcomes, regardless of the varying racial and ethnic demographics of the communities in which the municipal courts preside.

# CREF AND THE FUTURE

- ▶ Despite the unprecedented challenges of operating in a global pandemic during the past 2 years, CREF is moving forward to tackle the issues that erode confidence in the fairness of our courts.
- ▶ Among the topics currently under review, the Judicial Subcommittee is evaluating of the effectiveness of *Batson* challenges in guarding against race discrimination during jury selection.
- ▶ The Systemic Racism Workgroup is reviewing concerns about offensive displays of slavery, confederacy, and Native American history in murals and markers at Missouri courthouses.
- ▶ The Practice of Law subcommittee has surveyed over 23,000 licensed attorneys in Missouri and the raw data is be analyzed.

# FUTURE

- ▶ The Data Subcommittee is working to expand the scope of criminal and civil records that are required to include information about race or ethnicity of persons involved in particular cases. With the sustained pursuit of this collective work, the best is yet to come.

CREF is well-equipped and well-positioned to meet its goals of ensuring equal access and full participation for racial and ethnic minorities in Missouri courts.

**THANK YOU FOR YOUR TIME!**

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