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DESIGN JUSTICE IN MUNICIPAL CRIMINAL REGULATION

Amber Baylor

INTRODUCTION

Like many places in the United States, municipal courts in New Orleans, Louisiana, date back to the 1880s.¹ These small, city courts were granted, through the Louisiana’s Home Rule Charter Act, the ability to locally regulate and adjudicate low-level criminal charges.² Municipal courts hear charges against residents and visitors for crimes like trespass, public intoxication, disturbing the peace, and disrupting school classes.³ Many of these regulations are the direct descendants of the city’s Black Codes, postbellum attempts to regulate the movement and behavior of its newly emancipated Black residents.⁴ In the modern era, these crimes may be described as “Quality of Life Offenses.”⁵ Yet in 2015, the majority of municipal court fines and fees in New Orleans were still burdening Black people.⁶ Though the prosecutions occur in a different century, the impact of municipal court laws is inseparable from their original intention.⁷

From 1915 until the time of its removal in 2017, Confederate General Beauregard’s statue overlooked the City Park entrance in New Orleans.⁸ The statue stood as a reminder of the city’s violently segregated past. Residents and visitors to New Orleans’s parks and plazas could not avoid the tall figures of the city’s

1. James Kimbrough Owen, *Home Rule in Louisiana*, 45 NAT’L MUN. REV. 383 (1956).

2. *Id.*; see also Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OH. ST. L. J. 1409, 1423, 1426–28 (2001).

3. Eve Abrams, *For Many in New Orleans, Municipal Court is the Gateway to the Criminal Justice System*, NEW ORLEANS PUB. RADIO (Jan. 20, 2016), <https://www.wvno.org/post/many-new-orleans-municipal-court-gateway-criminal-justice-system-2#:~:text=A%20block%20from%20the%20Criminal,to%20the%20criminal%20justice%20system> [<https://perma.cc/KTD4-QSJG>].

4. See David F. Forte, *Spiritual Equality, the Black Codes, and the Americanization of the Freedmen*, 43 LOY. L. REV. 569 (1998).

5. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551, 557–58, 581 (1997) (stating that local policies of policing and making stops and arrests for petty crime in urban areas is referred to as “order maintenance” policing and “broken windows policing”); see also Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 804 (1999) (discussing “order-maintenance policing”).

6. MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 18 (Vera Institute of Justice 2017).

7. See Aviva Shen, *The Conflict of Interest at the Heart of New Orleans’ Courts*, THINKPROGRESS.ORG (Jan. 12, 2017), <https://thinkprogress.org/the-conflict-of-interest-at-the-heart-of-new-orleans-courts-44dc23c96508/> [<https://perma.cc/AP8Z-FS83>]; see also Abrams, *supra* note 3.

8. Amber Nicholson, *General Beauregard Statue*, NEW ORLEANS HIST. (Oct. 24, 2020), <https://neworleanshistorical.org/items/show/111> [<https://perma.cc/R39T-B9C3>].

Confederate heroes. Some people in New Orleans argued to keep the statues as reminders of the city's proud heritage or as a haunting but necessary reminder of its past sins.⁹ But many people felt differently.¹⁰ The statues, they argued, had to be removed from the feet up because their existence was inseparable from their original purpose.¹¹ Proponents of removal argued that the space could not belong to all residents as long as the Confederate heroes maintained their prominent posts along central walkways.¹² The city responded in the night, unfixing and dispersing the statues to less populated corners.¹³

As residents call for the removal of Confederate statues in New Orleans and other cities around the country, professional designers are assisting cities in re-imagining the spaces where the monuments previously stood.¹⁴ Designers are working with communities to reclaim formerly exclusionary spaces, developing new forms of participatory design that are centered on prioritizing the needs of marginalized community members.¹⁵ Design justice is an emergent form of participatory design geared towards inclusive redesign of previously exclusionary public spaces.

Law reform is a different beast than park design. Reforming the municipal court system is much less concrete than removing a statue. However, despite the difference between court reform and statue removal, design justice's contemplation of history and tools for participatory planning can help us envision and work towards more inclusive municipal court systems.¹⁶

This article explores design justice as a framework for deeper inclusion in municipal criminal court reform. Section I provides a brief summary of a typical litigant's path through modern municipal courts. This section then explores the historic role of municipal courts, the insider/outsider dichotomy of municipal criminal regulation, and the limitations of past reform efforts. Section II shifts into an overview of participatory design and discusses the new emergence of design justice. Within the discussion of design justice, the article focuses on three precepts of design justice: excavating the history and impact of the courts, creating tools for

9. See *id.*; see also Campbell Robertson, *New Orleans Removes Beauregard Statue, and Subdued Crowds Look On*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/beatregard-confederate-new-orleans-statue.html> [<https://perma.cc/D77L-92TP>].

10. See Robertson, *supra* note 9.

11. *Id.*; see also Julian Chabliss, *Don't Call Them Memorials*, FRIEZE (Aug. 23, 2017), <https://frieze.com/article/dont-call-them-memorials> [<https://perma.cc/GL62-DSDA>].

12. See Nicholson, *supra* note 8; see also Robertson, *supra* note 9.

13. Robertson, *supra* note 9.

14. *Statement on the Intersection of the Arts, History, and Community Dialogue*, AMS. FOR THE ARTS: NEWS ROOM (Aug. 18, 2017), <https://www.americansforthearts.org/news-room/arts-mobilization-center/statement-on-the-intersection-of-the-arts-history-and-community-dialogue> [<https://perma.cc/9R3A-6YQN>].

15. See *id.*; Paul Keskeys, *Can Participatory Design Save the World?*, ARCHITECTURAL DIG. (July 25, 2018), <https://www.architecturaldigest.com/story/participatory-design-open-architecture-collaborative> [<https://perma.cc/UUZ9-6XGU>].

16. See DAVID DE LA PEÑA, DIANE JONES ALLEN, RANDOLPH T. HESTER JR., JEFFREY HOU, LAURA J. LAWSON & MARCIA J. McNALLY, *Introduction*, in DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY (David de la Peña et al. eds., 2017); CYNTHIA E. SMITH, *Designing an America of the People, by the People, and for the People*, in BY THE PEOPLE: DESIGNING A BETTER AMERICA (Cooper Hewitt 2016).

participation, and finding clear and shared understandings of spatial experiences. The final section applies a design justice framework to municipal criminal regulation to create fundamental change. By implementing design justice principles, marginalized communities can strike down oppressive municipal criminal regulation that maintains the social hierarchy, and rally supporters from within and outside of the system to design an inclusive plan for change.

I. MUNICIPAL CRIMINAL REGULATION

A. A Litigant's Path through Municipal Court

Municipal courts are located in nearly every city in the country.¹⁷ In a large city like Phoenix, Arizona, the municipal court is a nine-story, red-brick building with thirty-eight separate courtrooms and over twenty judges to hear low-level misdemeanor cases.¹⁸ In a more rural area, like Montgomery County West, Ohio, the municipal court consists of one courtroom and one judge presiding over ten municipalities.¹⁹ The municipal court jurisdictions are limited to charges that do not warrant significant time in jail²⁰—the municipal courts in New Orleans, for instance, only have jurisdiction over crimes defined as misdemeanors and traffic offenses.²¹

There are many ways to find oneself in municipal court. One might receive a ticket after a stop by a police officer mandating appearance in municipal court.²² The officer may accuse the ticketed individual of intoxication in public, sleeping in public, trespass, pushing a classmate in a public school, jaywalking, or a minor traffic

17. Nat'l Ctr. for State Cts., *State Courts Web Sites*, <https://www.ncsc.org/Information-and-Resources/Browse-by-State/State-Court-Websites.aspx> [<https://perma.cc/RF5A-NFGF>].

18. City of Phoenix, *About the Court*, <https://www.phoenix.gov/court/about> [<https://perma.cc/WX25-EVT3>].

19. *The Municipal Court of Montgomery County Ohio*, <http://www.mccountycourts.org/> [<https://perma.cc/5L46-HWU5>].

20. Depending on the state's penal code, allegations of trespass, disorderly conduct, public intoxication, loitering, traffic, harassment, simple assault, and marijuana possessions could bring a person into municipal criminal court. Texas has over 1,300 fine-only offenses at the state level, and local ordinances create even more potential violations. TEX. MUN. CT. EDUC. CTR., TEXAS CLASS C & FINE-ONLY MISDEMEANORS, 2017-2019 (2017).

21. MUN. & TRAFFIC CT. OF NEW ORLEANS, <https://www.nola.gov/municipal-traffic-court/> [<https://perma.cc/L6GY-ZLLF>].

22. TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, PAY OR STAY: THE HIGH COST OF JAILING TEXANS FOR FINES & FEES 1 (2017).

violation.²³ A ticket requires the recipient to appear in municipal court to handle the charges, unless they want to send in a plea of guilt.²⁴

On paper, sentences for these crimes typically result in fines or mandated community service.²⁵ A person headed to the municipal court may not consider the trip to be very serious. However, this is a misconception: the process of resolving a ticket in municipal court can carry with it nearly all of the dangers that follow a criminal prosecution in state courts.²⁶ A conviction in municipal court results in a barrage of fees and has implications for employment, custody, housing, and immigration.²⁷ A litigant may be oblivious to the gravity of municipal court charges because a ticket appears less significant than an arrest or because they are not expected to have an attorney with them in municipal court. However, pleading guilty to a ticket for more than a violation is a true criminal conviction.²⁸

Most states interpret the Sixth Amendment to guarantee counsel only to people facing jail time; thus, an indigent litigant in municipal court has no right to an attorney.²⁹ In *Agersinger v. Hamlin* and *Scott v. Illinois*, the Supreme Court delineated the requirement for assignment of counsel and required states to provide counsel when a person is facing jail time.³⁰ Since a sentence of incarceration may not directly attach to a low-level conviction, *Agersinger* and *Scott* exempt courts with jurisdiction over fine-only offenses from having to assign an attorney to indigent

23. These are a sample of some of the charges the author and her students have represented individuals on in the Texas A&M Law Criminal Defense Clinic. See also TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 1; Ct. Watch NOLA, NEW ORLEANS CRIM. DIST., CT., MAGISTRATE CT. & MUN. CT.: 2018 REVIEW (2019) <https://www.courtwatchnola.org/wp-content/uploads/2018-Annual-Report.pdf> [<https://perma.cc/SSV3-73EN>] (enumerating Trespass, Disturbing the Peace, Etc.); SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN RURAL NEVADA: EVALUATION OF INDIGENT DEFENSE SERVICES (2018), https://sixthamendment.org/6AC/6AC_NV_report_2018.pdf [<https://perma.cc/NQL7-6S2Y>] (Nevada has two types of trial courts of limited jurisdiction: justice courts and municipal courts. Municipal courts have jurisdiction over misdemeanor cases and traffic/ordinance violations alleged to have occurred within a city limit where such courts exist.); JOHN PAWASARAT & MARILYN WALZAK, CITED IN MILWAUKEE: THE COST OF UNPAID MUNICIPAL CITATIONS 3 (2015) (enumerating disorderly conduct, driving without a license, failure to report, loitering, retail theft, resisting arrest, building code violations, noise, and littering).

24. MUN. & TRAFFIC CT. OF NEW ORLEANS, *supra* note 21; CITY OF LAS CRUCES, *FAQs*, <https://las-cruces.org/Faq.aspx?QID=220> [<https://perma.cc/K5KC-8GAE>]; SEATTLE MUN. CT., *Ticket Response Options*, <https://www.seattle.gov/courts/tickets-and-payments/ticket-response-options> [<https://perma.cc/33SQ-2J9A>].

25. TEX. MUN. CT. EDUC. CTR., *supra* note 20.

26. Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 208 (2017); TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 15.

27. Roberts, *supra* note 26, at 203; Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1097–98 (2013); TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 1.

28. MUN. & TRAFFIC CT. OF NEW ORLEANS, *supra* note 21; CITY OF LAS CRUCES, *supra* note 24; SEATTLE MUN. CT., *supra* note 24; see also *infra* RYAN KELLUS TURNER & W. CLAY ABBOTT note 36.

29. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); Roberts, *supra* note 26, at 184 (2017); Robert J. Martin & Walter Kowalski, “A Matter Of Simple Justice”: *Enactment Of New Jersey’s Municipal Public Defender Act*, 51 RUTGERS L. REV. 637, 638 (1999) (In 1997, NJ passed the first act providing for counsel in municipal court.).

30. *Argersinger* 407 U.S. at 40; *Scott*, 440 U.S. at 373–74.

litigants.³¹ Without counsel, no one is there to advise an individual about the consequences of her choices in municipal court. The litigant walks into the courtroom alone, is ushered to the prosecutor's table, and negotiates directly with the state. This direct negotiation with the prosecutor in municipal court would be outrageous in most state-level criminal courts that adjudicate state penal code misdemeanors and felonies.³² In speaking with the prosecutor, the litigant waives her Fifth Amendment right to remain silent regarding her criminal charges. The negotiation is inherently uneven. The litigant may have no idea how to challenge the charges against her or apply burdens or proof.³³ She is unlikely to know of the alternative resolutions that are available to indigent people facing a fineable offense.³⁴

After the litigant's brief conference with the prosecutor, she will be asked how she wants to move forward on her case in that courtroom.³⁵ Though she is making a decision critical to her future, there is no defense attorney in the room to offer her guidance. Her options at that stage are to plead guilty or to elect for a trial. Neither of these decisions is without consequence.

If the litigant chooses to plead "not guilty" to the ticketed charges, the next stage is a municipal court trial in which she would represent herself.³⁶ As a *pro se* litigant, she would be responsible for litigating each stage of a trial. If the litigant had an attorney, the attorney might file motions to dismiss charges based on lack of evidence—motions to dismiss require some familiarity with the criminal code and requirements of proof.³⁷ An attorney would argue suppression motions to exclude the fruits of unconstitutional or unlawful procedures³⁸ and might file motions to admit certain forms of evidence or witnesses, debate confrontation rights, or offer affirmative defenses. Legal issues that arise in lower-level misdemeanor cases often invoke complex constitutional arguments.³⁹ A case may open up the possibility of challenging vague laws under the Fourth Amendment.⁴⁰ An accusation of unlicensed vending or disorderly conduct might brush against a litigant's freedom of expression

31. Roberts, *supra* note 27, at 1097–98.

32. Roberts, *supra* note 26, at 182. In at least one case, I have represented a person in municipal court where, despite representation, the prosecution still felt very comfortable speaking directly with my represented client—in violation of the Sixth Amendment.

33. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1345 (2012).

34. DIANE DEPIETROPAOLO PRICE, COLETTE TVEDT, EMMA ANDERSSON, & TANYA GREENE, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS 14–15 (National Association of Criminal Defense Lawyers and American Civil Liberties Union 2016), https://www.aclu.org/sites/default/files/field_document/summaryinjustice2016_nacdl_aclu.pdf [<https://perma.cc/J86X-MLFD>]; TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 8.

35. Natapoff, *supra* note 33, at 1345–46.

36. See, e.g., MUN. & TRAFFIC CT. OF NEW ORLEANS, *supra* note 21; CITY OF LAS CRUCES, *supra* note 24; CITY OF GROSSE POINTE WOODS MUN. CT., <http://www.gpwmi.us/departments/mc.html> [<https://perma.cc/PT7E-SK5E>]; SEATTLE MUN. CT., *supra* note 24; CITY OF PUEBLO COLO., *Mun. Ct. Payments*, <https://www.pueblo.us/2572/ADVISEMENT-OF-RIGHTS> [<https://perma.cc/LF59-VHRP>]; RYAN KELLUS TURNER & W. CLAY ABBOTT, *THE MUNICIPAL JUDGES' BOOK* (2018).

37. See, e.g., N.M. R. CRIM. P. 7-304(F).

38. *Id.*

39. Natapoff, *supra* note 33, at 1369.

40. Livingston, *supra* note 5, at 560–61; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

guaranteed by the First Amendment.⁴¹ A ticketing and arrest for sleeping in public may impermissibly punish homeless status under the Eighth Amendment.⁴² Constitutional issues are involved and difficult for even experienced attorneys trained in litigation. It is difficult to imagine how a litigant, not trained in the law, would be able to provide justice for herself.⁴³

Predictably, the feat of trial is discouraging to a *pro se* litigant. The most well-tread path for recipients of a criminal ticket is to waive their right to trial.⁴⁴ Most litigants will opt for a quick, non-confrontational resolution to the case.⁴⁵ Typically the resolution constitutes a plea of guilty.⁴⁶ Since judges are not advisors, they may give general warnings, but the warnings are not particularized to the individual accepting the conviction. A judge may only partially advise on the consequence of a guilty plea.⁴⁷ The confines of a judge's neutral position leaves the judge unable to serve as an effective advisor to litigants.⁴⁸ Judges can only give general advisement that is untailored to the life context of the person taking the plea. Often, a litigant accepts and enters a plea with no opportunity to deliberate with an attorney and gauge the advisability of declaring guilt to a criminal charge.⁴⁹ After a plea, a litigant receives her fine and an assessment of fees, which may amount to thousands of dollars if she has more than one charge.⁵⁰ She signs paperwork and leaves the court with papers declaring new court-ordered debts.

The potential consequences of low-level criminal convictions are plentiful.⁵¹ A person may be impacted while interviewing for a potential job. If the

41. 27 C.J.S. Disorderly Conduct § 1 (1955).

42. See *Jones v. City of L.A.*, 444 F.3d 1118, 1138 (9th Cir. 2006).

43. Natapoff, *supra* note 33, at 1362 (arguing that generally, there is a lack of procedural integrity in petty offenses).

44. *Id.* at 1344 (“[I]t is the rare defendant . . . who has the personal stamina to resist the formidable hydraulic forces of the guilty plea process.”).

45. *Id.* at 1344 (Pleading is the default generally in the justice system—“in the US, pleas are not driven by evidence but institutional factors.”).

46. *Id.* at 1345–46 (“[P]eople may not perceive themselves as having a choice in the matter.”).

47. Roberts, *supra* note 26, at 185.

48. *Id.*

49. THOMAS HARVEY, JOHN MCANNAR, MICHAEL-JOHN VOSS, MEGAN CONN, SEAN JANDA & SOPHIA KESKEY, ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER (2013), <https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [<https://perma.cc/T574-BPJP>]; SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN RURAL NEVADA: EVALUATION OF INDIGENT DEFENSE SERVICES (2018) (explaining that in Nevada, uncounseled defendants often negotiate directly with prosecutors and then plea guilty); TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22; Natapoff, *supra* note 33, at 1329 (“Guilt is typically presumed in a process too rough-and-ready for the parties to develop and consider it properly.”) (quoting Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717 tbl.3 (2010)).

50. Courts are obligated to conduct a hearing for individuals unable to pay the debt prior to incarceration. Unfortunately, these hearings are not universally offered. In Texas, a study found that less than 1% of litigants had a hearing on ability to pay. People offered the hearing also may not be able to argue indigence sufficiently on their own. TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22.

51. In many places, the mere arrest will leave a person with a record. Though penalties of misdemeanor are different than misdemeanors, “the difference in collateral consequences have shrunk considerably.” Irene Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 763 (2017).

company has not adopted Fair Hiring practices, she will be screened out by a record check and dismissed as a candidate. Similarly, a student's school environment may be negatively affected by the issuance of a criminal ticket against him by a school officer. A litigant may be unable to secure housing since renter screenings may also reveal municipal court convictions.⁵² In this way, experiences of homelessness in the city may be tied to municipal court proceedings.⁵³ A municipal court conviction may re-emerge in different courtrooms and impact a litigant over child custody, immigration status, or a more serious charge in the state criminal courts.⁵⁴ In fact, it may take months or years before a person realizes the impact that a conviction will have on her life.⁵⁵

The consequences of a conviction can outweigh the actual sentence and expand the punishment beyond the rule makers' intent.⁵⁶ While a criminal record can follow anyone, it is most disruptive to already vulnerable persons. Criminal records disproportionately change the life course of people with insecure employment or housing; people who have experienced prior state involvement in parenting; or people subject to compounding forms of discrimination.⁵⁷ Most importantly, people who cannot afford an attorney in court are also unlikely to be able to pay an attorney to avail themselves of remedies such as having records expunged.⁵⁸

After a guilty plea, the litigant leaves the courthouse with papers describing unconquerable debts. Those debts can lead to time in jail—even though she was convicted of a non-jailable offense.⁵⁹ The courts' imposition of fees, on top of court-ordered fines, makes compliance with the court-ordered payments difficult for many people.⁶⁰ If a litigant is not able to summon the money quickly, these low-level charges result in insurmountable fees.⁶¹ In most municipalities, the failure to pay a fine or an additional fee results not just in the snowballing of debt but also additional

52. *Id.*

53. There has been a good deal of recent scholarship on the burden of consequences that follow misdemeanor criminal convictions. See Roberts, *Crashing the Misdemeanor System*, *supra* note 27, at 1098.

54. Natapoff, *supra* note 33, at 1325; TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22.

55. See Roberts, *supra* note 27, at 1097–98; see also Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911 (2017).

56. Roberts, *supra* note 27, at 1126.

57. See *id.*; see also Natapoff, *supra* note 33, at 1316; Joe, *supra* note 51, at 756.

58. See Roberts, *supra* note 26, at 174–75.

59. TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 1.

60. See *id.*; see also LAISNE ET AL., *supra* note 6, at 2; Shen, *supra* note 7.

61. Heather Hunt & Gene Nichol, *Court Fines and Fees: Criminalizing Poverty in North Carolina*, N.C. POVERTY RSCH. FUND, Jan. 1, 2017, https://scholarship.law.unc.edu/faculty_publications/444/ [<https://perma.cc/2R22-B5YL>]; CHRISTIAN HENRICHSON, STEPHEN ROBERTS, CHRIS MAI, AYESHA DELANY-BRUMSEY, MATHILDE LAISNE, CHELSEA DAVIS & ROSE WILSON, *THE COSTS AND CONSEQUENCES OF BAIL, FINES AND FEES IN NEW ORLEANS* (2017); PAWASARAT ET AL., *supra* note 23, at 1 (demonstrating how more money was spent on jailing individuals for failure to pay fines than would be collected in paid fines); TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 1; LAISNE ET AL., *supra* note 6; Shen, *supra* note 7.

criminal charges for a failure to follow the court order.⁶² Individuals who cannot pay on time can be picked up on warrants, charged with more serious crimes, and imprisoned.⁶³ In states that do not have public bond setting hearings, the municipal court litigant may be brought to a room in a jail full of other new arrestees.⁶⁴ There she sees a magistrate, likely communicating with the magistrate over a video feed.⁶⁵ The magistrate makes a perfunctory decision of whether to allow bail or force the respondent to remain in jail to meet obligations resulting from the ticket.⁶⁶ Just as the litigant had no attorney in the municipal courtroom, she may have no attorney with her in the jail to advocate for her release.⁶⁷ She will remain incarcerated if she cannot pay the bail bond that the magistrate sets.⁶⁸

Often, bail bonds for municipal criminal court cases are small.⁶⁹ However, small bonds paradoxically expose the inequalities embedded in low-level criminal prosecutions. Bond companies often do not feel it worth engaging in a contract for such a low amount.⁷⁰ As a result, people may remain incarcerated for want of a few hundred dollars. Thus, local jails, serving as debtors' prisons, are sites of municipal court injustice.

Finally, the inability to pay a ticket may also result in the loss of a license through surcharges.⁷¹ The loss of a license subjects people who need to drive to maintain jobs and childcare to additional criminal charges. Thus, people continue to be tethered to the consequences of the municipal criminal court.

62. In the New Orleans Municipal Court, failures to appear (FTAs) for scheduled court hearings are a routine event. See HENRICHSON ET AL., *supra* note 61, at 32. More than half of all cases in 2015 had an FTA at some point. See *id.* These FTAs lead to municipal attachments (meaning municipal court warrants), which are often listed as charges on subsequent arrests—either along with new charges or on their own. See *id.*; see also Hunt et al., *supra* note 61; PAWASARAT ET AL., *supra* note 23; TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22.

63. See e.g., TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 1; RYAN KELLUS TURNER & W. CLAY ABBOTT, THE MUNICIPAL JUDGES' BOOK (2018).

64. See e.g., *Daves v. Dallas*, 341 F.Supp. 3d 688 (N.D. Tex. 2018); Michael Barajas, *Videos of Dallas Bail Hearings Show Assembly-Line Justice in Action*, TEX. OBSERVER (Sept. 3, 2018), <https://www.texasobserver.org/videos-of-dallas-bail-hearings-show-assembly-line-justice-in-action/> [<https://perma.cc/48KA-ZXWW>].

65. See Barajas, *supra* note 64.

66. TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 14.

67. See SIXTH AMEND. CTR., *The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services* 158 (Sept. 2018) (“Yet with no defense attorney present at the initial appearance, there is no one to advocate on behalf of an indigent defendant and show good cause for their release (with or without bail).”).

68. In New Orleans, “1,153 individuals, in municipal court, spent an average of 29 pretrial days in jail because they could not pay their bail.” HENRICHSON ET AL., *supra* note 61, at iv.

69. See MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 5 (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [<https://perma.cc/J7CF-DKHH>]; see generally TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22.

70. See MENENDEZ ET AL., *supra* note 69, at 30.

71. See e.g., TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 17.

B. History of Municipal Criminal Regulation

Our criminal laws are normatively understood to reflect community values.⁷² The dominant narrative that places value in municipal criminal regulation will persist unless we engage in critical historical examinations of the United States' local criminal laws. Many believe that municipal criminal laws appropriately stigmatize wrongdoers. It follows that punishment is justified to deter, to incapacitate, or at best to rehabilitate the wrongdoer. A historic examination of criminal regulation unearths more sinister, original motives for municipal criminal regulation. Enforcement of municipal crimes, at its outset, was intentionally aimed at subjugating minority communities.

Neutralizing the origins of low-level criminal enforcement makes it impossible for decision-makers to understand how this history impacts people today. For instance, most histories of United States criminal regulation acknowledged Black Codes—a set of laws against vagrancy, unemployment, and minor crimes directed at Black people.⁷³ These laws existed in postbellum United States, particularly in the South, to prevent Black assimilation.⁷⁴ Yet, until recently, the origins of the laws were mischaracterized as a response to the recklessness, poverty, and lack of structure of newly freed people.⁷⁵ Widely espoused mischaracterizations of history allow for maintenance of the status quo.

The history of misdemeanor criminal regulation informs how litigants experience municipal courts today. In the years following emancipation, jurisdictions began enacting criminal statutes for low-level crimes that had never previously existed: loitering, public disturbance, failure to pay transit fees, obtaining goods under false pretenses, abusive language, gaming, and possession of alcohol. Charges of these new crimes were brought in “informal local courts.”⁷⁶

Prosecutions of these new crimes targeted Black people. In fact, these small crimes were created in order to prevent equality for Black communities and to exact labor from Black people that the landowners could no longer get for free.⁷⁷ Black people were arrested on suspicion that they might have a warrant out in some jurisdiction.⁷⁸ They were almost always unrepresented. In court, efficient adjudication was prioritized and bringing witnesses or challenging charges came with disincentives. Fees were levied. When people could not pay the fee, they were sentenced to free labor or the city would contract with a company to pay the municipality for the person's labor. Some members of the Black community, and White advocates, tried to publicize the issue nationally. However, race-fatigued

72. Natapoff, *supra* note 33, at 1366 (noting that a “conviction” is a statement that one did something wrong, but this statement is really socially constructed).

73. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 5 (Anchor Books 2009).

74. *Id.* at 56 (By the end of Reconstruction, every former Confederate state—except Virginia—had convict leasing. There was a forty-five percent mortality rate in Alabama's leasing system in its fourth year.).

75. *Id.*

76. *Id.* at 5.

77. *Id.*

78. *Id.*

White Americans in the North were not as interested in continuing to fight for equality post-bellum.

These new, low-level charges had huge consequence. Convicted people unable to pay fees were forced to become free sources of labor, which undercut job growth and potential union development. These prosecutions kept Black people from benefitting from the industrial revolution.⁷⁹ The indentured laborers made money for localities and—after Black people were disenfranchised post Reconstruction—legislators did not have to worry about a backlash from Black people affecting elections.⁸⁰

In the twentieth century, during the civil rights era, small courts adjudicated misdemeanors related to protest and dissent. People arrested at sit-ins and marches were brought to “city courts” or “police courts.” The accused were charged with public disturbance, trespass, or parading without a permit.⁸¹ The apartheid aims of these prosecutions were shrouded in low-level laws. People were arrested because they violated local regulations. The courts, the jails, and the local laws were all mechanisms for maintaining structures of racial hegemony, discouraging movement across racial lines, and warning outsiders against interference.⁸²

Recent civil rights lawsuits demonstrate that vagrancy and trespass charges disproportionately target Black people—and that these claims by police are often used to justify investigatory stops.⁸³ The laws emerged at the time of Black Codes; however, the control levied *then* and implications for Black public life *now* are indistinguishable. The historic wounds caused by adjudications in these courts still resonate with many. And these prosecutions often epitomized the worst ways localities embraced their very-codified prejudices.⁸⁴

As legal scholar Paul Butler points out, these types of prosecutions have been at the heart of policing communities of color since slavery—slave patrols quickly transformed into patrol vans seeking out the most minor of charges.⁸⁵ The locality could then levy their discretion to control the well-being, labor, and freedom of Black communities after slavery. Many of the low-level criminal offenses charged today are rooted in zero-tolerance policing and involve crime-mapping, defensible space, and anti-gang injunctions.⁸⁶ Commentators have found that the increase of

79. *Id.* at 92.

80. *Id.* at 93.

81. See *Boynton v. Virginia*, 364 U.S. 454, 456 (1960); Martin Luther King, Jr., *Letter from a Birmingham Jail*, STAN. UNIV., 8, http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf [<https://perma.cc/J9RM-QWP3>] (charged with parading without a permit); Livingston, *supra* note 5, at 598–99.

82. See Livingston, *supra* note 5, at 596–97 (recounting how vagrancy charges in municipal courts resulted in guilty findings without a semblance of a trial); see also *Boynton*, 364 U.S. 454.

83. See Complaint at 2, *Hightower v. City of Grand Rapids*, 256 F. Supp. 3d 742 (W.D. Mich. 2017) (No. 1:13-cv-00469) (challenging discriminatory trespass arrests); *Kohr v. City of Houston*, 4:17-CV-1473, 2017 WL 6619336 (S.D.Tex. Dec. 18, 2017).

84. See Livingston, *supra* note 5, at 597.

85. PAUL BUTLER, *CHOKEHOLD* (2017).

86. Roberts, *supra* note 5, at 778–79.

minor crime arrests of poor people or minorities often aligns with city revitalization planning.⁸⁷

As with the legacies of Confederate monuments, the desire to change municipal courts must recognize the legacy that prosecution of these laws has left within many communities. These discriminatory practices do not just exist in the imaginative space of those targeted by the laws. The origins of these criminal regulations are still present in the practices of municipal rule makers, police departments, and local courts. To change how municipal courts regulate and sanction, we must address this history and acknowledge its impact.⁸⁸

C. Realities of Localism—Insiders and Outsiders to Municipal Criminal Regulation

Localism, or regulation through local institutions, in its idealized form allows for the people affected by institutions to create the rules for managing them. Proponents of localism trust local officials to best address community needs; localism is at the core of democratic ideals.⁸⁹ But the idea that in all cases “local decision-making promotes citizen involvement and optimizes responsiveness to local needs” is a myth.⁹⁰

Even at the very local level, criminal regulations are not fully representative of resident experiences. When a portion of municipal residents push for an increase in municipal criminal legislation, historically disenfranchised and marginalized groups within that community tend to disproportionately suffer based on their status and vulnerability to policing and the courts.⁹¹ Traditional municipal regulatory schemes regularly fail those that request more police oversight.⁹² Localism in and of itself has always posed a danger for minority groups marginalized or undervalued within a community.⁹³

87. See e.g., Katherine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL CRIMINOLOGY 5, 17, 20 (2008) (casting urban control as spatial governmentality and criminal regulation to contain populations). See also BUTLER, *supra* note 85, at 75 (One study looked at San Francisco’s efforts to attract the creative class, which resulted in a significant increase in order-maintenance arrests. Loitering charges increased by almost three-hundred percent.); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419, 1422 (2016).

88. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 414, 468 (2018).

89. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 622-23 (1997) (localism centers desires of local residents in decision-making); *id.* at 626-27 (localism prioritizes the locality’s identity—an identity separate from state or federal government).

90. Logan, *supra* note 2, at 1410, 1449-51.

91. See *id.* at 1457-58; Roberts, *supra* note 5, at 828 (“Proposals for increased Black control over criminal justice decision making that threaten white supremacy, on the other hand, are soundly condemned as radical nonsense.”).

92. See generally Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 973 (2016).

93. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2027 (2000).

1. *Insiders and Outsiders*

In describing individuals' access to policy-making, people within communities are often distinguished as "insiders" or "outsiders."⁹⁴ This dichotomy has been applied to local regulation in the realm of municipal criminal courts.⁹⁵ "Insiders" make decisions or affect the considerations of decision makers. At the local level, the standard policy-making insiders consist of people in the mayor's office, the mayor's appointees, elected council people, and those appointed or voted onto regulatory boards. The term "insiders" also includes local business owners, home association leaders, and residents with the resources and time to engage in local politics. "Outsiders" are community members who are denied access to decision making bodies or do not carry much influence with decision makers on issues affecting their needs.⁹⁶ Historically disenfranchised communities are most heavily represented in the outsider groups. In the municipal court context, outsiders are more likely to be entangled in the municipal courts. Thus, those most affected by municipal criminal regulation are unlikely to have been engaged in the process of municipal rulemaking.⁹⁷ For example, minors are rarely in the group of traditional rule makers—local elected or appointed officials—and are rarely able to elect these rule makers. Yet, young people of color are heavily impacted by local regulatory policing, especially in-school policing.⁹⁸

Municipal rule-makers are unlikely to have the same experience as "outsiders." Rule makers and judges often travel differently through the world than the indigent litigants in municipal courtrooms.⁹⁹ In some instances, decision-makers have never been to the geographic sites where the local criminal law is applied—they may not live or operate within neighborhoods with intensive policing in their local municipality.¹⁰⁰ For example, a judge may assume that people can travel freely or easily in their own neighborhood; however, that assumption is based on one,

94. William A. Maloney, Grant Jordan & Andrew M. McLaughlin, *Interest Groups and Public Policy: The Insider/Outsider Model Revisited*, 14 J. OF PUB. POL'Y 17, 18–19 (1994) (The authors critique the paradigm but define the terms as "insider groups enjoying some sort of privileged access to (and advanced intelligence on the thinking of) decision-makers, and outsiders who did not."). See also, e.g., Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 94 N.C. L. REV. 1597, 1599. Logan instead explains that community members who abide by the law may view themselves as "insiders" and those who violate laws as "outsiders." Logan, *supra* note 2, at 1445.

95. See Logan, *supra* note 2, at 1418.

96. Maloney et al., *supra* note 94, at 25.

97. Logan, *supra* note 2, at 1454 (noting that commentators, led by Kahan and Meares, argue that local governments are more racially inclusive than in the past).

98. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 402 n.51 (2016) ("For instance, some scholars have highlighted the tendency of community policing efforts to exclude the most marginalized and disadvantaged people in their meetings and interactions with 'stakeholders'—particularly youth.).

99. See *id.* at 442–43 ("Surely judges do not intend to substitute their own individual views for those of all of society; but without access to information about society's views of particular practices, they are left with their own impressions of what society considers reasonable."). Some judges may experience this type of profiling—but many likely have superior experiences negotiating these stops through manifestations of status. They will not be likely to be pulled in and arrested on a low-level ticket. And it would be rare for them to be transferred to or remain in jail because they cannot pay a fine, fee, or bail.

100. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 UNIV. OF PA. L. REV. 607, 609 (1997).

limited experience of space. The application of criminal law in many communities interferes with this assumption. Or, within the same geographic sites, “insiders” and “outsiders” may have different experiences of municipal policing. On the same street, one individual may walk peacefully, blissfully unaware that others on that street remains on subconscious alert to potential police encounters.¹⁰¹ People find the streets of their neighborhood to be welcoming or unwelcoming depending on whether they are policed as an “outsider.”¹⁰² The experience of municipal court itself for poorer, unrepresented laypeople is drastically more complex than rule makers often imagine. For instance, a local judge may not be attuned to the difficulty of taking time off from a low-wage job to travel to a courthouse multiple times for a case.¹⁰³

Many insiders have no experience of jail time. Unlike those with positions as legislative and judicial decision-makers, people without money are much more likely to end up in jail for minor municipal crimes.¹⁰⁴ Jails in many cities are overflowing beyond capacity with people charged and convicted of minor crimes. Though the charges leading to incarceration are minor, city and county jails often have worse conditions than prisons.¹⁰⁵ Jail conditions have been fatal for people incarcerated for minor offenses.¹⁰⁶ Jail can cause irreparable harm to mental health,

101. See Simonson, *supra* note 98, at 443 (“[C]ommunity policing’ happens on the terms of the elite. Police departments and other state actors decide which community residents to consult, when and where to consult them, and the goals of those consultations.”). Studies have determined that Black people who were stopped are less likely to be arrested than white people. This is because police frequently use excuses to stop a black person whereas police are more likely to stop a white person for something that is actually suspicious, which leads to an arrestable offense. Andrea J. Ritchie, *Black Lives Over Broken Windows*, PUB. EYE, Spring 2016, at 4, 9, <https://www.politicalresearch.org/2016/07/06/black-lives-over-broken-windows-challenging-the-policing-paradigm-rooted-in-right-wing-folk-wisdom> [<https://perma.cc/K9GN-EV2M>] (describing some daily indignities of broken windows policing even where no conviction results—for example, being frisked in front of neighbors and spending hours in a police precinct).

102. Experiences of trauma in a space can further “change the spatial dynamics of environment.” Bryan Lee Jr., *How to Mark an American Atrocity*, CITYLAB (May 15, 2018, 1:26 PM), <https://www.bloomberg.com/news/articles/2018-05-15/the-brutal-truths-of-the-national-lynching-memorial> [<https://perma.cc/NVV3-TP5G>] (discussing the impact of lynching on the visual environment). See also Ritchie, *supra* note 101 (describing community organizations connecting police violence to broken windows policing). Communities may also be intentionally unfriendly to nonresidents, or visitors, to discourage their presence. Some traffic regulations—such as speed traps—may be particularly aimed at visitors to an affluent community. These socioeconomic, and often historically racially drawn, geographic divides are reinforced by municipal laws and policing that protects insular communities. Territorial policies and practices that discourage minorities from being in a space result in long-term harm to members of unwelcome groups. See Elise Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 406–07, 442 (2010); Roberts, *supra* note 5, at 788 (“Restricting people’s freedom of movement is a form of political subjugation.”).

103. See Ritchie, *supra* note 101.

104. *Id.*

105. Natapoff, *supra* note 33, at 1321–23. See also Adam Ferris, *Death of Cuyahoga County Jail inmate subject of criminal investigation: What we know about 7 jail deaths*, CLEVELAND.COM (Sept. 19, 2019), <https://www.cleveland.com/news/erry-2018/11/12db721f324418/death-of-cuyahoga-county-jail.html> [<https://perma.cc/JVG5-XGM2>]; Dan Solomon, *There is Video of Sgt. James Brown’s Final Moments in an El Paso Jail*, TEX. MONTHLY (May 20, 2015), <https://www.texasmonthly.com/the-daily-post/there-is-video-of-sgt-james-browns-final-moments-in-an-el-paso-jail/> [<https://perma.cc/M4AE-ENSS>].

106. Natapoff, *supra* note 33, at 1323.

particularly for people with existing mental health concerns.¹⁰⁷ Poor conditions in jails are exacerbated when they become crowded from indiscriminate use of incarceration in pursuing fines and fees.¹⁰⁸ In many places, individuals will be vulnerable to immigration detention and deportation agents while in jail.¹⁰⁹ People lose parenting rights, housing, and employment due to incarceration on minor offenses.¹¹⁰

Yet municipal criminal rule makers have little insight into the experience and consequences of jail. Often those who wind up in jail on the lowest level offenses are unable to afford an attorney. And since there is no attorney assigned to clients facing low-level charges, attorneys are unable to act as initial reporters in jails or other sectors where adjudication of indigent people occurs.¹¹¹ Which begs the question, without these insights, how can decision-makers fairly assess whether the experience of jail leads to a disproportionately punitive result for these minor crimes?

Thus, the challenge is how to demand more space for inclusion within municipal criminal regulation. The aim of inclusion is not just more local participation, but also centering the concerns of affected peoples—who are often outsiders in the system. Inclusion acknowledges that the experiences of traditional policymakers may reflect a narrow slice of experience and can blind them to the realities of other lives within the municipality.¹¹² Infusing the rulemaking space with more perspectives makes clear how the legislation’s narrow focus assesses benefit and detriment through the lens of the privileged sectors.¹¹³ Inclusion requires grappling with different lived experiences.¹¹⁴ It is necessary for accountability— but also for true deliberation. People cannot deliberate about concerns that are missing from the conversation.¹¹⁵

107. See generally AZZA ABUDAGGA, SIDNEY WOLFE, MICHAEL CAROME, AMANDA PHATDOUANG & E. FULLER TORREY, *INDIVIDUALS WITH SERIOUS MENTAL ILLNESSES IN COUNTY JAILS: A SURVEY OF JAIL STAFF’S PERSPECTIVES* (2014), <https://www.treatmentadvocacycenter.org/storage/documents/jail-survey-report-2016.pdf> [<https://perma.cc/T4SB-2TGZ>]; *Jailing People with Mental Illness*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Advocacy/Policy-Priorities/Divert-from-Justice-Involvement/Jailing-People-with-Mental-Illness> [<https://perma.cc/EQE9-768W>].

108. ABUDAGGA ET AL., *supra* note 107.

109. See, e.g., S.B. 4, 85th Leg. (Tex. 2017).

110. See, e.g., Eli Hage and Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, THE MARSHALL PROJ. (Dec. 2, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [<https://perma.cc/P2KF-N6UF>].

111. In Texas, as of 2019, most counties did not have open bail settings. Attorneys typically do not appear until the first court appearance after bail is set. TEX. APPLESEED & TEX. FAIR DEF. PROJECT, *supra* note 22.

112. Smith Futrell, *supra* note 94, at 1608 (“[D]ominant narratives or stock stories are deeply embedded in the legal standards and interpretation and have a powerful, subordinating effect on marginalized groups.”).

113. *Id.*

114. Simonson, *supra* note 98, at 435–36. Agonism allows parties and affected community members to approach community engagement as an equalizing process by appreciating the conflict inherent when plural societies engage in decision making. *Id.* at 397.

115. Jaime Alison Lee, *Can You Hear Me Now?: Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL’Y REV. 405, 409–10 (2013) (“The involvement of marginalized stakeholders is especially critical to accountability. Marginalized stakeholders are uniquely positioned to offer new information, perspectives, and ideas, as well as to serve as a check on more established actors who might otherwise use New Governance processes to further regulatory capture.”).

2. *Dangers of Discretion*

Low-level misdemeanor criminal regulation is where discrimination within the criminal legal system is at its most evident. Much of this is tied to the discretion actors have to determine who is engaged in criminal activity and who engaged in harmless activity. There is more discretion at each stage in the adjudication of low-level municipal crimes than in the adjudication of higher-level misdemeanors and felony offenses.¹¹⁶ Many of the crimes that fall within municipal jurisdiction are *malum prohibitum*—regulatory offenses that do not involve a victim or a civilian complaint. Some do not fit our image of a “crime.” Many such charges may appear as a civil violation in one jurisdiction, and a crime in a neighboring municipality.¹¹⁷ Where it is a crime, there may be only a degree of difference between criminal and innocent behavior. For instance, it is difficult to gauge whether protestors are criminally obstructing a pedestrian pathway or lawfully congregating.¹¹⁸ Police, prosecutors, and judges in these instances have wide discretion to determine what situations fall inside or outside of the bounds of criminal law.¹¹⁹ The police use their discretion when identifying activity as an ordinance or penal code violation; prosecutors use their discretion when deciding that a violation warrants prosecution; and judges use their discretion when finding that the necessary elements exist to prove a municipal offense.

The police make independent, and often biased, assessments of who is violating criminal laws and who is only subject to civil liability or less.¹²⁰ In some instances, low-level municipal crimes—like obstruction of a pedestrian walkway—suffer from vagueness in that a potential offender may be unable to tell lawful activity from criminal activity and may be subject to highly discretionary enforcement.¹²¹ Other common traffic crimes—such as failing to signal, rolling stops at stop signs, and wide turns—require police to enforce the law somewhat arbitrarily, since they are unable to stop all offenders. Enforcement of basic traffic crimes is demonstrably prejudicial yet continues to be legal.¹²² Often police officers use the stops to conduct investigations for other suspected crime—a practice that has been

116. Natapoff, *supra* note 33, at 1317 (There is a “correlatively heightened influence of law enforcement discretion as offenses get pettier and defendants grow poorer.”).

117. One example, among many, is how different municipalities within the same state may handle dog leash laws. *See, e.g.*, Rebecca F. Wisch, *Brief Summary of State Dog Leash Laws*, ANIMAL L. WEB CTR., <https://www.animallaw.info/intro/dog-leash-laws> [<https://perma.cc/R8JC-4LGS>] (explaining that states may give municipalities the ability to decide if and how to legislate dog leashing).

118. *See, e.g.*, DUPONT, WASH., MUN. CODE § 9.17.030 (2020), <https://www.codepublishing.com/WA/DuPont/html/DuPont09/DuPont0917.html> [<https://perma.cc/WK3Z-7U4S>].

119. Quality of life offenses are selectively enforced. Ritchie, *supra* note 101 (“[L]aws that are widely violated . . . especially lend themselves to selective and arbitrary enforcement.” (quoting Charles Reich)).

120. *See id.* Between 2001 and 2013, eighty-one percent of people charged with violations in New York City were Black or Latinx. *Id.*

121. *See* Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS W. L. J. 261, 267 (2002) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (finding vagrancy ordinance unconstitutionally vague)).

122. *Rethinking Traffic Stops*, NPR (Feb. 9, 2019, 7:57 AM), <https://www.npr.org/2019/02/09/692955849/rethinking-traffic-stops> [<https://perma.cc/9EEZ-MCBL>] (interviewing Frank Baumgartner, professor of political science at the University of North Carolina of Chapel Hill).

deemed lawful under the federal constitution.¹²³ During these stops, officers can legally conduct preliminary investigations, less-invasive searches, and interrogations.¹²⁴ In line with their general mission, the police are seeking out crime in the way regulators, local policy, and departmental training have promoted.

Stops often target people based on stereotypes and reflect societal biases about who is criminal, which communities need to be controlled, and whose loss of freedom is significant.¹²⁵ These biases directly affect the policing of municipal criminal laws and lead to the increased targeting of people of color, people whose identity does not conform to traditional gender norms, and people who are clearly impoverished.¹²⁶

An example of allowances for police discretion can be found in Texas's disorderly conduct statute, which may be adjudicated in a municipal court. According to the Texas penal code, a person engages in disorderly conduct if that person "[i]ntentionally or knowingly uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace."¹²⁷

An officer, upon a report or observation, must decide whether or not to cite an individual. The officer first evaluates whether the act included prohibited language—an assessment based on the officer's own cultural context and the assumed intent of the speaker.¹²⁸ The police officer then decides if they think that the person's use of language is likely to cause a disruption. When the language is aimed at the officer, they might make this assessment based on whether the act disrupted their policing duties.¹²⁹ Then, the officer determines whether or not the language they've heard is worth the intervention of criminal law.¹³⁰ As an incentive to arrest, an allegation of disorderly conduct—or any crime—provides the opportunity for an officer to detain and search a person.¹³¹

In this example, discretion then passes on to municipal prosecutors who review police interventions and decide whether the disorderly conduct allegation

123. *Whren v. United States*, 517 U.S. 806 (1996); Livingston, *supra* note 5, at 629 (explaining that courts have difficulty applying laws equally and avoiding selective enforcement.).

124. *See Whren*, 517 U.S. at 811–12.

125. Roberts, *supra* note 5, at 783.

126. Ritchie, *supra* note 101, at 7 (noting that quality of life offense are selectively enforced).

127. TEX. PENAL CODE ANN. §42.01 (2007).

128. Ritchie, *supra* note 101, at 7 (what is considered “disorderly” or “lewd” is in the eye of the beholder); Livingston, *supra* note 5, at 619 (public order laws invite police to make judgements about application based on middle-class norms).

129. *See* Christy Lopez, *Disorderly (mis)Conduct: The Problem with “Contempt of Cop” Arrests*, AMERICAN CONSTITUTION SOCIETY (June 2010), http://cdn.ca9.uscourts.gov/datastore/library/2015/08/10/Velazquez_ContemptOfCop.pdf [<https://perma.cc/S6BS-JPLN>]; *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (holding the arrest of a man for being loud and boisterous “unconstitutional”); *Johnson v. Campbell*, 332 F.3d 199, 213–14 (3rd Cir. 2003) (holding that the man was improperly arrested for disorderly conduct after cursing in front of the arresting officer).

130. Natapoff, *supra* note 33, at 1317.

131. *See Whren v. United States*, 517 U.S. 806 (1996) (noting that officers are permitted to make pretextual stops and searches).

warrants prosecution.¹³² Prosecutors are likely to credit the impressions of officers at the scene rather than a person they have not met or that they met in handcuffs after an arrest. Judges too have some discretion when faced with the question of whether to find a crime constitutionally sound, sufficiently charged, and proven—this is especially true when judges are adjudicating charges on the edge of criminal and non-criminal regulation.¹³³ This problematic discretion persists in part because the adjudication of misdemeanors is largely invisible because the processes are informal and the system keeps poor track of the proceedings.¹³⁴

D. Deconstructing “Neutral” Impacts of Municipal Criminal Regulation

To a rule maker—distanced from the experience of people affected—regulations can appear to be neutral and non-discriminatory.¹³⁵ Norms are how people construct appropriate behavior and responses to an environment. In our society, norms are based on the experiences of wealthier people. Accordingly, norms devalue the actions, reactions, and lives of the poor and characterize them as deviant.¹³⁶ “Normal” people are not ticketed, or they resolve their tickets quickly while incurring as little stigma as possible. “Deviant” people are prosecuted, fail to appear at weekday court appearances, earn lasting convictions and fines, fail to pay fines, and go to jail.

Repeat offenders are considered particularly deviant within municipal criminal regulation. Individuals with open cases and outstanding warrants on low-level offenses are more likely to be arrested if found in violation again.¹³⁷ They receive compounding charges for open cases. Minor charges can stack into higher level charges and the fines and fees for people who cannot pay will continue to compound until they tower over the charged individual.¹³⁸ From the perspective of police, judges, or local legislators, these people are flaunting the law. Through the lens of experience of those arrested, their lack of ability to financially resolve prior cases has resulted in an impossible situation.¹³⁹

Rule makers and the institutions they inhabit also often benefit from the collection of fees and fines. Municipal courts appear to make money for many cities’

132. See Roberts, *Crashing the Misdemeanor System*, *supra* note 27, at 1092, 1108 (noting that prosecutors decline to prosecute more felonies than misdemeanors); Natapoff, *supra* note 33, at 1328, 1337–39 (noting that prosecutors may screen charges based on officer allegations and petty offenses screening can be nonexistent).

133. Natapoff, *supra* note 33, at 1328 (acknowledging that judges are pressured to resolve pleas and move the docket).

134. *Id.*, at 1329–30.

135. Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through the Physical Design of the Built Environment*, 124 *YALE L. J.* 1934, 1948 (2015) (citing Richard Thaler & Cass Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3 (2008) (“[There is] no such thing as ‘neutral’ design.”)).

136. SHARON E. SUTTON & SUSAN P. KEMP, *THE PARADOX OF URBAN SPACE: INEQUALITY AND TRANSFORMATION IN MARGINALIZED SPACES* 260 (2011) (describing the imposition of hegemonic norms).

137. TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 1.

138. *Id.*

139. See *id.*

coffers.¹⁴⁰ Court fees cover some of the court's expenses—such as the hearing, the officer's time, and the clerks' work.¹⁴¹ Fees are written up as though they solely pay for court costs, but often fees also contribute to other municipal budgetary needs.¹⁴² Furthermore, municipal revenue is not a distributed resource: Municipal revenue is disproportionately “hoarded” by wealthier communities represented in local rulemaking processes.¹⁴³ Those with power are not likely to give it up rather than use it for their own benefits.¹⁴⁴

In some instances, the pursuit of fines cost cities more than it would to waive costs.¹⁴⁵ Additionally, the costs to a community of pursuing these fines can include families scrambling to find money to pay bonds, an individual losing a job, a family being kicked out of an apartment, and whole groups of people feeling unsafe in public spaces. These costs may not seem immediately relevant or connected to how courts operate, but they are the costs that litigants with little financial resources pay.

E. Efforts at Municipal Court Reform

Historically, municipal courts in this country have been the bodies that adjudicate crimes related to dissent. These small, local courtrooms have played an integral role in the sentencing of people arrested for sit-ins or for violating apartheid ordinances.¹⁴⁶ However, agencies around the country that are responsible for court reforms dedicate little space to excavating the history of “quality of life” policing, the profits municipalities have made from Black people for low-level offenses, and other historically racialized uses of municipal courts.¹⁴⁷ The creation of ordinances and policing within municipalities is inextricable from efforts to exert control over marginalized communities. Forgetting history is not just an oversight; it renders certain experiences of history invisible. Such sidelining of marginalized experiences results in ineffective reforms.

Criminal regulation within the municipality generally trends in one direction: towards more criminal controls.¹⁴⁸ It is much easier to get the municipal rulemaking bodies to create a new criminal law than to decriminalize an existing

140. Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 *YALE L. & POL'Y REV.* 93, 105 (2015).

141. See TEXAS APPLESEED & TEXAS FAIR DEFENSE PROJECT, *supra* note 22, at 31.

142. See Marsh & Gerrick, *supra* note 140, at 99.

143. SUTTON & KEMP, *supra* note 136 (Under the banner of local control, resource-rich municipalities were able to hoard opportunities at the expense of other more needy ones, thus “reinforc[ing] and redefin[ing] local control in such a way as to retrench and eventually undermine the scope and promise of civil rights.”)

144. See Lee, *supra* note 115, at 415–16 (“[It is difficult to] overcome cognitive and other biases that protect the status quo, and to sacrifice selfish interests in favor of policies that benefit less powerful groups or some notion of the public good.”)

145. See Jeffrey Selbin, *California Needs to End All Collection on Juvenile Detention Fees*, *L.A. TIMES* (Sept. 11, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-selbin-juvenile-fees-sb190-20180911-story.html> [<https://perma.cc/Z8W2-6XPZ>].

146. See, e.g., *Boynton v. Virginia*, 364 U.S. 454 (1960).

147. See Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 *WM. & MARY L. REV.* 1171 (2016).

148. Logan, *supra* note 2, at 1433–35.

one.¹⁴⁹ Campaigns to increase criminal regulation are not matched by analogous efforts for more police oversight or procedural protections in municipal courts.¹⁵⁰

Most municipal courts systems around the country implemented some reform efforts in the last three years.¹⁵¹ Some reform efforts have attempted to combat deep systematic problems. Many—though not all—municipal judges are now very aware of lasting problems with local criminal regulation. Some courts have made intentional efforts to accommodate vulnerable groups that appear in the courts. These efforts appear in many forms: advice clinics, waivers of fees for indigent litigants, amnesty from warrants, or online systems for resolving matters and paying fees.¹⁵² These are improvements, but reforms can miss vital needs by not including indigent people who have been directly affected by municipal court regulation in the planning processes.¹⁵³ While some benefits are undoubtedly accrued through these efforts, such reforms may only reach portions of a community, may have inadvertent detrimental effects, or may not tap into the core problems.

One such reform effort can be seen in the Department of Justice’s investigation into Ferguson’s courts. While this investigation certainly spurred discussions about debtor’s prisons across the country,¹⁵⁴ critics point out that the changes to Ferguson’s courts were distanced from the voices of people who had been harmed by the courts.¹⁵⁵ Ultimately, the reforms did not substantially meet the core objectives of the Black Lives Matter movement and others calling for change.¹⁵⁶

149. *Id.*, at 1433–34.

150. *Id.*, at 1435.

151. Marsh & Gerrick, *supra* note 140.

152. See, e.g., Austin Mun. Ct., *Austin Driver’s License Recovery Clinic*, https://austintexas.gov/sites/default/files/files/Municipal_Court/Flyer_11-13-17.pdf [<https://perma.cc/99WU-FYW8>] (describing local clinic at the courthouse); TEXAS MUNICIPAL COURT EDUCATION CENTER, *THE MUNICIPAL JUDGES’ BOOK 207* (2020) (outlining indigence hearings); Shahla Farzan, *Municipal Court Will Forgive Outstanding Warrants For 3 Days — No Questions Asked*, ST. LOUIS PUB. RADIO (Mar. 2, 2019, 4:25 PM), <https://news.stlpublicradio.org/post/municipal-court-will-forgive-outstanding-warrants-3-days-no-questions-asked> [<https://perma.cc/8HJV-8RPF>] (advertising a warrant forgiveness program); Steven St. Vincent, *A Day in Court Without Leaving Home*, PHILADELPHIA CITIZEN (Oct. 12, 2016), <https://thephiladelphiacitizen.org/court-innovations-matterhorn-handle-court-cases-online/> [<https://perma.cc/E84V-LH5C>] (noting online payment systems implemented in Ohio and Michigan).

153. SUTTON & KEMP, *supra* note 136, at 77 (“Here, the contrast between richly detailed practical knowledge (residents’ perspectives and experiences of their communities) and the simplified accounts of those communities imposed through the agency of state power becomes visible.”).

154. See Marsh & Gerrick, *supra* note 140.

155. See Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460 (2018); Sunita Patel, *Toward Democratic Police Reform: A Vision for ‘Community Engagement’ Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 973 (2016); Kimberly Jade Norwood, *Recalibrating the Scales of Municipal Court Justice in Missouri: A Dissenter’s View*, 51 WASH. UNIV. J. L. & POL’Y 121 (2016).

156. See Akbar, *supra* note 155; Patel, *supra* note 155; Norwood, *supra* note 155 (stating that race and economic status are part of what drive the dysfunction in the municipal court system); Thomas Harvey & Kathleen Heath, *For-Profit Policing, Municipal Courts, and Human Rights Violations*, 42 HUM. RTS. 24, 24 (2016) (noting concerted efforts to control black lives and maximize revenue).

II. DESIGN JUSTICE

A. Overview of Traditional Participatory Design

Participatory design is a design strategy that prioritizes user experience.¹⁵⁷ Within European-derived traditions, architecture and planning has been treated as the province of formally-trained professionals.¹⁵⁸ It is assumed that formally-trained professionals would design the most useful, aesthetically pleasing structures for the community.¹⁵⁹ Participatory design, in its idealized form, rebukes this tradition. Instead, “participation” is viewed as a utilitarian and morally necessary component of design.¹⁶⁰ According to participatory design theory, only users and intended users can provide the history and understanding of experience, need, and future goals necessary.¹⁶¹ A public space’s success is evaluated largely on its usefulness to the general public; the sentiments people attach to a space; its avoidance of common harms; and its inclusive nature.¹⁶² In this paradigm, the more information designers have from the public, the better the ultimate product.¹⁶³

The moral basis of participation design is its equity practices. Equity requires that designers seek participation from the people least likely to be incorporated in traditional decision-making processes.¹⁶⁴ Designers working in this area note that the first step in a design project is to identify historic oppression of communities.¹⁶⁵ Equity practices also ensure that the final product incorporates more than just the objectives of enfranchised community members.¹⁶⁶ Thus, a designer may seek guidance from children, people who feel unwelcome in a space, people who speak different languages, or community members who never attend traditional municipal meetings.¹⁶⁷

The “charrette” is a standard process employed in participatory design. In the classical sense, a charrette was the process of collecting art student design proposals for a project.¹⁶⁸ In common usage today “charrette” describes a process

157. See generally Diana R. Sherman, *Participatory Parks Planning: Exploring Democratic Design as a Tool to Mediate Cultural Conflict Over Neighborhood Green Space* (June 2005) (M.A. Thesis, M.I.T.) (on file with the university).

158. See generally *id.*

159. See generally *id.*

160. See generally *id.*

161. See generally *id.*

162. See *id.* at 79; Keskeys, *supra* note 15; SUTTON & KEMP, *supra* note 143, at 1.

163. See Sherman, *supra* note 157, at 79.

164. See *id.*

165. Noah Billig, *Start by Listening*, in *DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY* 48, 48 (2017); see also CREATIVE RECREATION LAB, *EQUITY-CENTERED COMMUNITY DESIGN FIELD GUIDE 1* (2018).

166. SMITH, *supra* note 16, at 14. Sherman, *supra* note 157, at 80.

167. See SUTTON & KEMP, *supra* note 136, at 84 (“If group difference exists and is attached to oppression and privilege . . . then social justice requires an examination of those differences to undermine their effect.”). See also Elizabeth Greenspan, *Bryan Lee Jr. and Sue Mobley, Colloqate Design*, *ARCHITECT* (May 31, 2018), https://www.architectmagazine.com/practice/bryan-lee-jr-and-sue-mobley-colloqate-design_o [<https://perma.cc/Y8P9-YT45>]; Keskeys, *supra* note 15.

168. Charettes have centuries-old practices that are rooted in European traditions. A charrette (“cart”) would travel through the halls of art schools to collect the students’ sketches submitted for a project.

where team members, or stakeholders, join with professionals to contribute to the vision of a project.¹⁶⁹ Versions of charrettes are recognizable to those outside of design fields; they manifest as “a workshop, a listening session, surveys, public hearing, or a design exercise.”¹⁷⁰ The goal of charrettes today is to encourage all participants to contribute ideas to a community design plan.¹⁷¹ Ideally a charrette is used to neutralize power imbalances within decision-making.¹⁷² Often, the end goal of a charrette is not consensus.¹⁷³ Instead, the charrette is used to create space for affected members of the public to voice their vision and opinions about a project.¹⁷⁴

While participatory design—and charrettes in particular—first emerged as radically inclusive ideas, the discipline struggles to cultivate and deepen authentic community participation.¹⁷⁵ This section explores three central oversights of traditional participatory design: (1) the technical limitations of non-professional designers; (2) the fact that participants are not fully representative of marginalized sub-communities; and (3) the fact that participation is often only a facade.

1. *Technological Limitations*

Technological limitations are an obstacle to inclusion. Designers cannot expect full inclusion of laypeople in a design process when participation requires specialized knowledge and skills.¹⁷⁶ Imagine designers and residents come together for a charrette to map out a public memorial. The aspirational vision of an untrained community member entering a room and executing a technical design is not going to occur in reality:¹⁷⁷ A resident is blocked from accessing the ideal equal partnership in a charrette if she does not know how to technically draft a design. Aspects of the

Architects absorbed the term into their field and used the term “charrette” to describe intense sessions where a team worked together to hash out a final design of a project. These sessions were notable for their equalizing effect—partners would work alongside junior designers and all contributions would be considered equal. See Daniel Willis, *Are Charrettes Old School?*, 33 HARVARD DESIGN MAGAZINE 2 (2010), <http://www.harvarddesignmagazine.org/issues/33> [https://perma.cc/5V73-TRW3]; Terri-Ann Hahn, *Community Design Charrettes - Getting the Most from a Charrette*, NEREJ (November 23, 2010), <http://nerej.com/44212> [https://perma.cc/GX6B-4Q33].

169. Willis, *supra* note 168.

170. *Id.*

171. Recently, a designer in the South of France instated a throw-back charrette in her project and used a cart to travel through the streets of Sospel to engage residents in a city planning process for public spaces. The cart both served a participatory design purpose—inclusion advocacy—and harkened back to the original charrette by traveling around collecting different ideas for the design. See Javier Fraga Cadórnica & David de la Pena, *El Carrito: Rolling Out the Cart*, in DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY 64, 66 (2017).

172. SUTTON & KEMP, *supra* note 136, at 98.

173. See generally *id.* at 98 (describing how charrettes function); Jeffrey Hou & Michael Rios, *Community-Driven Place Making: The Social Practice of Participatory Design in the Making of Union Point Park*, 57 J. ARCHITECTURAL EDUC. 19, 21 (2003); see also Sherman, *supra* note 157, at 87.

174. Hou & Rios, *supra* note 173, at 19, 21.

175. See Sherman, *supra* note 157, at 89.

176. Leah Wulfman, *Recognizing Hungers That Are Already There: A Conversation with Designer Mitch McEwen*, SAMPSONIA WAY (Jan. 12, 2017), <https://www.sampsoniaway.org/interviews/2017/01/12/recognizing-hungers-that-are-already-there-a-conversation-with-architect-mitch-mcewen/> [https://perma.cc/FF83-D52E].

177. *Id.*

memorial require the use of traditional design techniques, so community participation, realistically, is limited in some aspects.¹⁷⁸ Essentially, broad community inclusion in technical components of a design project is hampered by a community's lack of information, education, or access to technical knowhow.¹⁷⁹

2. *Problems of Representation*

Participatory design often overlooks the reality that those who participate in a charrette are not always representative of their community. To a certain extent, designers themselves determine who will be considered the "public."¹⁸⁰ Often those chosen to represent their community consist of residents within a geographic boundary.¹⁸¹ However, a designer invested in equity may narrow their "public" to the least enfranchised members of a local geographic community.

Participatory design may reject top-down planning, but it does not necessarily destabilize the intra-community power dynamics.¹⁸² In any group, a subsection of the community can play a disproportionate role in the decision-making. This active subsection is frequently made up of elected officials, business owners, moneyed residents, or those appointed to care for the community—which, in many minority communities, often means women elders.¹⁸³ Other members of that community are not represented. For instance, young people are often left out of participatory design projects despite being useful contributors with unique insights based on their age.¹⁸⁴

Without critical examination of inclusion, participation does not necessarily enhance equity. Many segments of the desired public may not have infrastructure or existing bodies to be represented at decision-making tables by accountable organizations.¹⁸⁵ Additionally, community development groups that are tasked with providing the voice of the community may not have socio-economic, racial, or age diversity within their ranks.¹⁸⁶ Thus, if equity is not prioritized, participatory design can actually re-entrench inequality by continuing to allow resource-rich segments of a locality to hoard resources and local decision-making power.¹⁸⁷

3. *Participation as a Facade*

Often participatory designers seek input to further their preconceived plan for a community. Participatory designers often become attached to their own initial

178. *Id.*

179. *But see* Sherman, *supra* note 157, at 89.

180. Wulfman, *supra* note 176.

181. *Id.*

182. *See generally* SUTTON & KEMP, *supra* note 136, at 95 (discussing power dynamics in community development).

183. *See* Sherman, *supra* note 157, at 71; *see generally* SUTTON & KEMP, *supra* note 136, at 118 (discussing examples of community involvement in farming and household initiatives).

184. *See generally* SUTTON & KEMP, *supra* note 136, at 118 (demonstrating the importance of family and child involvement in community households).

185. *See generally id.* at 157 (offering an example of grassroots organizing with limited resources).

186. *See generally* Sherman, *supra* note 157 (promoting equity through community-informed design when designers do not share the same characteristics as community members).

187. *See generally id.* (advocating for equity focused participatory design).

ideas and find it difficult to accommodate or shift as they learn of the community's actual wants and needs. For example, a designer may seek input on a particular structure only to discover that it is not desired by the community.¹⁸⁸ A designer does not invite true participation by requesting input on what to do with a new, empty space if people do not want an existing structure to be demolished.¹⁸⁹ True participation does not exist if participants cannot dissent from a proposal; people must be able to challenge an underlying proposal even if that destabilizes the designer's initial vision.¹⁹⁰

The facade of participation may cover up a highly bureaucratic process that is not actually influenced by the input of users.¹⁹¹ Perfunctory practices that allow professionals to claim that their processes are inclusive do more harm than good.¹⁹² When people learn that the energy they have invested in expressing their needs has little impact on the final design, they are less likely to believe that professionals have a true desire to be inclusive.¹⁹³ When professional designers do not change their approach, community members are less likely to give up their time to participate in future projects.¹⁹⁴

B. Design Justice

Design justice has emerged out of participatory design as a response to many of the limitations of participatory design.¹⁹⁵ This form of design focuses not just on changing a place but on the process through which change occurs. Design justice prioritizes understanding the historically oppressive impact of a space and designing projects to defeat those legacies.¹⁹⁶ By opening up new dialogues, designers invite a community to assist professional planners in designing inclusive processes that can more effectively meet users' needs.¹⁹⁷

Design justice began at the same time as the Black Lives Matter movement.¹⁹⁸ Prompted by this movement, designers began focusing their attention on gentrification, the historic experiences of marginalized communities, and

188. See ADRIENNE MAREE BROWN, *EMERGENT STRATEGY: SHAPING CHANGE, CHANGING WORLDS* 117 (2017).

189. See generally SUTTON, *supra* note 143, at 122 (discussing spatial interdependence and approaches for achieving regional equity, sustainability and environmental justice, and global networking).

190. *Id.*

191. *Id.*

192. Lee, *supra* note 115, at 413–436.

193. Hou & Rios, *supra* note 173, at 20.

194. Lee, *supra* note 115, at 413–36.

195. See SASHA COSTANZA-CHOCK, *DESIGN JUSTICE: COMMUNITY-LED PRACTICES TO BUILD THE WORLDS WE NEED* 11 (2020) (claiming that design justice is also inspired by participatory action research).

196. CREATIVE RECREATION LAB, *supra* note 165, at 19.

197. *Id.*

198. See Keskeys, *supra* note 15 (describing the rise of humanitarian and participatory design); Greenspan, *supra* note 167 (describing the work of Colloqate Design to engage the public in humanitarian design); Brooke Staton, Julia Kramer, Pierce Gordon, & Lauren Valdez, *From the Technical to the Political: Democratizing Design Thinking* (July 2016) (conference paper, *Contested Cities*), https://www.researchgate.net/publication/306107677_From_the_Technical_to_the_Political_Democratizing_Design_Thinking [<https://perma.cc/XF7C-VVGW>] (describing “public interest design”).

sustainable community health. A growing and vocal community of designers of color undertook design projects to transform sites of historic injustices.¹⁹⁹ These activist designers began referring to their work as “design justice.”²⁰⁰

Design justice principles help carve out necessary spaces for collaboration and rebuke past perfunctory uses of participation.²⁰¹ Three planning principles of design justice are critical to creating meaningful change within the municipal courts: (1) excavating the history and impact of a space; (2) creating tools for true participation; and (3) articulating clear and shared understandings of spatial experience.

1. *Excavating the History and Impact of a Space*

Design justice projects emphasize the investigation of a site’s historic context.²⁰² Professional designers make space for the experiences of residents.²⁰³ Without an understanding of what has occurred in a space, transformative design is impossible.²⁰⁴ Meaningful change “requires examining also who wrote the dominant history of what occurred in this community and the context in which this information emerges.”²⁰⁵ Project planning must address the history of the space and not simply seek to build over that history. For example, the projects at the sites of former Confederate statues do not simply seek to cover history with new and unrelated designs, but rather they center experiences that were repressed by the monuments that previously stood there.²⁰⁶ By listening to residents tell the history of a space, designers gain new frames of reference to understand the context in which the monuments, for example, existed and their impact on residents.²⁰⁷

The Paper Monuments project in New Orleans developed in the aftermath of the Take ‘Em Down campaign to remove all confederate monuments. The Paper Monuments project solicits locally developed artwork that addresses unpublicized histories of the city.²⁰⁸ The project includes events, workshops, and proposals from the public on how the city’s history should be honored. Some initiatives allow residents to create model designs for future monuments.²⁰⁹ Designers work with the public to investigate how the space has historically been used; who was celebrated

199. See Greenspan, *supra* note 167.

200. Keskeys, *supra* note 15.

201. See Costanza-Chock, *supra* note 195; *Design Justice Network Principles*, DESIGN JUST. NETWORK (2018), <https://designjustice.org/read-the-principles> [<https://perma.cc/G9KH-MLZE>].

202. DE LA PEÑA ET AL., *supra* note 16, at 73–74.

203. *Id.*

204. CREATIVE RECREATION LAB, *supra* note 165, at 27 (“[One must] first[] begin to understand how the system is designed before attempting to disrupt it.”).

205. *See id.*

206. Lee Jr., *supra* note 102 (describing the work of the Equal Justice Initiative’s lynching memorial as an attempt to represent and recognize our collective past in physical form).

207. Holland Cotter, *Half-Measures Won’t Erase the Painful Past of Our Monuments*, N.Y. TIMES (Jan. 12, 2018), https://www.nytimes.com/2018/01/12/arts/design/statues-monuments-deblasio-commission.html?_r=0 [<https://perma.cc/9PDA-MZH9>]; *see also* Greenspan, *supra* note 167.

208. *See About Paper Monuments*, PAPER MONUMENTS, <https://www.papermonuments.org/aboutus> [<https://perma.cc/YPF6-FTFS>].

209. *Id.*

in the public space; who has been excluded; and who has felt protected.²¹⁰ These histories have been shared widely through storytelling events and artistic posters.²¹¹ These participatory practices help solidify residents' sense of ownership of the public project.

Even where design is not used to create or replace monuments, narrative and history is often used to create shared understandings about experiences of the space among those working on the project.²¹² The excavating of history within a project allows collaborators to grapple with how to uproot historical injustices.²¹³ Deliberation can expose different frames for "understanding [the] realities experienced" within a space. Conflicting values are also potentially exposed in the process.²¹⁴ It can also be calming for parties to exhume history together.²¹⁵ These discussions are necessary for "true collaboration" and to open up the "binary of served and provider."²¹⁶

Narratives and share histories informed the initial stages of designing a new park space in the Fruitvale neighborhood of Oakland, California.²¹⁷ Here, the designers held events about the yet untouched site for residents and the community of future users: high school students. The designers asked the students to sketch out an entire vision of their ideal park, which included elements such as a tower for privacy and romantic canoodling.²¹⁸ Some of these aspects were incorporated into the final design.²¹⁹ And ultimately, these events created a forum for residents to comment about their neighborhood and to share their experiences of green spaces.²²⁰ The stories shared led to a common sense of the importance of green space for this community.²²¹

In some projects, the process for gathering historic narratives is more openly controlled by community members. For example, in creating a master plan for a park in Raleigh, North Carolina, designers conducted oral histories with residents.²²² These oral histories focused on residents' experiences in the park and

210. *Id.*; see also AMS. FOR THE ARTS, *supra* note 14.

211. See Greenspan, *supra* note 167.

212. CAROLYN FINNEY, BLACK FACES, WHITE SPACES (UNC Press 2014) ("through our institutions, our policies, our changing social mores and beliefs, we continue to navigate, negotiate, revisit and revise" the legacy of our history").

²¹³ See *id.*

214. DE LA PEÑA ET AL., *supra* note 16, at 2 ("Shared values are articulated and conflicting ones exposed.").

215. CREATIVE RECREATION LAB, *supra* note 165.

216. As Septima Clark emphasized in her development of Freedom Schools around the South, the space for narratives of experience was necessary for developing trust and a shared vision for change. "I found I could say nothing to those people, and no teacher as a rule could speak with them. We [first] had to let them talk to us and say to us whatever they wanted to say." SEPTIMA CLARK, READY FROM WITHIN: SEPTIMA CLARK AND THE CIVIL RIGHTS MOVEMENT 53 (Cynthia Stokes Brown, ed.) (1990).

217. Hou & Rios, *supra* note 173, at 24.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. DE LA PEÑA, *supra* note 16, at 2 ("Shared values are articulated and conflicting ones exposed.").

the park's role within the Black community where it was located.²²³ The goal of the recorded histories was to "identify key historic themes to inform the plan."²²⁴ These designers also asked residents to travel through a gentrified, historically Black neighborhood and record significant personal experiences that occurred within it.²²⁵ As a result, residents used their own experiences as tie-ins to the city's revitalization project.²²⁶

Another participatory project used a method described as the "investigative reporter," in which design professionals give community members video recorders to capture their neighbors' experiences of the space under consideration.²²⁷ This method gives community members control over identifying issues for discussion, posing questions, and deciding how the information is put together.²²⁸ Excavating the history of a space provides the opportunity for designers to more fully understand the context of the space where a new design will stand.

2. *Creating Tools for Community Participation*

Control of the design process will always rest in the hands of professionally trained designers unless everyone has the tools to participate. A critical stage of design justice projects is creating tools to allow for community participation. The Detroit Future City project popularized new and innovative tools for participation in city planning and design processes.²²⁹ When project planners realized that many older and immobile residents might not be present at neighborhood forums, the planners found new pathways for providing information to these residents.²³⁰ They broadcasted information on the city planning process on local radio shows.²³¹ The shows were call-in, which allowed residents to get in-depth information through conversations.²³² On the other end of the age spectrum, Detroit Future City used video game technology to introduce younger residents to the city plan via a virtual city design game.²³³

The architect Kofi Boone describes the expansion of expertise as learning "to expert."²³⁴ Design justice requires designers to both respect the tools that community members arrive with and provide the education necessary to allow people to expand their areas of expertise.²³⁵ The better people understand the systems

223. *Id.* at 81.

224. *Id.* at 82.

225. *Id.* at 94.

226. *Id.*

227. Patsy Eubanks Owens, *The Investigative Reporter*, in *DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY* 87, 87 (2017).

228. *Id.*

229. SMITH, *supra* note 16, at 222–225.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. See Kofi Boone, *Cellphone Diaries: Asset Mapping with Mobile Technology*, in *DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY*, *supra* note 16, at 73–86 (explaining the notion of "experting").

235. See generally CREATIVE RECREATION LAB, *supra* note 165.

at play, the better able they are to disrupt those systems.²³⁶ In Boone's Raleigh park project, community members and professionals reviewed the videos together to unearth themes.²³⁷ This project encouraged "experting" by community members by ensuring that everyone was on equal footing while assessing the videos for design objectives. Detroit Future City's video tool allowed for young people to insert their design preferences via the videogame;²³⁸ thus, the project created ways for young people "to expert."

3. *Articulating Clear and Shared Understandings of Spatial Experience*

A central part of planning for a design justice project is defining how the community would like a space to inform human behavior. Particularly, design justice is interested in how the experience of the space might impact larger systems. The way a space is arranged can impact social behavior. In design justice, the intentions for a space are often framed boldly. They tend to transcend the superficial uses of the site. The projects aspire to such lofty goals as "shaping the moral capacity of our living democracy."²³⁹

The symbolic nature of space and place matter within design justice projects. Designers advocating for the removal of monuments make a salient point about place: A pedestal is place of honor. Without a counter-narrative, a statue on a pedestal is honored by such placement. By erecting statues in their names, the leaders of the Confederacy were recast as regional heroes and hometown liberation fighters—and completely removed from their history of perpetuating slavery, oppression, torture, and racial hegemony. These figures became symbols of the self-determination of the South, in the eyes of some.²⁴⁰ This type of ahistorical narrative erases the interests of a large segment of the southern population: Black people, Indigenous people, and Mexican Americans.²⁴¹

Certainly, each of us experience space differently, and effective design justice projects recognize this fact. As a part of design justice projects, collaborators examine their "space origins."²⁴² Through practices such as the collection of oral histories, or "investigative reporter" assignments, diverse viewpoints on a space are laid out on the table for all to see. Exercises in spatial subjectivities can also help

236. *See id.* at 1.

237. Boone, *supra* note 234.

238. SMITH, *supra* note 16, at 222–25.

239. *See* David de la Peña et al., *Introduction*, in *DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY*, *supra* note 16, at 2.

240. One architect argued that those interested in preservation of this legacy should pay for the institutions where the statues would be housed; it should not be at the expense of the public. *Tear Down the Confederate Monuments—But What Next? 12 Art Historians and Scholars on the Way Forward*, ARTNET NEWS (August 23, 2017), <https://news.artnet.com/art-world/confederate-monuments-experts-1058411> [<https://perma.cc/3MEX-KTSP>].

241. The statues were re-historicized in the years after they were placed as historic relics representing Southern pride. In reality, many were made from cheap materials—materials that would be rejected by many museum material standards. *See id.* These statues were not placed until well after the war, and most were pointedly placed to intimidate. *Id.*

242. Marcia J. McNally & Laura J. Lawson, *Environmental Autobiography Adaptions*, in *DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY*, *supra* note 16, at 26. *See generally* CREATIVE RECREATION LAB, *supra* note 165; DE LA PEÑA, *supra* note 16, at 17–31.

participants understand the limitations of their own experiences. Through collaboration, design justice participants can come to a clear understanding of the diverse experiences that a space holds. From this understanding, designers can move forward and better support both diverse and shared goals for a project.

III. APPLYING DESIGN JUSTICE TO MUNICIPAL CRIMINAL COURTS

Participatory design is rooted in the aesthetics of structures and the planning of landscapes. While spatial design practices seem like an unlikely model for assessing courts, design justice has developed a useful framework to contextualize and understand multiple, invisible experiences of systemic oppression. Design justice potentially flips—or at least equalizes—power structures and sees the people most affected by the courts’ inequities as knowledgeable insiders to the impacts of municipal courts.²⁴³ By applying design justice principles to municipal court reform, radically inclusive and transformative change is possible. Three planning principles of design justice are critical to creating meaningful change within the municipal courts: (1) excavating the history and impact of municipal criminal courts; (2) creating tools for community participation in municipal court reform; and (3) articulating clear and shared understandings of spatial experience.

A. The History and Impact of Municipal Criminal Courts

Understanding the long and often complex history of municipal criminal courts within communities is integral to any reform effort. Design justice projects prioritize listening.²⁴⁴ Historic investigation requires developing an in-depth understanding of how different communities historically have viewed the court and its reach. Those invested in change might be involved in exploring collections of local historical narratives. The realms of relevant narratives might include histories of local policing, adjudication of crimes, resolution of fines and fees, and the city’s jails. The importance of these histories must be recognized when reformers seek to change municipal courts.

Court reformers might very well come to understand that the court will never be free of their historical context and that any reform effort will have to explicitly address the history and the postbellum uses of municipal courts. After gaining a fuller understanding of the history of municipal courts, reformers might

243. Cf. Caitlin Cahill & Matt Bradley, *Documenting (In)justice: Community-Based Participatory Research and Video*, in *THE PARADOX OF URBAN SPACE*, *supra* note 143, at 227 (citing to Linda Tuhiwai Smith: “Research, like schooling, once the tool for colonization and oppression is very gradually coming to be seen as a potential means to reclaim languages, histories, and knowledge, to find solutions to the negative impacts of colonialism, and to give voice to an alternative way of knowing and of being.”). The spirit of these participatory design’s origins may be best captured by the Citizen Education School developed by Septima Clark. In her work, the people most affected and experiencing the inequality are considered expert in problem analysis. See CLARK, *supra* note 216 at 50. See also ARCHON FUNG, *EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY* 56–68 (2004) (laying out the ideal of participatory deliberation in community policing using Chicago as a model).

244. See *Restorative Justice City*, *DESIGNING JUSTICE + DESIGNING SPACES*, <http://designingjustice.org/restorative-justice-city/> [<https://perma.cc/KBC4-ZUZH>] (emphasizing tools to enhance listening).

eliminate crimes like basic trespass from municipal criminal codes. Similarly, reformers might move away from punishment and toward creating opportunity for the municipality to meet the needs of marginalized community members who are disproportionately affected by regulation. The histories may in fact recruit new allies who were previously unsympathetic to the cause of decriminalization.

B. Creating Tools for Community Participation in Municipal Court Reform

Design justice offers steps towards developing deep local involvement of people from affected communities. True design justice flips traditional insider/outsider planning participant paradigms.²⁴⁵ Design justice invites traditional “outsiders” who use and are affected by a space to participate in the planning process. The perspectives of people affected by these injustices are the most urgent, important messages about still-existing injustice in local criminal courts. Their accounts are the most telling—from students who have been ticketed for disruption in school, to spouses fearful of riding in cars together because they each have warrants for fees they cannot pay, to people experiencing homelessness jailed for unpaid fines, to respondents alone in court pleading to charges that will forever complicate job searches. Under-represented communities have the most intimate knowledge of our justice systems, the problems therein, and how these systems can be improved.

Design justice projects must not only aim to listen to the community but also to provide integral education and access. Design justice projects must gather and share information in a way that is easily accessible to laypeople. As applied to municipal criminal courts, this education might center on municipal rulemaking, policing, and the role of the court.²⁴⁶ It might also include transparent analyses about which communities or demographics are charged to generate revenue through the court.²⁴⁷ Education about the system—that is presented in a digestible, accessible form—signals to participants that a reformer is investment in inclusion.

To involve community members, design justice projects can tap into the current expertise of people marginalized from municipal decision making. Some designers have experimented with new ways to apply experiential community insights to reform municipal criminal court. The Just City Innovation Lab at Detroit Justice Center collaborated with the firm Designing Justice + Designing Solutions for a charrette with local students to create alternatives to the municipality’s proposal for a multimillion-dollar jail.²⁴⁸ The students’

245. See generally SUTTON & KEMP, *supra* note 136, at 94–96 (describing the insider/outsider concept as used in design literature).

246. See Harvey & Heath, *supra* note 156, at 24.

247. See, e.g., *id.* See also Marsh & Gerrick, *supra* note 140. Cf. SMITH, *supra* note 16, at 82–83 (describing a high school project outlining communities’ relative contributions to the New York Lottery system).

248. “Nationally, we suffer from a lack of strategic vision about how to divest from jails and prisons and reinvest in the health and safety of our communities. Our focuses on introducing and normalizing alternatives to punitive justice. We convene change-makers from Detroit and elsewhere who are, for example, experimenting with restorative justice approaches to architecture and urban planning, ‘flipping’ prisons into community support centers, and implementing justice reinvestment solutions through policy change. We incubate and amplify Just City solutions that will ripple far beyond Detroit.” *Just Cities Lab*, DETROIT JUSTICE CENTER (Jan. 23, 2019),

experiences of youth policing were developed into useful expert insights for the project.²⁴⁹ The workshop highlighted that youth expertise in important areas—such as public sites of policing—could serve to improve the health of the city.²⁵⁰ This project is one example of how design justice can be applied successfully to municipal court reform.

C. Articulating Clear and Shared Understandings of Spatial Experiences of Court

Design justice explores new practices for understanding multiple narratives of spatial experience. Design justice projects acknowledge that people have different experiences of space. Spatial considerations are a critical part of the experience of criminal law that is often entirely disregarded by decision-makers.²⁵¹ In many instances, municipal rule-makers traverse the exact same physical spaces as litigants, but each group views comfort and danger through a very different lens. Safety might mean something very different to a criminologist consulting municipal regulators than to a resident who has been frequently ticketed for “broken windows” offenses.²⁵² Through education initiatives, participants may create shared understandings of critical concepts that were previously taken for granted to have a common meaning, such as “safety.”

Relevant questions for examining local spatial experiences might include: How and why do these local criminal laws exclude? How does municipal “broken windows” policing affect feelings of safety for “undesirable” or targeted groups?²⁵³ How do people’s feelings of safety relate back to the operations of courts? Articulations of spatial experience unveil the implications municipal criminal regulation has within a municipality.

Court reformers have also taken on reforming the physical space of justice systems. These designers often work with legal professionals on plans to improve these spaces and meet system goals.²⁵⁴ Often justice design projects aim to enhance

<https://www.detroitjustice.org/just-cities-lab> [<https://perma.cc/BTA8-S43D>]; see also *Detroit Teens Reimagine Criminal Justice with Alternative to New Jail*, DETROIT METRO NEWS (Oct. 5, 2018), <https://www.metrotimes.com/news-hits/archives/2018/10/05/detroit-teens-reimagine-criminal-justice-with-alternative-to-new-jail> [<https://perma.cc/7U34-NYL9>].

249. Municipal courts often adjudicate school disciplinary misdemeanors—misdemeanors that students would be uniquely poised to assess. THE MUNICIPAL JUDGES’ BOOK, *supra* note 152, at 303.

250. The project also serves long-term “experting” goals by exposing youth to local court processes and municipal criminal regulation. This could create a pipeline of people with insights into critical justice issues. People’s involvement with these issues could even spur careers within the field.

251. See Boddie, *supra* note 102.

252. In Medellín, Colombia—a poster city of participatory budgeting practices—participants in local budgeting meetings disagreed on how to spend money for “safety.” Traditional regulators wanted to fund police, while residents wanted “nonviolent [security] based on citizen training.” Omar Uran, *Medellin: Participatory Creativity in a Conflictive City*, in PARTICIPATION AND DEMOCRACY IN THE TWENTY-FIRST CENTURY CITY 127, 139 (Jenny Pearce ed., 2010).

253. See THE MUNICIPAL JUDGES’ BOOK, *supra* note 152, at 61.

254. As an example of recent justice design work, the Center for Court Innovation responded to complaints that visitors to a New York City courthouse found the court hard to navigate. The organization worked with actual designers on enhancements to court signage to alleviate the disorientating effect of

procedural justice and user perceptions of procedural justice by making the physical design of the environment less stressful. For example, if the objective is to alleviate anxiety in the court, the project may post clear signage directing litigants to the proper courtroom.²⁵⁵ They may enhance transparency in courtroom operations through posters that maps the stages of a case. Some project designers use construction materials such as light-colored wood to create spaces that have a calming effect.²⁵⁶

To a certain extent, less stressful environments result in better decision-making.²⁵⁷ However, the outcome sought through procedural justice project is that more people will be likely to abide by court orders.²⁵⁸ The orientation of the reform effort thus hinges in part on the courts' objectives. As a journalist observing a holding cell in a community court observed: "The trappings of a regular court remain in place, however moderated."²⁵⁹ The courtroom design can confer respect on all defendants, but it can also obscure the fact that the system as a whole does not confer such respect.²⁶⁰ Thus, justice design that focuses solely on physical aspects of a court does not always address fundamental issues of injustice.²⁶¹ In fact, calming design may provide people with a level of comfort and ease that actually belies the true consequences of the court. If the goal is to alert people to potentially life-altering consequences attached to these proceedings, alleviating anxiety and causing people to feel sufficiently informed actually undermines the sense of urgency necessary to relay that message.²⁶²

A design justice project for municipal criminal regulation must first define what behavior the community wants to encourage through design. The purposes might be multi-layered, for instance basic needs can be addressed through altering

the court. Emily Gold-LaGratta, Justin Barry & Manuel Toscano, *Retrofit for Fairness*, URBAN OMNIBUS (Feb. 7, 2018), <https://urbanomnibus.net/2018/02/retrofit-for-fairness/> [<https://perma.cc/J6UQ-9CDA>].

255. *Id.*

256. *But cf.* Anna Altman, *The People's Court*, URBAN OMNIBUS (Jan. 10, 2018), <https://urbanomnibus.net/2018/01/the-peoples-court/> [<https://perma.cc/3LPM-JCJ5>] (critiquing, in part, whether or not this kind of change truly leads to greater justice).

257. *See generally* Gold-LaGratta et al., *supra* note 254 (explaining how redesigning a criminal court can lead to better outcomes); Altman, *supra* note 256 (discussing how changes to the conception and design of courthouses away from the drama and hierarchy of the traditional courtroom can improve outcomes).

258. Altman, *supra* note 256.

259. *Id.*

260. Projects designing Restorative Justice Sites might offer more alignment with participatory design practices and goals of the affected community of users. Designing Justice + Designing Spaces, a collective working on a restorative justice center and resource hubs in Oakland, CA, proclaims a user-centered approach. New justice spaces have the ability to define their purposes from scratch and are less beholden to the historic purposes of "court" than a traditional municipal court. *Restorative Justice Center*, DESIGNING JUSTICE + DESIGNING SPACES, <http://designingjustice.org/restorative-justice-center/> [<https://perma.cc/B27W-NCBV>]. If the physical space of institutions influences the behavior of people within systems, then the design of streets, courthouses, jails, and re-entry spaces can be contoured to meet the justice goals of the community. *See generally* JOHN R. PARKINSON, DEMOCRACY & PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE (2012) (arguing that form relates to political behavior).

261. *See* BUTLER, *supra* note 85, at 198 (arguing that the focus on improving perceptions cloaks aggressive policing in enhanced legitimacy).

262. *See id.*

the immediate experiences of court.²⁶³ Just as participatory design projects at the site of Confederate and segregationist monuments hope to heal, there might be deeper, secondary purposes of municipal criminal regulatory design. This underlying objective is where the limits of inclusion are often tested. Collaborators may have underlying objectives that are different but merge at critical points. Conversely, they may also have underlying objectives that are incompatible. At that point, the question becomes, whose objectives are prioritized.

One method to develop participation might be diffusing sites for participation and centering some of the analysis in locations where people are charged with municipal offenses. This practice would allow court reformers to tap into the representatives, services, and people that already practice or embody advocacy within the existing community support structures.

Another method for acknowledging the varying impacts of space may be to have conversations about experiences of municipal criminal regulation in the locations where people have been negatively affected. In-situ design processes help affected people evoke the experience and outsiders understand it.²⁶⁴ The investigation in real space is critical for better tactile understanding of experiences and the forces needed to change that space.²⁶⁵ Part of the design justice project is, as architect Bryon Lee Jr. asserts, being and recreating the space—and as a designer “unabashedly fac[ing] down the nation’s flaws.”²⁶⁶ In this way, design justice provides a strong foundation for re-imagining municipal criminal regulation.

IV. CONCLUSION

When applied to municipal courts, design justice can transform how localities treat people who live and move through them. Through design justice, reformers can advance the objectives of people traditionally excluded from municipal decision-making. The past has shown us that superficial, symbolic inclusion is more dangerous than no community participation at all. At times, organizations and professionals who seek to reform institutions fail to tap into networks of traditionally marginalized people. Instead, experts that claim to speak for the people—non-profits, elected officials, public interest attorneys, even law professors, like myself—are often consulted as the representatives of people who have had harmful experiences of adjudication in the courts.

263. See generally Randolph T. Hester Jr., *I Am Someone Who*, in DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY, *supra* note 16, at 17–20 (setting forth a technique for a designer to assess their personality traits and reflect on design intentions); Sungkyung Lee & Laura J. Lawson, *Challenging the Blank Slate*, in DESIGN AS DEMOCRACY: TECHNIQUES FOR COLLECTIVE CREATIVITY, *supra* note 16, at 21–25 (describing a technique intended for a designer to reflect prior to a participatory design process); McNally & Lawson, *supra* note 242 (setting forth a technique for designers to evaluate their preconceptions about what the designer thinks is “standard” so it is not imposed on the community); CREATIVE REACTION LAB, *supra* note 165 (discussing problem-solving processes to focus on community needs and culture).

264. See e.g., SMITH, *supra* note 16, at 90–91 (describing D.C. workshop’s popup, for designing the new D.C. public library, that places the stand on the site of the new library).

265. See generally Theodore Jojola, *The People are Already Beautiful*, in SMITH, *supra* note 16, at 45–53 (discussing the need to recognize and complement the sustainability practices that are already in place in Indigenous communities).

266. Lee Jr., *supra* note 102.

I propose design justice not as a cure-all, but rather as a tool for people negatively affected by local criminal courts to demand inclusion and accountability.²⁶⁷ Within the field of design—which has traditionally been considered too esoteric or technical for laypeople to understand—community demands have led to new, inclusive processes. Borrowing inclusive processes from design justice is a way to break through barriers and advocate for deeper inclusion in municipal criminal regulation.

To reengage those who have suffered from superficial reform practices, there must be a greater municipal investment in dialogue. The deeper consideration of participation can move “outsider” concerns into “insider” deliberations. This serves not as a form of assimilation, but as a path to greater self-determination by people who will be affected. The precepts of design justice are a part of continuing processes, seeking more voices, building more beautiful structures, and tearing down the ugly legacies of the old.

Design justice can excavate, acknowledge, and potentially remediate spaces of harm within local criminal regulation. The adoption of critical design justice processes opens up the possibility of more equitable courts dedicated to the advancement of all they reach.

267. “Black citizens’ control of the political, cultural, and economic life of their communities, moreover, is essential to Black liberation.” Roberts, *supra* note 5, at 821 (advocating for more resident participation in community safety policies).