



## WASHTENAW COUNTY

### OFFICE OF THE PROSECUTING ATTORNEY

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### PROSECUTOR TRANSPARENCY PROJECT: PRELIMINARY SCOPE OF WORK AND WORKFLOW

The Washtenaw County Prosecutor's Office is committed to building a data-informed prosecutor's office that prioritizes equity, fairness, and harm reduction. Towards that end, the Prosecutor's Office will partner with researchers on two separate—but related—projects: (1) a robust study into racial disparities in Washtenaw County's legal system, and (2) the identification, and publication, of performance and equity-based metrics.

Thanks to generous grants from the University of Michigan, the American Civil Liberties Union (ACLU) of Michigan, and the Vital Projects Fund, work on the Prosecutor Transparency Project will commence in January, 2021. The work will be led by independent, third-party researchers at the University of Michigan, including:

- **Professor J.J. Prescott** of the University of Michigan Law School, one of the nation's leading empirical criminal-justice scholars;
- **Grady Bridges**, Research Scholar at the University of Michigan Law School, who previously served as Data Administrator for Michigan's Criminal Justice Policy Commission and was the data consultant for the Citizens for Racial Equity in Washtenaw (CREW) report;
- **Dr. Trevor Bechtel** at University of Michigan Poverty Solutions, who manages student engagement at Poverty Solutions, and has led multiple projects designed to increase access to information.

The work will build on, and modify, the national Prosecutorial Performance Indicators that have been created by a team of leading criminal-justice researchers and practitioners. Those include:

- **Dr. Besiki Luka Kutateladze**, Florida International University
- **Dr. Don Steman**, Loyola University Chicago
- **Dr. Rebecca Richardson**, Florida International University
- **Melba V. Pearson, Esq**, Florida International University
- **Ana Carazo**, Florida International University
- **Dr. Lin Liu**, Florida International University
- **Branden DuPont**, Medical College of Wisconsin
- **Dr. David Olsen**, Loyola University Chicago.

This scope of work and draft workflow was created in partnership with dozens of Washtenaw County leaders, activists, and community members. See the Appendix for a full list of names.

This document provides a *preliminary* overview of the two related projects—the racial disparities study and the performance and equity-based metric identification—that together make up the Prosecutor

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Transparency Project. This document also provides as well as a *preliminary* workflow and timetable. As with any data-intensive project, both the scope and the timetable are subject to further modifications as trends in the data are uncovered.

## I. Racial Disparities Study

The purpose of the racial disparities study will be to determine where in the Washtenaw County Prosecutor's Office disparate racial treatment occurs. The recent study from Citizens for Racial Equity in Washtenaw (CREW) concluded that Washtenaw "prosecutors charged many more People of Color (POC) than whites, both in absolute numbers and in comparison, to their presence in the general population."<sup>1</sup> But as the Report itself concluded, more analysis is necessary.<sup>2</sup>

The incoming Washtenaw County Prosecutor would like to partner with researchers to conduct that analysis. Specific areas of interest include:

### A. Charging

The incoming Washtenaw Prosecutor is interested in conducting a racial disparities analysis with respect to charging decisions made by the office. Specific questions include:

- **To what extent do the observed racial disparities in charging result from disparities in the cases that are submitted to the Prosecutor's Office by law enforcement?** For example, the CREW report indicates that people of color are 4x as likely to be charged with felony possession of a controlled substance as are white people.<sup>3</sup> To what extent does that disparity result from the fact that the Prosecutor's Office has a disproportionate number of felony possession of a controlled substance charges referred to it for POC by law enforcement?
- **To what extent do observed racial disparities in charging result from disproportionate declinations by race by the Prosecutor's Office?** Again, by way of example: is the observed disparity in felony charges for controlled substance possession explained by the Prosecutor's Office disproportionately declining to bring such charges against white people?
- **To what extent do observed racial disparities in charging result from decisions by the Prosecutor's Office to charge white people with lesser crimes (i.e., "vertical overcharging")?** For example: is the observed disparity in felony charges for controlled substance possession explained by the Prosecutor's Office disproportionately choosing to charge white people with *misdemeanor* drug possession, when felony charges were sought by law enforcement?
- **To what extent do observed racial disparities in charging result from decisions by the Prosecutor's Office to charge POC with *more* crimes stemming from an incident than white people ("horizontal overcharging")?** For example, in similar incidents, are Black people being charged with more counts than are white people?

For all of the above, the Prosecutor's Office wishes to compare similar *conduct* (which will require some qualitative analysis of the underlying incident reports). By way of example only, consider three separate

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<sup>1</sup> Citizens for Racial Equity in Washtenaw (CREW), *Race to Justice* (Aug. 2020) at 20, available at <https://www.citizensforracialequitywashtenaw.org/crew-s-report>.

<sup>2</sup> *See id.* at 37.

<sup>3</sup> *Id.* at 20.

incidents:

- Abel, a white defendant, was arrested by officers for possession of heroin. In the course of the arrest, Abel struggled with the officers when they were placing him in handcuffs. Law enforcement thus sought charges for both (1) felony possession of a controlled substance; and (2) resisting and obstructing an officer. The Prosecutor’s Office filed charges for felony possession, but not for resisting and obstructing.
- Blair, a Black defendant, was arrested by officers for possession of heroin. In the course of the arrest, Abel struggled with the officers when they were placing him in handcuffs. Law enforcement thus sought charges for both (1) felony possession of a controlled substance; and (2) resisting and obstructing an officer. The Prosecutor’s Office filed charges on both felony possession and for resisting and obstructing.
- Chris, a Black defendant, was arrested by officers for possession of heroin. During the arrest, Chris punched and bit the arresting officer. Law enforcement thus sought charges for both (1) felony possession of a controlled substance; and (2) resisting and obstructing an officer. The Prosecutor’s Office filed charges on both felony possession and resisting and obstructing.

In the foregoing examples, Abel and Blair’s cases are similar (because the underlying conduct was similar). Chris’s was dissimilar, because he punched and bit the arresting officer. It would thus be appropriate to conclude that there was disparate racial treatment by the Prosecutor’s Office, with respect to the resisting and obstructing charge, as between Abel (a white defendant) and Blair (a Black defendant).

Without more, it probably would be inappropriate to conclude that there was disparate racial treatment between Abel (a white defendant) and Chris (a Black defendant), since Chris’s conduct was more severe.

## **B. Habitual Offender Designation**

The incoming Washtenaw County Prosecutor is interested in conducting a racial disparities analysis with respect to “habitual offender” designations made by the Prosecutor’s Office. In Michigan, the Prosecutor “may”—but need not—“seek to enhance the sentence of the defendant” if the defendant has been previously convicted of one or more felonies. MCL 769.13. The CREW report noted that the Prosecutor’s Office is disproportionately likely to seek habitual offender designations for POC than white defendants.

Specific questions include:

- **To what extent are POC disproportionately designated as “habitual offenders” when their prior offenses are similar in number or type to those of white defendants?** For example, are POC being disproportionately designated as “habitual offenders” as compared to white defendants where their prior felony convictions are non-violent? Are POC being disproportionately designated as “habitual offenders” when they have 2, 3, or 4 prior offenses?
- **To what extent are POC disproportionately designated as “habitual offenders” when the *current crime charged* is identical to white defendants?** For example, are POC with prior felony convictions being disproportionately designated as “habitual offenders” for controlled-substance offense? For felonious assault offenses?

### **C. Plea Bargaining**

The incoming Washtenaw Prosecutor is interested in conducting a racial disparities analysis with respect to plea bargaining conduct. Specific questions include:

- **To what extent are POC offered less favorable substantive plea deals than white people, for a particular charge?** For example, do the plea deals that Black defendants receive for felonious assault carry more jail, prison, or probation time than the plea deals white defendants receive for felonious assault?
- **To what extent are POC offered less favorable plea deals, in terms of the *number of charges, than white people*?** For example, is it the case that Black defendants who were charged with (1) an underlying felony and (2) resisting & obstructing a police officer are more frequently asked to plead guilty to both offenses—whereas white defendants may have the resisting & obstructing charges dropped as part of the plea?
- **To what extent do white people disproportionately receive reductions in the severity of their charge, as compared to POC?** For example, are white people more likely than POC to have a felony possession of a controlled substance pleaded down to a misdemeanor charge?

As with charging decisions, the Prosecutor's Office wishes to compare similar *conduct* (which will undoubtedly require some qualitative analysis of the underlying incidents). This will require both qualitative analysis of the underlying incidents, the evidentiary strength of the case, and any affirmative defenses that may be available to the defendant. For example:

- Aaron, a white defendant, was charged with felonious assault after he pulled a gun on another driver following a fender-bender. Aaron received a plea agreement in which he pled guilty to misdemeanor assault, and received a year of probation.
- Blake, a Black defendant, was charged with felonious assault after he pulled a gun on another driver following a fender-bender. Blake pleaded guilty to felonious assault, and received six months in jail.
- Claire, a white defendant, was charged with felonious assault after she pulled a gun on another driver following a fender-bender. The evidence, however, indicated that the other driver emerged from the car with a crowbar, and Claire claimed that she believed the driver was going to strike her with that crowbar. Claire also had two young children in the car during the incident. Claire received a plea agreement in which she pleaded guilty to misdemeanor assault, and received six months of probation.

In all of the foregoing incidents, the underlying charge (felonious assault) is the same, and there are superficial similarities between the cases. Only Aaron and Blake's case, however, are truly similar. Given the facts of the case, Claire had a colorable claim of self-defense, and her actions may have been more justified. It would thus be appropriate to conclude that there was disparate racial treatment between Aaron and Blake, but not between Blake and Claire.

### **D. Diversion and Deferral Opportunities**

The incoming Washtenaw Prosecutor is interested in conducting a racial disparities analysis with respect to the availability of diversion, problem-solving courts, and deferrals. For example:

- **To what extent are white defendants more likely to be offered an opportunity to be diverted into problem-solving courts, or other diversion programs?** For example, are Black defendants who are dealing with substance abuse issues less likely to be offered an opportunity to participate in drug court?
- **To what extent are younger white defendants who qualify for the Holmes Youthful Trainee Act (HYTA) more likely to be offered an opportunity to participate in HYTA Act deferrals than qualified young POC?**
- **To what extent are qualified white defendants disproportionately offered an opportunity to participate in statutory deferral programs, such as programs under MCL 333.7411 (for first-time drug offenses) or deferrals under MCL 769.4a (domestic violence offenses)?**

In conducting this analysis, it will be necessary to consider whether a defendant met the statutory conditions for the various deferral or diversion programs. For example, major controlled substance offenses are not eligible for HYTA.

That said, an individual may initially be charged with a HYTA non-eligible offense, but then enter into a plea agreement for a HYTA eligible offense. The Prosecutor's Office is interested in examining racial disparities between POC and white people who obtain such plea deals which allow entry into diversion, deferral, and problem-solving courts.

## **II. Prosecutorial Performance Indicators**

In addition to the foregoing, the Washtenaw County Prosecutor's Office would like to adopt, and make publicly available on its website, some of the prosecutorial performance indicators recently released at <https://prosecutorialperformanceindicators.org/>. Specific performance indicators the Prosecutor's Office is interested in adopting include:

- 2.1 (ability to identify dismissable cases at filing);
- 2.2 (strategic case rejections at filing and dismissal);
- 2.5 (reserving incarceration for serious offenders);
- 3.3 (time to disposition for pretrial detainees);
- 3.6 (dismissal timeliness);
- 7.3 (case filing differences by Defendant race/ethnicity);
- 7.4 (pretrial detention differences by Defendant race/ethnicity);
- 7.5 (diversion differences by Defendant race/ethnicity);
- 7.6 (charging and plea offer differences by Defendant race/ethnicity);
- 7.7 (incarceration differences by race/ethnicity);
- 8.1 (avoiding unnecessary felony filings);
- 8.2 (diversion as alternative to incarceration);
- 8.3 (reducing reliance on pretrial detention);
- 8.5 (incarceration triggered by pretrial detention of the poor); and
- 8.7 (disproportionate punishment for the poor).

The Prosecutor's Office may be interested in additional indicators as well.

Given the Washtenaw County Prosecutor’s Office’s priority on treating *similar cases similarly*, the Prosecutor’s Office is interested in modifying these performance metrics to take stock of the underlying facts of each case. For example: Performance Indicator 7.4 tracks pretrial detention differences by Defendant race/ethnicity. The Washtenaw County Prosecutor’s Office wishes *only* to detain those individuals, pretrial, who pose an imminent risk to the community. This metric should therefore be broken down by (for example) whether someone is accused of a violent offense, and/or whether they pose an imminent threat to the community.

The Prosecutor’s Office recognizes that, to track such metrics, it will be necessary to put data-collection systems into place which capture that data. See *infra*, Part IV, for further discussion on the creation of those systems.

### **III. Long-Term Tracking/Interventions**

As part of its commitment to ensuring long-term tracking of racial disparities and other metrics, Prosecutor’s Office would like to put into place systems by which it can track, in the long term, the prosecutorial performance metrics it will adopt. In addition, the Prosecutor’s Office would like to put into place systems through which it can make “apples-to-apples” comparisons between cases and case dispositions (as discussed in Section I).

In addition, the Prosecutor’s Office is committed to adopting interventions to eliminate racial disparate treatment that is identified as a result of this study. Specific interventions may include, but are not limited to:

- (a) charging, plea bargaining, and diversionary policies which “level down”—i.e., ensure that POC receive just as favorable treatment as white defendants;
- (b) race-blind charging; and/ or
- (c) determinations not to charge specific types of crimes, or not to seek habitual offender designations.

The Prosecutor’s Office welcomes the opportunity to work with researchers on the implementation and evaluation of any of the above interventions.

### **IV. Timeline**

The Prosecutor’s Office understands that a study of this magnitude will be time-intensive, and require a significant expenditure of resources. In particular, this project will require both quantitative and qualitative analysis. On the quantitative side, the project will require analyzing the raw numbers of, e.g., warrant requests by law enforcement, declinations of charges by the Prosecutor’s Office, etc—broken out by race. On the qualitative side, a review of underlying case files will be necessary to ensure that comparisons are being made between similar cases. And, of course, there will be a web and design component to make publicly available the long-term performance metrics.

At the same time (particularly given the CREW Report) the Prosecutor’s Office is anxious to provide further details to the community about the racial disparities that exist in Washtenaw County’s legal system—and to take action to address it. The Prosecutor’s Office thus anticipates the following timeline:

#### **A. Racial Disparities Study**

The Prosecutor’s Office anticipates that the racial disparities study outlined in Section I will take

place in two phases: an initial quantitative phase, and a subsequent qualitative phase.

### **1. Phase 1: Initial Quantitative Analysis:**

A baseline study will be performed which analyzes the raw racial disparities relating to charging, declinations, and decisions to charge with lesser crimes. The Prosecutor's Office anticipates that the baseline study will cover the 2018 and 2019 calendar years.<sup>4</sup> The baseline study will analyze:

#### **a. Charging:**

- To what extent do observed racial disparities in charging result from racial disparities in the cases that are submitted to the Prosecutor's Office by law enforcement?
- To what extent do the observed racial disparities in charging result from racial disparities in cases declined by the Prosecutor's Office?
- To what extent do the observed racial disparities in charging result from decisions by the Prosecutor's Office to disproportionately charge white defendants with a lesser offense?

#### **b. Habitual Offender Designation**

- To what extent are POC disproportionately designated as "habitual offenders" when their prior offenses are similar in number and type to those of white defendants?
- To what extent are POC disproportionately designated as "habitual offenders" when the *current crime charged* is identical to white defendants?

#### **c. Plea Bargaining**

- To what extent are POC offered less favorable substantive plea deals than white people, for a particular charge?
- Keeping charge types consistent, to what extent are POC offered less favorable plea deals, in terms of the *number* of charges, than white people?
- Keeping charge type consistent, to what extent do white people disproportionately receive reductions in the severity of their charge, as compared to POC?

#### **d. Diversion and Deferral Opportunities**

- To what extent are white defendants more likely to be offered an opportunity to be diverted into problem-solving courts, or other diversion programs?
- To what extent are younger white defendants who qualify for the Holmes Youthful Trainee Act (HYTA) more likely to be offered an opportunity to participate in HYTA Act deferrals than qualified young POC?
- To what extent are qualified white defendants disproportionately offered an opportunity to participate in statutory deferral programs, such as programs under MCL 333.7411 (for first-time drug offenses) or deferrals under MCL 769.4a (domestic violence offenses)?

Recognizing that it will likely be a more labor-intensive task to conduct the "apples-to-apples" comparisons between incidents outlined in Section I, this initial baseline study will *only* deal with raw numbers. It will not attempt to compare the conduct in the underlying incidents.

Nevertheless, the Prosecutor's Office intends to publicize the results of this phase. Even the raw numbers will likely spark community conversation and action. In addition, the raw numbers may be cause

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<sup>4</sup> The 2020 calendar year will undoubtedly be an outlier on many metrics due to the COVID-19 pandemic.

for policy changes in the Prosecutor’s Office. For example, raw racial disparities as to who is being designated a habitual offender (keeping charge types consistent) may require the Prosecutor’s Office to reconsider or modify its habitual-offender designation policy.

## **2. Phase 2: Qualitative Analysis**

The second phase of the racial disparities study will seek to compare “apples to apples,” and will analyze the underlying incidents to determine whether similar cases are being treated differently based on race. The results of the Phase 2 analysis will be publicized upon completion. The Prosecutor’s Office will make policy changes to reduce or eliminate the racially disparate treatment uncovered by the analysis.

### **B. Prosecutorial Performance Indicators**

#### **1. Phase 1: Identification of Metrics, and Prospective Data Collection Practices**

As noted above, the Prosecutor’s Office is interested in modifying the relevant performance metrics so that similar cases are treated similarly. In order to do that prospectively, tracking techniques must be put into place that will ensure a prospective “apples to apples” comparison of cases.

Again, by way of example, Prosecutorial Performance Indicator 7.4 tracks pretrial detention differences by Defendant race/ethnicity. The incoming Prosecutor is interested only in holding people pretrial if they pose an imminent threat to the community. To ensure that like cases are being treated alike, it thus might make sense (for example) to have an assistant prosecutor, when filling out a Bond Information Form, to check a box indicating whether the facts of the case suggest the defendant poses a threat to the community.<sup>5</sup>

In this phase, the Prosecutor’s Office anticipates working with research partners to identify the metrics that will need to be tracked, and to put systems in place to capture that data on an ongoing basis. This work should be done contemporaneously with the Phase 1 quantitative analysis of the racial disparities study.

#### **2. Phase 2: Application of Identified Metrics to Baseline Cases**

Once the foregoing data metrics are identified, it will be necessary to apply them to *past* decisions by the Prosecutor’s Office, in order to build a baseline. This work should be done contemporaneously with the Phase 2 qualitative analysis for the racial equity study.

In other words, when researchers are reviewing files to identify similarities between cases, they will also be coding those case files according to the metrics identified in Phase 1 of the Prosecutorial Performance Indicators workstream. Thus, for example, assuming that the Prosecutor’s Office wishes to track pretrial detention according to whether the defendant “posed an imminent threat to the community,” the researchers will “code” the cases they are reviewing as either (a) involving an imminent risk to the community, or (b) not.

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<sup>5</sup> The Prosecutor’s Office does not intend to seek cash bail, but may seek to hold somebody without bond, pretrial, if they are accused of a particularly serious offense (e.g. murder, first degree criminal sexual conduct, armed robbery). The Prosecutor’s Office may also seek nonmonetary conditions of release that a defendant may be unable to satisfy for a period of time (for example, requiring the defendant to be released only to the custody of a “responsible member of the community,” see MCR 6.106(D)(2)(j). See also Policy Directive 2021-02, *Policy Eliminating the Use of Cash Bail and Setting Standards for Pretrial Detention*.

### **3. Phase 3: Publication of Web-Based Dashboard**

Once baseline files have been appropriately coded, the Prosecutor's Office will publish a web-based online dashboard featuring performance metrics. That dashboard will be updated on an ongoing basis.

#### **C. Interventions/Policy Changes**

The Prosecutor's Office will implement interventions and policy changes, on an ongoing basis, throughout the course of this process and as the data dictates. The Prosecutor's Office will welcome the opportunity to work with researchers on policy changes and evaluation.

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