

# RACE TO JUSTICE

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CITIZENS FOR RACIAL EQUITY IN WASHTENAW'S REPORT ON  
RACIAL DISPARITIES IN THE WASHTENAW COUNTY CRIMINAL  
LEGAL SYSTEM

CITIZENS FOR RACIAL EQUITY IN WASHTENAW (CREW)  
AUGUST 2020

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This is a unique moment of heightened awareness about the long-standing and harmful personal and societal impacts of racial inequities. Individuals, corporations, and organizations are urging state, county, and municipal entities to identify and finally address historical and present-day racial inequities and disparities in our society and systems of government. The call for real action has gone beyond law enforcement and reaches into our criminal legal system including prosecutors and judges. Over sixteen chief justices from the nation’s state courts have supported reviews of the inequities of a system that appear to “value Black lives less than it values White lives.”<sup>1</sup>

In an effort to contribute to the goal of a criminal legal system that ensures equal justice for all participants, Citizens for Racial Equity in Washtenaw (CREW) was formed to gather public data on the charging and sentencing of individuals in Washtenaw County and to assess whether the data reflected any racial disparities and the impact of any disparity on members of our community. CREW’s work is inspired by and dovetails with Washtenaw County’s *One Community: Advancing Racial Equity in Washtenaw County* initiative.

## I. PURPOSE AND SCOPE OF THE REPORT

From policing to prosecution to cash bail and jury selection through sentencing and incarceration to parole and probation, there is overwhelming statistical evidence that People of Color in this country are discriminated against at every level of the criminal legal system.<sup>2</sup> At the county level, however, such evidence has been largely anecdotal.

CREW members came together to examine publicly available criminal case data from the Washtenaw County Circuit Court to assess whether there existed a basis for concern about disparities in the treatment of individuals, based on race, in charging and sentencing which would naturally impact the fair and just application of justice in our criminal legal system. As discussed in the methodology section below, CREW did not dig into every data point in Washtenaw County’s criminal legal system which might contain disparities; we anticipate, however, that this report will prompt others to study these data points.

The public data that might provide insights into the experiences of Washtenaw County residents who come in contact with the county’s criminal legal system is not readily available.<sup>3</sup> There is no public reporting of:

- The number, age or race of people criminally charged in Washtenaw County.
- What people are charged with or the outcomes.

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<sup>1</sup> *We Are Part of the Problem They Protest*, New York Times

<https://www.nytimes.com/2020/06/16/opinion/state-supreme-courts-racial-justice.html>

<sup>2</sup> *There’s Overwhelming Evidence That the Criminal Justice System Is Racist. Here’s the Proof.*, Washington Post

<https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>.

<sup>3</sup> In Washtenaw County, the population is made up of African Americans 12.3%, American Indian and Alaska Native .4%, Asian 9.4%, Hispanic or Latino 4.9%, Native Hawaiian and Other Pacific Islander .1%, Two or More Races 3.6%, and whites 74.2%. U.S. Census Bureau Quick Facts, Washtenaw County, Michigan. <https://www.census.gov/quickfacts/fact/table/washtenawcountymichigan/PST045219>

- What happens once someone in Washtenaw County is charged with a crime, including whether a plea is offered or the nature of the plea.
- How our elected judges sentence individuals, to whom they give probation, jail time or a prison sentence and for how long.

The Washtenaw County Circuit Court website does, however, include all criminal cases and their dispositions, albeit with limited searchability. CREW collected and examined certain categories of non-capital felony cases (FH cases) filed between 2017-2019 in Washtenaw County along with a review of all specified capital felony cases (FC cases) filed in Washtenaw County between 2013-2019<sup>4</sup>. In total, CREW studied 11 case categories.<sup>5</sup>

CREW’s focus on the most common felony charges in Washtenaw County resulted in such serious racial disparities that we deemed it necessary to report our initial data review to the community. Our data and analysis show troubling racial differences in a variety of areas such as charging decisions, the use of the habitual offender designation, average convictions per case and sentencing.

At this stage, we did not draw any firm or definitive conclusions about implicit or explicit racial *bias* by any one person or entity, although there is a serious basis for concern that such biases, whether intentional or not, exist. Along those lines, CREW did not determine the source and nature of some of the disparities due to time and resource constraints. Instead, we see our work as a roadmap prompting further community discussion to address the racial disparities through specific actions outlined below, including deeper, broader study of systemic racism, individual biases, and other variables that underlie the significant racial disparities in the data we collected.

CREW is chaired by Alma Wheeler Smith and Linda Rexer. Additional members include Rev. Jerry Hatter, Dan Korobkin, Desiraé Simmons, and Rev. Joe Summers.<sup>6</sup>

## A. Committee Charge

CREW adopted the following charge to describe the scope and purpose of its work:

To collect and examine all public data available for specified non-capital felony cases (FH cases) filed between 2017-2019 in Washtenaw County along with a review of all specified capital felony cases (FC

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<sup>4</sup> CREW hired a professional statistician to do an analysis of the case records we documented and produce the tables (Tables Section) which form the data CREW studied. CREW collected all capital felony (FC) cases from 2005-2019 but chose to study a limited set of case categories from 2013-2019 because the judges currently hearing criminal cases in the Washtenaw County Circuit Court have been seated since 2013. We note, however, that Judge Kuhnke took over cases from her predecessor and began her own criminal docket in 2015. CREW also documented all non-capital felony (FH) cases from 2005-2019 and reviewed a limited set of case categories from 2017-2019 due to the volume of FH cases. Further analysis could review the entire span of time. Additionally, our research captured data that we did not use for this analysis but that could also be useful in a deeper study, e.g. fines levied, defendant’s age, retained/appointed counsel.

<sup>5</sup> CREW limited our analysis to the following case categories: Assault, Resisting or Obstructing an Officer, Controlled Substance-Delivery, Controlled Substance-Possession, Suspended License, Weapons-Carrying Concealed, Weapons-Felony Firearm, Weapons-Possession by Felon, Armed Robbery, Assault with Intent to Commit Murder, Assault with Intent to Do Great Bodily Harm Less than Murder, and Homicide. A complete list of offenses captured in each category can be found in Section VIII (Tables) portion of this report.

<sup>6</sup> See Acknowledgments for brief biographical information about the committee members and acknowledgments of other community member who assisted.

cases) filed in Washtenaw County between 2013-2019. Specifically, in the felony capital category, we examined cases involving charges of homicide, assault with intent to commit murder, assault with intent to commit great bodily harm less than murder and armed robbery. In the non-capital felony category, we examined cases involving charges related to weapons, controlled substances, obstruction/resisting arrest, and license suspension.

CREW determined what observations and questions the data posed and suggests which entities should be asked to consider those questions or help encourage further conversations and greater accountability.

The data drove CREW's observations and questions, such as highlighting where fairness appears to exist, where it may not exist or where additional data may inform those observations.

CREW may also decide to invite the broader community to participate by, among other things, launching listening sessions or an oral history project, such as a Story Corps Justice Lab, where community members can share their experiences with the justice system.

## **B. Methodology**

As noted above, CREW did not collect and examine all sources of data regarding possible disparate treatment within the Washtenaw County criminal legal system largely because those sources are not publicly accessible. Given its primary goal of initiating informed discussions and greater accountability, CREW determined that focusing on data from some of the most common capital felony (FC) and non-capital felony (FH) cases would allow it to make pertinent observations, frame issues requiring immediate action, and pose questions in key areas that merit looking into. CREW documented the information contained in individual case records and turned it over to an experienced statistician who did a statistical analysis by race as illustrated in the [Tables](#).<sup>7</sup>

CREW understands that it is possible there are multiple factors that might account for the inequities revealed by the data in the tables and has made no final findings regarding whether bias is the sole cause of the differences. We recognize that bias could be present even before the defendant is charged or reaches the courtroom including law enforcement's decision whether to arrest and the prosecutor's decision whether to press charges, add habitual offender levels, offer plea agreements and what level of bail to recommend. In addition, there are other potential factors such as varying fact patterns, prior offenses, pre-sentence investigation reports and sentencing guidelines which might impact the differences in outcomes but we have no basis to conclude that these account for all of the racial disparities in the data.

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<sup>7</sup> The sentence lengths for each case incorporate concurrent and consecutive sentences for additional convictions. This is necessary to capture the actual type of sentence imposed as well as the total sentence imposed. For example, suppose a defendant was convicted of two different felonies and sentenced to concurrent terms. For the first conviction they were sentenced to 6 months in Jail, while the second conviction resulted in a 3-5 year prison sentence. In this example the second conviction determines the type and length of sentence for this case. Ultimately, the 6-month sentence for the first conviction would be served in prison concurrent to the 3-5 year sentence. Furthermore, the actual length of time before the defendant would be eligible for release would be 3 years, not 6 months.

With due regard for those factors, which must be acknowledged within a complex criminal legal system, CREW noted disturbing differences in outcomes for People of Color versus white defendants which warrant immediate attention. In fact, although many variables may be at play, some of the racial disparities are so stark that we have a basis for serious concern that systemic racism, individual biases, or both are damaging the integrity of the criminal legal system in Washtenaw County. Section IV of this report highlights those differences and Section VI poses questions for further inquiry.

## II. EXECUTIVE SUMMARY

Reports that are full of numbers and statistics can end up looking like a tax return. As with tax returns, readers might skim the pages until they get to the bottom line. The bottom line here is that the statistics in this report are not just numbers -- they represent our neighbors, the person we sit alongside on the bus and greet on the street as we walk our dogs. They are us.

We as a nation cannot fully address racial inequities in the criminal legal system that lead to mass incarceration until we start fixing it at the local level. That is why CREW and others in the community did the tedious work of documenting and analyzing over 3,600 felony charges to see whether there are things that need fixing. The bottom line: Washtenaw County, we have some work to do.<sup>8</sup>

The breadth of the racial disparities CREW documented and the impact in terms of punishment on People of Color are so stark that CREW presents this report to our community with a call for immediate action by those institutions responsible for funding, administering and overseeing the criminal legal system in Washtenaw County. Every action we seek and recommendation we make is driven by the overarching goals of having a criminal legal system in Washtenaw County that is just, both in fact and in perception, and preventing future injustice based on racial disparities and unequal treatment.

### A. Findings Regarding Prosecutors

Prosecutors have a unique role in the justice system not only because they have “the responsibility of a minister of justice and not simply that of an advocate” as laid out in the comment to Rule 3.8 of the ABA Model Rules of Professional Conduct<sup>9</sup> but also because they are often viewed as the most powerful actor in our criminal legal system<sup>10</sup>. When it comes to charging a person with a crime, the Washtenaw County prosecutor has broad discretion in deciding:

- Whether or not to bring charges against someone.
- What charges to bring, if any.

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<sup>8</sup> Washtenaw County is often held up as exceptional with regard to its justice system. Our data suggests this is far from true.

<sup>9</sup>[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/comment\\_on\\_rule\\_3\\_8](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8)

<sup>10</sup> “The office of prosecutor is regarded by many as the most powerful position in the U.S. criminal justice system. Prosecutors decide which cases to investigate, which suspects to charge, which charges to bring, and which penalties to pursue upon conviction.” P. 9, *Report of The Sentencing Project to the Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, 2013.

- Whether or not to designate a person as a “Habitual Offender.”<sup>11</sup>
- Whether or not to offer a plea and the terms of a plea.
- Whether or not to dismiss charges.

In areas where prosecutors have discretion in deciding such things as whether to charge someone with a crime, what charges to bring and whether to designate a person as a Habitual Offender, the Washtenaw County prosecutors’ decisions resulted in significant disparities between People of Color and whites across the board.

1. In all 11 case categories that CREW studied, prosecutors charged dramatically more People of Color than whites.

The differences were not small. They ranged from 22% to 1,150% more People of Color charged than whites. That is to say that, in Washtenaw County, a Person of Color is anywhere from 3 to 29 times as likely to be charged with one of the eleven case categories than a white person.

One example of the dramatic difference that CREW saw in the number of whites versus People of Color charged is in the Felony Firearm category of cases. In Michigan, a person can be charged with a violation of the statute which makes it a crime to use a firearm (legal or otherwise) in the commission of a felony. A prosecutor may choose to add a Felony Firearm charge when there are other felony charges and the felony involves a gun. By law, a conviction for Felony Firearm requires a mandatory 2-year prison sentence that is *in addition* to any sentence for any other conviction for the original charge. In other words, it automatically lengthens the sentence by 2 years. During the time frame we studied, prosecutors charged 25 People of Color with Felony Firearm while only 2 whites were charged.<sup>12</sup>

2. In 10 of the 11 categories, prosecutors filed more charges against People of Color, on average, than white people.

The difference in the average number of charges ranged from a 12.8% difference to 62.9% depending on the case category. The practice of routinely leveling more criminal charges against People of Color than against whites raises the questions of whether the Washtenaw County prosecutor’s office is engaging in “horizontal overcharging” and “vertical overcharging.” Horizontal overcharging describes instances when a prosecutor includes as many charges as possible (even ones that she/he may not be able to prove) in order to induce a person charged to accept a plea agreement and plead guilty. Vertical overcharging is the practice of charging the highest possible charge that carries the stiffest penalty with the intention that a prosecutor will use that highest charge to force a plea on the person charged. These practices are viewed as coercive techniques that may fall under the heading of “we’ve always done it this way” but are not necessarily in the interest of justice.

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<sup>11</sup> If a person has previously been convicted of one or more felonies (or attempts to commit felonies), a prosecutor may choose to charge that person for a subsequent felony charge as a “habitual offender.” If that person is convicted, s/he faces a much longer sentence that could lengthen his/her prison time by 25% - 100%.

<sup>12</sup> In asking why so many People of Color were charged as compared to whites in any of the case categories, we do not mean to suggest that more white people should be charged or that the criminal legal system should be more punitive.

3. In 10 of the 11 categories that CREW studied, People of Color also received more convictions per case, on average, than whites.<sup>13</sup>

What accounts for People of Color consistently receiving more convictions per case than whites? Are more convictions the natural result of more charges? One of the reasons the statistics on the average number of convictions for People of Color versus whites are so disturbing is because more convictions per case makes it more likely a Person of Color will be charged as a Habitual Offender, and receive a significantly longer sentence, if she/he gets charged again with a felony. We discuss Habitual Offender enhancements further in Section IV (Data Highlights).

#### 4. A Snapshot of the Data on Prosecutorial Decision-Making

CREW understands that it is possible there are multiple factors that might account for some of the inequities revealed by the data and has made no final findings regarding whether bias is the sole cause of the differences. We recognize that bias could be present even before a defendant is charged and did not study arrest data as part of our work. We believe that an effort like ours should be done to study racial disparities in officer-initiated contacts and arrest data.

Nevertheless, the door that the statistics opens for us shows a disturbing pattern in prosecutions in Washtenaw County. The data on charging issues illustrates the breadth and depth of a potentially problematic approach to justice in our county, in that disturbing racial disparities are evident across the board. At the very least, the data raises questions (although it does not answer them) about the exercise of prosecutorial discretion, whether there are cultural norms or implicit biases within or outside of the prosecutor's office that are contributing to unfairness, and whether and what kind of systemic reforms are necessary.

### **B. Findings Regarding the Judiciary**

The role of a judge as a neutral and impartial arbiter holds a special place in our criminal legal system. The system hinges on that impartial arbiter avoiding impropriety and the appearance of impropriety. In other words, the perception of a judge's impropriety can be as harmful to the integrity of the legal system as actual impropriety. Impartiality and the perception of impartiality are critical in a judge's performance of her/his duties because judges have broad discretion in deciding:

- Whether to accept a plea agreement.
- Whether to sentence a person to probation, jail, or prison.<sup>14</sup>
- How to apply the sentencing guidelines upon a conviction.
- What minimum number of years a person must serve in prison before being eligible for release.
- What maximum number of years a person could serve in prison.
- Whether to go outside of the guidelines for sentencing since the sentencing guidelines became advisory in 2015.

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<sup>13</sup> Since less than 5% of the cases we studied went to trial these convictions are largely the result of plea deals.

<sup>14</sup> Those convicted of certain offenses are required to fulfill their sentences in prison.



- What weight to give mental health and substance abuse issues when sentencing.
- What weight to give to information contained in the presentence investigation report.
- What weight to give the prosecutor’s sentencing recommendation.
- Whether to give weight to the victim’s impact statement, if any.

## 1. CREW’s Methodology for Analyzing the Statistics on Judges’ Decision-Making

For each of the case categories, we looked at dispositions in the Circuit Court by an individual judge as well as the totality of the dispositions by the four judges who handle criminal cases, Chief Judge Carol Kuhnke, Judge Archie Brown, Judge Darlene O’Brien and Judge David Swartz. It is worth noting that our analysis is limited to the case categories we studied and is potentially impacted by the lack of public access to other data such as the rationale for departing from sentencing guidelines and the presentence investigation reports used for each case. Notwithstanding those caveats, CREW looked at the following three areas in analyzing the statistics on how judges resolved and disposed of the charged offenses:

- First, we studied each case category to see whether any individual judge displayed a significant racial disparity in her/his sentencing for the same charged offense. We found instances where there was a significant difference between the length of prison and jail sentences imposed on whites as compared to People of Color. We also found and noted disparities in the length of probation imposed, based on race.
- Second, we assessed whether any of the sitting Washtenaw County Circuit Court judges were an outlier in terms of the average minimum/maximum prison or jail sentences or probationary term lengths he/she imposed for specific categories of charged cases.
- Third, we looked to see whether a racial disparity occurred in terms of the type of punishment imposed by a judge upon conviction among the available options of probation only, a jail sentence or a prison sentence.

## 2. A Snapshot of the Data on Judicial Decision-Making

Our data offers numerous examples of one Washtenaw County Circuit Court judge or another being out of step with others on the court or showing disparities in sentencing against racial minorities in a single case category.<sup>15</sup> CREW highlighted 23 instances across the case categories we studied where an individual judge was an outlier as compared to other judges in terms of harsher sentencing or whose sentences showed racial disparities. We discuss each instance and the particular judge’s (Brown, Kuhnke, O’Brien or Swartz) sentencing decision. We discuss those further in Section IV.

Of more concern, though, was whether we would find a pattern of disparities across all case categories by one or more judges or by the entire court. CREW found that one Washtenaw County judge’s sentencing decisions accounted for 13 of the 23 issues we discuss below which appears to reflect a

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<sup>15</sup> Judicial discretion is valued and should not be limited artificially; indeed, when it takes into account appropriate factors, it can enhance justice. It just should not be used a discriminatory manner.

troubling pattern of disparities and/or harsher sentencing practices against racial minorities across the case categories but that the Washtenaw County Circuit Court, as a whole, did not demonstrate a pattern of racial disparity in its sentencing of our community members across all case categories we studied.

3. The summary table below provides an overview of those case categories where we found at least one instance of racial disparity or harsher sentencing practices among the judges. The table shows where instances of racial disparity or harsher sentencing practices were indicated in every case category and for which judge. Each instance is discussed further in Section IV.

Offense	Judge Brown	Judge Kuhnke	Judge O'Brien	Judge Swartz
<b>ARO</b>	*Disparity/Place			*Disparity/Sen *Disparity/Place
<b>DEL</b>	*Disparity/Sen *Disparity/Prob *Disparity/Place			*Disparity/Place
<b>POS</b>	*Disparity/Sen			
<b>WCC</b>	*Disparity/Sen *Disparity/Place	*Disparity/Prob		*Disparity/Place
<b>WPF</b>	*Disparity/Sen *Disparity/Prob *Disparity/Place	*Outlier		
<b>ARM</b>	*Disparity/Sen		*Disparity/Sen	*Disparity/Sen *Outlier
<b>GBH</b>	*Disparity/Sen			*Disparity/Sen
<b>AWIM</b>	*Outlier			

Key: Racial Disparity in Sentencing = Disparity/Sen  
 Racial Disparity in Placement = Disparity/Place  
 Racial Disparity in Length of Probation = Disparity/Prob  
 Outlier/Higher Minimum and Maximum Sentence = Outlier

### C. Recommendations: Prosecutors and the Court

The data CREW compiled sheds light on deep racial disparities within Washtenaw County's criminal legal system that members of the public have undoubtedly experienced but have never seen in documented form. In Section V, CREW sets forth recommendations for action and mechanisms to address racial inequities and discriminatory treatment in our criminal legal system because we believe the institutions central to that system must not only operate in a non-discriminatory manner in fact but must also be perceived to operate in that way. Restoring public confidence in the criminal legal system drives the recommendations set forth below. Additionally, Section VI lays out other areas of review and analysis that should be studied with the goals of better defining and understanding the extent and cause of the disparities and, importantly, of rectifying them.

To address the deeper issues in the Prosecutor's Office, we recommend:

1. Rigorous financial and administrative oversight by the Washtenaw County Board of Commissioners, including the establishment of a citizen's race equity commission chosen with input of community members.
2. The Board of Commissioners, in collaboration with the prosecutor-elect and the citizen's race equity commission, engage a neutral, third-party evaluator to study prosecutors' files, policies and procedures and make recommendations for data driven, evidence-based improvements to address racial disparities and determine whether the tools and practices employed by the Washtenaw County prosecutor's office are applied in way that is not racially discriminatory and does reflect the fair administration of justice. Issues to review and/or revise include, among other things:
  - a. The disparate impact that the Habitual Offender designation has on People of Color.
  - b. The charging of Weapons Felony Firearm. Are there written guidelines; if so, are they applied without regard to race?
  - c. The factors used to offer plea deals and the creation of a transparent process for plea negotiations.
  - d. The impact that the race of the victim might have on such things as charging decisions, conviction rates, and sentencing decisions.
  - e. The use of vertical and horizontal charging practices.
  - f. The factors/circumstances involved in deciding to dismiss charges including the cases where all charges are dismissed
  - g. Current use of diversion (i.e., before and after filing charges) and restorative justice; the implementation of evidence-based diversion, deflection and/or restorative justice practices that are shown to improve outcomes for people involved in the County's criminal legal system in a racially neutral manner.
  - h. The current performance review process for assistant prosecutors and other staff to ensure it is consistent with the racial equity considerations outlined in this report and supports the "minister of justice" role that prosecutors should play in the legal system.

- i. All assault arrests to identify how decisions are made regarding which charges to file (i.e., misdemeanor, felony or no charges) and whether People of Color are treated the same as whites in terms of the severity of the assault charges filed.
- j. Community members' experiences in the criminal legal system.

3. The creation of an online dashboard to display data points like those documented by CREW so the public can assess whether the decisions by the Washtenaw prosecutor's office have a disparate impact on racial minorities. Citizens elect the prosecutor but have almost no data upon which to assess the performance of the office; a publicly available dashboard would provide voters and others with such data and improve the transparency of justice. A dashboard would also assist the prosecutor's office because they do not maintain aggregated data on data points such as race, age, and income.<sup>16</sup>

4. Developing written policies and procedures for charging decisions and sentencing recommendations made within the Washtenaw County prosecutor's office. Any such policy/procedure should be accompanied by a racial impact statement (i.e. an analysis assessing the possible racial consequences of any proposed policy before adopting it to avoid any unintended disparate racial effects.)<sup>17</sup>

5. Developing and implementing transparent mechanisms, processes and/or rules for exercising discretion, including a robust process to review assistant prosecutors' decisions regarding cases to ensure they are not engaging in racially weighted decisions that have a disparate impact on racial minorities.

6. Implementing a mandatory, ongoing training program on implicit and explicit racial bias for all county employees within the prosecutor's office and those individuals and entities used to investigate cases.

7. Developing and implementing regular equity audits to ensure that county employees within the prosecutor's office and others used by that office to investigate cases are not engaging in practices that have a disparate impact on racial minorities in Washtenaw County.

8. The Michigan Legislature use CREW's data on the discriminatory impact of the Habitual Offender law as well as available research to eliminate the Habitual Offender statute.

To address the deeper issues in the Court, we recommend:

1. Since state courts across the country have acknowledged that the judicial system can be part of the problem in the unequal treatment of minorities, particularly with regard to Black people in the criminal legal system, and that such discriminatory treatment contributes to mass incarceration of People of Color, we are compelled to ask why hasn't our court developed any method of

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<sup>16</sup> In answer to a FOIA request asking whether the Washtenaw County prosecutor's office has aggregated data on such things as age and race, First Assistant Prosecutor Eric Gutenberg wrote, "This office does not have aggregated data on data points such as race or age of those charged." Email dated August 17, 2020 from Eric Gutenberg to MaryAnn Sarosi.

<sup>17</sup> In fact, any policy or procedure adopted regarding prosecutorial functions should be accompanied by a racial impact statement as states such as Iowa, Connecticut, Oregon, and New Jersey have done. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, The Sentencing Project, 2018 <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

transparency in reporting these problems to the public and initiated oversight and change? Since our case data came from the court's own public website, but in a format that takes hundreds of hours to collect and analyze, it's natural for us to wonder why the court hasn't performed an equity audit in the past; or, if it has, why such an audit hasn't been made public so voters can make an informed decision when they elect a judge. While the disparities revealed in our analysis pre-date the tenure of the current chief judge of the Washtenaw County Court, we strongly encourage the use of our report to assist the current court to undertake serious and transparent reforms.

2. The Washtenaw County Board of Commissioners also has an integral role to play in the reforms needed to address racially discriminatory practices in the county's criminal legal system. Not only does the Board have an interest in ensuring that the county's criminal legal system aligns with the *One Community: Advancing Racial Equity in Washtenaw County* initiative, it has oversight of the county's budget, 20% of which is allocated to judicial functions.<sup>18</sup> Given the responsibility of the Board as well as the Washtenaw County Court to ensure equal justice in the criminal legal system, they could jointly establish a citizens race equity commission made up of community members appointed by relevant stakeholders to:
  - a. Annually compile, study, and publish statistics such as those analyzed by CREW to detect racial disparities in the Washtenaw County Courts. The data could be posted on an online dashboard described below.
  - b. Address the issues and questions raised in Section VI of CREW's report. As noted in that section, some of the questions can be answered using the capital felony (FC) and non-capital felony (FH) dataset that CREW has already compiled while other questions require additional information that was not available to CREW. For example, the citizens race equity commission could examine the cases involving life sentences to understand why life sentences are given to People of Color at such a disproportionate rate compared to whites.
3. CREW noted 23 instances where a Washtenaw County judge's sentencing decision exhibited racial disparity or was an outlier in terms of handing down harsher sentences than others on the court. More than half of the concerns CREW raised in this report (i.e., 13 of the 23) come from the judicial decision-making of one judge. The other 3 judges combined comprised less than half of our concerns. With those 23 instances in mind, we urge Washtenaw County Court to, among other things:
  - a. Study the 23 issues further by gathering additional information on the cases involved to understand and address the source of the disparities. The study could be done under the auspices of the citizens race equity commission described above and would address the questions raised in Section VI (Additional Analysis) below.

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<sup>18</sup> Washtenaw County 2019-2022 Preliminary Budget Summary, D-4 <https://www.washtenaw.org/DocumentCenter/View/11250/2019-2022-Preliminary-Budget-Summary>

- b. Study whether there is an imbalance among the judges in terms of defendants designated as Habitual Offenders, average number of convictions, percentage of dismissed charges, etc.
4. The disparities exhibited in cases presided over by Judge Brown are so strikingly consistent among all eight categories we highlighted and affect so many people that the court should consider taking immediate action (in collaboration with the impartial citizen's race equity commission). Therefore, we:
  - a. Suggest that the Washtenaw County Court engage a neutral, outside, third-party to determine whether the racial disparities evidenced in Judge Brown's sentencing decisions are rooted in any personal bias or systemic bias. To fully capture and understand the source of the disparities, the third-party entity should be permitted and encouraged to: thoroughly review the cases filed in the case category where the issue is raised in our report during the time frame CREW studied; notify the defendants in the cases under review of the existence of CREW's report as well as the review underway by the third-party entity; solicit confidential interviews with party participants in the cases and public comment from those who have been involved and impacted; and inquire whether additional information is needed to assess the disparities in question.
  - b. Believe the review should be completed in a timely manner in the interest of justice.
  - c. Understand that the public could rightfully ask for assurance that the pattern of disparities in Judge Brown's sentencing decisions do not continue during the review period and believe the court has a variety of tools it could implement to instill confidence in the justice system. For example, the Washtenaw County Court could supervise/monitor his criminal cases, place a moratorium on sentencing in Judge Brown's pending criminal cases or shift his criminal caseload temporarily pending outcome of the review. Taking any of those steps would signal to the public that the court understands that judges must be neutral in fact and be publicly perceived "as an impartial dispenser of justice."<sup>19</sup>
5. The Washtenaw County Court could also:
  - a. Issue a Local Administrative Order addressing racial bias and prejudice in conduct and judicial decisions such as sentencing.
  - b. Institute a mechanism for receipt of public comment and complaints related to bias and prejudice in judicial conduct (including judicial staff) and judgments with a mechanism for investigation, review, and implementation of any remedies.

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<sup>19</sup> *People v. Killebrew*, 416 Mich. 189, 202; 330 N.W.2d 834 (1982). Such a review would not preclude a person from filing a complaint with the Judicial Tenure Commission or taking similar action.

- c. Develop and implement a publicly available dashboard that is searchable and updated regularly for reporting such things as: all charges, all sentences, pleas with details of offense, and race broken down by judge. The creation of an online dashboard by the Washtenaw County Court and/or the State Court Administrative Office will assist the public in assessing whether a judge’s decisions have a disparate impact on racial minorities.
- d. Establish a protocol whereby all policy and procedures adopted by the Washtenaw County court regarding judicial functions in the criminal legal system should be accompanied by a racial impact assessment.
- e. Provide ongoing equity/implicit bias training to all county employees at the courthouse and ensure that their performance reviews reflect any concerns about unequal treatment of courthouse users. We recognize that judges are not the only tax-funded court employees whose decisions could result in disparate treatment and outcomes. Judicial attorneys, for example, participate in decision-making and draft rulings in cases and can, therefore, impact proceedings. As with judges, they should not administer justice in a preferential manner whether in fact or by perception.<sup>20</sup> When a court employee’s actions suggest unequal treatment of a person/persons using the court, action should be taken so Washtenaw County residents can have confidence that everyone receives equal justice under law.

## 6. Oversight of Racial Disparities in Judicial Decision-Making

Judges are human and not necessarily immune from the myths and biases, implicit as well as explicit, that have informed decisions and impacted our criminal legal system laws for decades, resulting in racial disparities in arrests, treatment, and incarceration of People of Color at astonishingly high rates.<sup>21</sup> As CREW studied the data on patterns of racial disparities related to sentencing decisions by Washtenaw County judges, we looked to see whether there was an oversight mechanisms that should have caught the disparities and possible discriminatory treatment evident in our data.

First, we looked at the court of appeals. While there is appellate review of judicial sentencing and decisions, CREW’s understanding is that the court of appeals limits its review to whether there is abuse of discretion or error in applying the law to the facts of an individual case. There appears to be no effective mechanism for appellate review of overall patterns of racial disparities that could indicate discriminatory or racially biased rulings.

Second, we looked to the ethical canons embodied in the Code of Judicial Conduct. While the Michigan Supreme Court authorizes the Canons, adherence to the Canons is supervised by the Judicial

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<sup>20</sup> A judicial attorney to one of the Washtenaw County judges suggested in a news article that she may not treat people equally when she said, “I really do keep a list of attorneys that annoy me. (There are currently 9 people on the list and you know who YOU are.)” While her comment might have been intended as a joke, it might not be perceived that way by the public and serves to undermine confidence in the justice system. <http://www.legalnews.com/washtenaw/1266844>

<sup>21</sup> Sara Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L.Rev. 397(2009); John J. Dilulio, Jr., *My Black Crime Problem and Ours: Why Are So Many Blacks in Prison? Is the Criminal Justice System Racist? The Answer is Disquieting*, City Journal, Spring 1996; Hon. Harold Hood, *The Race/Ethnic Bias Task Force Four Years Later—Looking Back*, 73 Mich B.J.267 (1994)

Tenure Commission (JTC) which is responsible for “investigating complaints of judicial misconduct and judicial incapacity, and for recommending discipline of judges by the Michigan Supreme Court.”<sup>22</sup>

The JTC, however, is limited in its review and investigation to conduct that violates the Code of Judicial Conduct, and Michigan’s Code does not explicitly speak to racial bias or prejudice in decision-making, including that which may result in racial disparities. The American Bar Association’s Model Code of Judicial Conduct, by contrast, includes a Canon explicitly prohibiting racial and gender prejudice in performance of a judge’s duties. Other states have adopted such a Canon for judges, such as Canon 3 B (5) of the Virginia Canons of Judicial Conduct, which states that:

*“A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.”<sup>23</sup>*

Given that Michigan’s Canons do not explicitly cover bias and prejudice<sup>24</sup>, we are concerned that racial disparities in sentencing People of Color may not receive the attention it deserves by the JTC. In fact, the JTC expressly states that claims involving a judge’s discretionary handling of judicial duties do not fall under misconduct and are, therefore, not within the JTC’s authority.<sup>25</sup> That leaves open the question, “Where does oversight lie for a judge’s discretionary handling of judicial duties, when such acts include racial disparities in sentencing?”

Third, we considered if the public has oversight capabilities to assess whether a judge’s decision-making results in racial disparities to the disadvantage of People of Color. In Washtenaw County, and indeed across Michigan, the public lacks effective mechanisms for review of a judge’s record as there are no audits, scorecards or dashboards to inform the public of disparities and other patterns that emerge from the decisions of a specific judge.

Without such a mechanism, there is no basis for the public to make fully informed election decisions regarding incumbent judges, when racial disparities in decision-making or signs of bias or prejudice are important to voters. So, while the voters in Michigan elect judges, the public is largely flying blind.

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<sup>22</sup> The authority and composition of the membership of the Judicial Tenure Commission comes from Article 6 Sec 30 of the Michigan Constitution adopted in 1968. Does the composition of the JTC which has been in place since 1968 (where 5 of the 9 members must be judges, 2 more are lawyers and only the remaining 2 are non-lawyers) adequately reflect input from the public or serve as an effective oversight body such that the public can have confidence in its fairness?

<sup>23</sup> [http://www.courts.state.va.us/courts/scv/canons\\_of\\_judicial\\_conduct.pdf](http://www.courts.state.va.us/courts/scv/canons_of_judicial_conduct.pdf)

<sup>24</sup> Michigan Canon 3(A)(14) does provide: “Without regard to a person’s race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.” However, the Canon does not explicitly address bias or prejudice in decision-making, including that which may result in racial disparities.

<sup>25</sup> State of Michigan Judicial Tenure Commission Annual Report 2019 at Page 7  
[http://cms4.revize.com/revize/mjtc/annual\\_report/docs/2019%20Annual%20Report.pdf](http://cms4.revize.com/revize/mjtc/annual_report/docs/2019%20Annual%20Report.pdf)



Thus, CREW was left with the same question with which we started: How should judges in Michigan be held accountable for patterns of discriminatory judgements and/or biased treatment of individuals who come to the court?

To answer this question, we urge the Michigan Supreme Court to:

- a. Examine the ways in which the Michigan Constitution protects against racial bias, discrimination, and prejudice and how those protections are evidenced in the criminal legal system.
  - b. Issue for public comment, a Canon that is consistent with the ABA Model Judicial Canons, which explicitly addresses the mandate that a judge's conduct (and that of her/his judicial staff) and judgments be without bias and prejudice based on all protected categories and status.
  - c. Provide a basis for review and audit of racial disparities in criminal sentencing and authorize the JTC to investigate such disparities for violation of the new Canon.
7. We urge the Michigan Judicial Tenure Commission to provide a mechanism for public complaints on racial disparity and bias in judicial conduct and judgements and make such data public.

#### **D. Deeper Dive**

When CREW began this effort months ago, we had no idea where the data would take us. We thought our efforts would provide a springboard into the deep waters of racial disparities in Washtenaw County's criminal legal system, but we had no idea there would be so many underwater caves to explore. In Section VI, CREW poses over thirty questions that explore those caves; resolving the questions will be necessary if the Washtenaw County criminal legal system is committed to eliminating and preventing racial discrimination.

### **III. FINDINGS**

The public data that CREW studied reveals significant racial disparities in both the charging and sentencing of members of our community. The breadth of these disparities and the impact in terms of punishment on People of Color are so stark such that CREW presents this report to our community with a call for further informed inquiry and discussion by others in our communities and immediate action by those institutions responsible for funding, administering and oversight of the criminal legal system in Washtenaw County.

## A. Findings: Patterns in Prosecution

1. The data related to charges filed by the Washtenaw County prosecutor's office present disturbing patterns of racial disparities across virtually every case category that CREW examined.
2. In all 11 case categories CREW examined, prosecutors charged many more People of Color than whites (up to 29 times more).
3. In 10 of the 11 categories, prosecutors filed more charges against People of Color, on average, than whites. The difference in the average number of charges ranged from a 12.8% difference to 62.9%.
4. In 10 of the 11 categories that CREW studied, People of Color also received more convictions per case, on average, than whites.
5. In all 11 categories, prosecutors charged People of Color as Habitual Offenders at a higher rate than whites.

## B. Findings: Patterns in Judicial Decision-Making

1. While we found racial disparities among individual judges, CREW did not find that the Washtenaw County Circuit Court, as a whole, demonstrated a pattern of racial disparity in its sentencing of our community members across all eight case categories we studied. That is not to say, however, we found no instances of disparity across the court. For example:
  - a. Our data revealed that 44.1% of People of Color convicted of homicide were sentenced to life in prison compared to only 27.3% of white defendants convicted of homicide.
  - b. Most of the judges contributed to a wide racial disparity in the average minimum/maximum sentence in armed robbery cases.
2. In addition, we highlighted 23 instances across the case categories that we studied where an individual judge was out of step with others on the court in terms of harsher sentencing or whose sentences showed racial disparities. Those instances are discussed below.
3. Over half of the instances we raise in the judicial decision-making section below relate to *one* judge (13 of the 23 issues). The other 3 judges accounted for less than half of the concerns we pointed out. The data revealed that the one judge's sentencing decisions reflected a pattern of racial disparities negatively impacting People of Color and/or harsher sentencing practices across all eight case categories.

## IV. DATA HIGHLIGHTS

### A. Background

1. To navigate the data [tables](#), it is helpful to understand their design and organization. The statistical tables analyzing Washtenaw County Circuit Court records are divided into the 11 categories of cases reviewed and analyzed by CREW. (See list at footnote 5.) For each category, there is a teal colored table (reporting or summarizing the charges brought by prosecutors) and an orange table (reporting or summarizing the convictions and judicial sentencing resulting from those charges).

2. Prosecutors have a unique role in the justice system not only because they have “the responsibility of a minister of justice and not simply that of an advocate” as laid out in the comment to Rule 3.8 (Special Responsibilities of a Prosecutor) of the ABA Model Rules of Professional Conduct<sup>26</sup> but also because they are often viewed as the most powerful actor in our criminal legal system<sup>27</sup>. When it comes to charging a person for an incident that may give rise to a claim of violation of the criminal statutes, the Washtenaw County prosecutor has broad discretion in deciding:
  - Whether or not to bring charges against someone.
  - What charges to bring, if any.
  - Whether or not to designate a person as a “Habitual Offender”.<sup>28</sup>
  - Whether or not to offer a plea and the terms of a plea.
  - Whether or not to dismiss charges.
  
3. When it comes to sentencing a person who: a) admits guilt to one or more of the charges brought by a prosecutor; b) enters a no contest or guilty plea for a plea agreement; or c) is convicted by a jury or judge, Washtenaw County judges have broad discretion in deciding:
  - Whether to accept a plea agreement.
  - Whether to sentence a person to probation, jail, or prison.<sup>29</sup>
  - How to apply the sentencing guidelines upon a conviction.
  - What minimum number of years a person must serve in prison before being eligible for release.
  - What maximum number of years a person could serve in prison.
  - Whether to go outside of the guidelines for sentencing since the sentencing guidelines became advisory in 2015.
  - What weight to give mental health and substance abuse issues when sentencing.
  - What weight to give to information contained in the presentence investigation report.
  - What weight to give the prosecutor’s sentencing recommendation.
  - Whether to give weight to the victim’s impact statement, if any.

## B. Patterns in Prosecution

1. The following tables reflect the Washtenaw County prosecutors’ use of discretion in charging. In reviewing Table 1 of both the FC and the FH statistics (see [Tables](#)), we noticed that Black people were overrepresented as a percentage in the People of Color category. Black people represent

<sup>26</sup>[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor/comment\\_on\\_rule\\_3\\_8](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8)

<sup>27</sup> “The office of prosecutor is regarded by many as the most powerful position in the U.S. criminal justice system. Prosecutors decide which cases to investigate, which suspects to charge, which charges to bring, and which penalties to pursue upon conviction.” P. 9, *Report of The Sentencing Project to the Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, 2013

<sup>28</sup> If a person has previously been convicted of one or more felonies (or attempts to commit felonies), a prosecutor may choose to sentence that person for a subsequent felony charge as a “habitual offender.” If that person is convicted, s/he faces a much longer sentence that could lengthen his/her prison time by 25% - 100%.

<sup>29</sup> Those convicted of certain offenses are required to fulfill their sentences in prison.

12.3% of the total population of Washtenaw County. While they make up about 52% of the People of Color in Washtenaw County, Black people account for 98.16% of the People of Color charged by prosecutors in serious capital felony cases (FC cases) and 99.4% of the People of Color charged in non-capital felony cases (FH cases).

2. The teal colored tables in each category (see Tables) describing the *charges* brought by the Washtenaw County prosecutor present disturbing patterns of racial disparities across virtually every case category of charges brought by prosecutors for criminal actions.<sup>30</sup>
  - a. **Cases charged:**<sup>31</sup> In all 11 categories, prosecutors charged many more People of Color than whites, both in absolute numbers and in comparison, to their presence in the general population. You can see from the table below the difference ranged from 22% more to 1,150% more People of Color charged than whites<sup>32</sup> and a Person of Color is anywhere from 3 to 29 times as likely to be charged as a white person.

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<sup>30</sup> CREW's data challenges the myth that Washtenaw County is exceptional in terms of racial equity. The data points to racially weighted decision-making by Washtenaw County prosecutors that is line with national studies that describe how discretionary decision-making by actors in the criminal legal system are used to more negatively impact People of Color than whites. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, The Sentencing Project, 2018 <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

<sup>31</sup> Of the 56 FC cases (about 12.6% of FC cases) in which all charges were dropped and a defendant, People of Color made up 76.8% of this group, whites made up 12.5% and 10.7% of the cases had no race information for the defendants. In the FH study, of the 140 cases (7.7% of all FH cases) in which the defendant was not convicted of any charge, People of Color accounted for 55.7% of this group, whites accounted for 41.4% and the race of 2.9% of the defendants was unknown. More charges being dropped against People of Color may suggest a lower threshold for arresting them than for a white person.

<sup>32</sup> CREW did not have access to arrest data; thus, we could not determine how/whether law enforcement contributed to the imbalance between those charged who were Persons of Color and white. CREW's report should prompt law enforcement leaders in Washtenaw County and the County Board of Commissioners to review and make public data on arrests.

		Cases Charged			Based on their Population in Washtenaw County...
		PoC	White	Diff %	
FC Cases <sup>33</sup>	ARM	140	39	259.0%	A PoC is 8 ½ times as likely to be charged with ARM as a white person
	AWIM	41	10	310.0%	A PoC is almost 10 times as likely to be charged with AWIM as a white person
	GBH	35	17	105.9%	A PoC is almost 5 times as likely to be charged with GBH as a white person
	HOM	38	12	216.7%	A PoC is 7 ½ times as likely to be charged with HOM as a white person
FH Cases <sup>34</sup>	ARO	172	56	207.1%	A PoC is over 7 times as likely to be charged with ARO as a white person
	DEL	96	23	317.4%	A PoC is almost 10 times as likely to be charged with DEL as a white person
	POS	146	94	55.3%	A PoC is almost 4 times as likely to be charged with POS as a white person
	SLI	110	90	22.2%	A PoC is almost 3 times as likely to be charged with SLI as a white person
	WCC	108	37	191.9%	A PoC is about 7 times as likely to be charged with WCC as a white person
	WFF	25	2	1150.0%	A PoC is more than 29 times as likely to be charged with WFF as a white person
	WPF	67	8	737.5%	A PoC is almost 20 times as likely to be charged with WPF as a white person

- i. What explains the pronounced tilt toward charging People of Color (primarily Black people since they comprise over 98% of the People of Color charged in the cases we analyzed) when they represent less than 30% of Washtenaw County’s population? Is it possible that whites who were arrested for similar actions were charged with misdemeanors instead of felonies? Are these the only cases being brought to prosecutors by law enforcement? If so, why is that? If not, then what decisions do prosecutors make that lead them to charge People of Color overwhelmingly more than whites?
- ii. The Felony Firearm (WFF) is an interesting category to examine. In Michigan, a person can be charged with a violation of the statute which makes it a crime to use a firearm (legal or otherwise) in the commission of a felony. Therefore, WFF is not generally a

<sup>33</sup> Armed Robbery (ARM), Assault with Intent to Commit Murder (AWIM), Assault with Intent to Commit Great Bodily Harm Less than Murder (GBH), Homicide (HOM)

<sup>34</sup> Assault, Resisting, Obstructing an Officer (ARO), Controlled Substance-Delivery (DEL), Controlled Substance-Possession (POS), Suspended License (SLI), Weapon-Carrying Concealed (WCC), Weapon-Felony Firearm (WFF), Weapon-Possession by Felon (WPF)

stand-alone charge; a prosecutor may choose to add it when there are other felony charges and the felony involves a gun. By law, a conviction for WFF requires a mandatory 2-year prison sentence that is *in addition* to any sentence for any other conviction for the original charge. In other words, it automatically lengthens the sentence by 2 years.

As with all charges, prosecutors have total discretion to decide whether to charge a person with WFF. During the time frame we studied, 25 People of Color were charged with WFF while only 2 whites were charged (for those 2 white people, the WFF charges were dismissed.) Were firearms used in only 2 of the cases involving whites? A review of cases involving white defendants confirm that firearms were used in the commission of other felony cases, however, prosecutors chose not to add on a WFF charge.<sup>35</sup>

iii. Weapons Possession by a Felon (WPF) is a charge that can be filed when a person who has been convicted of a felony is found in possession of a firearm. As with other charges, it is in the prosecutor's discretion whether to file a WPF charge. The table above shows that 737% more People of Color were charged with WPF than whites in the time frame we studied. That is an astounding gap that begs the question "Why?" Is it the case that in the 1,014 non-capital felony (FH) and capital felony (FC) cases we reviewed there were only 8 cases of a white person with a prior felony conviction who possessed a firearm?

**b. Average Number of Charges per Case:** The broad discretion prosecutors have in charging people with crimes leaves open the possibility of "horizontal overcharging" and "vertical overcharging."<sup>36</sup> Horizontal overcharging describes instances when a prosecutor includes as many charges as possible (even ones that she/he may not be able to prove) in order to induce a person charged to accept a plea agreement and plead guilty. Vertical overcharging is the practice by prosecutors of charging the highest possible charge that carries the stiffest penalty with the intention that they will use that highest charge to force a plea on the person charged.

In 10 of the 11 categories, prosecutors filed more charges against People of Color, on average, than whites. The difference in the average number of charges ranged from a 12.8% difference in the average number of charges (GBH cases) to 62.9% (HOM cases).<sup>37</sup> In 8 of the 11 categories, the average number of charges for People of Color was more than 20% higher than their white counterparts.

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<sup>35</sup> We reviewed court records and media of cases involving white defendants who used a firearm in the commission of a felony but were not charged with felony firearm.

<sup>36</sup> A.W. Alshuler, *The Prosecutor's Role in Plea Bargaining*, 36 U Chi L Rev 50, 85-105 (1968); A.M. Crespo, *The Hidden Law of Plea Bargaining*, 118 Colum L Rev 1303 (2018) (By inflating the substance of the charges beyond what the law, evidence and equities of the case supply, a prosecutor can achieve a potent lever for plea bargaining even when they are unlikely to satisfy the burden of proof at trial).

<sup>37</sup> In the homicide category, for example, prosecutors charged People of Color with an average of 6 charges while White defendants had an average of 3.7 charges.

		Charges per Case (Avg.)		
		PoC	White	Diff %
FC Cases	ARM	4.6	3.8	20.5%
	AWIM	6.6	4.7	40.1%
	GBH	5.8	5.1	12.8%
	HOM	6.0	3.7	62.9%
FH Cases	ARO	4.2	4.5	-5.9%
	DEL	3.0	2.4	24.6%
	POS	3.3	2.7	20.5%
	SLI	3.6	3.1	15.1%
	WCC	3.0	2.3	30.9%
	WFF	5.8	4.5	28.0%
	WPF	4.4	3.4	29.1%

- i. There may be explanations to account for some of the differences but the pattern across the board and the size of the differences seem to reveal a more disturbing problem. Had there been a large disparity in only one or two categories, we might have investigated those categories further to determine if there was an extreme outlier case that skewed the averages. But the disparities across the spectrum of cases leads us to believe that the gaps between People of Color and whites is not the result of a few extreme cases.
  - ii. In teasing out these statistics, we considered whether, in fact, People of Color were reported by law enforcement to have been suspected of committing more separate criminal offenses in each incident than whites did (which, if true, would raise questions of biased policing and reporting that would warrant further study which lies beyond the scope of this report). We also considered whether prosecutors used additional charges against People of Color more often as a negotiating tool to get them to accept a conviction on a lesser charge and whether whites were not charged for offenses that they could have been. These are questions that cannot be answered without access to the records of the Washtenaw County prosecutor’s office.
- c. **Average Number of Convictions per Case:** In 10 of the 11 categories that CREW studied, People of Color also received more convictions per case, on average, than whites.<sup>38</sup> On the low end, People of Color had 6.3% more convictions per case, on average, than whites in suspension of license cases (SLI). The greatest difference in the average number of convictions per case was in homicide cases (HOM) where there was a 77.1% difference between People of Color and whites.

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<sup>38</sup> Further analysis must be done to determine whether prosecutors offered different plea deals when charging people for the same felony offenses that more often resulted in whites having their charges dismissed than People of Color.

		Convictions per Case (Avg.)		
		PoC	White	Diff %
FC Cases	ARM	2.3	1.9	21.2%
	AWIM	3.1	2.0	57.3%
	GBH	2.7	1.9	39.8%
	HOM	4.1	2.3	77.1%
FH Cases	ARO	2.4	2.5	-6.0%
	DEL	1.8	1.4	25.8%
	POS	1.8	1.6	16.2%
	SLI	1.7	1.6	6.3%
	WCC	1.9	1.4	31.8%
	WFF	3.5	2.0	74.0%
	WPF	2.7	2.1	25.7%

i. Is the imbalance in the average number of convictions due to the prosecutor or the judge, or both? Most criminal cases do not go to trial; they end with a plea deal whereby the defendant usually agrees to a conviction(s) in return for dismissing other charges or a recommendation for a lighter sentence. But if the prosecutor starts off by filing more charges for People of Color than whites, it is foreseeable that People of Color would end up with more convictions. A defendant facing a higher number of charges could perceive a greater threat and feel compelled to agree to more convictions. While there is typically a blind rotation by which judges are assigned a particular case, prosecutors' decisions related to such things as charges, bail, or pleas continue after the assigned judge is known. Prosecutors might tailor their decisions to the judge before whom they are appearing. For example, if a judge is viewed as giving harsher sentences to a certain group of people or for a certain class of offenses, the prosecutor might include additional charges or might not offer a plea to that group of people or when the charges involve those offenses.

d. **Percentage of People charged as a Habitual Offender:** In all 11 categories, prosecutors charged People of Color as Habitual Offenders more often than whites. The only category where People of Color and whites were similarly charged as Habitual Offenders was in the suspension of license category where 3% more People of Color were charged than whites. On the other end of spectrum, in Carrying Concealed Weapon cases, prosecutors used the Habitual Offender designation 653% more for People of Color than for whites.



		Cases Charged as Habitual Offender (%)		
		PoC	White	Diff %
FC Cases	ARM	35.0%	25.6%	36.5%
	AWIM	41.5%	10.0%	314.6%
	GBH	31.4%	23.5%	33.6%
	HOM	44.7%	0.0%	-
FH Cases	ARO	27.9%	21.4%	30.2%
	DEL	28.1%	8.7%	223.4%
	POS	32.9%	18.1%	81.8%
	SLI	30.9%	30.0%	3.0%
	WCC	20.4%	2.7%	653.7%
	WFF	44.0%	0.0%	-
	WPF	44.8%	25.0%	79.1%

- i. The Habitual Offender (HO) designation is another area of discretion for prosecutors. If a person has previously been convicted of one or more felonies (or attempts to commit felonies), a prosecutor *may* choose – but is not required - to designate that person as a “habitual offender” if charging that person for a subsequent felony charge. If that person is convicted, s/he faces a much longer sentence that could lengthen the prison sentence by 25% - 100%, depending on the number of prior convictions. One might think the HO designation makes sense for prosecutors to use in instances when they are charging someone who displays a serious pattern of ongoing criminal behavior. But that is not the only way it is used.

In 2008, the Michigan Supreme Court said in [People v. Gardner](#) that the habitual offender law passed by the legislature was so broad that it required courts to count each separate felony *conviction* in calculating the amount by which a sentence will increase under the habitual offender law, not the number of separate criminal *incidents* resulting in felony convictions. In other words, if someone has more than one conviction stemming from one incident, each conviction would add on additional time to the person’s sentence if the prosecutor opts to charge that person as a Habitual Offender in connection with another felony down the road.

That is one of the reasons why the statistics on average number of convictions for People of Color versus whites is so disturbing—more convictions per case makes it more likely a Person of Color will be charged as a Habitual Offender, and receive a significantly longer sentence, if she/he gets charged again with a felony. The likelihood that People of Color will get charged as Habitual Offenders is also magnified when you consider the

rate at which they are charged with a crime and the average number of charges they receive per case.<sup>39</sup>

- ii. We were troubled here by two things. First, to see how often Washtenaw County prosecutors charged people as Habitual Offenders overall when the decision whether to charge someone as a Habitual Offender is discretionary. Second, the racial disparity in terms of who was charged as a Habitual Offender. For example, in the homicide cases, almost half of People of Color were charged as Habitual Offender while no whites were charged in that way. Could whites have been charged as a Habitual Offender but were not? Does the breadth of how the HO label is applied indicate use or misuse of the HO tool beyond its intended purpose, and, if so, are discretionary decisions by the Washtenaw County prosecutor's office responsible for a racial disparity?

### C. Patterns in Judicial Decision-Making

#### 1. Overview

- a. CREW utilized a sample of 3,608 charges for its initial review of judicial decision-making patterns. The charges analyzed in the four capital felony (FC) case categories represent seven years of judicial dispositions while the charges included in the seven noncapital felony (FH) categories cover three years of judicial dispositions. While we recommend further data review and ongoing transparency, the analysis of all judges' rulings in these felony categories was sufficient to conclude that racial disparity is a concern that must be addressed in the Washtenaw County Circuit Court's criminal proceedings.

CREW took into consideration that there might be instances where an individual judge's sentencing decision showed disparity in one of the case categories.<sup>40</sup> In fact, our data does offer examples of one judge or another being out of step with others on the court or showing racial disparities in sentencing in a single case category. We highlighted 23 instances across the case categories that we studied where an individual judge was out of step with others on the court in terms of harsher sentencing or whose sentences showed racial disparities.

Of more concern, though, was whether we would find a pattern of disparities across all 11 case categories by one or more judges or by the entire court. While we found racial disparities among individual judges, CREW did not find that the Washtenaw County Circuit Court, as a whole, demonstrated a pattern of racial disparity in its sentencing of our community members across all case categories we studied.

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<sup>39</sup> In addition to possible bias in charging, Blacks being charged more often with Habitual Offender status may reflect other factors, such as heavy law enforcement presence in low-income Black communities.

<sup>40</sup> Judicial discretion is valued and should not be limited artificially; indeed, when it considers appropriate factors, it can enhance justice. It just should not be used a discriminatory manner.

That is not to say, however, we found no instances of disparity across the court. As an example, our data revealed that 44.1% of People of Color convicted of homicide were sentenced to life in prison compared to only 27.3% of White defendants convicted of homicide and most of the judges contributed to a wide racial disparity in the average minimum/maximum sentence in armed robbery cases.

The data did reveal, however, that one Washtenaw County Circuit judge's sentencing decisions appear to reflect a troubling pattern of racial disparities and/or harsher sentencing practices across the case categories and account for 13 of the 23 issues we raise in our discussion below.

b. The data on how judges handled the charges brought by the prosecutors are detailed in two sets of tables (see [Tables](#)). The teal colored tables detail the charges for each of the 11 categories of criminal offenses that CREW studied. The orange colored tables, entitled "Sentencing Statistics by Defendant's Race and Sentencing Judge" analyze what happened when someone charged with an offense was convicted of that offense.

For each of the case categories, we looked at the dispositions by an individual judge as well as the totality of the dispositions by the entire bench. In analyzing the statistics on how judges resolved and disposed of the charged offenses, CREW looked at three areas:

- i. First, we studied each case category to see whether any individual judge displayed a significant racial disparity in her/his sentencing for the same charged offense. We found instances where there was a significant difference between the length of prison and jail sentences imposed on whites as compared to People of Color. We also found and noted disparities in the length of probation imposed, based on race.<sup>41</sup> In this section of the report, while we highlight certain areas of racial disparity, this is not intended to suggest that the others areas do not require further consideration or analysis.
- ii. Second, we assessed whether any of the sitting Washtenaw County Circuit judges were an outlier in terms of the average minimum/maximum prison or jail sentences or probationary term lengths he/she imposed for specific categories of charged cases.
- iii. Third, we looked to see whether a racial disparity occurred in terms of the type of punishment imposed by a judge upon conviction among the available options of probation only, a jail sentence or a prison sentence.

c. Of the 11 case categories, there were 3 categories that did not demonstrate significant racial disparities among any of the judges nor was there any outlier in terms of sentencing ranges.

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<sup>41</sup> CREW did not have the capacity to review the terms of probation, other than the length, to assess any further racial disparities in punishment regarding probation terms including restrictions and/or costs imposed. We did collect that data which could be studied in a subsequent review.

These areas have narrow statutory sentencings that limit judicial discretion in sentencing. The areas were:

- i. Suspended License (SLI) – a category for which there is a high dismissal and low conviction rate.
- ii. Weapons Felony Firearm (WFF) – a category for which the judge has no discretion in terms of the mandatory sentence. Only 2 WFF charges were filed by Washtenaw County prosecutors against whites and both of those charges were dismissed. At the same time, 64% of People of Color were convicted of WFF. The prosecutors also designated 44% of People of Color charged with felony firearm as a Habitual Offender while none of the white people charged were designated as a Habitual Offender.
- iii. Homicide (HOM) – a category for which sentencing discretion is limited. For example, there is no discretion in a sentence for a first-degree homicide conviction for an adult. The law requires a mandatory life without parole sentence.

d. Of the remaining 8 case categories, Washtenaw County Judge Brown’s sentencing decisions raised at least one issue in all categories. Those issues were significant racial disparities in sentencing, harsher average sentences that were outliers compared to the rest of the court or significant racial disparities with regard to where whites versus People of Color carried out their sentences (e.g. probation versus prison). These disparities were greater and more consistent as compared to data regarding the cases before other judges.

The summary table below provides an overview of the case categories discussed in this section and notes where we found instances of racial disparity or harsher sentencing practices among the judges. Each instance is discussed further throughout this section.

Offense	Judge Brown	Judge Kuhnke	Judge O'Brien	Judge Swartz
ARO	*Disparity/Place			*Disparity/Sen *Disparity/Place
DEL	*Disparity/Sen *Disparity/Prob *Disparity/Place			*Disparity/Place
POS	*Disparity/Sen			
WCC	*Disparity/Sen *Disparity/Place	*Disparity/Prob		*Disparity/Place
WPF	*Disparity/Sen *Disparity/Prob *Disparity/Place	*Outlier		
ARM	*Disparity/Sen		*Disparity/Sen	*Disparity/Sen *Outlier
GBH	*Disparity/Sen			*Disparity/Sen
AWIM	*Outlier			

Key: Racial Disparity in Sentencing = Disparity/Sen  
Racial Disparity in Placement = Disparity/Place  
Racial Disparity in Length of Probation = Disparity/Prob  
Outlier/Higher Minimum and Maximum Sentence = Outlier

## 2. Non-Capital Felony Cases (FH Tables)

- a. Assaulting, Resisting, or Obstructing an Officer (ARO): This is one of the most frequent charges made in Washtenaw County among the FH cases and is almost always an add on charge to another felony.
  - i. Disparity in Sentencing
    - The percentage of whites convicted of ARO was far lower than People of Color. Though there were a limited number of whites convicted, in general, whites received a slightly higher number of years when sentenced to prison among three of the judges.
    - There was a wide difference in the average minimum/maximum prison sentence that Judge Swartz gave to People of Color (1.5 – 4.1 years) versus whites (.4 – 2 years).

ARO Sentence Disparity	Judge Swartz		
	PoC	White	% Diff.
Average Min. Prison Sentence (yrs.)	1.5	0.4	250.0%
Average Max. Prison Sentence (yrs.)	4.1	2.0	106.3%

ii. Differences in Where Defendants Served their Sentence

- For two of the judges there was a disparity based on race as to who received the lesser punishment of probation for a conviction of this charge. Judges Brown and Swartz sentenced the largest share of their White defendants to probation (42.9% and 50%, respectively) while sentencing the largest share of People of Color to incarceration in jail (52% and 56.3%, respectively).

ARO Placement	Judge Brown			Judge Swartz		
	PoC	White	% Diff.	PoC	White	% Diff.
Sentenced to Jail (%)	52.0%	28.6%	82.0%	56.3%	25.0%	125.0%
Sentenced to Probation Only (%)	16.0%	42.9%	-62.7%	18.8%	50.0%	-62.5%

b. Controlled Substance-Delivery (DEL): Most convictions for this charge result in jail or probationary sentences.

i. Disparity in Sentencing

- Where jail or prison sentences were imposed, Judge Brown gave People of Color significantly longer jail sentences than whites (0.6 years versus 0.2 years).

DEL Sentence Disparity and Probation Length	Judge Brown		
	PoC	White	% Diff.
Average Jail Sentence (yrs.)	0.6	0.2	290.0%
Average Probation Period Accompanying Jail Sentences (yrs.)	2.17	1.00	116.7%

- Judge Brown gave People of Color longer terms of probation after release from jail (2.17 years) than he gave to whites (1 year).<sup>42</sup>

ii. Differences in Where Defendants Served their Sentence

- No one on the bench sentenced a white person convicted of this charge to a prison sentence. As a group, the court gave the least harsh punishment –

<sup>42</sup>Longer terms of supervision correlate with an increased likelihood of a violation of one of the terms of probation often resulting in incarceration.

probation only – 66.7% of the time to white defendants. Only 31.8% of People of Color received probation while the rest were incarcerated either in jail or prison.

- Judge Swartz placed 100% of the whites convicted of DEL on probation while placing 0% of the People of Color on probation. People of Color all received prison or jail sentences.
- Judge Brown placed 2/3 of white defendants on probation while sentencing the majority of People of Color to incarceration in prison or jail.

DEL Placement	All Judges			Judge Brown			Judge Kuhnke			Judge O'Brien			Judge Swartz		
	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.
Probation Only Cases (%)	31.8%	66.7%	-52.3%	41.2%	66.7%	-38.2%	66.7%	66.7%	0.0%	10.0%	0.0%	-	0.0%	100%	-

c. Controlled Substance – Possession (POS)

i. Disparity in Sentencing

- Judge Brown’s average minimum/maximum prison sentences were significantly higher for People of Color (1.5 – 8.5 years) than whites (1 – 3.5 years).

POS Sentence Disparity	Judge Brown		
	PoC	White	% Diff.
Average Min. Prison Sentence (yrs.)	1.5	1.0	53.2%
Average Max. Prison Sentence (yrs.)	8.5	3.5	142.9%

d. Weapons- Carrying Concealed (WCC)

i. Disparity in Sentencing: Judge Brown’s average minimum/maximum prison sentences were significantly higher for People of Color (2.4 – 6 years) versus whites (.5 – 5 years).

WCC Sentence Disparity	Judge Brown		
	PoC	White	% Diff.
Average Min. Prison Sentence (yrs.)	2.4	0.5	372.2%
Average Max. Prison Sentence (yrs.)	6.5	5.0	30.0%

ii. Differences in Where Defendants Served their Sentence

- The entire bench displayed a large difference in the percentage of people convicted whom they sent to prison. They incarcerated a significantly higher percentage of People of Color in prison than whites.

- Judge Brown gave probation in 90% of the cases involving whites and only 54.5% of the cases involving People of Color.
- Judge Swartz gave probation in 88.9% of the cases involving whites and only 44.8% of the cases involving People of Color.
- Judge Kuhnke gave People of Color and whites just probation at roughly the same rate but the length of probation was significantly higher for People of Color than whites (3 years versus 1.5 years).

WCC Placement	All Judges			Judge Brown			Judge Kuhnke			Judge O'Brien			Judge Swartz		
	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.
Prison Cases (%)	14.6%	2.9%	410.4%	13.6%	10.0%	36.4%	13.0%	0.0%	-	13.6%	0.0%	-	17.2%	0.0%	-
Probation Only Cases (%)	39.6%	62.9%	-37.0%	54.5%	90.0%	-39.4%	56.5%	62.5%	-9.6%	0.0%	0.0%	-	44.8%	88.9%	-49.6%

WCC Disparity Probation Length	Judge Kuhnke		
	PoC	White	% Diff.
Average Probation Only Period (yrs.)	3.0	1.5	102.6%

e. Weapons – Felon in Possession (WPF)

- Disparity in Sentencing: There were significant racial disparities in Judge Brown’s average minimum/maximum prison sentence for People of Color (2.7 - 7.2 years) versus whites (.6 – 5 years).
- Outliers in Min/Max Sentencing: Judge Kuhnke’s average minimum/maximum sentences were significantly higher than the rest of the court.

WPF Sentence Disparity & Outlier	Judge Brown			Judge Kuhnke		
	PoC	White	% Diff.	PoC	White	% Diff.
Average Min. Prison Sentence (yrs.)	2.7	0.6	361.9%	5.3	-	-
Average Max. Prison Sentence (yrs.)	7.2	5.0	43.3%	16.1	-	-

iii. Differences in Where Defendants Served Their Sentence

- Judge Brown gave the lesser punishment of probation to 75% of the whites convicted of WPF while giving probation to 22.2% of People of Color.
- When he did give People of Color the lesser punishment of probation, Judge Brown handed out much longer probation terms for them than he did for whites (2.5 years versus 1.7 years).



WPF Probation Length & Placement	Judge Brown		
	PoC	White	% Diff.
Probation Only Cases (%)	22.2%	75.0%	-70.4%
Average Probation Only Period (yrs.)	2.5	1.7	50.0%

### 3. Capital Felony Cases (FC Tables)

#### a. Armed Robbery

i. Disparity in Sentencing: Our data shows a racial disparity in sentencing of cases involving an armed robbery conviction for the three judges who sentenced People of Color and whites for armed robbery: Brown (132.6% difference in average minimum sentence between whites and People of Color), O'Brien (115.1% difference) and Swartz (73.5% difference).

ii. Outliers in Min/Max Sentencing: Judge Swartz's average min/max sentence for People of Color was noticeably higher than the other judges making it an outlier on the court. The court as a whole had an average of 9.8 year min/23.7 year max for People of Color while Judge Swartz averaged 14.1 year min/31.0 years max.

ARM Sentence Disparity & Outlier in Sentence Length	All Judges			Judge Brown			Judge Kuhnke			Judge O'Brien			Judge Swartz		
	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.
Average Min. Prison Sentence (yrs.)	9.8	4.9	101.9%	9.7	4.2	132.6%	6.1	-	-	10.1	4.7	115.1%	14.1	8.1	73.5%
Average Max. Prison Sentence (yrs.)	23.7	18.9	25.6%	24.9	19.9	24.8%	17.7	-	-	23.6	16.0	47.4%	31.0	22.0	41.1%

#### b. Assault with Intent to do Great Bodily Harm Less Than Murder (GBH)

##### i. Disparity in Sentencing

- Judge Brown sentenced whites convicted of GBH to markedly lower average prison sentences than he did People of Color. His average minimum/maximum prison sentence for People of Color was 7.1 - 18.7 years while the average min/max sentence for white people was 2.5 - 10 years.

- Judge Swartz sentenced whites convicted of GBH to markedly lower average prison sentences than he did for People of Color. Judge Swartz’s average minimum/maximum prison sentence for People of Color was 8.1 – 21 years while the average minimum/maximum sentence for whites was 3.5 – 12.5 years.

GBH Sentence Disparity	Judge Brown			Judge Swartz		
	PoC	White	% Diff.	PoC	White	% Diff.
Average Prison Min. Sentence (yrs.)	7.1	2.5	185.6%	8.1	3.5	134.3%
Average Prison Max. Sentence (yrs.)	18.7	10.0	86.7%	21.0	12.5	68.0%

c. Assault with Intent to Commit Murder (AWIM)

i. Disparity in Sentencing: A conviction for AWIM carries one of the most severe punishments in criminal sentencing falling just behind a homicide conviction. Unlike a homicide charge where the death of a person at the hands of another person points a prosecutor directly to a homicide charge, an injury of a person at the hands of another person does not necessarily point a prosecutor to a charge of assault with intent to commit murder. There are other assault charges ranging in severity of punishment with which a prosecutor could choose to charge a person who injured another person (e.g., misdemeanors such as assault and battery and felonies such as assault with a dangerous weapon and assault with intent to do great bodily harm less than murder.) An AWIM charge hinges on a subjective element, whether the person charged *intended to murder* another person. Therefore, when CREW saw the wide gap between the number of People of Color and the number of whites charged with AWIM (41 and 10, respectively), it raised questions as to the reasons for choosing the most severe charge possible for injuring another person and whether the outcomes for those charged with AWIM differed depending on one’s race.

The data for the period we studied shows that the outcomes for those charged with AWIM do indeed differ in Washtenaw County depending on one’s race. During the period CREW studied (2013-2019), 10 whites were charged with AWIM and only 2 were convicted of AWIM. What happened to the others? Judges approved plea deals for those white defendants to the much less severe charges of assault by strangulation, assault with a dangerous weapon and assault with intent to do great bodily harm less than murder. Most of the white defendants received penalties such as probation up to about 2 years in prison.

In contrast, the teal AWIM table in the [Table Section](#) shows that People of Color were convicted of AWIM (not a lesser charge) at a much higher rate. In Washtenaw County, if a

Person of Color was charged with AWIM during the time frame CREW studied, that person had a far greater chance of being convicted for AWIM than if a White person was charged.

The disparity is most striking in data pertaining to convictions in cases presided over by Judge Brown. Almost 2/3 of People of Color charged with AWIM in cases presided over by Judge Brown were convicted of AWIM and none of the whites who came before him charged with AWIM were convicted of AWIM. To put it another way, 36.4% of People of Color charged with AWIM did not get convicted of AWIM before Judge Brown while 100% of whites charged with AWIM did not get convicted of AWIM before him. None of the other judges convicted People of Color of AWIM at such a high rate (63.6%) as Judge Brown. Judges Kuhnke, O'Brien and Swartz convicted 14.3%, 21.4% and 11.1% of People of Color of AWIM, respectively.

AWIM Sentence Disparity	All Judges			Judge Brown			Judge Kuhnke			Judge O'Brien			Judge Swartz		
	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.
Cases Charged with AWIM	41	10	-	11	4	-	7	1	-	14	2	-	9	3	-
Cases Convicted of AWIM	12	2	-	7	0	-	1	0	-	3	1	-	1	1	-
Cases Convicted of AWIM (%)	29.3%	20.0%	46.3%	63.6%	0.0%	-	14.3%	0.0%	-	21.4%	50.0%	-57.1%	11.1%	33.3%	-66.7%

ii. Outliers in Min/Max Sentencing: Judge Brown also gave People of Color convicted of AWIM significantly longer average minimum sentences (almost 21 years) compared to Judge O'Brien (11 years) and Judge Swartz (7 years).

AWIM Outlier	All Judges			Judge Brown			Judge Kuhnke			Judge O'Brien			Judge Swartz		
	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.	PoC	White	% Diff.
Average Prison Min. Sentence (yrs.)	17.0	10.0	70.0%	20.7	-	-	-	-	-	11.0	10.0	10.0%	7.0	-	-

To understand the picture that emerged from studying Judge Brown's sentencing disparities in all case categories discussed throughout this section of the report, CREW decided to review Judge Brown's AWIM cases going to 2005. We wanted to take extra care and

provide more data believing that a larger dataset would clarify whether the disparities we were seeing were anomalies or part of a longstanding pattern.

The table below shows the pattern of disparity in Judge Brown’s sentencing of AWIM charges since 2005. There were 36 cases of people charged with AWIM and convicted of one or more charges in front of Judge Brown during that period. As in the 2013-2019 review, no white person before Judge Brown was convicted of AWIM. The average minimum sentence Brown gave to People of Color convicted of AWIM is similar to his average minimum sentence in the original time frame of 2013-2019 that CREW studied (20.7 vs 20.1 years).

We can see the outcomes for those charged with AWIM differ depending on one’s race. Overall, People of Color (as noted earlier over 98% of whom were Black people) charged with AWIM received, on average, a minimum sentence of 11 years compared to a minimum sentence of 4 years for White people charged with AWIM.

Convictions for Cases with AWIM Charges Filed Between 2005-2019, Excluding Life Sentences: Judge Archie Brown	Charged				Charged & Convicted			
	PoC	White	Difference		PoC	White	Difference	
<b>Assault With Intent to Murder</b>								
Number of Cases	24	12	Number	Percent	11	0	Number	Percent
Average Minimum Sentence (Years)	11.0	4.0	6.9	172%	20.1	-	-	-
Average Number of Prior Convictions	1.5	1.0	0.5	50%	1.5	-	-	-
Average Number of Charges (Current Case)	7.0	5.9	1.1	18%	8.3	-	-	-
Average Number of Convictions (Current Case)	3.6	2.8	0.8	30%	5.3	-	-	-

## V. CREW’S INTERPRETATIONS AND RECOMMENDATIONS

CREW’s work operates under the belief that the institutions that form the basis of our criminal legal system must not only operate in a non-discriminatory manner in fact but must also be perceived to operate in that way. That belief drives the recommendations set forth below.

The data CREW compiled sheds light on deep racial disparities within Washtenaw County’s criminal legal system that members of the public have undoubtedly experienced but never seen in documented form. In this Section, CREW puts forth recommendations for action and mechanisms to address racial inequities and discriminatory treatment in our criminal legal system. Discriminatory treatment in the criminal legal system permanently alters a community member’s ability to participate equally in our

society.<sup>43</sup> Section VI (Additional Analysis) lays out other areas of review and analysis with the goals of better defining and understanding the extent and cause of the disparities and, importantly, rectifying them.

### **A. Recommendations: Prosecution**

The door that the statistics opens for us shows a disturbing pattern in prosecutions in Washtenaw County. The data illustrates the breadth and depth of a potentially problematic approach to justice in our county, in that disturbing racial disparities are evident across the board. At the very least, the data raises questions (although it does not answer them) about the exercise of prosecutorial discretion, whether there are cultural norms or implicit biases within or outside of the prosecutor's office that are contributing to unfairness, and whether and what kind of systemic reforms are necessary. To address the deeper issues, we recommend:

1. Rigorous financial and administrative oversight by the Washtenaw County Board of Commissioners, including the establishment of a citizen's race equity commission chosen with input of community members.
2. The Board of Commissioners, in collaboration with the prosecutor-elect and the race equity commission, engage a neutral, third-party evaluator to study prosecutors' files, policies and procedures and make recommendations for data driven, evidence-based improvements to rectify racial disparities and determine whether the tools and practices employed by the Washtenaw County prosecutor's office are applied in way that is not racially discriminatory and does reflect the fair administration of justice. Issues to review and/or revise include, among other things:
  - a. The disparate impact that the Habitual Offender designation has on People of Color.
  - b. The charging of Weapons Felony Firearm. Are there written guidelines; if so, are they applied without regard to race?
  - c. The factors used to offer plea deals and the creation of a transparent process for plea negotiations.
  - d. The impact that the race of the victim might have on such things as charging decisions, conviction rates, and sentencing decisions.
  - e. The use of vertical and horizontal charging practices.
  - f. The factors/circumstances involved in deciding to dismiss charges including the cases where all charges are dismissed.
  - g. Current use of diversion (i.e., before and after filing charges) and restorative justice; the implementation of evidence-based diversion, deflection and/or restorative justice practices that are shown to improve outcomes for people involved in the County's criminal legal system in a racially neutral manner.
  - h. The current performance review process for assistant prosecutors and other staff to ensure it is consistent with the racial equity considerations outlined in this report and supports the "minister of justice" role that prosecutors should play in the legal system.

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<sup>43</sup> Beyond the obvious impact of loss of freedom by incarceration, felony records impose disabilities and barriers on access to housing, employment, and education which drastically limit returning citizens' ability to successfully participate in our community.

- i. All assault arrests to identify how decisions are made regarding which charges to file (i.e., misdemeanor, felony or no charges) and whether People of Color are treated the same as whites in terms of the severity of the assault charges filed.
- j. Community members' experiences in the criminal legal system.

3. The creation of an online dashboard to display data points like those documented by CREW so the public can assess whether the decisions by the Washtenaw prosecutor's office has a disparate impact on racial minorities. Citizens elect the prosecutor but have almost no data upon which to assess the performance of the office; a publicly available dashboard would provide voters and others with such data and improve the transparency of justice. A dashboard would also assist the prosecutor's office because they do not maintain aggregated data on data points such as race, age, and income.<sup>44</sup>

4. Developing written policies and procedures for charging decisions made within the Washtenaw County prosecutor's office. Any such policy/procedure should be accompanied by a racial impact statement (i.e. an analysis assessing the possible racial consequences of any proposed policy before adopting it to avoid any unintended disparate racial effects.)<sup>45</sup>

5. Developing and implementing transparent mechanisms, processes and/or rules for exercising discretion, including a robust process to review assistant prosecutors' decisions regarding cases to ensure they are not engaging in racially weighted decisions that have a disparate impact on racial minorities.

6. Implementing a mandatory, ongoing training program on implicit and explicit racial bias for all county employees within the prosecutor's office and those outside the office used to investigate cases.

7. Developing and implementing regular equity audits to ensure that county employees within the prosecutor's office and individuals and entities used by that office to investigate cases are not engaging in practices that have a disparate impact on racial minorities in Washtenaw County.

8. The Michigan Legislature use CREW's data on the discriminatory impact of the Habitual Offender law as well as available research to eliminate the Habitual Offender statute.

## **B. Recommendations: Judicial Decision-Making**

1. Since state courts across the country have acknowledged that the judicial system can be part of the problem in the unequal treatment of minorities, particularly with regard to Black people in the criminal legal system, and that such discriminatory treatment contributes to mass incarceration of People of Color, we are compelled to ask why hasn't our court developed any method of transparency in reporting these problems to the public and initiated oversight and change? Since

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<sup>44</sup> In answer to a FOIA request asking whether the Washtenaw County prosecutor's office has aggregated data on such things as age and race, First Assistant Prosecutor Eric Gutenberg wrote, "This office does not have aggregated data on data points such as race or age of those charged." Email dated August 17, 2020 from Eric Gutenberg to MaryAnn Sarosi.

<sup>45</sup> In fact, any policy or procedure adopted regarding prosecutorial functions should be accompanied by a racial impact statement as states such as Iowa, Connecticut, Oregon, and New Jersey have done. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, The Sentencing Project, 2018 <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

our case data came from the court’s own public website, but in a format that takes hundreds of hours to collect and analyze, it’s natural for us to wonder why the court hasn’t performed an equity audit in the past; or, if it has, why such an audit hasn’t been made public so voters can make an informed decision when they elect a judge. While the disparities revealed in our analysis pre-date the tenure of the current chief judge of the Washtenaw County Court, we strongly encourage the use of our report to assist the current court to undertake serious and transparent reforms.

2. The Washtenaw County Board of Commissioners also has an integral role to play in the reforms needed to address racially discriminatory practices in the county’s criminal legal system. Not only does the Board have an interest in ensuring that the county’s criminal legal system aligns with the *One Community: Advancing Racial Equity in Washtenaw County* initiative, it has oversight of the county’s budget, 20% of which is allocated to judicial functions.<sup>46</sup> Given the responsibility of the Board as well as the Washtenaw County Court to ensure equal justice in the criminal legal system, they could jointly establish a citizens race equity commission made up of community members appointed by relevant stakeholders to:
  - a. Annually compile, study, and publish statistics such as those analyzed by CREW to detect racial disparities in the Washtenaw County Courts. The data could be posted on an online dashboard described below.
  - b. Address the issues and questions raised in Section VI of CREW’s report. As noted in that section, some of the questions can be answered using the capital felony (FC) and non-capital felony (FH) dataset that CREW has already compiled while other questions require additional information that was not available to CREW. For example, the racial equity commission could examine the cases involving life sentences to understand why life sentences are given to People of Color at such a disproportionate rate compared to whites.
3. CREW noted 23 instances where a Washtenaw County judge’s sentencing decision exhibited racial disparity or was an outlier in terms of handing down harsher sentences than others on the court. More than half of the concerns CREW raised in this report (i.e., 13 of the 23) come from the judicial decision-making of one judge. The other 3 judges combined comprised less than half of our concerns. With those 23 instances in mind, we urge the Washtenaw County Circuit Court to, among other things:
  - a. Study the 23 issues further by gathering additional information on the cases involved to understand and address the source of the disparities. The study could be done under the auspices of the citizens race equity commission described above and would address the questions raised in Section VI (Additional Analysis) below.
  - b. Study whether there is an imbalance among the judges in terms of defendants designated as Habitual Offenders, average number of convictions, percentage of dismissed charges, etc.
4. The disparities in cases presided over by Judge Brown are so strikingly consistent among all eight categories we highlighted and affect so many people that the court should consider taking

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<sup>46</sup> Washtenaw County 2019-2022 Preliminary Budget Summary, D-4 <https://www.washtenaw.org/DocumentCenter/View/11250/2019-2022-Preliminary-Budget-Summary>

immediate action (in collaboration with an impartial citizens race equity commission). Therefore, we:

- a. Suggest that the Washtenaw County Circuit Court engage a neutral, outside, third-party to determine whether the racial disparities evidenced in Judge Brown’s sentencing decisions are rooted in any personal bias or systemic bias. To fully capture and understand the source of the disparities, the third-party entity should be permitted and encouraged to: thoroughly review the cases filed in the case category where the issue is raised in our report during the time frame CREW studied; notify the defendants in the cases under review of the existence of CREW’s report as well as the review underway by the third-party entity; solicit confidential interviews with party participants in the cases and solicit public comment from those who have been involved and impacted; and inquire whether additional information is needed to assess the disparities in question.
- b. Believe the review should be completed in a timely manner in the interest of justice.
- c. Understand that the public could rightfully ask for assurance that the pattern of disparities in Judge Brown’s sentencing decisions do not continue during the review period and believe the court has a variety of tools it could implement to instill confidence in the justice system. For example, the Washtenaw County Circuit Court could supervise/monitor his criminal cases, place a moratorium on sentencing of Judge Brown’s pending criminal cases or shift his criminal caseload temporarily pending outcome of the review. Taking any of those steps would signal to the public that the court understands that judges must be neutral in fact and be publicly perceived “as an impartial dispenser of justice.”<sup>47</sup>

5. The Washtenaw County Court could also:

- a. Issue a Local Administrative Order addressing racial bias and prejudice in conduct and judicial decisions such as sentencing.
- b. Institute a mechanism for receipt of public comment and complaints related to bias and prejudice in judicial conduct (including judicial staff) and judgments with a mechanism for investigation, review, and implementation of any remedies.
- c. Develop and implement a publicly available dashboard that is searchable and updated regularly for reporting such things as: all charges, all sentences, pleas with details of offense, and race broken down by judge. The creation of an online dashboard by the Washtenaw County Court and/or the State Court Administrative Office will assist the public in assessing whether a judge’s decisions have a disparate impact on racial minorities.
- d. Establish a protocol whereby all policy and procedures adopted by the Washtenaw County court regarding judicial functions in the criminal legal system should be accompanied by a racial impact assessment.
- e. Provide ongoing equity/implicit bias training to all county employees at the courthouse and ensure that their performance reviews reflect any concerns about unequal treatment of courthouse users. We recognize that judges are not the only tax-funded court employees whose decision could result in disparate treatment and outcomes. Judicial attorneys, for example, participate in decision-making and draft rulings in cases and can, therefore,

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<sup>47</sup> *People v. Killebrew*, 416 Mich. 189, 202; 330 N.W.2d 834 (1982). Such a review would not preclude a person from filing a complaint with the Judicial Tenure Commission or taking similar action.



impact proceedings. As with judges, they should not administer justice in a preferential manner whether in fact or by perception.<sup>48</sup> When a court employee's actions suggest unequal treatment of a person/persons using the court, action should be taken so Washtenaw County residents can have confidence that everyone receives equal justice under law.

## 6. Oversight of Racial Disparities in Judicial Decision-Making

Judges are human and not necessarily immune from the myths and biases, implicit as well as explicit, that have informed decisions and impacted our criminal legal system laws for decades, resulting in racial disparities in arrests, treatment, and incarceration of People of Color at astonishingly high rates.<sup>49</sup> As CREW studied the data on patterns of racial disparities related to sentencing decisions by Washtenaw County judges, we looked to see whether there was an oversight mechanisms that should have caught the disparities and possible discriminatory treatment evident in our data.

First, we looked at the court of appeals. While there is appellate review of judicial sentencing and decisions, CREW's understanding is that the court of appeals limits its review to whether there is abuse of discretion or error in applying the law to the facts of an individual case. There appears to be no effective mechanism for appellate review of overall patterns of racial disparities that could indicate discriminatory or racially biased rulings.

Second, we looked to the ethical canons embodied in the Code of Judicial Conduct. While the Michigan Supreme Court authorizes the Canons, adherence to the Canons is supervised by the Judicial Tenure Commission (JTC) which is responsible for "investigating complaints of judicial misconduct and judicial incapacity, and for recommending discipline of judges by the Michigan Supreme Court."<sup>50</sup>

The JTC, however, is limited in its review and investigation to conduct that violates the Code of Judicial Conduct, and Michigan's Code does not explicitly speak to racial bias or prejudice in decision-making, including that which may result in racial disparities. The American Bar Association's Model Code of Judicial Conduct, by contrast, includes a Canon explicitly prohibiting racial and gender prejudice in performance of a judge's duties. Other states have adopted such a Canon for judges, such as Canon 3 B (5) of the Virginia Canons of Judicial Conduct, which states that:

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<sup>48</sup> A judicial attorney to one of the Washtenaw County judges suggested in a news article that she may not treat people equally when she said, "I really do keep a list of attorneys that annoy me. (There are currently 9 people on the list and you know who YOU are.)" While her comment might have been intended as a joke, it might not be perceived that way by the public and serves to undermine confidence in the justice system.

<http://www.legalnews.com/washtenaw/1266844>

<sup>49</sup> Sara Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L.Rev. 397(2009); John J. Dilulio, Jr., *My Black Crime Problem and Ours: Why Are So Many Blacks in Prison? Is the Criminal Justice System Racist? The Answer is Disquieting*, City Journal, Spring 1996; Hon. Harold Hood, *The Race/Ethnic Bias Task Force Four Years Later—Looking Back*, 73 Mich B.J.267 (1994)

<sup>50</sup> The authority and composition of the membership of the Judicial Tenure Commission comes from Article 6 Sec 30 of the Michigan Constitution. Does the composition of the JTC which has been in place since 1968 (where 5 of the 9 members must be judges, 2 more are lawyers and only the remaining 2 are non-lawyers) adequately reflect input from the public or serve as an effective oversight body such that the public can have confidence in its fairness?

*“A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.”<sup>51</sup>*

Given that Michigan’s Canons do not explicitly cover bias and prejudice<sup>52</sup>, we are concerned that racial disparities in sentencing People of Color may not receive the attention it deserves by the JTC. In fact, the JTC expressly states that claims involving a judge’s discretionary handling of judicial duties do not fall under misconduct and is, therefore, not within the JTC’s authority.<sup>53</sup> That leaves open the question, “Where does oversight lie for a judge’s discretionary handling of judicial duties, when such acts include racial disparities in sentencing?”

Third, we considered if the public has oversight capabilities to assess whether a judge’s decision-making results in racial disparities to the disadvantage of People of Color. In Washtenaw County, and indeed across Michigan, the public lacks effective mechanisms for review of a judge’s record as there are no audits, scorecards or dashboards to inform the public of disparities and other patterns that emerge from the decisions of a specific judge.

Without such a mechanism, there is no basis for the public to make fully informed election decisions regarding incumbent judges, when racial disparities in decision-making or signs of bias or prejudice are important to voters. So, while the voters in Michigan elect judges, the public is largely flying blind.

Thus, CREW was left with the same question with which we started: How should judges in Michigan be held accountable for patterns of discriminatory judgements and/or biased treatment of individuals who come to the court?

To answer this question, we urge the Michigan Supreme Court to:

- a. Examine the ways in which the Michigan Constitution protects against racial bias, discrimination, and prejudice and how those protections are evidenced in the criminal legal system.
- b. Issue for public comment, a Canon that is consistent with the ABA Model Judicial Canons, which explicitly addresses the mandate that a judge’s conduct (and that of

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<sup>51</sup> [http://www.courts.state.va.us/courts/scv/canons\\_of\\_judicial\\_conduct.pdf](http://www.courts.state.va.us/courts/scv/canons_of_judicial_conduct.pdf)

<sup>52</sup> Michigan Canon 3(A)(14) does provide: “Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.” However, the Canon does not explicitly address bias or prejudice in decision-making, including that which may result in racial disparities.

<sup>53</sup> State of Michigan Judicial Tenure Commission Annual Report 2019 at Page 7  
[http://cms4.revize.com/revize/mjtc/annual\\_report/docs/2019%20Annual%20Report.pdf](http://cms4.revize.com/revize/mjtc/annual_report/docs/2019%20Annual%20Report.pdf)

her/his judicial staff) and judgments be without bias and prejudice based on all protected categories and status.

- c. Provide a basis for review and audit of racial disparities in criminal sentencing and authorize the JTC to investigate such disparities for violation of the new Canon.
7. We urge the Michigan Judicial Tenure Commission to provide a mechanism for public complaints on racial disparity and bias in judicial conduct and judgements and make such data public.

## VI. ADDITIONAL ANALYSIS

### A. Additional Analysis Using CREW's Dataset

1. In calculating the sentencing tables (orange tables), we excluded sentences where the defendant received a life sentence or was designated as a Habitual Offender 4th offense. For those given a life sentence, we could not calculate what term of years to use when calculating the average maximum sentence, so we excluded them from calculating sentence lengths reported in the tables. A defendant convicted as a HO 4th offense, would receive a 100% longer sentence which might skew the average maximum sentence for a judge. Although we did not incorporate those 2 factors into the sentencing calculations, there remain significant questions that need to be addressed, namely:
  - a. Of the 265 capital felony cases that CREW analyzed, 50 cases had homicide charges (45 of which resulted in a homicide conviction). Of the 45 convictions, 27 were sentenced to non-life sentences and 18 were given life sentences. People of Color made up 83.3% of those 18 people sentenced to life in prison. In other words, 44.1% of People of Color convicted of homicide were sentenced to life in prison, compared to only 27.3% of White defendants convicted of homicide. Further study needs to be done to get to the root of why People of Color (primarily Black people) are sentenced to life in prison in such a disproportionate manner in Washtenaw County.
  - b. People of Color are charged as Habitual Offenders far more often than whites; this has a multiplier effect on the length of the final sentence. Is this a form of bias or does this reflect an objective difference in prior convictions?
  - c. To what extent does the Washtenaw County prosecutor's office apply the HO designation when a defendant's prior felony convictions result from one event rather than serial criminal behavior?
  - d. To what extent is the prosecutor's power to designate a defendant as a Habitual Offender used (either at the outset or during a case) as a bargaining chip for a defendant to accept a plea deal involving a conviction? Is a HO designation dropped more often for whites?

2. Of the 12.6% of the capital felony cases in our dataset in which all charges were dropped and a defendant was not convicted of any charge, People of Color made up 76.8% of this group, whites made up 12.5% and 10.7% of the cases had no race information for the defendants. In the FH study, there were 7.7% of all FH cases in which the defendant was not convicted of any charge. Of that group, People of Color accounted for 55.7% of this group, whites accounted for 41.4% and the race of 2.9% of the defendants was unknown. This is not an insignificant number of cases.
  - a. What law enforcement or prosecutorial practices account for the disproportionate number of People of Color (mainly Black people) who were arrested, charged, and then released at some point with no charges being brought? What explains charging these people only to release them? How much taxpayer dollars are being spent arresting, charging, and holding these people? Even if all charges are dismissed and they return home, arresting and charging people impacts their lives in a variety of ways. For example, they are usually incarcerated in jail for some period before the charges are dropped and, in that period of incarceration, they may have lost their job, housing and custody of their children. Additionally, they have been fingerprinted, required to give a DNA sample, and photographed. Their information is then placed in various law enforcement databases.
  - b. Further examination of all capital felony (FC) and non-capital felony (FH) cases (beyond the case categories and time frame we examined) could be done to study the percentage of charges that are dismissed and to calculate the costs involved in bringing charges that are routinely dismissed. In other words, what are the costs to Washtenaw taxpayers and individuals who are charged by prosecutors when those charges are ultimately dismissed (i.e. the cost to the person charged as well as the cost of prosecutors, law enforcement and the courts).
3. What accounts for the differences in the average number of charges brought by prosecutors against People of Color versus whites? Are the number of initial charges compared to the number of final charges different for People of Color and whites? If so, what accounts for the difference; could it indicate that prosecutors are filing some charges with the intention of using them to drive defendants toward agreeing to a conviction on lesser charges and not intending to prove the elements of the higher charges (a practice known as vertical overcharging)?
4. Further study should be done to assess whether there are differences in the facts of cases such prior criminal history, age, weapon, race of victim or location of the incident that could account for the appearance of such a severe disparity in punishment based on race.
5. Would examining fines levied indicate possible racial disparities?

6. Would comparing charges, convictions and sentencing by age show racial disparities, e.g., are young People of Color and young White defendants treated similarly for similar behavior? National data indicates that there are racial disparities among young people.<sup>54</sup>
7. Is there data that would show why far fewer white people are charged in some areas (e.g. AWIM, weapons cases)? Are they not being arrested, not being charged, or charged for lower offenses?
8. Would comparing the length of time between case milestones, e.g., filing date, disposition date and sentencing date, show disparities in terms of length of time between milestones? For example, are People of Color subjected to longer periods in jail before they are offered a plea.
9. Would data on the type of representation show disparate outcomes for a case with a retained attorney versus assigned counsel/public defender? Does the type of representation or the individual prosecutor involved impact the pleas offered?
10. Far more People of Color are charged with and convicted of Resisting Arrest (ARO) than whites. Does this indicate bias in arrests by law enforcement and/or charging by prosecutors? Does this recognize the potential fear that People of Color may feel due to the disproportionate use of force their communities experience and witness? While that pulling away might be seen by an officer as resisting an arrest, it could also be a response to perceived danger. Or could this indicate that whites are pleading to lesser charges? What other charges are typically filed in these cases (such a Fleeing and Eluding, Attempted Resisting Arrest, or other)?
11. Felony Firearms (WFF) convictions carry a mandatory 2-year consecutive add-on sentence. Who gets charged or does not get charged with WFF? Specifically, when and for whom are WFF charges added on in AWIM, GBH or other cases? To what extent do WFF charges get dropped and for whom? How do these answers affect People of Color?
12. In weapons charges, Weapons-Concealed Carrying (WCC) is charged much more often than Felony Firearms or Firearms Possession, and there are few dismissals. Could this indicate that defendants plead to WCC to avoid more serious charges? Or that WCC is taken very seriously so dismissals are not offered? Could this also reflect lack of awareness of the license requirement? How do these answers affect People of Color?
13. What charges typically accompany armed robbery, assault with intent to commit murder, assault with intent to do great bodily harm less than murder, and homicide charges? Do they tend to differ depending on one's race? How do those added charges affect sentence outcomes between People of Color and white defendants?
14. As noted above, whites are charged with Assault with Intent to Commit Murder (AWIM) at a far lower rate than People of Color; even when whites are charged with AWIM, they do not

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<sup>54</sup> <https://www.sentencingproject.org/wp-content/uploads/2016/02/Facts-About-Prisons.pdf>

generally get convicted of that severe offense unlike People of Color. While AWIM conviction rates are lower overall than other FC cases we examined, the AWIM conviction rate for People of Color is still 46% higher than for whites.

In addition to the review of Judge Brown's criminal docket, a deeper review of court and prosecutor files on all assault cases should be undertaken to understand:

- a. How and why the paths diverge when people of different race start out with a similar incident that results in the injury of another person.
  - b. The basis on which prosecutors charge assault cases differently.
  - c. Why People of Color (primarily Black people who make up 12.3% of the county's population) account for 80% of the AWIM charges.
  - d. Why AWIM conviction rates are overall lower than for other FC case categories yet still much higher for People of Color. What accounts for this wide disparity?
  - e. Whether prosecutors offer People of Color and whites similar plea deals and whether plea deals differ by race depending on the presiding judge.
  - f. Why the disparity in how some judges routinely convict People of Color of more serious offenses than whites.
15. Sentencing data for convictions for assault with intent to commit great bodily harm less than murder (GBH) show about 95% of People of Color are sentenced to prison and 5% to the less severe outcome of jail versus 62% of whites sentenced to prison and 37% to jail. What accounts for the more severe placement of People of Color in prison?
  16. Of those sentenced to prison for a GBH conviction, the average minimum sentence for People of Color was more than a 64% higher than whites (when looking at all judges). The average minimum sentence for People of Color under one judge was an alarming 185.6% higher.

## **B. Further Analysis Using Other Sources**

1. When a judge departs from the sentencing guidelines does that sentence reflect racial disparities? What data is available that the public can use to assess whether racial bias plays a role? Do the guidelines themselves reflect bias?
2. Are there ethical or other standards that Washtenaw County prosecutors follow in choosing particular charges for a case? Is there information available documenting the analysis prosecutors use in choosing charges? If there are standards, how is the public assured that prosecutors adhere to those standards/guidelines?
3. What processes are used in the prosecutor's office to monitor data related to possible racially disparate practices? How is that administered? What action is undertaken to correct racial disparities? How is it determined if a prosecutor exhibits racial bias or a practice within the office is racially biased? Is any racial disparity information and data available to the public? Who has responsibility for overseeing it?

4. Is data available to document why prosecutors dismiss certain charges before or after the defendant reaches court? If so, does that reflect racial disparities in those decisions? Judges must approve plea deals, but do they have a role when charges are dismissed absent a plea deal?
5. Is there information that would explain where there is a small cohort of white defendants whether law enforcement arrested fewer whites, the prosecutor chose not to charge those that could have been charged or the prosecutor chose to charge them with a misdemeanor rather than a felony?
6. Black people represent 12.3% of the total population of Washtenaw County yet they account for 98.16% of the People of Color charged (FC cases) and 99.4% of the People of Color charged (FH cases) by prosecutors. What explains why People of Color are charged at exponentially higher rates than whites?
7. We suggest a deeper analysis of plea data to understand the disparities in pleas offered and charges dismissed.
8. How does a prosecutor's use of prior convictions impact the sentence s/he recommends to the court? What standards or procedures ensure that prosecutors apply prior convictions in a racially neutral way?
9. Is there information available that would allow us to determine which defendants were not designated as a Habitual Offender but could have been? How do these answers affect People of Color?
10. Prosecutors in Michigan have the ability to automatically charge children as adults without any hearing or deliberations before a judge. How often do the Washtenaw County prosecutors waive children into adult courts and is there a disparate impact on children of color?
11. For Washtenaw County offenders, do the terms of parole and probation follow the statutory requirements that they be related to the crime for which a person is on parole/probation? What percentage of returning Washtenaw County citizens violate their parole? For those deemed to have violated parole, what percentage of people are in violation for a substantive violation versus a minor violation? Do violations of parole/probation have a disparate impact on People of Color versus whites?
12. What discretion does a judge have in assigning weight to a pre-sentence investigation report (PSIR) at sentencing? Do they follow any standards? How is the public assured that a judge is not biased in the weight s/he gives to the PSIR?
13. Does any data and analysis exist by independent 3<sup>rd</sup> parties who have assessed any of the issues reflected in this report? Is that information publicly available? If not, why?



14. For the categories we examined (other than homicide), we did not eliminate the higher charges. If we had the prosecutor's offense codes that rank the criminal violations in order of severity, further study of CREW's data could be done to eliminate the higher charges in each case category. Doing that would isolate the convictions in each case category to compare specific sentences for the same conviction.
15. How can we assess the impact of a particular judge on a prosecutor's decision regarding charges filed, whether the Habitual Offender designation is used against a defendant, whether and what charges to dismiss, whether a plea is offered, the prosecutor's sentencing request or other actions after the defendant is assigned to a particular judge? What role does the judge play in furthering the unequal treatment of People of Color by allowing prosecutors to use their discretion in a racially tinged manner?
16. Is there information available to show the process of assembling pre-sentencing investigation reports (PSIRs) and whether they are balanced for both sides? Does the close relationship between the probation staff at Michigan Department of Corrections (responsible for developing the PSIRs) and prosecutors impact fairness and transparency? Who decides what goes into the PSIR or is excluded? Is there a process for an individual to challenge a PSIR?
17. How does data regarding the issues in this report compare to other regions similar to Washtenaw County or to national data?
18. Should CREW or the proposed citizens racial equity commission consider inviting broader community input by community organizations, community members and returning citizens and their families impacted and involved in advocacy surrounding the criminal legal systems by launching listening sessions or an oral history project, such as a Story Corps Justice Lab, where people can share their experiences with the justice system?

## **VII. ACKNOWLEDGEMENTS**

### **A. Biographical Information of CREW**

Alma Wheeler Smith (Co-Chair) has been dedicated to public service for over 30 years and served in the Michigan Legislature for 14 years. Her legislative work earned her numerous awards from health, social, legal, and human services organizations. Governor Rick Snyder appointed Alma to fill a term on the Michigan Civil Rights Commission from February 2018 to December 31, 2019. She currently serves on the boards of the Regional Transit Authority of Southeast Michigan, the Michigan Campaign Finance Network, the Michigan Legislative Retirement System and is chair of the Board of Directors of University Bank of Ann Arbor. Alma lives in Salem Township (Washtenaw County).



Linda Rexer (Co-Chair) was Executive Director of the Michigan State Bar Foundation for 30 years, leading the Foundation in its mission to provide funding and leadership for nonprofit legal aid for the poor. She chaired or served on numerous state level or national groups working to improve access to justice and has received state level and national awards for contributions to access to justice, the legal profession, and the public. Since her retirement, Rexer continues public service through positions on five nonprofit boards. She lives in Ann Arbor and is a lawyer admitted to practice in Michigan and before the U.S. Supreme Court.

Rev. Jerry Hatter has been the Pastor of Brown Chapel A.M.E. Church since 1991. For further information, please see <https://www.bcamecy.org/pastor-hatter>

Dan Korobkin is a civil rights and civil liberties attorney who has helped lead criminal law reform efforts in Michigan for over a decade. Korobkin's work and expertise spans a wide range of issues and includes debtors' prisons, bail reform, juvenile life without parole, police misconduct, and forfeiture. He lives in Ann Arbor.

Desiraé Simmons is a Co-Director with the Interfaith Council for Peace and Justice. She also is a community organizer and advocate serving in multiple grassroots organizations and coalitions. Currently she serves as the Vice Chair for the Michigan Democratic Party's Progressive Caucus and the Washtenaw County Democratic Party's Black Caucus. She is also a founding member of Liberate! Don't Incarcerate, Rising for Economic Democracy in Ypsi, What's Left Ypsi, and Untold Stories of Liberation and Love, among other groups. Simmons is a member of the Subcommittee on Housing Affordability and Accessibility through the City of Ypsilanti's Planning Commission.

Rev. Joe Summers has been the pastor of The Episcopal Church of the Incarnation since 1987. He and his congregation have been involved in criminal justice reform efforts throughout this period. Rev. Summers helped create and served as the county co-chair of the Washtenaw County branch of the Michigan Prisoner ReEntry Initiative and later became involved with Friends of Restorative Justice. He also serves on the Steering Teams of the Interfaith Council for Peace and Justice and the Washtenaw County Poor People's Campaign.

### **Organizational support and statistical analysis**

MaryAnn Sarosi's legal career has focused on access to justice and civil rights issues as an executive director of a legal services program, assistant dean for public service at Michigan Law School and as a consultant. She currently sits on the Governor's Committee on Juvenile Justice.

Grady Bridges is an independent consultant, specializing in criminal justice research and policy. Prior to consulting, he worked for the Criminal Justice Policy Commission where his research focused on Michigan's sentencing guidelines, Raising the Age legislation, bail reform, and habitual offender sentencing.

## B. Acknowledgments

1. This report would not have been possible without the truly generous contributions of time and money from community members who supported this citizen-led effort. When folks heard about our work, they contacted us by the dozen and offered to roll up their sleeves and open their wallets. It made us realize we live in a compassionate, justice-minded community that wants to ensure that compassion and justice is applied equally to all of us.
2. One of the inspirations for this work was the Washtenaw County Board of Commissioner's *One Community: Advancing Racial Equity in Washtenaw County* initiative. We are confident that our report will greatly assist the Board in carrying out their commitment to advance racial equity in the county we call home.
3. Special thanks to CREW members for taking the leap of faith together and investing so much time analyzing and probing the data; to MaryAnn Sarosi whose idea sparked this project and persistence kept it going; and to Grady Bridges who exhibited skill and depth in helping us understand the data.
4. High fives and deep gratitude go to Gretchen Keppel-Aleks and Aaron Wolf for showing us how to leap into the data. We followed your lead and you made our work more productive.
5. There are so many case researchers to thank, including Rachel Manela, Ruthie Mills, Eleanor Mills, Gabriel Gurulé, Emma Huntley and Maria Kroeger.
6. Thanks to Phil Keller for donating his skills and time to developing CREW's website and to Steve Harrington whose deep expertise and creative problem-solving saved the day.
7. We are grateful for funding provided by the ACLU of Michigan which was enormously helpful in underwriting the cost of our effort.

## VIII. TABLES

### A. Acronyms

1. Non-capital felony (FH)
2. Capital Felony (FC)
3. Assault, Resisting or Obstructing an Officer (ARO)
4. Controlled Substance-Delivery (DEL)
5. Controlled Substance-Possession (POS)
6. Suspended License (SLI)
7. Weapons-Carrying Concealed (WCC)
8. Weapons-Felony Firearm (WFF)
9. Weapons-Possession by Felon (WPF)
10. Armed Robbery (ARM)
11. Assault with Intent to Commit Murder (AWIM)
12. Assault with Intent to Do Great Bodily Harm Less than Murder (GBH)
13. Homicide (HOM)

### B. Data Tables