

January 15, 2020

Jessica Cooper, Esq.  
Oakland County Prosecutor  
1200 N. Telegraph Road  
Pontiac, MI 48341-1032

Re: Denby High School/Almont High School Football Altercation

Dear Ms. Cooper:

We are prompted to write because of ongoing public speculation about potential criminal prosecution of student athletes who participated in the football game involving Denby High School and Almont High School on November 23, 2019. According to media reports, Denby players took a knee during the national anthem. What happened after that is the subject of sharp disagreement. The many reported and disputed allegations include, among others:

- White spectators hurled racial epithets at the kneeling players.
- White spectators spit at Denby players.
- Denby players engaged in unnecessary roughness during the game.
- Denby players shoved an Almont band member and another shoved a police officer.

While these allegations are all contested, it is undisputed that referees ended the game three minutes early and afterwards there were many and widespread expressions of hostility.

We do not know whether you plan to file criminal charges related to these events, but it is our hope that given the many serious crimes that occur in our communities, you will treat a sports conflict of this kind as one not worthy of the use of public resources. However, if you are investigating events of that day, the ACLU of Michigan requests that you give serious consideration to the social context in which prosecution would be pursued, as well as any racial implications of a decision to bring charges against only African American students from Denby High School. A useful tool for such analysis is *21 Principles for the 21<sup>st</sup> Century Prosecutor*.<sup>1</sup>

The 21 Principles document makes at least three recommendations that are of particular relevance in this matter. One of them is: "Treat kids like kids." The document explains:

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<sup>1</sup> The report can be found at:

[https://www.brennancenter.org/sites/default/files/publications/FJP\\_21Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf)



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The adolescent brain differs from the adult brain in ways that increase the likelihood of risky and reckless behavior. Neurological development continues until around the age of 25, and most young people who commit crimes don't continue to do so in adulthood. Long-term outcomes for teenagers and young adults are substantially better when they have as little contact with the criminal justice system as possible, or when their cases remain in juvenile court...Recommendations: Do not prosecute kids for typical adolescent behavior such as fist fights, smoking marijuana, disorderly conduct, or other infractions at school that don't result in serious physical harm...

For the reasons explained above, prosecution may not be the best alternative in this case.

A second relevant and useful recommendation is: "Address racial disparity." The document states:

Extensive evidence shows that racial disparity exists at every stage of the justice system.<sup>2</sup> Possible causes include over-policing of communities of color, and overt and implicit bias. Prosecutors must confront these issues by looking closely at the relevant data and working to promote equity and a healthier, more cooperative relationship with the communities they serve.

The sources cited by the 21 Principles document explain the racial disparities with documented evidence of discriminatory policing, prosecution and sentencing. For example: African American drivers are twice as likely to be pulled over than white drivers; blacks are more likely to be searched when detained; they are more likely to be charged with serious crimes; and African Americans' sentences tend to be four times longer than those given to white defendants.<sup>3</sup>

Concern for Denby High School's predominantly African American student athletes rests not solely on their racial identity, but also on their great potential for success because of the discipline required to be not only athletically competitive, but also academically successful. It is our understanding that the average grade point average for Denby's football team is 2.8. Nevertheless, these students, like anyone, must be held accountable for their actions, but great care must be taken when considering prosecution of these children because of the inequities in the criminal justice

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<sup>2</sup> Evidence cited by the document for this proposition includes: . Frank R. Baumgartner, Derek A. Epp, Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (New York: Cambridge University Press, 2018); Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees," *Criminology* 41 (August 2003): 898; David Arnold, Will Dobbie, and Crystal S. Yang, "Racial Bias in Bail Decisions," *Quarterly Journal of Economics* (forthcoming): 3, <https://doi.org/10.1093/qje/qjy012>; Marvin D. Free, Jr., "Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited," *Critical Criminology* 10 (October 2001): 195–223; L. Song Richardson and Philip Atiba Goff, "Implicit Racial Bias in Public Defender Triage," *Yale Law Journal* 122 (June 2013): 2106–720; Cassia Spohn, "Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage," *University of Kansas Law Review* 57 (2009): 898–99; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012),; Anthony G. Greenwald and Linda Hamilton Krieger, "Implicit Bias: Scientific Foundations," *California Law Review* 94 (July 2006); L. Song Richardson, "Police Efficiency and the Fourth Amendment," *Indiana Law Journal* 87 (Summer 2012): 1145.

<sup>3</sup> See footnote 2.

system which are demonstrated dramatically by prison demographics. In Michigan more than 55% of prisoners are non-white<sup>4</sup> even though Michigan's white residents constitute almost 79% of the state's population. Such an imbalance is the result of many of the institutional factors referenced by the 21 Principles document.

To be considered also is the fact that "the school to prison pipeline" is real, and these student athletes have defied the odds by simply maintaining their status as high school students in good standing and engaging in athletic competition. The term school to prison pipeline refers to a demonstrated correlation between the disproportionate suspension and expulsion of black students from school and their eventual involvement in the criminal justice system. Years ago, when the ACLU conducted research on the phenomenon in Michigan, we published a comprehensive report titled, *Reclaiming Michigan's Throwaway Kids: Students Trapped in the School-to-Prison Pipeline*.<sup>5</sup> Our research established that, among other things, black students across the state were suspended and expelled at rates grossly disproportionate to their representation in the student population, notwithstanding comparable behavior across racial lines. We believe it would be tragic for students who have excelled and who have not allowed their academic careers to be derailed by school discipline and the criminal justice system to now face prosecution.

Finally, we agree with the 21 Principles' call for prosecutors to "Promote Restorative Justice." If you are compelled to take action against any of the students, in a case like this, you should not feel hamstrung by the conventional procedural course of criminal cases. The objective of restorative justice is to place offenders, victims and other affected persons in a setting where an offender is able to learn first-hand from victims and others about the harm caused by the crime, and then, after acknowledging the offense, participate in developing a plan to restore broken conditions and relationships. This process can sometimes render criminal prosecution unnecessary.

To employ restorative justice is not to be "soft on crime." In a restorative justice situation, an offender is not given an opportunity to wallow in self-pity and resentment. The restorative justice approach gives victims a voice that the offender must hear when he comes face-to-face with the true victim and observes the pain resulting from the crime. At the same time, victims are able to recognize the humanity of the offender and participate in a process of healing that might otherwise not be possible.

We recognize that restorative justice approaches are not necessarily appropriate for every case. But a restorative approach (or something comparable) might be better suited to addressing underlying causes of conflict in this case. The less favored alternatives are criminal convictions that could potentially destroy all prospects for a student's productive future. As you know, certain convictions can present long-term obstacles to obtaining employment, education and housing even when an individual has not been incarcerated.

The ACLU of Michigan is engaged in an unprecedented, multi-year effort to challenge racism in the criminal legal system and to cause substantial reduction in the jail and prison populations. This "Campaign for Smart Justice" includes work to reform bail practices and sentencing guidelines. The campaign seeks also to ensure that prosecutors employ best practices. It is our sincere hope

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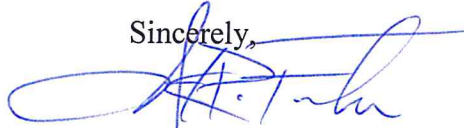
<sup>4</sup>[https://www.michigan.gov/documents/corrections/MDOC\\_2017\\_Statistical\\_Report\\_644556\\_7.pdf](https://www.michigan.gov/documents/corrections/MDOC_2017_Statistical_Report_644556_7.pdf)

<sup>5</sup> [https://www.njjn.org/uploads/digital-library/resource\\_1287.pdf](https://www.njjn.org/uploads/digital-library/resource_1287.pdf)

that you will seize the opportunity to demonstrate in this case the type of enlightened approach to prosecution that we hope to see throughout the state.

Thank you for considering our thoughts on these matters. Do not hesitate to contact me if you have questions or concerns.

Sincerely,



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