MILWAUKEE COUNTY
OFFICE OF EQUITY

Office of Corporation Counsel

MEMORANDUM

To: Interested Parties and Stakeholders

From: County Board Chairwoman, Marcelia Nicholson
County Chief Equity Officer, Jeff Román
County Corporation Counsel, Margaret Daun
County Deputy Corporation Counsel, Scott Brown
County Deputy Corporation Counsel, Karen Tidwall

CC: County Executive David Crowley

Re: Racial Justice and Intersectionality

Date: March 14, 2022

Correcting County ordinances and procedures that directly or indirectly create racially inequitable outcomes is, of course, necessary to change the pervasive and historically entrenched systems of discrimination, as contemplated in File No. 21-1084.

To achieve justice and equity, correcting racial discrimination is necessary but ultimately, insufficient. Moreover, if remediation focuses only on race, historic and current systemic racism will remain largely intact. Since the late 1980s, a framework of legal analysis—intersectionality—addresses this reality.

Intersectionality has become a political flash point. *See, e.g.*, Katy Steinmetz, *She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today*, Time Magazine, Feb. 20, 2020, https://time.com/5786710/kimberle-crenshaw-intersectionality/ (Mar. 9, 2022); Jane Coaston, *The intersectionality wars—When Kimberlé Crenshaw coined the term 30 years ago, it was a relatively obscure legal concept. Then it went viral.*, Vox, May 28, 2019, https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination (Mar. 9, 2022). Thus, it is all the more important that we educate and inform policymaking and day-to-day management with an accurate understanding of intersectionality, as it is the key to unlocking true equity and justice.

This memo presents basic introductory information regarding intersectionality, attempts to depoliticize the concept, promote continued dialogue among Milwaukee County stakeholders, and provide access to additional resources in furtherance of our shared mission to achieve racial equity

and become the healthiest county in Wisconsin. This memorandum serves as a starting point and does not capture the continual evolution of the academic work in this area, nor its nuances.

What is intersectionality?

Intersectionality, a concept first articulated by legal scholar Kimberlé Crenshaw in 1989 (article included herewith), is a legal theory which states, greatly simplified, that (1) race, gender, nationality, sexual identity, sexual preference, ablism, economic power, etc. are inextricably intertwined, coextant bases of systemic discrimination and oppression, which are impossible to realistically unbundle; and (2) the law and society writ large must address all axes of oppression simultaneously to remedy the scourge of racism and create a more just and equitable democracy.

"The law" (i.e., case law, enacted law at all levels, the courts, judges, attorneys, etc.) has failed to adequately redress systemized discrimination because it addresses each axis of oppression separately and fails to confront reality—namely, that numerous factors intersect to create often insurmountable institutional barriers to equity and advancement. Systems of oppression do not operate individually. Systems of oppression, rather, overlap, intersect, and interact to create multilayered barriers to justice and equity. By failing to address reality, the justice system has at times merely performed or pantomimed antidiscrimination, thus failing to truly impact and transform our systems.

Intersectionality is not predominantly concerned with shallow questions of identity but is instead more interested in the deep structural and systemic questions about discrimination and inequality.

As a result, when governments begin their work to dismantle systems of racial oppression, to be effective, governments must also confront all systems of oppression including those based on race, gender, nationality, sexual identity, sexual preference, ablism, economic power, etc.

What does intersectionality teach us?

1. Racism is not an historical irrational aberration corrected long ago through "colorblind" laws and facially "equal" treatment.

   Crenshaw and other leading thinkers attack what they view as a false consensus within the legal community: that discrimination and racism in the law were irrational, and "that once the irrational distortions of bias were removed, the underlying legal and socioeconomic order would revert to a neutral, benign state of impersonally apportioned justice." This was, she argued, a delusion as comforting as it was dangerous. Racism—whether individual or institutional—did not cease to exist in 1965 with the passage of the Civil Rights Act. And racism was a mere multi-century aberration that, once corrected through legislative action, would no longer impact the law or the people who rely upon it.

2. Data demonstrates that benefits undeservedly gifted to white people historically through our legal system continue to confer benefits currently and systemically, resulting in persistent racially inequitable outcomes in education, wealth, representation, etc.

   Discrimination remains because of the "stubborn endurance of the structures of white dominance." In other words, the American legal and socioeconomic order was largely built on racism and despite laws at every level of government that aimed to wipe away the right to discriminate, racially inequitable outcomes persist.

3. To correct the historical gifting of unearned benefits based upon whiteness and to create systems and institutions that do not perpetuate racism, discrimination, and oppression requires acknowledgment and engagement across all axes of oppression, including gender, nationality, sexual identity, sexual preference, ablism, economic power, etc. in addition to race.

What case law demonstrates this concept?

Ms. Crenshaw's paper centers on three legal cases that dealt with the issues of both racial discrimination and sex discrimination: *DeGraffenreid v. General Motors*, *Moore v. Hughes Helicopter, Inc.*, and *Payne v. Travenol*.

In each case, Crenshaw argued that the court's narrow view of discrimination was a prime example of the "conceptual limitations of ... single-issue analyses" regarding how the law considers both racism and sexism. In other words, the law seemed to forget that black women are both black and female, and thus subject to discrimination based on both race, gender, and often, a combination of the two.

For example, in *DeGraffenreid v. General Motors* (1976), five black women sued General Motors and argued that seniority-based layoffs unconstitutionally harmed black women exclusively. Because the company simply did not hire black women before 1964, when seniority-based layoffs arrived during an early 1970s recession, all the black women hired after 1964 were subsequently laid off. The policy, Crenshaw argues, should have been subject to legal challenge not based as *either* gender *or* race discrimination, but rather as *both*. But the court decided that efforts to bind together both racial discrimination and sex discrimination claims — rather than sue on the basis of each separately — would be unworkable.

Judge Harris Wangelin ruled against the plaintiffs, writing in part that "black women" could not be considered a separate, protected class within the law, or else it would risk opening a "Pandora's box" of minorities who would demand to be heard in the law:

> The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black

> women' who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.

By treating black women as purely women or purely black, the courts, as they did in 1976, have repeatedly ignored specific challenges that face black women as a group.

"Intersectionality was a prism to bring to light dynamics within discrimination law that weren't being appreciated by the courts," Crenshaw said. "In particular, courts seem to think that race discrimination was what happened to all black people across gender and sex discrimination was what happened to all women, and if that is your framework, of course, what happens to black women and other women of color is going to be difficult to see."

The County is adding intersectionality training to its equity work. For further engagement and dialogue, on this topic and beyond, please contact Milwaukee County's Chief Equity Officer, Jeffrey Roman, at EquityOffice@milwaukeecountywi.gov.

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