

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

Summer 2020

Introduction

Angela J. Davis

American University Washington College of Law, angelad@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Angela J. Davis, *Introduction*, 11 *Criminal Law Practitioner* 4 (2020).

Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/2066

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.



An Introduction by Angela J. Davis

Distinguished Professor of Law, American University
Washington College of Law

The scourge of mass incarceration has plagued the United States for decades. With roughly 2.3 million people in federal and state prisons and close to 7 million people under some form of criminal justice control¹—in prison or jail or on probation and parole—this country maintains the unenviable status of having the highest incarceration rate in the world. Demands for reform have come in fits and starts, resulting in modest changes that have done little to reduce the number of people incarcerated or under some other form of control by the criminal legal system.



Severe and unwarranted racial disparities at all levels of the criminal legal system exacerbate the crisis of mass incarceration even further. Black and brown people are treated worse than their similarly situated white counterparts at every step of the criminal process, from arrest to sentencing.² These disparities exist whether a black or brown person is charged with a crime or is the victim of a crime.

Although the causes of mass incarceration and pervasive unwarranted racial disparities are complex and varied, discretionary decisions by criminal justice officials play a significant role in perpetuating these unjust outcomes. By way of example, when police officers exercise their considerable discretion to make an arrest, they bring individuals into the criminal legal system, and when they racially profile, they produce unwarranted racial disparities at the front end of the system. When prosecutors choose to bring charges, they further entrench individuals in the system, and when they exercise their charging power in ways that produce racial disparities, they further contribute to the problem. Judges, probation and parole officers, and corrections officials also make decisions that contribute to the joint problems of mass incarceration and racial disparity.

There is no one better suited to address these crises in our criminal justice system than the prosecutor. As the most powerful official in the system, prosecutors determine the direction of our criminal justice system through their discretionary charging decisions. They decide whether a person should be charged with a crime and what the charge or charges should be. If prosecutors decide to make charging decisions with the goal of reducing the incarceration rate and racial disparities, they can begin to address these problems in a meaningful way.

1 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

2 *Report to the United Nations on Racial Disparities in the Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.



The overwhelming majority of criminal cases are prosecuted on the state and local levels, and most state and local chief prosecutors are elected officials. In the past, most elected prosecutors ran for office unopposed and served for decades. However, in recent years, there has been a noticeable shift in prosecutorial elections. The criminal justice reform movement has inspired a number of individuals to run for district attorney on a platform of using their power and discretion as prosecutors to reduce the incarceration rate and racial disparities pervading the criminal justice system. These so-called “progressive prosecutors” have successfully defeated long-standing incumbents in a number of high-profile races³ and have begun to implement new policies and practices to fulfill their promises to transform the criminal legal system.

Diversion is one strategy that prosecutors can use to reduce the incarceration rate. There are many different types of diversion programs, but all of them seek to provide an alternative to incarceration and/or a criminal conviction. Drug courts and other alternative courts divert cases out of the system on the condition that the accused receive treatment, counseling, or some other form of rehabilitative assistance. Other diversion programs lead to the dismissal of the criminal case if the accused does community service, pays restitution, or participates in some other program that seeks to address the issues that lead to his or her arrest. Criteria for participation in diversion programs vary widely. Some programs only admit first offenders accused of minor crimes while others admit individuals charged with a wider range of offenses and/or who have some criminal history. Courts fund and manage some diversion programs while prosecutors initiate and run others. Diversion programs have been in existence for decades, and most jurisdictions offer some type of diversion. However, despite the widespread use of these programs, the incarceration rate has not declined significantly over the years. All of the newly-elected progressive prosecutors have promised to expand the use of diversion. But without data and evidence, it is difficult to determine what type of expansion holds the most promise of success. Hence, the need for a roundtable to evaluate the collection of data, diversion criteria, and the measurement of success.

On December 3, 2018, the Institute for Innovation in Prosecution (“IIP”) convened a Roundtable on Prosecutor-Led Pretrial Diversion. This day-long roundtable brought together prosecutors, other criminal justice officials, and directly impacted individuals to examine diversion as a strategy to address some of the problems plaguing the criminal legal system. The IIP was uniquely suited to convene this roundtable because of its work with prosecutors across the country to promote “safety, fairness, and dignity” in the criminal justice system. The IIP has sponsored numerous projects and events with the aim of achieving that goal, including an Executive Session on “Reimagining the Role of the Prosecutor in the Community.” The Executive Session convened elected prosecutors, criminal justice officials, academics, formerly incarcerated individuals, and legal experts to discuss the issues, do research, and author papers on some of the most pressing issues in the criminal system, including racial inequities and other injustices.⁴

³ Some high-profile examples of recently elected progressive district attorneys include Larry Krasner in Philadelphia, Pennsylvania and Rachael Rollins in Suffolk County, Massachusetts. See Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, THE GUARDIAN (Jul. 23, 2019), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty>.

⁴ Other IIP projects include a Re-entry Simulation for prosecutors and communities and a criminal justice seminar that connects prosecutors and incarcerated individuals. See *Re-Entry Simulation*, INST. FOR INNOVATION IN PROSECUTION, <https://www.prosecution.org/reentrysimulation>; *Inside Criminal Justice*, INST. FOR INNOVATION IN PROSECUTION, .



This edition of the Practitioner features a report on the IIP Roundtable and three papers that discuss and analyze some of the important issues raised at this event. In “Mapping the Landscape of Prosecutor-Led Pretrial Diversion,” David Noble summarizes the work of the Roundtable and provides a comprehensive analysis of diversion. He also expands upon the work of the Roundtable’s participants by further exploring several important issues relevant to the successful implementation of diversion as a strategy to transform the criminal legal system. “Prosecution Office Culture and Diversion Programs” by Beth McCann, Courtney Oliva, and Ronald Wright explores an important issue that many prosecutors face—how to overcome internal opposition to the successful implementation of new diversion programs in their offices. In “Innovative Approaches to Diversion Data,” Sean Flynn, Robin Olsen, and Maggie Wolk discuss how to collect, analyze, and share data in order to implement an effective and efficient diversion program. Connor Concannon and Shona Hemmady discuss how prosecutors can use data to inform decision-making in “How Data Analysis Can Shape Diversion Policy.” Together these four articles illustrate the promise of diversion while exposing the challenges and roadblocks of implementing diversion programs. The articles demonstrate that diversion, if implemented properly, can be an effective tool in the movement to transform the criminal justice system.

Angela J. Davis
Distinguished Professor of Law
Washington College of Law

