

The first three sections of Davis' paper lay out many of the statistics and legal consequences of mass incarceration. Given that these stats are not controversial, I will not summarize them here. Beginning in section 4, however, Davis lays the intellectual groundwork for why she claims that prosecutors have an ethical obligation to avoid lengthy and burdensome sentences.

Davis cites two sources of ethical constraint in regards to lawyers. First she quotes from Rule 3.8 entitled *Special Responsibilities of a Prosecutor*, which states that 'a prosecutor has the responsibility of a minister of justice and not simply that of an advocate.' Building on that, Davis cites from the Supreme Court ruling about a case known as *Berger v. United States*. That passage states that:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Later, she cites from the *ABA Standards for Criminal Justice: Prosecution and Defense Function*.

"The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."

Justice being done, then, is what Davis finds to be the most illuminating insight from these passages. A prosecutor's role is *not* to seek as many convictions as is possible. A prosecutor's role is *not* to always prosecute to the furthest extent of the law. A prosecutor's job is *not* to target particular crimes which pose little risk to society. A prosecutor's role *is* to seek justice in every case.

Davis then goes on to criticize the view of Michael Cassidy. Cassidy's view is two-fold. First, prosecutors should oppose mandatory sentences for almost all crimes. Only crimes which are the most 'serious' and 'violent'. Cassidy claims that prosecutors ought to create their own internal policies and guidelines to prevent cases which are not serious and violent from being too harshly persecuted. Cassidy explains that there are four negative consequences of not implementing his changes:

1. Such sentences are costly
2. Guilty pleas can very often be compelled
3. Recidivism is accidentally encouraged
4. Certain racial groups are the target

Cassidy goes on to claim that if an attorney wants to reduce or dismiss a mandatory minimum charge, they should have to do so through a committee. Apparently, Cassidy is assuming that lawyers will 'think twice' before charging someone with a crime that has a mandatory minimum because they will need to get committee approval to dismiss it.

Davis rightly points out that Cassidy's assumption is speculative at best. Where is the evidence Cassidy? Rather than accepting this, Davis accepts Cassidy's first point alone. Davis then goes on to develop a legal system that she finds plausible in regards to reducing the prison population. First, she introduces diversion programs.

"For example, they might be required to complete a drug or alcohol program, do community service, pay restitution, or enroll in an education or employment program. Upon successful completion of the program or other conditions, the prosecutor dismisses the charges. These diversion programs are very beneficial in that the defendant avoids a criminal conviction and all its collateral consequences. Most prosecutor offices, however, only offer diversion for very minor offenses (possession of marijuana, petty theft, littering, etc.)"

Davis wants to expand these programs to the nearly ½ of all prisoners who are serving time for nonviolent offenses. Of course, diversion is not a free pass and there are conditions that would need to be met. The example that Davis gives is of someone suffering from substance abuse and their needing to complete some sort of rehab program.

Davis then goes on to discuss the possibility of certain so-called 'violent offenders' having a chance to have their sentences pardoned / commuted. Some crimes which are listed as 'violent' in fact involve no physical harm. Some crimes which did involve physical violence are such that we may think that enough time has been served and that the convict has been rehabilitated. In such cases, mandatory minimums would not be a way for the prosecutor to be a minister of justice.

Justice, for Davis, is a way of structuring society that weights certain crimes much differently than our current justice system. Nonviolent crimes are not in need of mandatory minimums necessarily. Neither are some so-called violent crimes. The effects of the crimes on society need to be weighted and Davis seems to think that once we do that, then prosecutors will want to change the justice system in a way that promotes justice, and not convictions.