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Prosecutorial Discretion and Attorney General Directives

Carleton EDI Research Project

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Introduction

Prosecutors reserve great power and influence over the trajectory of criminal court cases.¹ They make decisions on whether to proceed with charges laid by police officers; determine the intensity with which to charge; offer plea bargains where they see it appropriate; and can also offer suggestions during sentencing. Because of how often prosecutors exercise their discretion, two identical cases could have very different results based on who is prosecuting the case. This project aims to identify how prosecutorial discretion interacts with mass incarceration and whether it can be utilized as an instrument to reduce incarceration rates, particularly as they relate to Indigenous offenders.

Methodology and Findings

For this project, I looked at directives from the office of the Attorney General of Ontario to assess whether they had significant bearing on the way cases were prosecuted. These directives were found in crown prosecution manuals, of which two have been published since 2000. Both manuals were initially published under the Liberal government; the latter of the two has been updated with directives from Attorneys General who are members of the Progressive Conservative Party. To evaluate trends, I tracked directives on Indigenous offenders from both manuals and subsequently analyzed incarceration numbers of Indigenous people after the release of each directive to see if the directive had any effect on incarceration rates of Indigenous people.

The results of my analysis did not depict a strong correlation between the policy directives and the incarceration of Indigenous offenders. The directives themselves were largely similar to one another, with both recommending exhausting all potential remedies before

¹ Angela J Davis, “The Power and Discretion of the American Prosecutor” (2005) 49 *Égalité et Discrimination* 55.

incarceration (as courts are recommended to do through the guidelines in *Gladue*).² Despite the directives, incarceration rates of Indigenous people actually increased for some time between the directives. The rates only came below their 2001 levels in 2013-2014 and has gone down consistently since then.³

Shortcomings

I originally intended for this project to include a comparative component which would have offered insight into how prosecutorial discretion is used in different jurisdictions. I had also hoped to include a section on offenders of colour more broadly and how they were affected by drug offences. However, I found that the data I required was not publicly available and despite a request to the office of the Ontario Attorney General, I was not able to access any relevant data in time.

Future Considerations and Conclusion

Even focusing on provincial jurisdictions is arguably too broad when trying to assess the nuances of prosecutorial discretion. One potential avenue to expand on this work would be to evaluate the work of individual prosecutors' offices and analyze how they interact with alternative sentencing systems in their localities and if they have a positive effect on prosecutorial discretion and incarceration rates. As Frederick and Stemen note, prosecutorial discretion is unique to each individual.⁴ Thus, a more effective way to analyze its use would be a qualitative analysis involving interviews with prosecutors.

² Ministry of the Attorney General - Criminal Law Division, *Crown Prosecution Manual*, (Toronto, 2017).

³ Statistics Canada, *Adult custody admissions to correctional services by aboriginal identity* 35-10-0016-01(Ottawa: Statistics Canada, 2020).

⁴ Bruce Frederick and Don Stemen “The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report” (2012) National Institute of Justice 1.

Though this project did not produce any firm conclusions, my analysis and exploration of the literature has shown me that prosecutorial discretion is influenced by many factors and its effect on incarceration rates will require considering more factors than just directives from attorneys general.