

MARYLAND ALLIANCE FOR JUSTICE REFORM

Working to end unnecessary incarceration and build strong, safe communities



Prosecutorial discretion

Prosecutors' awesome power

Maryland prosecutors, by state constitution and common law, have discretion to exercise enormous power to control the criminal justice process, with minimal oversight by the courts:

- They may advise police officers as to charges, search warrants, and ongoing investigations.
- They select and write charges before these are filed in court or submitted to grand juries.
- They may dismiss charges filed by citizens, police, or prosecutors themselves for various reasons, including incentives for defendants to plead guilty to other charges.
- They can offer to drop or reduce charges against one defendant as incentive to obtain testimony—often found later to be unreliable—against another defendant.
- They can make plea bargains to maximize convictions.
- They decide what evidence to disclose or not to disclose to defendants and their attorneys.
- They decide what evidence to present or not to present at trial.
- They craft arguments seeking to persuade judges and juries at trial of each defendant's guilt.
- At sentencing, they argue for incarceration, or sometimes for alternative sentences.
- They may oppose defendants' appeals and requests for post-sentence modifications.

Maryland prosecutors are only rarely required to speak publicly about how they choose to exercise their "[awesome power](#)." But their choices often create serious public problems:

- [African American men](#) are incarcerated in Maryland at more than twice their proportion in the population—the highest rate of any U.S. state. According to a [2015 report](#) from the Justice Reinvestment Coordinating Council, among prisoners with sentences of ten years or longer, 87% were black.
- African Americans are incarcerated twice as often for drug offenses as whites, although studies suggest their rates of drug abuse are not significantly different from those of whites.
- [Baltimore County](#) was the source of the large majority of all Maryland death penalty cases because its State's Attorney chose to seek the death penalty whenever possible.
- In Frederick County, the State's Attorney refused approval for a victim-assisting mediation program to work out informal solutions to criminal charges, although almost every other Maryland county has such [programs](#).

According to the [National District Attorneys Association](#), "The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth." A prosecutor's job is not to obtain as many convictions and the longest sentences possible. Both [legal ethics](#) and Maryland law require the prosecutor to consider the public interest and to do justice, sometimes choosing not to prosecute.

One solution

Pretrial detention, which can last months or even years, often causes defendants to lose their jobs and weakens their ties with family, putting them deeper in the hole. Some Maryland prosecutors review citizen-filed charges early and dismiss those that appear inadequate, rather than make some defendants wait in pretrial detention until their trial dates. Prince George's County's program is a good example. Pretrial screening became even more important when the pandemic presented mortal dangers to those in our local detention centers.

Prosecutors should be directed to [use their discretion](#) to help reduce Maryland's incarceration rate and its disparate impact on the African American community and the poor:

- Prosecutors can choose to screen and drop some charges.
- They can offer pretrial diversion to avoid convictions, or accept alternatives to prison that result in taxpayer savings and citizens' rehabilitation.
- Those in pretrial detention because of poverty can be released with [pretrial supervision](#). [Earlier screening](#) of laypersons' charges also can reduce caseloads and pretrial detention.
- ["Problem-solving courts"](#)—"designed to stop crime by treating substance use disorders and other serious problems underlying criminal conduct"—and criminal mediation programs could be offered in every Maryland jurisdiction with prosecutors' support.

Will this work?

Prince George's County prosecutors use early screening of all citizens' complaints to consider mediation, diversion or, if appropriate, dismissal. Mediation of criminal cases has been offered via [court-related programs](#) in nearly half the state and by community-based programs in the rest, except for [Frederick County](#), where the prosecutor has refused to cooperate. [Statistics show](#) that successful mediation decreases later court appearances and use of police resources.

Problem-solving court techniques and resources have been [shown](#) to reduce recidivism. With prosecutors' support, these could be expanded to all parts of the state and offered as widely as possible within every criminal court.

Learn more

- [Jessica Anderson, "Report: Proportion of Maryland black prison population is more than double the national average of 32%", Baltimore Sun, 11/6/2019](#)
- [Justice Reinvestment, Coordinating Council Final Report, Dec 2015](#)
- [ACLU, "Victory! Maryland Repeals Its Broken Death Penalty System", 2012?](#)
- [Maryland Judiciary, "Impact of Mediation on Criminal Misdemeanor Cases", 06/2017](#)
- [Iman Freeman, Nicole Hanson and Caryn York, "Further bail reform needed in Maryland", Baltimore Sun, 7/10/2020](#)
- [Lisa Pilnik, "A Framework for Pretrial Justice", National Institute of Corrections, 2/2017](#)
- ["Operational Problem-Solving Courts in Maryland", Maryland Courts, 8/1/2019](#)
- [Deborah Eisenberg, Rachel Wohl, Toby Guerin, "Alternative Dispute Resolution and Public Confidence in the Judiciary: Chief Judge Bell's "Culture of Conflict Resolution"", 2013](#)
- [Maryland Judiciary, "Impact of Mediation on Criminal Misdemeanor Cases", 9/2016](#)
- [Lorig Charkoudian, "Giving Police and Courts a Break: The Effect of Community Mediation on Decreasing the Use of Police and Court Resources", Conflict Resolution Quarterly, Winter 2010](#)
- [Paul A. Haskins, "Problem-Solving Courts: Fighting Crime by Treating the Offender", National Institute of Justice, 9/26/2019](#)
- ["21 Principles For The 21st Century Prosecutor", Brennan Center for Justice, 8/2019](#)
- ["A Prosecutor's Guide for Advancing Racial Equity" VERA Institute of Justice, 11/2014](#)
- ["Disrupting the Cycle: Reimagining the Prosecutor's Role in Reentry: Best Practices", NYU Center on the Administration of Criminal Law, 2017](#)
- ["National Prosecution Standards", National District Attorneys Association, nd](#)
- ["Smart on Crime I", United States Attorneys' Bulletin, 1/2015](#)
- ["Criminal Justice Standards for the Prosecution Function", The American Bar Association, 2017](#)
- [Lars Trautman, "Why prosecutorial discretion must be less discreet for criminal justice", The Hill, 2/21/2020](#)