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## Weighing Prosecutorial Power and Discretion: Fixing the Imbalance

Harvey Gee

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## Book Review

### WEIGHING PROSECUTORIAL POWER AND DISCRETION: FIXING THE IMBALANCE

ARBITRARY JUSTICE: THE POWER OF THE AMERICAN  
PROSECUTOR. By Angela J. Davis.  
Oxford University Press. 2008. Pp. 264.

Reviewed by Harvey Gee\*

#### I. INTRODUCTION

It might sound cliché, but some legal commentators contend that prosecutors – the most powerful officials in the criminal justice system – too often seek convictions instead of justice.<sup>1</sup> Commentators argue that prosecutors pay more attention to their cases involving educated and upper-income victims, and put more work into them, than cases where the victims are poor and uneducated.<sup>2</sup> Not surprisingly, lenient plea bargains are more available to wealthy defendants than to indigent defendants.<sup>3</sup> Angela J. Davis, a Professor of Law at American University Washington College of Law, expands on this premise in her timely and well-written book, *Arbitrary Justice: The Power of the American Prosecutor* [*Arbitrary Justice*]. In *Arbitrary Justice*, Professor Davis examines the growing power of prosecutors, from mandatory minimum sentencing laws that enhance prosecutorial control over the outcome of cases to the increasing politicization of prosecutors' offices. Professor Davis knows her subject well. She gained a tremendous amount of trial experience and practical knowledge as a public defender and agency director at the Public Defender Service for the District of Columbia [PDS], one of the leading indigent defense offices in the country.

Part II of this Book Review discusses the role of prosecutors in the American criminal justice system. Next, Part III expands the issue of criminal administration beyond the traditional black-and-white racial

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\* Assistant Federal Public Defender (Capital Habeas Unit); Federal Public Defender's Office, Western District of Pennsylvania; Former Deputy State Public Defender, Colorado; LL.M (Litigation & Dispute Resolution), The George Washington Law School; J.D., St. Mary's School of Law; B.A., Sonoma State University. The views expressed herein are not necessarily those of any past, present, or future employer.

<sup>1</sup> ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4 (2007).

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.*

scheme. Part IV describes Professor Davis's proposals for reform. Finally, this Book Review concludes with a reminder that criminal justice remains a complex topic for all Americans.

## II. PROSECUTORS, POWER, AND JUSTICE

At the outset, *Arbitrary Justice* offers an illuminating look at the prosecutor's role in the criminal justice system. Professor Davis argues that the most serious system-wide issue is the lack of accountability for the daily decisions of prosecutors.<sup>4</sup> According to Professor Davis, prosecutors hold vast power because they are largely under-regulated. She contends that the criminal justice system gives prosecutors a pass by allowing them to circumvent scrutiny and accountability, which affords them more power than any other government official.<sup>5</sup> "Because prosecutors make these decisions in private without meaningful supervision or accountability, they are rarely punished when they engage in misconduct."<sup>6</sup> In fact, Professor Davis asserts that prosecutors are often rewarded with promotion and career advancement as long as their conviction rates remain high.<sup>7</sup> The author emphasizes that the time has come to focus on prosecutors, require more information from them, and institute fundamental reforms that result in more fairness in the performance of the prosecutorial function.<sup>8</sup>

Professor Davis further argues that a prosecutor's legal responsibility is not just to represent the state in seeking convictions, but is to pursue justice. In her work as a public defender, Professor Davis noticed that prosecutors held and dealt almost all of the playing cards. In her time with the Public Defender's Office, Professor Davis found that prosecutors were the most powerful officials in the criminal justice system.<sup>9</sup> Professor Davis states that the routine, everyday decisions of prosecutors control the direction and outcome of criminal cases and cause more serious consequences for criminal defendants.<sup>10</sup> She contends that the most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable.<sup>11</sup> Even more remarkable is that prosecutors

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<sup>4</sup> *Id.* at 15-17.

<sup>5</sup> *Id.* at 18.

<sup>6</sup> *Id.* at 140.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 15-17.

make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors.<sup>12</sup>

There have been high-profile cases involving the abuse of prosecutorial power. For example, after the release of *Arbitrary Justice*, there was the prosecution of former Senator Ted Stevens on corruption charges. After Senator Stevens was convicted, United States District Judge Emmet G. Sullivan dismissed seven counts regarding Stevens's lying about the receipt of \$250,000 in gifts and free renovations to his Alaska house. Judge Sullivan then appointed an outside lawyer to investigate allegations of prosecutorial misconduct, including the mishandling of evidence and witnesses.<sup>13</sup> Apparently, federal prosecutors failed to provide the defense with notes that contradicted key government witnesses.<sup>14</sup> Judge Sullivan remarked that "[i]n 25 years on the bench, I have never seen anything approaching the mishandling and misconduct that I have seen in this case."<sup>15</sup>

In her book, Professor Davis provides the example of the Duke Lacrosse Team rape case.<sup>16</sup> In that case, two African American strippers were sent by an escort service to the home of one of the captains of the Duke Lacrosse Team.<sup>17</sup> One of the strippers claimed that several white members of the Duke Lacrosse Team raped and assaulted her. Michael Nifong was the Durham County District Attorney who led the prosecution of the Duke Lacrosse players.<sup>18</sup> According to Professor Davis, racial and economic dynamics motivated Nifong's decision to charge the Duke Lacrosse players.<sup>19</sup> Professor Davis explains that racial animus was apparent because Nifong's supporters were primarily African Americans who rallied around the alleged victim.<sup>20</sup> On the other hand, the white defendants were represented by a high-priced defense attorney.<sup>21</sup> At the time of the prosecution, critics claimed Nifong was pandering to his constituents because he was up for re-election.<sup>22</sup> Nevertheless, the three Duke Lacrosse players battled the phony gang-rape allegations for thirteen months before the North Carolina Attorney

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<sup>12</sup> *Id.*

<sup>13</sup> See Del Quentin Wilber, *Judge Orders Probe of Attorneys in Stevens Case*, WASH. POST, Apr. 8, 2009, at A1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See DAVIS, *supra* note 1, at 196-98; see also Duff Wilson, *Ethics Hearing For Duke Prosecutor*, N.Y. TIMES, June 13, 2007, at A14.

<sup>17</sup> See DAVIS, *supra* note 1, at 196.

<sup>18</sup> *Id.* at 196-97; Wilson, *supra* note 16, at A14.

<sup>19</sup> See DAVIS, *supra* note 1, at 197.

<sup>20</sup> See *id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

General declared them innocent and dropped the charges against them.<sup>23</sup> Ultimately, Nifong was found guilty of misconduct in the criminal case against the Duke Lacrosse players, stripped of his law license, and ousted from office.<sup>24</sup>

In another example, Professor Davis claims that the prosecution in the Jena Six cases was racially motivated.<sup>25</sup> She argues that Louisiana prosecutor Reed Walters engaged in race-based selective prosecution in response to a series of confrontations between African American and white students at predominately-white Jena High School.<sup>26</sup> Professor Davis emphatically claims that “[a]lthough a number of white and black students engaged in assaultive behavior, Walters charged only one white student with a minor misdemeanor while charging a group of black students with serious adult felonies for engaging in a very similar behavior.”<sup>27</sup>

Given the racial reality of the American criminal justice system, Professor Davis advocates for racial disparity studies designed to reveal racially discriminating treatment. Such studies should be published and widely available to the public.<sup>28</sup> As a result, prosecutors could acknowledge the importance of racial disparity to the electorate.<sup>29</sup> The proposed studies would assist in determining whether defendants of color receive harsher treatment for the same criminal behavior as whites and whether some cases are prosecuted more vigorously than others depending on the racial backgrounds of the defendant and the victim.<sup>30</sup>

Demonstrating its comprehensiveness, *Arbitrary Justice* also discusses prosecutorial discretion in capital punishment cases. Professor Davis cautions that the arbitrariness of the decision to charge the death penalty is troubling. She asserts that “the death penalty decision is far too arbitrary, often depending on the philosophy and proclivities of the chief prosecutor instead of on legal principles, standards, or guidelines.”<sup>31</sup> Professor Davis also notes that the decision to seek the death penalty is often based on politics.<sup>32</sup> According to Davis, the chief prosecutor is

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<sup>23</sup> Wilson, *supra* note 16, at A14.

<sup>24</sup> *Id.*

<sup>25</sup> See DAVIS, *supra* note 1, at 199–201.

<sup>26</sup> *Id.* at 199.

<sup>27</sup> *Id.* at 200.

<sup>28</sup> See *id.* at 186–89.

<sup>29</sup> *Id.* at 186–87.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 89.

<sup>32</sup> *Id.*

concerned about re-election; thus, his or her decisions are heavily influenced by their potential political consequences.<sup>33</sup>

### III. AMERICAN JUSTICE IS NOT ALL BLACK, WHITE, AND BROWN

Professor Davis notes that studies, such as Professor David Baldus's, illustrate that there are sentencing disparities between African Americans, Hispanics, and whites.<sup>34</sup> Throughout *Arbitrary Justice*, Professor Davis holds the reader's attention because she uses specific, compelling stories of individuals from her prior cases to reveal the unfair and unequal treatment of both defendants and victims.<sup>35</sup> As a public defender, Professor Davis saw disparities in the way prosecutors handled individual cases. Cases involving educated, wealthy victims took priority over cases involving poorer, uneducated victims.<sup>36</sup> From her perspective, the few white defendants represented by her office sometimes appeared to receive preferential treatment from prosecutors.<sup>37</sup> Although Professor Davis never saw evidence of intentional discrimination based on race or class, the consideration of such factors in the prosecutorial process often produced disparate results along class and racial lines.<sup>38</sup> But intentional discrimination is not always necessary to create racial injustice, and prosecutors are not the only individuals who contribute to shocking consequences. Here, a broader perspective is possible.

For instance, Professor Viet Dinh asserts that race relations in the context of criminal justice have never been a strictly black-and-white conflict, although many legal scholars tend to frame it as such.<sup>39</sup> Professor Dinh advocates for analyses of the criminal justice system to reflect the multiracial reality of American life. The application of Professor Dinh's notion to *Arbitrary Justice* reveals that Professor Davis tends to write about justice administration in Washington, D.C. as existing in a black-and-white paradigm. Thus, the analysis in *Arbitrary Justice* should be extended beyond the Beltway to show that criminal justice may be evaluated in a multiracial context.

Furthermore, Asian Americans are often overlooked in conversations about race and crime. In fact, Asian Americans represent

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<sup>33</sup> *Id.* at 91.

<sup>34</sup> *Id.* at 82-84.

<sup>35</sup> *See generally id.*

<sup>36</sup> *Id.* at 37-39.

<sup>37</sup> *Id.*

<sup>38</sup> *See generally* Wilson, *supra* note 16, at A14.

<sup>39</sup> *See* Viet Dinh, *Races, Crime, and the Law*, 111 HARV. L. REV. 1289, 1289 (1998) (book review of Randall Kennedy's *Race, Crime, and the Law* (1997)).

one of the fastest growing segments of the prison population. The model minority stereotype of Asian Americans as one monolithic ethnic group that has achieved success through education and hard work without the assistance of governmental benefits is one possible explanation for the lack of attention given to Asian-American crime. The model minority myth has created a stereotype of Asian Americans.<sup>40</sup> Such a myth is disingenuous, however, and masks the reality that Asian Americans are still affected by discrimination and are involved in the criminal justice system.<sup>41</sup>

Five years ago, the U.S. District Court in San Francisco considered a prisoner's claim of discrimination stemming from a thirty-six-year absence of minorities serving as grand jury forepersons. Although the court in *Chin v. Runnels* ultimately denied the claim, the court noted the subjectivity involved in the judge's selection of grand jury forepersons and the possibility of bias.<sup>42</sup> In *Chin*, the defendant filed a habeas petition claiming that his right to equal protection was violated because Chinese Americans, Filipino Americans, and Hispanic Americans were excluded from service as forepersons on the grand jury that indicted him.<sup>43</sup> The defendant relied on statistical evidence to demonstrate that from 1960 to 1996, the grand jury forepersons selected in San Francisco were underrepresented with respect to three minority groups: Chinese, Filipino, and Hispanics. There were no forepersons chosen from these groups between 1960 and 1966.<sup>44</sup>

Yet, as the defendant emphasized, during this time period the composition of the grand jury pools from which grand jury forepersons were chosen consisted of: 13.4 percent Chinese Americans; 6.9 percent Hispanic Americans; and 4.0 percent Filipino American.<sup>45</sup> The defendant relied on expert opinion that reflected there was a 0.0003 percent chance that no individuals from the three groups would be chosen to serve as foreperson.<sup>46</sup> "[D]uring the same period there were Chinese-American and Filipino-American grand jurors who had comparable age, education and occupational characteristics to the individuals selected [to be

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<sup>40</sup> See FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 42 (2002); Gabriel J. Chin, et. al, *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 *ASIAN PAC. AM. L.J.* 129, 149 (1996); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 *J. GENDER RACE & JUST.* 177, 185 (1997).

<sup>41</sup> See Jerry Kang, *Racial Violence Against Asian Americans*, 106 *HARV. L. REV.* 1926, 1931 (1993).

<sup>42</sup> 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004).

<sup>43</sup> *Id.* at 892.

<sup>44</sup> *Id.* at 895.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

foreperson]."<sup>47</sup> The defendant further alleged that while the number of African Americans and female forepersons increased, there was no increase in forepersons of Chinese or Hispanic descent.<sup>48</sup> He based his *prima facie* case of discrimination on the fact that Chinese Americans were a legally recognized class and his undisputed statistics showed that "no Chinese-Americans had served as grand jury foreperson over a 36-year period, even though they represented 13.4% of the pool of grand jurors from which the foreperson was chosen."<sup>49</sup>

Ultimately, United States District Judge Charles Breyer found that the narrow scope of habeas review prevented the court from reviewing the issues *de novo*. As a result, the court could not take "a closer inquiry – particularly as to the possibility that the selection process could have been subject to unconscious bias."<sup>50</sup> Judge Breyer concluded that the constraints of habeas review prevented the court from finding the state court's evidentiary findings objectively unreasonable.<sup>51</sup>

In addition, in Chin's state court appeal, the Superior Court's executive director and assistant district attorney testified that race did not factor into the selection process. Instead, according to their testimony, the presiding judges applied race-neutral criteria looking for members with "'leadership' experience, 'people skills,' and the capacity to motivate others to work together."<sup>52</sup>

However, Judge Breyer observed that "unconscious stereotyping or biases may have contributed to the exclusion of these groups notwithstanding the best of intentions of those involved."<sup>53</sup> He remarked that the qualities of leadership and people skills were subjective judgments that involved "subtle and unconscious mental processes susceptible to bias."<sup>54</sup> Moreover, a member of the U.S. Equal Employment Opportunity Commission, who echoed Judge Breyer's opinion, noted "the cultural bias of selecting officials and all the stereotypical misconceptions, the fears, myths and stereotypes about the leadership skills of Asian[]Americans," and suggested that more research needed to be done on the issue of why Asian Americans are not able to break into management levels and are not viewed as leaders.<sup>55</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 895–96.

<sup>49</sup> *Id.* at 901

<sup>50</sup> *Id.* at 903.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 905.

<sup>53</sup> *Id.* at 906.

<sup>54</sup> *Id.*

<sup>55</sup> Transcript of July 22, 2008 U.S. Equal Employment Opportunity Commission Meeting, *Issues Facing Asian Americans and Pacific Islanders (AAPIs) in the Federal Workplace and*



Judge Breyer cited to critical race theory scholarship that addressed the pervasiveness of unconscious racial stereotyping and bias.<sup>56</sup> The first citation was to Professor Charles Lawrence's pioneering article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.<sup>57</sup> Professor Lawrence asserts that unconscious racial motivation influences the behavior that produces racial discrimination and that it is impractical to require conscious or intentional motivation in a wrongdoer's mind.<sup>58</sup> Consequently, Lawrence concluded that because of the ubiquity of racist beliefs and the fact that people are not even conscious that they hold those beliefs, a motive-centered doctrine of racial discrimination creates a heavy burden of persuasion.<sup>59</sup> Lawrence further articulates a critique of the Intent Doctrine, which he considered outdated and ineffective.<sup>60</sup> These facts have long been overlooked by the courts; the harms of racial bias and inequality exist whether or not decision-makers act with clear racial animus.<sup>61</sup>

Essentially, under this theory of stereotyping, individuals who believe all Asian Americans are highly skilled at mathematics, non-assertive, and quiet, will continue to hold this belief whenever they encounter Asian Americans, even if it is not true. In *Chin*, Judge Breyer also referred to the state court transcripts of a superior court administrator who testified that, based on his twenty years of experience, judges selected the foreperson after an off-record in-chambers discussion with him or with the deputy assistant attorney who served as an advisor.<sup>62</sup> The administrator stated that a foreperson must get along with others when conducting a meeting and must be able to manage a jury.<sup>63</sup> Likewise, the deputy district attorney, who was a grand jury advisor, testified that judges seek forepersons who were good leaders, strong motivators, and possessed effective administrative skills.<sup>64</sup> While Judge Breyer analyzed the unconscious bias that has played a role in contemporary discrimination against Asian Americans, this unconscious

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*Compliance Manual Chapter on Religious Discrimination* at 14, <http://www.eeoc.gov/abouteeoc/meetings/7-22-08/transcript.html>.

<sup>56</sup> *Chin*, 343 F. Supp. 2d at 906.

<sup>57</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>58</sup> *Id.* at 321.

<sup>59</sup> *Id.* at 319.

<sup>60</sup> *Id.*

<sup>61</sup> See Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005).

<sup>62</sup> *Chin v. Runnels*, 343 F. Supp. 2d 891, 898 (N.D. Cal. 2004).

<sup>63</sup> *Id.* at 896.

<sup>64</sup> *Id.*

bias is ultimately difficult to prove, and under traditional equal protection laws, it has been allowed to exist unchallenged.

Significantly, Judge Breyer closes his opinion with a four-paragraph exploration of the model minority myth and negative stereotyping of Asian Americans. Perhaps Judge Breyer was very cognizant of the model minority myth because he worked in San Francisco, a city with a large Asian community, with Judge Edward Chen, who is the first and only Asian American on the federal bench for the Northern District of California.<sup>65</sup> Whatever his influences may have been, Judge Breyer's discussion sets forth three related points about Asian American stereotypes that can be affected by unconscious bias: (1) Asian Americans have been described as "nonassertive and deferential, intelligent but devious, and mathematically and technically oriented rather than verbally skilled[]"; (2) Asian Americans are not perceived to be compatible in managerial and executive roles or as lawyers because they lack leadership skills; and (3) Asian Americans "are often perceived as quiet and unassuming."<sup>66</sup>

In comparison, based on the reviewer's personal experiences as a public defender, during jury selection, aside from the jury questionnaires and questions posed to potential jurors, very little is known about jurors. It is quite plausible that attorney and judge may fall into a comfortable tendency to base their judgments on racial or cultural stereotypes, unless challenged. Judges must select a jury foreperson in a matter of minutes. As discussed in *Chin*, perhaps San Francisco judges gave undue deference to certain racial stereotypes. San Francisco is such a diverse, multicultural city; it is surprising that there has never been an Asian American jury foreperson. Rather, the exclusion of Chinese Americans from serving as grand jury forepersons is likely evidence of an unconscious racial intent. The absence of an Asian American foreperson in San Francisco should be as glaring as if there was never an African American foreperson in Washington, D.C. or if a Hispanic had never been appointed as foreperson in San Antonio. But, unfortunately, as discussed by Judge Breyer in *Chin*, discrimination against Asian Americans often goes unnoticed.

#### IV. MODERATE PROPOSALS FOR REFORM

Unlike other commentators, Professor Davis not only focuses on the problems, but she also offers a sensible agenda for comprehensive

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<sup>65</sup> See Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1109 (2003).

<sup>66</sup> *Chin*, 343 F. Supp. 2d at 907-08.

review and reform. *Arbitrary Justice* challenges the legal community and concerned citizens to pursue and enact meaningful standards of conduct and effective methods of accountability to help prosecutors serve their communities and the interests of justice. Professor Davis's suggestions include: (1) having national, state, and local bar associations conduct in-depth investigations to determine the adequacy of current prosecutorial misconduct controls and possible reforms; (2) improving the plea bargaining process by requiring prosecutors to prove all of the relevant information, which would enable the defendant to make an informed decision, require prosecutors to reveal the weaknesses in their case, and inform the defendant of information that is helpful to the defense; and (3) creating accountability through transparency to improve the prosecutor's troubling role in the implementation of the death penalty.<sup>67</sup>

While Professor Davis's reforms are modest, it is still unlikely that any substantial cultural reform in the federal, state, and local prosecutorial systems will occur quickly. As the Author has personally witnessed as a public defender, and from what *Arbitrary Justice* shows, the American criminal justice system is highly complex.

The last two years have produced a rise in the rate of violent crime in large American cities. Simultaneously, the national rate of incarceration is continuing to rise at an unprecedented rate. This dramatic observation is produced by such factors as: changing crime rates, strict sentencing, politics, culture, and demographics. There is no consensus on these new realities; however, sentencing laws and increased incarceration are often referred to as the solution to address increasing crime rates. A reliance on this approach imposes a heavy burden on courts and communities, but only marginally impacts crime. The racial divide in crime and punishment in America is also exacerbated by unequal treatment in sentencing. But there is room for optimism. President Barack Obama recognizes our criminal justice system needs reform. If President Obama follows through with his campaign promises, he will work to: (1) eliminate sentencing disparities; (2) sign legislation banning racial profiling by federal law enforcement agencies; and (3) reduce crime and recidivism by providing ex-offender support. Such priorities represent an effort to restore and advance our nation's commitment to equal justice.<sup>68</sup>

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<sup>67</sup> See DAVIS, *supra* note 1, at 180.

<sup>68</sup> barackobama.com, Organizing for America, [http://www.barackobama.com/issues/civil\\_rights/index\\_campaign.php#racial-profiling](http://www.barackobama.com/issues/civil_rights/index_campaign.php#racial-profiling) (last visited Oct. 6, 2009).

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V. CONCLUSION

In sum, *Arbitrary Justice* offers strong support for the proposition that criminal justice cannot be equally divided between good guys and bad guys or between justice and injustice. Rather, criminal justice and racial justice are complex subjects each deserving of deeper consideration. A closer and more meaningful examination of the continually evolving criminal justice system would uncover the real reasons for crime, which would assist policymakers in developing pragmatic measures to address the present day realities of crime and punishment.