

## Prosecutors' Bad Rap

By Harvey Gee

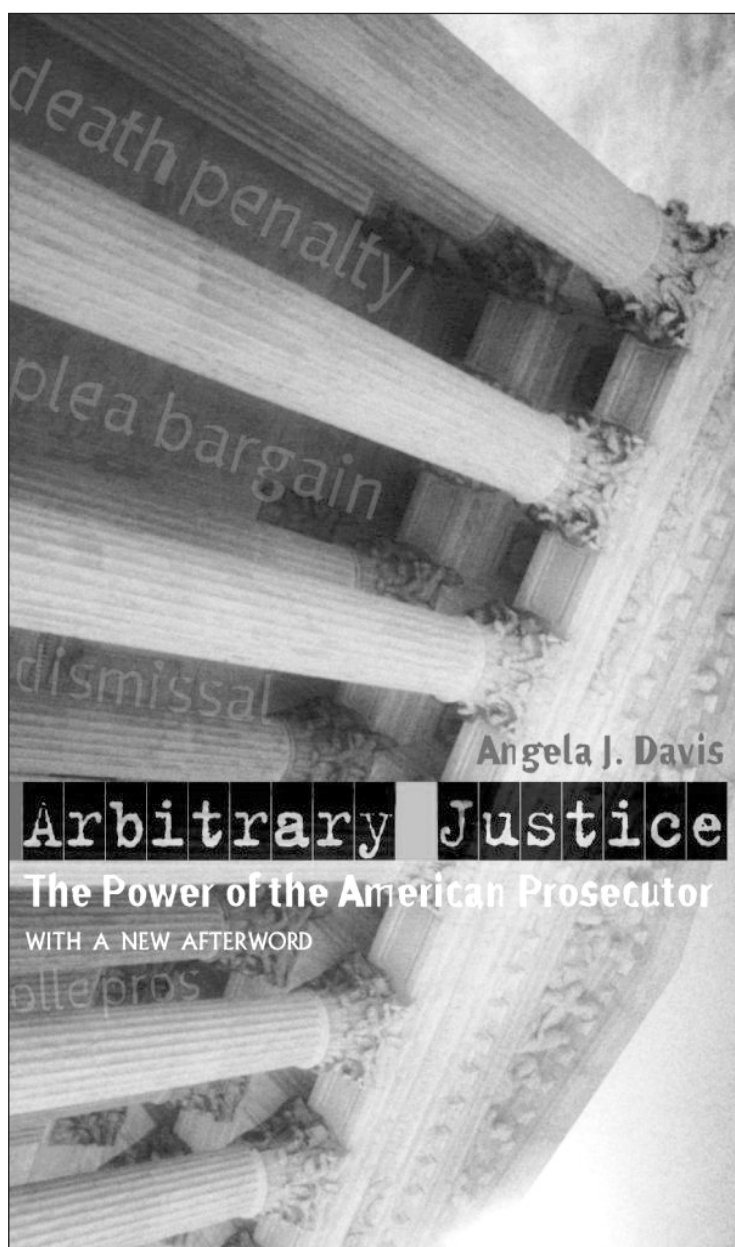
The House and Senate are attempting to pass legislation to curb crime and ensure fairness to criminal offenders. Earlier this year, hearings were held to address disparities in sentencing; and the feasibility of a five-year pilot program addressing racial and ethnic bias in the criminal justice system. Congress is also seeking to reauthorize the Justice and Delinquency Prevention Act, which provides protections to youths in the juvenile justice system, and to establish the Youth Prison Reduction Through Opportunities, Mentoring, Intervention, Support and Education Act to establish programs preventing gangs and encouraging positive youth development.

These congressional efforts provide the backdrop for "Arbitrary Justice: The Power of the American Prosecutor" and "Let's Get Free: A Hip-Hop Theory of Justice." It might sound almost cliché that some legal commentators contend that prosecutors, the most powerful officials in the criminal justice system, too often seek convictions instead of justice. These prosecutors also more vigorously prosecute cases involving educated and upper-income victims than cases where the victims are poor and uneducated. Not surprisingly, lenient plea bargains are more available to wealthy defendants than disadvantaged defendants. Angela J. Davis, a professor at American University Washington College of Law, in her timely and well-written book, "Arbitrary Justice," expands this premise by examining the growing power of prosecutors, from mandatory minimum sentencing laws that enhance prosecutorial control over the outcome of cases to the increasing politicalization of offices. Davis knows her subject well. She is a former public defender, and agency director, at the Public Defender Service for the District of Columbia.

In "Let's Get Free," Paul Butler, associate dean at The George Washington Law School, offers an intriguing volume exploring the major ailments of the American criminal justice system.

Butler declares that the prison system is overcrowded and out of control. He explains that most inmates committed nonviolent offenses. He also notes that higher rates of incarceration is not a deterrent. Mass incarceration interferes with the social organization of neighborhoods (parents taking care of their children, and neighbors looking out for other neighbors, which translates to safe environments). It creates too many unemployed young men. Butler further argues that it costs more money to operate prisons and jails than it would be to provide good university educations.

Butler firmly believes in rehabilitation. Almost sounding like a passionate criminal defense attorney at sentencing, he suggests that deference should be paid to criminal policy and public interest experts when crafting effective



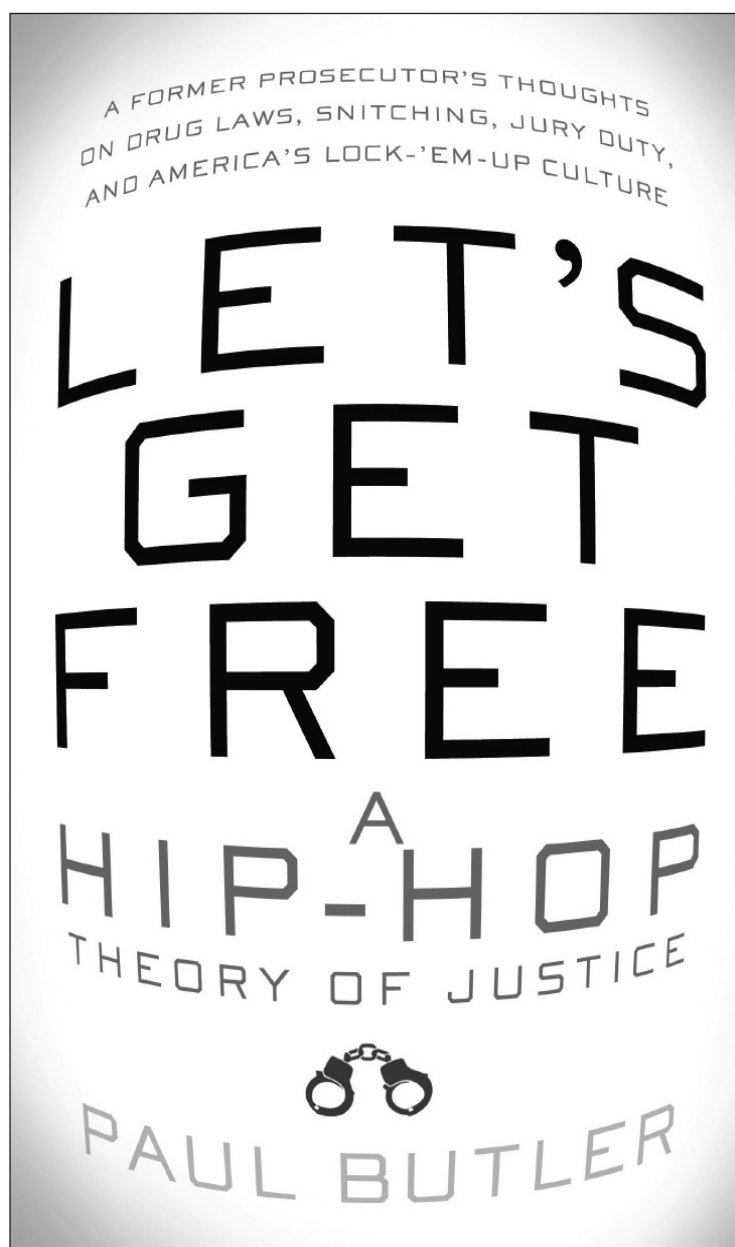
criminal justice policy. Butler argues that "criminal justice policy is often inefficient, sometimes counterproductive and oftentimes emotionally driven defying reason."

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

Davis further argues that a prosecutor's legal responsibility is not just to represent the state in seeking convictions; it is to pursue justice. In her work as a public defender, Davis noticed that prosecutors held and dealt almost all of the playing cards. Prosecutors are the

most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have great impact and more serious consequences. She contends that the most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable. Prosecutors make the most important of these decisions behind closed doors and answer only to other prosecutors.

Demonstrating the book's comprehensiveness, "Arbitrary Justice" discusses prosecutorial discretion in capital cases. Davis cautions that the arbitrariness of the death penalty charging decision 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." Davis notes that the decision to seek the death penalty often is based on politics. She suggests that the chief prosecutor, concerned about re-election, knows that he or she is in the public, and thus, his or her decisions are heavily influenced by their potential political conse-



quences.

Unlike other treatments, Davis not only focuses on the problems, but she also offers a sensible agenda for comprehensive 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. Davis suggests that: having national, state and local bar associations conduct in-depth investigations to determine the adequacy of current prosecutorial misconduct controls, and possible reforms; the plea bargaining process would be greatly improved if prosecutors were required to prove all of the relevant information that would enable the defendant to make an informed decision, and prosecutors should also reveal the weaknesses in their case and inform the defendant of information that is helpful to the defense; and creating accountability through transparency might improve the prosecutor's troubling role in the implementation of the death penalty.

Next, the beginning of "Let's Get Free" recalls Butler's early days as a 33-year-old prosecutor in the U.S. attorney's office in the District of Columbia, when he

prosecuted a variety of defendants, including a prostitute, and then a U.S. senator. He then went to work at the Department of Justice's public integrity section, when the most unexpected thing happened to him — he was arrested for simple assault after a dispute over a parking space, based on a false accusation by a neighbor holding a grudge. Very unlikely for a graduate of Yale College and Harvard Law School who held a clerkship with federal Judge Mary Johnson Lowe, and was a former associate, specializing in white-collar criminal defense and civil litigation, at Williams & Connolly. This experience was a turning point for Butler, from which his sense of injustice was expanded.

Butler offers some concrete examples of a system gone awry: during May 2008, the police stop of every driver in a high-crime neighborhood in D.C., and the officers asking drivers if they have a "legitimate purpose" for being in the neighborhood. The police decided if drivers had such a purpose (going to church, doctor's visit, or visiting family), and if not, they were ordered to leave. A refusal could have meant being arrested for "failure to obey a police officer,"

police officers regularly cruising the streets stopping expensive cars for potential traffic infractions as a pretext for discovering more serious crimes; and the increase of the incarceration rate without regard to the crime rate.

Butler's central thesis is that hip-hop music contains a powerful analysis of the criminal justice system. Butler imagines a better world that utilizes pop culture and technology to make a difference. Hip-hop is one of the best-selling genres of music, and has a measurable social impact: It transcends television, movies, fashion and visual arts. The songs reveal what life is like inside and outside from inmates. Butler suggests that hip-hop theory considers the justice system as unfair, but also recognizes that criminals should be punished in our overcrowded prisons and that communities should be protected. Just as the law is shaped and influenced by popular culture via television and other forms of media, hip-hop can also affect culture. With this as foundation, Butler asserts that hip-hop, like jury nullification, can be used to inform a principled criminal justice theory.

"Let's Get Free" offers "seven ways to take back justice:" paying children to do well, and finish school; educate citizens, including jurors about the social and economic costs of mass incarceration; reduce the amount of lead consumption because lead is harmful to the development of the nervous systems of young children — "lead poisoning results in higher aggression and a reduction in impulse control;" do not arrest first-time youthful offenders, instead get parents and the community involved in the youth's efforts to right his wrongs and achieve a fresh start; end racial profiling; sentences should be appropriate to the crime committed; and release 500,000 of the inmates convicted of nonviolent, victimless crimes.

"Arbitrary Justice" and "Let's Get Free" serve as the building blocks for future scholarship and conversations about racial issues affecting real people. As long as the problems in the criminal justice system persist, scholars and policy analysts will likely have more to study and write about. The volumes offer 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.

Harvey Gee is a Washington, D.C. attorney and a volunteer for the D.C. Public Defender Service.

### Letters to the Editor

## Focus on AOC, Judicial Council Expenditures Misses the Mark

At the Administrative Office of the Courts, we have been surprised and puzzled by some of the recent stories published by the Daily Journal regarding the Judicial Council and the AOC. In the past, Daily Journal stories have been generally fair, accurate, and complete stories about the council and its staff arm, the AOC. More recently, however, their articles have taken a different, critical tone and contain several errors of fact, misleading statements and unsubstantiated opinions that more properly belong in editorials rather than news articles.

For example, the Aug. 11 article on the Bernard E. Witkin Judicial College for new judges ("Despite Money Woes, Judges Train in Luxury") emphasizes that the two-week, mandatory education program cost nearly 30 percent more for food, lodging and meeting rooms than last year's session, but does not mention that this year's session had 130 participants while last year's had 99 participants. That resulted in higher costs and accounts for about two-thirds of the total cost increase for the event. The story also describes the location as "opulent" but the reporter apparently did not visit the site herself and instead relied on the hotel's self-promoting Web site.

The Aug. 18 article ("Nearly All Judges Forego Day's Pay") states that the AOC instituted one-day-a-month court closures and asserts that the AOC has resisted calls to divert funds from court technology and construction funds to assist the trial courts with their budget shortfalls. In fact, the court closures were instituted by the Judicial Council with the authorization of the governor and the Legislature — not the AOC — at a public meeting on July 29, which was covered by the Daily Journal.

At the same meeting, the Judicial Council allocated \$165.3 million in one-time special fund monies — including funds for court technology and construction — and \$46.7 million in projected new fee revenues to help offset a \$360 million reduction in funding for state trial courts. The council utilized additional one-time funds to address shortfalls in funding for court security, court-appointed dependency counsel, and court interpreters; used available funding to cover shortfalls in new fee revenue linked to the late enactment of the state budget; and directed that \$71 million come from local court reserves in addressing the overall budget reductions.

Each of these council actions served to minimize the impact of budget reductions on court operations and, subsequently, the

availability of court services for all Californians. The reporter failed to contact the AOC to obtain updated information, leaving the misimpression that the AOC was refusing to assist the trial courts. Indeed, the AOC exists to serve the trial courts.

The Daily Journal has always been known as a publication that covers the news with fairness, accuracy and integrity, so we were disappointed to see that these recent articles did not measure up to its usual standards.

**William C. Vickrey,**  
Administrative director of the courts

**Thomas M. Maddock,**  
Contra Costa Superior Court judge

**Eddie C. Sturgeon,**  
San Diego Superior Court judge

With all due respect, I think the Daily Journal's recent reporting on the Administrative Office of the Court's expenditures for Judicial College has missed the real story.

Amidst all of the supposed muckraking about a 30 percent increase in judicial college expenses, you either ignored or overlooked the conclusive but decidedly anti-climactic piece of evidence: 30 percent more judges attended this year.

The real story: The AOC should

be applauded for finding accommodations in the Bay Area for \$100 per night.

**David W. Stuart,**  
Los Angeles County Superior Court judge

### Rogan Nomination Would Widen Partisan Rift

I read with interest Kenneth K. Lee's plea to the Obama administration to re-nominate James Rogan to the federal bench ("Re-Nominating Rogan Could Help Heal the Partisan Rift," Aug. 25).

Perhaps you recall that Rogan spearheaded the charge to impeach President Clinton on grounds that did not even approach a common sense understanding of "high crimes and misdemeanors." Rogan's support for the impeachment effort demonstrated his contempt for the democratic process, and his willingness to place political expediency over the Constitution.

I am not a lawyer, but I have the same interest as all citizens do in ensuring that our judicial officers will impartially dispense justice, without regard to political affiliation. Lee's cynical appeal to "heal the rift" did not persuade me of Rogan's integrity in that regard.

**Robert Bealmear,**  
Los Angeles

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