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BOOK REVIEW

AT HIS DISCRETION (N.): “TO BE DISPOSED OF AS HE THINKS FIT; AT HIS DISPOSAL, AT HIS MERCY; UNCONDITIONALLY”¹

J. AMY DILLARD*

ANGELA J. DAVIS, *ARBITRARY JUSTICE* (Oxford University Press, Inc.
2007) 264 pp.

From the misguided Duke rape prosecution to the White House firings of U.S. Attorneys, our society is focusing anew on the role of the prosecutor. The unchecked power of Michael Nifong in Durham, North Carolina led to a year-long discussion of race, wealth, sex, and ultimately the power of the prosecutor. Nifong’s abuses have led to his personal downfall, loss of bar membership, and a criminal investigation into whether his acts warrant his own prosecution.² Similarly, with the U.S. Attorney firings, the need for a free prosecutor who does not suffer the politicization of duty has become a paramount concern.³ The White House influence over whether and when U.S. Attorneys should prosecute capital crimes and seek the death penalty has created an unlikely marriage between defense attorneys and prosecutors in the fight for prosecutorial independence.

¹ 4 OXFORD ENGLISH DICTIONARY 756 (2d ed. 1989).

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² Durham-in-Wonderland: Comments and Analysis About the Duke/Nifong Case, <http://durhamwonderland.blogspot.com> (last visited Sept. 21, 2007).

³ See, e.g., Dan Eggen & Paul Kane, *Gonzales, Senators Spare on Credibility*, WASH. POST, July 25, 2007, at A1.

With her book *Arbitrary Justice*, Professor Angela J. Davis has tackled the sticky topic of prosecutorial discretion and abuse.⁴ Anyone who has been a criminal trial lawyer, either for the defense or for the prosecution, will find Davis's book familiar and thorough. Davis is, first and foremost, a public defender, and like many of us, she values the work she did as a public defender as "the most important work I have ever done or will ever do."⁵ In her recitation of cases of prosecutorial misconduct and abuse, Davis is a trustworthy narrator because of her deep, personal experience.

From years of personal experience and research, Davis is able to provide a complete rendering of the criminal justice system with an examination of the role and power of the prosecutor at each stage. Without a hint of sarcasm, Davis presumes that most prosecutors are well-intentioned, honest, and genuinely trying to do a good job.⁶ This presumption makes her book useful rather than scandalous. She believes in the system she served for many years, and she writes as one who seeks more accountability for prosecutors and reform in governance to achieve it. The moral imperative that Davis enjoys in her commentary comes from experience, distance, and the presumption that the road to prison, for many, is paved with the good intentions of misguided prosecutors.

Davis's major complaint with the sins of prosecutors comes less as an indictment of the prosecutors themselves and more as a criticism of the unchecked power and discretion of the prosecutor.⁷ Underlying this lack of accountability is the misconduct of the prosecutor, which often stems from lack of preparation, lack of maturity, or lack of a full understanding of the prosecutor's complex role. The most basic principle is that the role of prosecutor is not adversarial. But because the nature of litigation is always adversarial, this guiding principle of the prosecutor as a minister of justice, even to the defendant, is often lost.

My law school mentor, a criminal law professor, former prosecutor, and one-time director of a capital defense clinic in Virginia, proclaimed to his many students that the only place they could really make a difference was in a prosecutor's office. Yet, more quietly, he told some of us that we did not have the stomach to prosecute. It was easy to take that observation as a compliment, to be marked as a golden child, so tender and noble that locking people up for a living was out of reach. As the prosecutors took pride in doing the only work where they could make a real difference, I, like Davis, spent many years doing the gritty work, hanging out in jails, and

⁴ ANGELA J. DAVIS, *ARBITRARY JUSTICE* (2007).

⁵ *Id.* at vii.

⁶ *Id.* at 16.

⁷ *Id.* at 11-12.

routinely answering the question, “How can you represent *those* people?” with references to Jesus.⁸

It was not until years later, when preparing to give a short talk at my mentor’s memorial service in 2006, that I realized I had misunderstood his secret message. It was not that I was too good to prosecute; I wasn’t good enough. If I ever got a taste of it, I would love prosecuting people. I would wrap myself in a cloak of righteousness and rely on my personal “philosophy and proclivities . . . instead of on legal principles, standards, and guidelines.”⁹ The zealotry with which one should defend in criminal cases does not extend to the prosecution. Zealots lack discretion, which is one reason they make great defense attorneys. Prosecutors, when doing their job the right way, should carry the weight of the world on their shoulders, tabling personal conviction in favor of thoughtful, objective standards.

In this Review, I will recount Davis’s tremendous contribution to the current conversation in the United States about the role of prosecutors. I will delve more specifically into the power of the prosecutor in capital cases, and I will contend that, in those cases, prosecutors have a moral obligation to exercise their discretion with abundance. Finally, I will conclude with an examination of Davis’s calls for reform and accountability.

Davis’s short historical review of the creation and role of the prosecutor starts with the political genesis of the office in 1643.¹⁰ The first public prosecutor served at the pleasure of both the court and the governor of Virginia, and Davis explains in her first chapter not only how prosecutors ultimately came to have discretion but also why the court rarely checks that discretion.¹¹ The sophistication of the criminal justice system, marked by the proliferation of criminal statutes from the legislature, increased the need for prosecutors to exercise discretion in choosing which crimes to prosecute. With statutory violations, prosecutors must act as a first line of review in determining what the intent of the legislature was when it passed the statute criminalizing certain conduct. Using gambling as an example, Davis argues that legislatures that have criminalized gambling have done so to stop large-scale operations and the attendant racketeering activities. She points out that every time a prosecutor does not prosecute the players in a

⁸ See Uncas McThenia, *A Tribute to Roger D. Groot: A Man Standing High*, 64 WASH. & LEE L. REV. 41, 44-45 (2007).

⁹ DAVIS, *supra* note 4, at 89.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 14; see also *Wayte v. United States*, 470 U.S. 598, 607 (1985).

private poker game, he has exercised some discretion in interpreting the legislative intent.¹²

The American Bar Association (“ABA”) standards advise prosecutors about how they should perform their duties and how best to exercise their discretion.¹³ The ABA promulgates the Model Code of Professional Responsibility that governs the conduct of all attorneys; the vast majority of states have adopted some version of the Model Rules.¹⁴ There is only one provision within the ABA’s framework, Rule 3.8, that is specifically directed towards prosecutors.¹⁵ The goal of Rule 3.8 is to promote the fair administration of justice and the appropriate exercise of prosecutorial discretion.¹⁶ Davis’s primary complaint with the system stems from the fact

¹² DAVIS, *supra* note 4, at 13.

¹³ MODEL RULES OF PROF’L CONDUCT (2007), available at http://www.abanet.org/cpr/mrpc/model_rules.html.

¹⁴ DAVIS, *supra* note 4, at 144.

¹⁵ See MODEL RULES OF PROF’L CONDUCT R. 3.8.

Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

¹⁶ DAVIS, *supra* note 4, at 145; see also MODEL RULES OF PROF’L CONDUCT R. 3.8.

that the standards are aspirational: the prosecutor exercises discretion even when he chooses whether to follow the standards.¹⁷ Moreover, the judicial and legislative branches have no meaningful review over this tremendous power. Even in states with laws governing the standards for prosecutors, there is no method of accountability when the prosecutor disregards the standards.¹⁸

In her chapters on charging crimes, making deals, and handling victims, Davis reviews the daily duties of the prosecutor and assesses the challenges and attendant responsibilities. She makes the point that prosecutors feel compelled to “do the right thing” even if they cannot prove their case with the available evidence.¹⁹ But prosecutors, likewise, get overly focused on the available evidence, which at times lines up for the successful prosecution of someone who needs not be prosecuted. Davis uses Marcus Dixon as the best example of the latter.²⁰ Dixon, an eighteen-year-old black football star and honor student in Georgia, had sex with a fifteen-year-old white girl. The prosecutor charged Dixon with every possible sex offense, all stemming from a single sexual encounter. The jury ultimately acquitted Dixon on all counts except the one involving consensual sex offenses with a minor. Even though the legislator who had written the statutory sex crimes legislation declared that he never intended it to be used against someone like Dixon, the competitive prosecutor wanted the conviction, perhaps to justify all his hard work.²¹ Given the facts, Davis argues that the prosecutor was not abiding by the ABA standards and seeking justice in every case, but Davis is also quick to point out that the prosecutor did not have to follow the standards, as there is no avenue for recourse. The Georgia Supreme Court’s reversal of Dixon’s conviction did not remedy the abject prosecutorial abuse of power, and while the Court made implicit reference to the abuse of discretion in overcharging, it did not expressly reprimand the prosecutor, as it had no avenue for doing so.²²

Davis maintains a steady focus on the role of race throughout, though the book itself is not a study in race relations. She simply includes race in her descriptions, as with Marcus Dixon, with the recognition that one cannot consider an allegation of prosecutorial abuse of discretion without acknowledging the historical and current role that race plays in the decision to prosecute. By reflecting on the historical role of race, Davis justifies her

¹⁷ DAVIS, *supra* note 4, at 15.

¹⁸ *Id.* at 200 n.70; *see also, e.g.*, MD. CT. R., R. 16-812 (LexisNexis 2005); W.VA. CODE ANN. § 7-4-1 (2006).

¹⁹ DAVIS, *supra* note 4, at 30.

²⁰ *Id.* at 32.

²¹ *Id.* at 33.

²² *Id.*; *see also* Dixon v. State, 596 S.E.2d 147, 149-51 (Ga. 2004).

position that most prosecutors are unconsciously influenced by race when determining which crimes to prosecute. One of the clearest examples of race affecting the exercise or abuse of discretion may be seen in how a prosecutor relates to a victim, and here Davis directly addresses race issues.²³ Davis asserts that prosecutors do their job with more vigor, in some cases improperly casting themselves as attorneys *for* the victim, when the victim is white and privileged.²⁴ This observation stems from the fact that all prosecutors enjoy the privilege of a white-collar profession and many prosecutors are white.

Davis uses the world of domestic violence cases to explore the failure of the prosecutor to keep his role in an appropriate perspective.²⁵ In cases of domestic violence, the prosecutor gets to stand on the moral high ground, championing the rights of the abused spouse and removing the abuser to jail.²⁶ Often, though, prosecutors lose sight of the victim in these cases, and following with Davis's assertion that prosecutors care most about victims with whom they relate, the battered woman who does not want to prosecute her abuser may seem extremely foreign. Anyone who has taught criminal law to first-year students has witnessed the confusion over personal conviction in the context of the professional role of prosecutor in domestic violence cases. Most students, instinctively, do not find themselves inclined to defend those accused of domestic assault charges. But when the tables are turned and the victim kills, the prosecutor must prosecute the battered woman who is the *original* victim. In such a case, the prosecutor often is so focused on the successful prosecution that he fails to recognize the conflict of having pressured the victim to prosecute her batterer, then turning around and prosecuting the battered woman who defends herself.²⁷ Whether ignoring the unfamiliar victim or becoming overly involved with the familiar victim, the prosecutor who fails to keep an appropriate level of objective discretion injects his own philosophy into the process and alters the effect and quality of process received by individual defendants as a result.

Through her examination of the practices of over-charging and manipulative plea-bargaining, and the misguided relationships with victims, Davis addresses the subtle ways that prosecutors fail to uphold their duties. When she turns to full-fledged misconduct, her focus shifts to the lack of oversight and accountability for prosecutors who break the rules. Unlike

²³ DAVIS, *supra* note 4, at 71.

²⁴ *Id.* at 76.

²⁵ *Id.* at 66.

²⁶ *Id.* at 67-68.

²⁷ See also *id.* at 68-69; Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

the Nifong debacle, the vast majority of prosecutorial misconduct goes undetected, and thus unchallenged.²⁸ Davis methodically walks the reader through the few studies of prosecutorial misconduct, leaving the reader to conclude that very few prosecutors are investigated on bar complaints when facing an allegation of misconduct. In the rare cases where a bar association does investigate, only a small number of prosecutors experience any punishment.²⁹ Other avenues of complaining of misconduct meet with similarly lackadaisical responses and sheer opprobrium from prosecutors. For example, in 2003, Federal District Court Judge Gerald Bruce Lee, sitting in the Eastern District of Virginia, presided over the kidnapping and inveiglement trial of Jay Lentz.³⁰ After the jury found Lentz guilty, Judge Lee discovered that a critical piece of evidence, the victim's day planner, had been erroneously given to the jury after he had ruled it inadmissible. Because only the prosecutor had possession of the day planner, Judge Lee reached the reasonable conclusion that the prosecutor, whose zealotry in the prosecution was called into question because of a past personal relationship with the victim, had intentionally placed the excluded evidence in boxes of evidence that went to the jury for consideration. Jurors were questioned and remarked that the day planner had been a dispositive piece of evidence in their decision to convict Lentz.³¹ Judge Lee overturned the jury verdict. On the government's appeal, the Fourth Circuit reversed, taking the very rare step of finding that the district court had clearly erred in finding misconduct. Without addressing the prosecutor's motives, the Fourth Circuit simply found that the evidence was not sufficient for a finding that the prosecutor "*intentionally placed*" the excluded day planners with the jury.³² In this extremely rare case of a trial judge finding prosecutorial misconduct, the appellate court was more comfortable finding that a federal judge had erred rather than finding that a federal prosecutor had abused his power.

Intentional *Brady* violations, the common practice whereby the prosecutor fails to disclose exculpatory evidence, seem to be the only misconduct that will routinely result in punishment of the offending prosecutor.³³ For all of Nifong's overreaching in the Duke Lacrosse team rape prosecution, he was seen by many as a champion for the mistreated

²⁸ DAVIS, *supra* note 4, at 126.

²⁹ *Id.* at 129.

³⁰ United States v. Lentz, 383 F.3d 191 (4th Cir. 2004).

³¹ *Id.* at 209-10; *see also* Jerry Markon, *Lentz Case Sends Chill Through Federal Courthouse*, WASH. POST, May 10, 2004, at B01.

³² *Lentz*, 383 F.3d at 210.

³³ DAVIS, *supra* note 4, at 130-31; *see also* *Brady v. Maryland*, 373 U.S. 83 (1963).

black population of Durham, North Carolina.³⁴ Nifong seemed to be the rare prosecutor who was not influenced by an ability to relate to the victim, as he put aside the victim's unsavory profession as a stripper in favor of prosecuting privileged defendants from his same racial background; however, when the news broke that Nifong had hidden exculpatory evidence from the defense, evidence that exonerated the defendants of sexual assault (though not of racist, immature behavior), Nifong lost all support.³⁵ Failing to disclose *Brady* evidence is a common occurrence, but when intense scrutiny is not focused on the prosecutor by the media, multiple lawyers, and powerful defendants, the offending prosecutors are rarely caught.³⁶

The daily burdens of prosecution challenge the most thoughtful and objective prosecutors, and prosecuting a capital case with diligence and proper discretion compounds the standard burdens. It is not a job for the overly competitive, nor a place for one who relates job performance to winning. Many states have implemented strict standards for attorneys eligible for appointment to defend in capital cases,³⁷ but no such standard for experience governs who may prosecute a capital case. The law swirling around capital crimes is intricate and makes up a disproportionate percentage of all petitions for certiorari granted by the Supreme Court. The emotional demands of dealing with a victim's family or a crowd of vengeful police officers or of facing a disappointed electorate challenge the most prepared in the field of prosecutors. Approaching capital prosecution unenthusiastically means the end of a career; approaching capital prosecution enthusiastically is a moral abyss.

The ABA's commentary on the "Special Responsibilities of a Prosecutor" describes the prosecutor as a "minister of justice."³⁸ "Minister" is defined as "a servant, attendant; one who waits upon, or ministers to the wants of another."³⁹ He is no mere advocate for his position, and the responsibility carries a specific obligation to see that each defendant "is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."⁴⁰ Harry Blackmun explicitly found that prosecutors could not shoulder this heavy burden in the death context: "Rather than

³⁴ See, e.g., Nicholas D. Kristof, *Jocks and Prejudice*, N.Y. TIMES, June 11, 2006, § 4, at 13.

³⁵ See Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, at Weekend.

³⁶ DAVIS, *supra* note 4, at 131.

³⁷ See, e.g., VA. CODE ANN. § 19.2-163.8(E) (2004).

³⁸ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2007).

³⁹ 9 OXFORD ENGLISH DICTIONARY 817-18 (2d ed. 1989).

⁴⁰ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

continue to coddle the Court's delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."⁴¹

The prosecutor bears the sole responsibility for setting the death machine in motion, and in high profile capital cases, prosecutors are most susceptible to political and community pressure for revenge.⁴² I contend that the duty to "minister" to the capital defendant carries additional moral obligations, since "death is different."⁴³ Presuming that a prosecutor *charges* capital murder when the facts alleged fit the statutory crime, the prosecutor must still declare whether he seeks death as a possible penalty or whether he will proceed with "life without parole" as the only sentencing option for the jury. This continuing duty to evaluate whether death is an appropriate option at all stages of the proceedings is a significant and challenging duty for prosecutors.

Even after making a decision to charge capital murder and to seek the death penalty, the prosecutor has a continuing responsibility to be a minister of justice. When the prosecutor learns that the capital defendant has significant mental deficiencies that may render him unsuitable for execution under *Atkins*, the prosecutor should be "a servant . . . who ministers to the wants of another."⁴⁴ His own interests aside, he must carry out his specific obligation to see that the defendant is not subjected to a penalty for which the defendant is not suited. Following the U.S. Supreme Court's decision in *Roper v. Simmons*, for example, a prosecutor would be abusing his discretion by seeking death against a juvenile.⁴⁵

It follows then that a prosecutor may similarly abuse his discretion by seeking the death penalty for a mentally deficient defendant, following the 2002 decision in *Atkins v. Virginia*.⁴⁶ One of the most complex demands on a prosecutor in a capital case is the exercise of discretion where there is significant, compelling evidence that the defendant is mentally retarded.

⁴¹ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (mem.) (Blackmun, J., dissenting).

⁴² DAVIS, *supra* note 4, at 78, 89; *see also id.* at 85-89 (detailing the experiences of Robert Johnson and Kamala Harris, two black prosecutors who chose not to seek death in high-profile capital prosecutions).

⁴³ *Id.* at 134; *see, e.g., Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (Stevens, J., concurring).

⁴⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002); OXFORD ENGLISH DICTIONARY, *supra* note 39, at 817-18.

⁴⁵ 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of a death sentence on any offender who was under the age of eighteen at the time he committed a capital crime).

⁴⁶ 536 U.S. at 321 (holding that execution of a mentally retarded criminal constitutes "cruel and unusual" punishment and is excessive and, thus, prohibited by the Eighth Amendment).

The Court in *Atkins* held that the Eighth Amendment places a substantive restriction on the State's power to take the life of the mentally retarded offender. The most obvious way to enforce the "substantive restriction" is to presume life, which would require a prosecutor's pre-trial assessment of death-eligibility.⁴⁷

Arguably, all death penalty analysis should begin with the Fourteenth Amendment's Due Process Clause, requiring in any capital sentencing that the prosecution prove "beyond a reasonable doubt that [the] death [penalty] is the only appropriate penalty."⁴⁸ In the past twenty-five years, presumptions in favor of criminal defendants at every stage of the proceedings have become more prevalent in legal commentary, some state court opinions, empirical studies, and important court decisions.⁴⁹ While the Court has never declared that a capital defendant is entitled to the presumption of life, the prosecutor, as a minister of justice *for the defendant*, should actively honor issues, like mental retardation, that could or *should* preclude a death sentence. It is the determination of what *should* preclude a death sentence that requires prosecutors to step outside of their politics, proclivities, and ideologies, and to assess the procedure and the evidence in a way that will protect the capital defendant.⁵⁰

The notion of a presumption of life grows directly from the presumption of innocence.⁵¹ This core principle of the criminal justice system values the individual's liberty interest over the government's interest in prosecution.⁵² The prosecution bears the burden of proof beyond a reasonable doubt for every element of the case, operating to assure leniency toward the defendant by giving him the benefit of the doubt.⁵³ Capital sentencing puts the defendant's most fundamental right—the right to life—at risk. Because the defendant's liberty interest trumps the prosecution's interest in obtaining incarceration in criminal trials, it follows that the defendant's life interest would also trump the prosecution's interest in obtaining a death sentence.

Like all juries, the death-qualified jury is made up of ordinary people who have no special expertise, and who must cope, especially in capital

⁴⁷ *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

⁴⁸ Beth S. Brinkman, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 *YALE L.J.* 351, 352-53 (1984).

⁴⁹ *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁵⁰ *See* DAVIS, *supra* note 4, at 89.

⁵¹ *See Taylor v. Kentucky*, 436 U.S. 478, 490 (1978) (examining the long precedent for the presumption of innocence).

⁵² Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 *HASTINGS L.J.* 457, 458 (1989).

⁵³ *See In re Winship*, 397 U.S. 358, 361 (1970).

trials, with complex emotions, facts, and instructions.⁵⁴ Total impartiality is impossible for any juror, and jurors often resort to arbitrary factors, such as race and religion, when choosing to impose a death sentence.⁵⁵ The mere appearance of due process fools no one who studies the results in capital trials. Even thirty-five years after *Furman v. Georgia*,⁵⁶ the possible reasons a jury may impose a death sentence are about as predictable as being “struck by lightning.”

Prosecutors may preemptively remove potential jurors who “would automatically vote against the imposition of capital punishment.”⁵⁷ All capital trials have a bifurcated sentencing phase and thus the duty of the capital jury is two-fold: deciding the guilt-innocence phase and then deciding the life-death phase. After the prosecution preemptorily strikes those potential jurors who foreclose the possibility of a death sentence, the remaining jurors are often white, male, Protestant, and “are more likely to be prejudiced—to be racist, sexist, and homophobic” than the juror pool from which they were selected.⁵⁸ Death-qualified, or *Witherspoon*, jurors are more likely to defer to prosecutors, less likely to feel sympathy for the defendant, and generally more prone to convicting in all criminal cases.⁵⁹ Most scholars focus on how prosecutors can abuse the death-qualifying voir dire process to select the jury most likely to convict the defendant. The original decision to seek a death sentence in the infamous Andrea Yates case raised this concern among those in the capital defense community.⁶⁰ To avoid jurors who would feel the most sympathy for Yates, the prosecutor sought the death penalty and death-qualified the jury, resulting in, at least initially, a jury that was unwilling to accept Yates’s affirmative insanity defense.

⁵⁴ José Felipé Anderson, *When the Wall Has Fallen: Decades of Failure in the Supervision of Capital Juries*, 26 OHIO N.U. L. REV. 741, 749-50 (2000).

⁵⁵ See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1071 (1995); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 380-87 (2001).

⁵⁶ 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

⁵⁷ *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

⁵⁸ See Adam Liptak, *Ruling Likely to Spur Convictions in Capital Cases*, N.Y. TIMES, June 9, 2007; see also Brooke Butler & Gary Moran, *The Role of Death Qualification and the Need for Cognition in Venirepersons’ Evaluations of Expert Scientific Testimony in Capital Trials*, 25 BEHAV. SCI. & L. 561 (2007).

⁵⁹ See, e.g., Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); James R.P. Ogloff & Sonia R. Chopra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 PSYCHOL. PUB. POL’Y & L. 397, 391 (2004).

⁶⁰ See Lisa Teachey, *DA Will Seek to Put Yates on Death Row*, HOUSTON CHRON., Aug. 9, 2001, at A1.

The Supreme Court has consistently held that the death-qualifying voir dire practice is constitutional, but it has never mandated that the same jury hear both phases of the capital trial.⁶¹ Frankly, this is the only result that makes capital prosecution possible because the verdict for death must be unanimous and jurors who would never impose death would nullify a death request from the prosecution.⁶²

Prosecutors like those in the *Yates* case abuse their discretion when they choose to seek death in order to seat a death-disposed jury for the “back-stop” purpose of getting a conviction.⁶³ The function of the prosecutor is “to seek justice, not merely to convict.”⁶⁴ Moreover, prosecutors should “seek to reform and improve the administration of criminal justice” and “must exercise sound discretion in the performance of [their] duties.”⁶⁵ Prosecutors should make an independent probable cause determination before proceeding on any charges against the defendant and should not pursue prosecution in cases where the evidence is insufficient to support a conviction.⁶⁶ In making the decision to pursue a charge, the prosecutor must consider his own “reasonable doubt that the accused is in fact guilty.”⁶⁷ Moreover, if the defendant suffers from mental retardation, the prosecutor abuses his discretion when he ignores this significant issue and seats *Witherspoon* jurors, assuming they will not apply the law from *Atkins*.

Federal prosecutors must work through a detailed report before seeking death, including the preparation of a “Death Penalty Evaluation,” vetted by the main justice.⁶⁸ When determining whether it is appropriate to seek the death penalty, the charging U.S. Attorney must weigh the mitigating factors against the aggravating factors.⁶⁹ These safeguards, once thought to make the federal capital prosecution machine more careful and deliberative, were ignored and overridden by the hyper-political Attorney General Alberto Gonzales.⁷⁰ Paul K. Charlton, who was among the U.S. Attorneys fired in December 2006, testified before a Senate Judiciary panel

⁶¹ See *Lockhart v. McCree*, 476 U.S. 162, 165 (1986); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).

⁶² See *Lockhart*, 476 U.S. at 165.

⁶³ DAVIS, *supra* note 4, at 33.

⁶⁴ STANDARDS FOR CRIMINAL JUSTICE R. 3-1.2(c) (1993), available at http://www.abanet.org/crimjust/standards/pfunc_blk.html.

⁶⁵ *Id.* at 3-1.2(b)(d).

⁶⁶ *Id.* at 3-3.9(a).

⁶⁷ *Id.* at 3-3.9(b)(i).

⁶⁸ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.040 (2007).

⁶⁹ *Id.* § 9-10.080.

⁷⁰ See DAVIS, *supra* note 4, at 80; Amy Goldstein, *Fired Prosecutor Says Gonzales Pushed Death Penalty*, WASH. POST, June 28, 2007, at A7.

that “Gonzales [had] been overzealous in ordering federal prosecutors to seek the death penalty.”⁷¹ Charlton spoke as a model prosecutor on the issue of capital prosecution, proclaiming, “[N]o decision is more important for a prosecutor than whether or not to . . . deliberately and methodically take a life.”⁷² Charlton maintained that he should not seek death in a murder prosecution that lacked important forensic evidence, namely a murder weapon, any DNA evidence, and the victim’s body. He fought to discuss the case with his supervisors, but Gonzales refused to hear Charlton’s concerns and simply sent a letter directing Charlton to seek death. When Charlton requested a ten-minute meeting with Gonzales, he was placed on the “firing list” for “repeated instances of defiance, insubordination.”⁷³

The original intent of the former Attorney General’s oversight of capital prosecutions was to safeguard against local U.S. Attorneys falling prey to the pressures that Davis articulates in Chapter Five,⁷⁴ but with the overt politicization in the Justice Department during the tenure of Alberto Gonzales, seeking death is the new marching order for local federal prosecutors. In 2006, Gonzales overruled recommendations not to seek the death penalty by U.S. Attorneys twenty-one times, up from three such overrulings in 2005.⁷⁵ The protocol intended to prevent overzealous prosecution in capital cases has backfired, and the remote politician has taken control over the process, resulting in the arbitrary decision-making against which Davis warns.⁷⁶ Moreover, following in the shameful tradition of the *Thornburgh Memo*, which instructed U.S. Attorneys to ignore local bar rules prohibiting contact with represented defendants,⁷⁷ the Justice Department is now changing its internal regulations to give Gonzales’s successors the authority to fast-track death appeals.⁷⁸ That Gonzales “supported the aggressive use of death penalty authority in the federal courts” is an understatement, and the policy to seek death without regard to mitigating factors is a clear violation of the ABA’s guidelines for prosecutors. Perhaps this recent turn marks the best reason for the reforms that Davis proposes.⁷⁹

⁷¹ Goldstein, *supra* note 70, at A7.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See DAVIS, *supra* note 4, at 77.

⁷⁵ Goldstein, *supra* note 70, at A7.

⁷⁶ DAVIS, *supra* note 4, at 89.

⁷⁷ *Id.* at 113-14.

⁷⁸ Dan Eggen, *Gonzales to Get Power in Death Penalty Cases*, WASH. POST, Aug. 15, 2007, at A2.

⁷⁹ DAVIS, *supra* note 4, at 179.

To amplify the need for reform, Davis walks the reader through the lack of prosecutorial accountability, noting that while the Constitution is silent on this specific issue, the defining premise of the Constitution is accountability.⁸⁰ Its system of checks and balances does not restrain prosecutorial misconduct and overreaching.⁸¹ Davis points to two arenas—the electoral process and the media—that could police prosecutors, but demonstrates how both are susceptible to manipulation by prosecutors.⁸² Because the ABA Guidelines are not mandatory and the election and appointment processes are overtly politicized, the prosecutor lacks any clear external motivation to serve as a responsible minister of justice. Moreover, the image of prosecutors on television as champions of justice bears little resemblance to those who hide exculpatory evidence and zealously seek to satisfy their personal vendettas.⁸³ Finally, while the news media followed the Gonzales saga closely and with careful criticism, the same reporters championed Nifong for the unpopular prosecution of white college boys accused of raping a black stripper only to realize later that they had missed the real story of prosecutorial misconduct. If society is counting on the news media to serve as watchdog over prosecutors, none of us is very safe.

Davis argues any efforts towards reform will stand a better chance of success if prosecutors engage in and encourage reform as a form of self-governance.⁸⁴ Legislatures have not heeded the calls from defense attorneys for reform, and, sadly, it may have taken the U.S. Attorney firings and the high-profile misconduct of Nifong to get the attention needed to initiate reform. National, state, and local bar associations could investigate claims of misconduct more vigorously, forcing prosecutors to follow the discretionary guidelines with the specter of investigation for those who ignore the guidelines.⁸⁵

I agree with Davis that any true reform will come from prosecutors themselves. As Davis acknowledges, many in the profession feel the moral imperative to set aside personal conviction in favor of seeing the case objectively⁸⁶ or, as in the situations where mentally retarded defendants are charged with capital murder, seeing the case in the light most favorable to the defendant. The job is hard enough for the best prepared and best tempered. I do not envy their burden.

⁸⁰ *Id.* at 164.

⁸¹ *Id.*

⁸² *Id.* at 166-76.

⁸³ *Id.* at 172-73.

⁸⁴ *Id.* at 189.

⁸⁵ *Id.* at 181.

⁸⁶ *Id.* at 16.