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The Policing of Prosecutors: More Lessons from Administrative Law?

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The Policing of Prosecutors: More Lessons from Administrative Law?

Aaron L. Nielson*

ABSTRACT

On a daily basis, prosecutors decide whether and how to charge individuals for alleged criminal conduct. Although many prosecutors avoid abusing this authority, prosecutors' discretionary decisions might result in biased enforcement, inappropriate leveraging of authority, and a lack of transparency. These problems also arise when agency enforcement officials decide whether to act on conduct that violates a legal prohibition.

An inherent tension between the desire to avoid overburdening the system and the need to prevent inconsistent decision-making exists in the exercises of both prosecutorial discretion and regulatory enforcement discretion. It is clear from the similarities between the two that administrative law may offer some important lessons to criminal law. This Article explores the need for transparency and consistency in the exercise of prosecutorial discretion and argues that governments can devise a system similar to regulatory waivers and exemptions to achieve that goal.

To frame this discussion, this Article examines recent recommendations adopted by the Administrative Conference of the United States on how agencies should use discretionary authority to grant waivers and exemptions. This Article posits that prosecutors can increase transparency and consistency when exercising discretion by: (1) adopting systems of prospective waiver; (2) notifying the legislature when laws become outdated; and (3) documenting the rationale behind a decision not to charge an individual. By examining criminal law through the administrative law lens, this Article provides solutions to a familiar problem: the abuse of discretion.

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INTRODUCTION

Be warned: I am not an expert on prosecutors—or, indeed, any part of the criminal justice system. Apart from pro bono cases, a short stint as a law student at a United States Attorney’s Office, and a few years clerking, I have not spent much time with criminal law, much less studying the role of prosecutors in it. My world is primarily administrative law and civil litigation, usually in federal court. Hence, at first blush, I might seem like a strange person to write about the “duties of the modern prosecutor.” That said, Rachel Barkow—who, by any measure, knows a great deal about prosecutors—has observed that administrative law may have lessons to teach criminal law.¹ Similar questions of government power and institutional design arise in both contexts.² In fact, the overlap between criminal law and administrative law can be substantial.³

1. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) [hereinafter Barkow, *Institutional Design*] (using administrative law to examine institutional design for prosecutors); Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 316 (2014) (“I would like to persuade you to see the criminal justice system in the United States as a regulatory system.”); see also Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 4 (2012) (“Although calls for reforming plea bargaining are decades old, only a few scholars have approached the issue from an administrative law perspective.”); Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 495–96 (1976) (urging greater use of administrative law checks); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136–41, 2143 (1998) (“A second, more radical, approach would acknowledge, at least in part, that our system has taken on an administrative law tinge, and then insist that it at least live up to the standards of administrative law.”).

2. See, e.g., Barkow, *Institutional Design*, *supra* note 1, at 874 (“The problems posed by federal prosecutors’ combination of adjudicative and enforcement functions are the very same issues raised by the administrative state—and the solutions fit equally well in both settings.”).

3. See, e.g., *Gundy v. United States*, 138 S. Ct. 1260 (2018) (granting certiorari on Question 4 only). Question 4 asks: “Whether SORNA’s delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) vio-

Although there are obvious differences (in my years involved with administrative law, for instance, I have never heard whispers of a jury, except in the context of patent law, which is its own beast⁴), Barkow's insight strikes me as true enough, at least at a certain level of abstraction.

This short Article will focus on an aspect of administrative law that is relevant to prosecutorial discretion in criminal law: regulatory waivers and exemptions. When it comes to excusing otherwise prohibited conduct, criminal law and regulatory law are analogous.⁵ In both contexts, the relevant decision-maker (the prosecutor in criminal law and the agency enforcement official in administrative law) must decide not only how but also *whether* to “bring the hammer down” on conduct that violates a legal prohibition.⁶ In making that decision, in both contexts, the decision-maker must consider many of the same factors, such as resource constraints, likelihood of

lates the nondelegation doctrine.” *Petition for Writ of Certiorari at I, Gundy v. United States*, 138 S. Ct. 1260 (2018) (No. 17-6086). For more examples of the overlap between criminal law and administrative law, see Brief of Amicus Curiae Institute for Justice in Support of Reversal at 5, *Gundy v. United States*, 138 S. Ct. 1260 (2018) (No. 17-6086) (“The President now makes more law than Congress—by an order of several magnitudes—and regulatory agencies have promulgated hundreds of thousands of federal criminal offenses.”); cf. Eisha Jain, *Arrests as Regulation*, 67 *STAN. L. REV.* 809, 810 (2015) (“Arrests now serve as a significant source of regulation, separate and apart from their role in the criminal justice system.”); Gregory M. Gilchrist, *Regulation by Prosecutor*, *AM. CRIM. L. REV.* (forthcoming), <https://bit.ly/2G4ydMl> [<https://perma.cc/N7F4-FNXA>] (explaining how prosecutors can use plea agreements to regulate future conduct).

4. See, e.g., John F. Duffy, *Jury Review of Administrative Action*, 22 *WM. & MARY BILL RTS. J.* 281, 282 (2013) (“Any scholar of modern administrative law surely knows that there is an error in the title of my paper. Federal administrative law in our era provides for judicial review—not jury review—of administration action.”); *id.* at 283 (“[P]atent law continues to have a system of judicial review remarkably different from the norms prevailing elsewhere in federal administrative law.”). *But see id.* at 284 (noting examples of jury review of executive action outside of patent law—notably involving criminal law).

5. See, e.g., Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 *HARV. L. REV.* 1332, 1354 (2008). According to Barkow:

In contrast to juries and executives, prosecutors are seen as making an ‘expert’ determination about priority-setting when they choose not to bring charges. Just as agencies escape oversight when they refuse to act—because they are balancing resource constraints and other considerations—prosecutors avoid scrutiny because they are viewed as making a professional determination based on their expertise in prioritizing cases.

Id.

6. AARON L. NIELSON, *ADMIN. CONFERENCE OF THE UNITED STATES, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION: AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES 1* (2017) [hereinafter NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION], <https://bit.ly/2BIts7i> [<https://perma.cc/DDX9-TK64>] (quoting *FTC Brings the Hammer Down on Trans Union Sales of Credit Info*, *CREDIT RISK MGMT. REP.*, Mar. 8, 2000, at 1).

success, and the egregiousness of the violation.⁷ And in both contexts, some of the same problems may arise, including biased enforcement,⁸ inappropriate leveraging of enforcement authority,⁹ and lack of transparency.¹⁰

7. *Cf.* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (“[A]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor . . . not to indict—a decision which has long been regarded as the special province of the Executive Branch . . .”). In *Heckler v. Chaney*, the Supreme Court further noted:

Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Id. at 831.

8. Compare Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590 (2006) (“[Prosecutors] are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality.”), with *NetworkIP, LLC v. Fed. Comm’n Comm’n*, 548 F.3d 116, 127 (D.C. Cir. 2008) (“The criteria used to make waiver determinations are essential. If they are opaque, the danger of arbitrariness (or worse) is increased. Complainants the agency ‘likes’ can be excused, while ‘difficult’ defendants can find themselves drawing the short straw.”), and Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 880 (1989) (noting risk of bias).

9. Compare Fred A. Bernstein, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 589 (1994) (“Those who have observed the criminal justice system are concerned that ‘the enormous range of discretion held by prosecuting authorities in the United States allows them to use the law for political and other improper ends’”), with Aaron L. Nielson, *Nonenforcement and the Danger of Leveraging*, LOY. U. CHI. J. REG. COMPLIANCE (forthcoming) (manuscript at 3), <https://bit.ly/2GnovDY> [<https://perma.cc/72JE-HCGR>] (“An agency, for example, may use a quid pro quo to obtain ends that are beyond the mission Congress set for it. Or the agency may decide that it wants something from the regulated party, and so go looking for a harmless, technical violation that the agency would not otherwise pursue.”).

10. Compare Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 911 (2006) [hereinafter Bibas, *Transparency and Participation*] (“The insiders who run the criminal justice system—judges, police, and especially prosecutors—have information, power, and self-interests that greatly influence the criminal justice system’s process and outcomes. Outsiders—crime victims, bystanders, and most of the general public—find the system frustratingly opaque, insular, and unconcerned with proper retribution.”), with Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1818 (2015) (noting the lack of “laws, procedures, or assurances of transparency” associated with waiver), and Paul B. Stephan, *The Political Economy of Choice of Law*, 90 GEO. L.J. 957, 968 (2002) (noting “that administrative agencies” may “engage in selective enforcement of facially neutral rules” and “[t]he inherent lack of transparency attendant to prosecutorial discretion makes it difficult to correct such tendencies”).

This analogy matters because a great deal of recent administrative law thinking has focused on waivers and exemptions. In particular, in December 2017, the Administrative Conference of the United States—comprised of administrative law experts from the academic, public, and private sectors—adopted a series of recommendations regarding how agencies should use discretionary authority to grant waivers and exemptions.¹¹ As a consultant to that project, I prepared the underlying report for those recommendations; in so doing, I surveyed and interviewed numerous agency officials to explore discretionary nonenforcement and to identify best practices to mitigate the danger of such discretion's abuse. This Article is intended to evaluate which of those recommendations may be of use in the criminal context. Likewise, I will briefly address what may be the hardest problem in this context, at least conceptually: making prosecutorial discretion more transparent without undermining compliance with the law.

In so doing, I stress that, like regulatory enforcement discretion, prosecutorial discretion has important benefits and that prosecutors—who have a difficult job and merit appreciation¹²—no doubt usually exercise their discretion well. Thus, the goal should not be to eliminate prosecutorial discretion (which, of course, is not realistic in any event). Rather, as is often the case with discretion, the objective should be to find the optimal amount of it; this is challenging to do, but at least conceptually, optimization should be the objective.¹³ To be clear, I do not claim that these recommendations are novel in the context of either administrative law or criminal law. What is significant about these recommendations, however, is that they have been carefully reviewed by an assembly of regulatory experts who approached the problem from different institutional per-

11. See Admin. Conf. of the U.S., Recommendation 2017-7, Regulatory Waivers and Exemptions, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017).

12. See, e.g., Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. (forthcoming 2019) (explaining the complex system of constraining forces that prosecutors must navigate); *Idaho Criminal Justice Reform Panel*, 10 IDAHO CRITICAL LEGAL STUD. J. 63, 78 (2016) [hereinafter *Reform Panel*]. Representative Raúl Labrador, a panelist on Idaho's Criminal Justice Reform Panel, noted:

We also have to realize that prosecutors have a very hard job. You know, they are overworked, they have a lot of people that they have to look—a lot of cases that they have to look at, so, you know, I think one of the issues that—my experience with prosecutors has generally been a very positive one.

Reform Panel, *supra* note 12, at 78.

13. See, e.g., Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1297 (1972) (“Given the complex considerations operating for and against controlling discretion, finding the ‘optimum’ combination of discretion and ‘law’ is easier said than done.”).

spectives. Hopefully that vetting process has produced recommendations that may do some good in the real world.

I. BACKGROUND

Even a relative outsider like me knows that one of the biggest questions in criminal law is how to best address prosecutorial discretion.¹⁴ On the one hand, such discretion has real value; presumably no one thinks that maximalist enforcement of every criminal law is always appropriate in every circumstance, no matter what.¹⁵ In light of “bounded rationality,”¹⁶ it is impossible for lawmakers to anticipate every situation that may arise, meaning that—inevitably—some set of facts will arise that technically fall within the scope of a general prohibition but do not merit punishment or, at least, merit a lesser punishment.¹⁷ When such situations arise, society benefits when a prosecutor stands down.¹⁸ On the other hand, discretion is not costless. It may “create[] the risk that improper factors will enter the decision-making calculus without being exposed,” which can be especially problematic when a lot of conduct is potentially unlawful.¹⁹ In other words, prosecutorial discretion is both useful and potentially dangerous.²⁰

14. See, e.g., Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 1 (2009) (“Prosecutorial discretion is a central component of the federal criminal justice system.”) (citing 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.9(c) (3d ed. 2007)).

15. See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014) (citations omitted) (explaining that one constitutional benefit sought by separating legislative and executive functions was “to create a safety valve that protects citizens from overzealous enforcement of general prohibitions”).

16. See, e.g., Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1547 (2018) (“[I]t is not costless for the lawmaker to anticipate activities that are not problematic and write legal prohibitions that do not capture such activities, especially if some unobjectionable activities are idiosyncratic; bounded rationality applies to lawmakers, too.”).

17. Cf. *id.*

18. See generally Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369 (2010) (explaining why prosecutorial discretion is important).

19. Barkow, *Institutional Design*, *supra* note 1, at 884.

20. See, e.g., Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 759 (2015) (“Discretion, in other words, is both valued and feared.”); Geoffrey C. Shaw, *H. L. A. Hart’s Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 668 (2013) (explaining that one of the most challenging questions in all of law is how to benefit from discretion without facilitating its abuse).

This same tension exists in administrative law. Agencies, as a rule, have considerable discretion when it comes to pursuing enforcement actions.²¹ This is not by accident. Like criminal statutes, regulatory provisions also are not always a great fit for every circumstance; bounded rationality applies in the regulatory context too. Likewise, sometimes a regulatory prohibition can achieve its desired purpose (for instance, a safe workplace) through less burdensome means. When that happens it often makes sense to use those less burdensome means. This is why Congress sometimes enacts legislation affirmatively encouraging regulated parties to propose alternatives that, if approved by the relevant regulator, would result in a waiver of the general prohibition.²² Despite those benefits, however, “agency discretion regarding nonenforcement can be problematic.”²³ According to Richard Epstein, the power to waive regulatory duties may raise rule-of-law concerns because a regulated party’s ability to operate might depend on persuading a regulator to use its discretion to waive a prohibition—a dynamic that runs contrary to classic notions of liberty.²⁴ Whether consciously or not, regulators may sometimes use their discretionary power to reward those who make their lives easier and punish those whom they dislike for whatever reason.²⁵ The appearance of unfairness is also a risk.²⁶ Thus, as with criminal law, the power to excuse noncompliance can also be problematic when it comes to regulation.

21. See, e.g., David J. Barton & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 273 (2013); NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION, *supra* note 6, at 2 (“As a general matter, agencies have a great deal of discretion whether to enforce legal provisions.”).

22. See, e.g., NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION, *supra* note 6, at 50 (“[The Trial Disclosure Program] allows regulated parties to propose a new form of disclosure that conflicts with the agency’s regulations. Congress explicitly gave the agency this power. The idea is that perhaps a regulated party can produce a better disclosure than what the regulations currently require.”) (discussing Policy to Encourage Trial Disclosure Programs; Information Collection, 78 Fed. Reg. 64,389 (Oct. 29, 2013) and 12 U.S.C. § 5532(e) (2018)).

23. *Id.* at 3.

24. Richard A. Epstein, *Government By Waiver*, 7 NAT’L AFFAIRS 39, 54 (2011), <https://bit.ly/2G8LqDK> [<https://perma.cc/8LAP-MJZ5>] (“The fate of our rights and liberties is left to the wisdom and discretion of individuals; we are therefore governed by men, not by laws. It was this exact circumstance that our system of government was designed to avoid . . .”).

25. See *NetworkIP, LLC v. Fed. Commc’ns Comm’n*, 548 F.3d 116, 127 (D.C. Cir. 2008) (explaining the danger of allowing regulators too much discretion over waiver).

26. Admin. Conf. of the U.S., *supra* note 11, at 61,742 (“For instance, when an agency decides to waive legal requirements for some but not all regulated parties, the decision to grant a waiver or exemption may create the appearance—or perhaps even reality—of irregularity, bias, or unfairness.”).

With such tension in mind, in 2016 the Administrative Conference of the United States determined that regulatory nonenforcement merited the Conference's attention. The Administrative Conference "is an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure."²⁷ It accomplishes its mission by commissioning reports for review by various committees of experts with diverse views and institutional perspectives. These committees then formulate recommendations for regulatory reform. Afterwards, the full Conference—consisting of 101 voting members, plus other non-voting members²⁸—meets in a plenary session to debate those recommendations. Recommendations that command a majority of support at the Conference are then reported in the Federal Register.

In late 2017, the Administrative Conference commissioned me to study agency nonenforcement. To do this, I prepared and sent a survey to various agencies. Nine responded: the Alcohol and Tobacco Tax and Trade Bureau (TTB); the Community Development Financial Institutions Fund; the Consumer Financial Protection Bureau (CFPB); the Employee Benefits Security Administration; the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration; the Federal Transit Authority; the Mine Safety and Health Administration (MSHA); and the Pipeline and Hazardous Materials Safety Administration. After receiving the agencies' responses, I also interviewed officials from the TTB, CFPB, FAA, and MSHA. After I prepared my report, the Administrative Conference's Committee on Administration and Management reviewed it and developed recommendations. With minor adjustments, the full Conference then approved those recommendations.

27. *ACUS*, ADMIN. CONF. U.S., <https://bit.ly/2WyWG1v> [<https://perma.cc/35XC-M2LQ>]; see also 5 U.S.C. § 591(1) (2018).

28. See ADMIN. CONFERENCE OF THE U.S., GUIDE FOR MEMBERS 3 (2017), <http://bit.ly/2SFubN5> [<https://perma.cc/P74N-4RR9>] ("The Assembly is the name given to the 101 statutory voting members of the Conference meeting in plenary session."); *id.* ("The government members of the Conference are current, senior officials at other government agencies."); *id.* at 4 ("The public members of the Conference are drawn from the general public. They are typically leading authorities in administrative law, public administration, or other areas of interest to the Conference. Most public members are lawyers, but some are experts in other disciplines. The public members come primarily from academia, law firms, and public interest organizations."); *id.* ("There are three additional categories of participants who have all the privileges of Conference members, except that they may not vote or make motions in plenary sessions of the Conference.").

Although the Conference commissioned me to study waivers,²⁹ exemptions,³⁰ and “prosecutorial discretion,”³¹ the Committee quickly determined that including prosecutorial discretion in the recommendations was too big of a bite for a single project. Even though there are similarities across these nonenforcement categories, prospective nonenforcement³² differs from retrospective nonenforcement in terms of culpability: the law often treats those who seek authorization before acting differently from those who violate the law first and then seek vindication.³³ Likewise, the costs and benefits of transparency may differ when it comes to retrospective nonenforcement. For example, agencies generally appear to be more hesitant to reveal enforcement priorities to those who have already violated the law, presumably because agencies do not want to reward violations.³⁴ In survey responses, for instance, agencies were less willing to discuss their practices regarding prosecutorial discretion.³⁵

29. See NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION, *supra* note 6, at 28 (defining “waivers” as prospective authorization to allow otherwise prohibited conduct, pursuant to express statutory authority).

30. See *id.* at 28 (defining “exemptions” to have the same meaning as waivers, with the exception that they are done pursuant to implied statutory authority).

31. See *id.* at 27 (defining “prosecutorial discretion” as nonenforcement of a violation for which the agency had not granted a waiver or exemption beforehand).

32. As I explain in my report, waivers and exemptions are two types of prospective nonenforcement; the line between them (if there is a line) is not well developed. See *id.* at 37.

33. See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929–30 (1975) (treating those who violated a prohibition differently from those who instead sought pre-enforcement review); *United States v. King*, No. CR-08-002-E-BLW, 2008 WL 5070329, at *2 (D. Idaho Nov. 26, 2008), *aff’d*, 660 F.3d 1071 (9th Cir. 2011) (“Congress recognized the human frailty that makes it ‘easier’ to seek forgiveness than permission, and countered that tendency by requiring permission to precede injection.”).

34. See, e.g., Barkow, *Institutional Design*, *supra* note 1, at 912 (“As an initial matter, publishing detailed guidelines could undermine law enforcement goals. If prosecutors announce, for example, enforcement thresholds, deterrence could be compromised.”) (citing Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 297 (1980)).

35. See NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION, *supra* note 6, at 45. In my report, I noted:

Agencies were reticent to share too much information about their exercises of prosecutorial discretion. This is not altogether surprising. An agency’s decision to not enforce the law where violations have occurred can be sensitive. Agencies may not want regulated parties to know exactly where the line is; if an agency’s enforcement priorities are cloaked in mystery, more entities will comply with the law.

Id.; see also *id.* (“The PHMSA, EBSA, MSHA, and CDFI did not respond to this section of the survey [at all] . . .”).

Nevertheless, I included the issue of prosecutorial discretion in my report. I did so because of the Administrative Conference's initial recognition that prosecutorial discretion shares similarities with waivers and exemptions.

II. SOME SIMPLE IDEAS

Reviewing the Administrative Conference's list of recommendations, three ideas strike me as potentially relevant to criminal law. First, to the extent possible (which may very well require legislation), prosecutors should consider establishing systems of prospective waiver. If prosecutors were to create and publicize these systems of prospective waiver, then members of the public would know the prosecutors' views on potentially actionable conduct before they engage in said conduct. Second, if prosecutors find themselves excusing a great deal of similar conduct, then they should notify the legislature that it might be time to change the law. And third, prosecutors should devise systems to better treat like cases alike, including carefully documenting why discretion was used in a particular case in a way that makes it possible to compare the rationale across defendants and individual prosecutors.

A. *Create a System of Prospective Waiver*

The first recommendation approved by the Administrative Conference is as follows:

When permitted by law, agencies should consider creating mechanisms that would allow regulated parties to apply for waivers or exemptions by demonstrating conduct that will achieve the same purpose as full compliance with the relevant statutory or regulatory requirement.³⁶

Along similar lines, the Administrative Conference also recommended that "agencies should consider providing written explanations of representative instances to help illustrate the types of activities likely to qualify for a waiver or exemption."³⁷

At first blush, this type of recommendation may seem counter-intuitive; after all, if the fear in administrative law is that agencies will abuse waiver authority, why entrust agencies with that authority in the first place? Such a reaction, however, misunderstands the dual nature of discretion. Discretion is dangerous, but it can also be valuable. Indeed, "[a]lthough all selective waivers may be suspect,

36. Admin. Conf. of the U.S., *supra* note 11, at 61,742.

37. *Id.*

there are surely some circumstances under which they are acceptable.”³⁸ Because nonenforcement discretion has important upsides, where the dangers of its abuse can be reasonably contained, it often makes sense to affirmatively create discretion.³⁹ The Administrative Conference determined that waivers and exemptions is such a context.

With that view of discretion in mind, the idea behind this recommendation is as follows. Sometimes a member of the public might have a good reason not to follow the law. For instance, where strict compliance with the law will result in a more dangerous situation, it makes sense to grant a waiver. When such a situation arises, and if time permits, it would be best if the regulator could credibly inform the person that such action will or will not result in an enforcement action; this would allow the regulated party to engage in socially beneficial behavior. Thus, the Administrative Conference urged regulators that did not have a system in place to review proposed actions to create such a system, to the extent the law allows.⁴⁰ Notably, Congress has already demonstrated its willingness to allow agencies to develop waiver systems. For example, Congress permitted the CFPB to prospectively authorize language in financial materials that differs from the language that is normally required, so long as the regulated party can demonstrate that the alternative language is equally effective.⁴¹ And the MHSA has a system in place to grant waivers where strict adherence to the law will result in situations that are either less safe than a proposed al-

38. Epstein, *supra* note 24, at 45. According to Epstein:

The question, then, is whether these duties and requirements must be enforced in absolutely all circumstances. To any reasonable observer, the answer is surely not: The immense range of circumstances that present themselves in a huge, complex society means that there will always be hard cases calling for exceptions. Sometimes various requirements have to be waived to avoid unreasonable hardship, and sometimes various requirements have to be waived for the system to function at all.

Id. at 42.

39. *See id.* at 45 (“Ultimately, an appeal to sound discretion is the best formula anyone has devised for dealing with this problem.”).

40. If the law does not allow the regulator to create such a system, it may make sense to change the law. My analysis here obviously depends on the law allowing such nonenforcement.

41. *See, e.g.,* NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION, *supra* note 6, at 50–51. Notably, regulated parties almost never use these options. *See, e.g., id.* This does not mean that creating more options is not a good idea that Congress should not repeat elsewhere. In other agencies, waiver authority is used much more robustly. *See, e.g., id.* at 52–55 (examining the FAA’s experience).

ternative or are equally safe but the alternative would be more economical for the party.⁴²

To be sure, one concern with waivers is that only sophisticated entities will learn of them, thus resulting in an unequal playing field. To avoid this problem, the Administrative Conference also urged that when “practicable,” regulators should “make standards and procedures for seeking and approving waivers and exemptions available to the public.”⁴³ Similarly, although not covered by the Administrative Conference’s recommendations⁴⁴ but consistent with its logic, where there are questions about whether conduct is lawful or not, agencies should consider creating a system that would allow a member of the public to ask for clarification about the agency’s reading of the law before acting. Potentially, at least when consistent with Article III requirements (if it involves federal prosecution), such a system would also provide the relevant person with the right to immediate judicial review of that determination.⁴⁵

Perhaps a similar approach could be taken in the context of criminal law. It is difficult to identify all situations involving criminal law in which such prospective nonenforcement authority would be beneficial to the public. At a minimum, however, crimes similar to or associated with regulatory duties surely fit the bill. To be sure, there are also many situations in criminal law that are not amenable to this recommendation. Violent street crime, for instance, is unlikely to be blessed *ex ante* by a prosecutor (thank goodness!), even if there were time to make the request. But to the extent that individuals or businesses seek to engage in conduct that does not undermine the purpose of the prohibition or otherwise create dangerous situations, and when there is time for prospective review, there may be some value in such a system.

Another concern is that the number of requests for nonenforcement may be significantly higher in the context of criminal law than in the regulatory space. For instance, although the MSHA is busy, prosecutors presumably have a lot more people to worry about; if waivers were allowed, prosecutors may be overwhelmed by requests. Whether that is true is an empirical question. If that is

42. *See id.* at 55–57.

43. Admin. Conf. of the U.S., *supra* note 11, at 61,742.

44. The Administrative Conference’s recommendations focused on waivers of prohibitions. These are situations where it is undisputed that the proposed activity would be unlawful without a waiver.

45. In recent years, the Supreme Court has facilitated such immediate judicial review in administrative law. *E.g.*, *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016); *Sackett v. Env’tl. Prot. Agency*, 132 S. Ct. 1367, 1374 (2012).

the case, however, prosecutors can choose to implement a modified waiver system that is better suited to their needs. For instance, a prosecutor's office could establish a waiver system whereby if certain objective criteria are met, a prosecutor will provide prospective review, but not otherwise; such a system would limit waiver to the most important situations. Alternatively, a prosecutor's office may be able to prepare a streamlined process for the most common types of questions. The FAA provides an example. In recent years, the FAA has started regulating drones. This change has required the agency to consider thousands of waiver requests.⁴⁶ The FAA has been able to better consider such requests by standardizing the procedure.⁴⁷

As in the regulatory context, should a local jurisdiction establish a waiver scheme, it is important for that scheme to be well publicized. One of the concerns with waiver is unequal information; some entities may seek waiver more than others, not because of the substantive merits of their requests, but because of their legal sophistication. Presumably the same sort of problems will arise in the context of criminal law.⁴⁸ Thus, publicity is important in both administrative and criminal law contexts. Relatedly, when establishing a waiver system, transparency is also important. The Administrative Conference observed that “[a]gencies should consider soliciting public comments before establishing standards and procedures for seeking and approving waivers and exemptions.”⁴⁹ In the context of prosecutorial discretion, to the extent that the relevant decision-maker is the legislature, there is no reason why this process should not be transparent.

B. *Retrospective Review*

The Administrative Conference's second approved recommendation may also be worth considering in the criminal context, although it also may have to be modified for many prosecutors:

46. See NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION, *supra* note 6, at 53 (“[A]lthough the agency has only recently begun tracking the number of waivers granted, its exemption practice is vigorous; indeed, it has received over 16,000 requests for nonenforcement regarding drones since August 2016 alone.”).

47. *See id.* (“No doubt driven by this volume, the agency has developed a standardized approach to nonenforcement.”).

48. *Cf., e.g.,* Bibas, *Transparency and Participation*, *supra* note 10, at 912 (noting the “gulf” between “knowledgeable” insiders and “poorly informed, powerless people”).

49. Admin. Conf. of the U.S., *supra* note 11, at 61,742.

When consistent with the statutory scheme, agencies should endeavor to draft regulations so that waivers and exemptions will not be routinely necessary. When an agency has approved a large number of similar waivers or exemptions, the agency should consider revising the regulation accordingly. If eliminating the need for waivers or exemptions requires statutory reform, Congress should consider appropriate legislation.⁵⁰

There are two overlapping ideas here. The main idea is that legislators should avoid overly broad legislation because even if enforcement discretion can be used for good purposes, such discretion is also susceptible to abuse. Accordingly, although it is more difficult to draft tailored legislation, legislative bodies should strive for such legislation and not simply assume that enforcement discretion will save society from the ills associated with overly broad laws. The second idea is similar to the first. If regulators find themselves repeatedly granting waivers to those engaged in the same sort of conduct, the regulator or the legislature perhaps should modify the prohibition itself. In this way, waiver serves as a signal to regulators that retrospective review may be warranted.

Many commentators have suggested that some criminal laws are overinclusive.⁵¹ That certainly seems possible.⁵² Just as in the regulatory context, as a rule, legislators should avoid overly broad laws in the first instance by drafting more precise statutes. Moreover, after a law is on the books, legislators should set up systems to learn when the law is not enforced because prosecutors have determined that the conduct at issue falls outside of the law's intended scope. If prosecutors regularly conclude that enforcement of a law is not warranted, that should be a signal to the legislature that perhaps the time has come to revise the statutory code.⁵³ This recom-

50. *Id.*

51. See, e.g., Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1610 (2011) ("In our criminal justice system we need protection from overinclusive or overrigid laws that criminalize benign behavior."); cf. Transcript of Oral Argument at 28, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451) (Scalia, J.) ("What kind of a mad prosecutor would try to send this guy up . . . ?").

52. See, e.g., Danielle Garrand, *Virginia City Threatens Trick-or-Treaters over the Age of 12 with Jail Time to Thwart Halloween Mischief*, CBS NEWS (Oct. 9, 2018), <https://cbsn.ws/2TsY5EB> [<https://perma.cc/GAC8-E3G8>] (explaining that a city has criminalized trick-or-treating by those older than 12, even though "the city says it won't be 'actively seeking out violations'" because the concern is not with trick-or-treating but instead non-trick-or-treating mischief).

53. Obviously, it is problematic when a prosecutor uses prosecutorial discretion to negate a policy choice by the legislative branch. See, e.g., Price, *supra* note 15. Indeed, in the federal system, that sort of decision arguably may violate the Take Care Clause. See U.S. CONST. art. II, § 3 (declaring that the President "shall take Care that the Laws be faithfully executed"). That issue is beyond the scope of

mendation works in tandem with the prior one; when a formal system of prospective nonenforcement exists, it is easier to identify which conduct prosecutors are regularly excusing. The legislature therefore should try to learn how often prosecutors determine non-enforcement is appropriate and in what contexts.

Some may object that this recommendation is not realistic in the criminal context because too many people are making decisions. Maybe that is correct, at least in some situations. This Article does not address all of the practical objections, especially because the number of contexts in which criminal law applies is extraordinary. Instead, more modestly, my point is only that overinclusive laws are a seedbed for discretion's abuse. When prosecutors regularly excuse a particular type of conduct, then that is some evidence that the law at issue *may* be overinclusive; at a minimum, it is something that the legislature should know about. That commonsensical observation applies in the regulatory context and may have purchase in the criminal context too.

C. Create Systems to Ensure Consistency

The Administrative Conference also issued two additional, related recommendations that could be transplanted into prosecutors' offices:

Agencies should endeavor, to the extent practicable, to establish standards and procedures for seeking and approving waivers and exemptions.⁵⁴

Likewise:

Agencies should apply the same treatment to similarly situated parties when approving waivers and exemptions, absent extenuating circumstances.⁵⁵

The notion that like cases should be treated alike is one of the foundations of administrative law;⁵⁶ indeed, courts and legal schol-

this Article, however. The focus of this Article is on conduct that technically falls within the scope of a law but that was not considered by the legislature and is considered unobjectionable by all involved. When such unobjectionable conduct is rightly excused, especially if it happens often, that should be a signal to the legislature that the law should be amended.

54. Admin. Conf. of the U.S., *supra* note 11, at 61,742.

55. *Id.*

56. *See, e.g.*, *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 526 (D.C. Cir. 2011) ("The rule in this case does not undermine the discretion granted by Congress but simply ensures that like cases will be treated alike—a necessary condition for 'avoid[ing] an arbitrary discretion in the courts.'" (citing *THE FEDERALIST* No. 78, at 529 (Alexander Hamilton) (J. Cooke ed., 1961))).

ars regularly refer to it as a key component of the rule of law itself.⁵⁷ When a large number of individuals are making a large number of decisions, however, it can be hard for the system to be consistent. One better way to achieve consistent decision-making is by having the decision-maker write explanations for why he or she used discretion in a particular case. In administrative law, many commentators recognize the value of such written explanations.⁵⁸ Accordingly, to help ensure consistency in the regulatory context, the Administrative Conference urged agencies to “provide written explanations for individual waiver or exemption decisions and make them publicly available to the extent practicable and consistent with legal or policy concerns, such as privacy.”⁵⁹

These recommendations could be applied to prosecutors too. As to prospective waivers, the analogy is obvious. But prosecutors could also apply a standardization process to retrospective prosecutorial discretion. Even if prosecutors do not publicize their written analysis, they should strive to develop internal systems to ensure consistency, including through written explanations. Although prosecutors may be reluctant to share their thought process with the public, the simple act of preparing a written explanation can help the prosecutor ensure that he or she has made a reasoned decision.⁶⁰

III. THE HARDER PROBLEM

It is (relatively) easy to see how the recommendations set out above can be transplanted into the criminal law context, especially to the extent that they refer to prospective nonenforcement. The harder problem is transparency, particularly transparency for retrospective nonenforcement. The Administrative Conference recom-

57. See *United States v. Aragones*, 483 F. App'x 415, 418 (10th Cir. 2012) (“The most fundamental rule of law is that like cases should be decided alike”); *WildEarth Guardians v. Jewell*, No. 1:15-CV-2026-WJM, 2016 WL 8577508, at *4 (D. Colo. June 17, 2016) (citing H.L.A. HART, *THE CONCEPT OF LAW* 160 (2d ed. 1994)) (similar).

58. See, e.g., Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 687–88 (2014). To be sure, reason-giving is not always optimal. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 489 (2015) (“[A]lthough reason-giving is important, it is often in tension with other values . . . such as guidance, sincerity, and efficiency.”). Even so, there is a reason that it plays such an important role in administrative law.

59. Admin. Conf. of the U.S., *supra* note 11, at 61,742.

60. See Effron, *supra* note 58, at 714 (“The decisionmakers themselves benefit from reason giving insofar as it clarifies one’s own thinking and illuminates facts or conclusions that might need additional support.”).

mends that “[a]gencies should endeavor, to the extent practicable, to make standards . . . for . . . approving waivers and exemptions available to the public.”⁶¹ Yet when it comes to prosecutorial discretion for crimes already committed, prosecutors may be wary of publicizing their standards; if members of the public know that prosecutors will not penalize them for engaging in certain unlawful conduct, then they may choose to ignore that the conduct is unlawful and engage in it more frequently. There is no simple answer to this problem.

Nevertheless, it may be possible to increase transparency, even when it comes to prosecutorial discretion. As Adam Cox and Cristina Rodríguez have explained:

The argument against transparency in the exercise of prosecutorial discretion conflates two very different types of enforcement settings. In one, the legal system makes clear that the desired level of some conduct is zero. In such a setting, there ideally would be perfect compliance with the legal prohibition. But compliance might fall short of that, and the government may lack the resources to punish every single violator. In that context, secrecy about enforcement strategy can be valuable, and transparency can threaten legal compliance. The threat to compliance will be most palpable when an offense can be committed in multiple ways, or in multiple places. In such situations, publicizing what law enforcement officials will be looking for, or where they will be looking, can make it easier for would-be violators to avoid having their legal violations detected. Secrecy about law enforcement tactics, even to the extent of randomizing those tactics, can often increase compliance, both by raising the risk of detection and by creating more uncertainty about the level of risk. For these reasons, the IRS works hard to keep its audit algorithms secret, state highway patrols do not disclose the locations of speed traps, Customs and Border Patrol frequently moves the roving checkpoints it uses along the southern border, and the CIA and other intelligence agencies resist disclosure of their surveillance tactics.⁶²

By contrast, Cox and Rodríguez argue that in other contexts, it is expected that the government will excuse some conduct, even if it had unlimited resources to police it, because the law “requires the Executive to assume responsibility for sorting ‘deserving’ violators

61. Admin. Conf. of the U.S., *supra* note 11, at 61,742.

62. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 202 (2015).

out from non-deserving ones.”⁶³ In that context, Cox and Rodríguez argue that a lack of transparency is much less defensible.⁶⁴

Although there is force to such a distinction, there are problems too. To begin, the argument’s premise merits examination. Should there really be laws that, by *design*, are overinclusive? Some prosecutorial discretion is worthwhile because it is impossible to foresee every situation that may arise. Yet that is different from concluding upfront that certain conduct should not be punished but nonetheless still enacting a prohibition that technically covers it, on the theory that public enforcers will later sort out who merits an exemption from the overbroad law. The goal, arguably, should be to minimize the instances in which prosecutorial discretion is necessary by better matching the prohibitions on the books with the conduct that society wants to prevent. When that nexus is tightened, there is less need to worry about transparency, because the statute book itself is open for all to read and the words on the page match what the law really is.⁶⁵ In any event, there are few laws in which the goal is *perfect* enforcement. It is impossible to predict every situation that may arise.⁶⁶ The reality that perfect enforcement is essentially never the goal (because unforeseen situations always may arise that fall within the scope of the prohibition but yet not its purpose) may complicate how we should think about transparency.

There are other reasons why transparency is a difficult issue. We may want to publicize the standards used by prosecutors even when perfect compliance is the goal because secrecy may not be

63. *Id.* at 203. Cox and Rodríguez argue that immigration law is such a context. *Id.* Whether that is true (and if so, whether it should be true) is beyond the scope of this Article.

64. *See id.* at 204. According to Cox and Rodríguez:

If we think that low-level . . . possession by a person with no other criminal record should not be punished, then we should hope that judgment applies to all cases, not to a random subset of violators. And we would not worry that publicizing the policy would undermine legal compliance, because the very point of the exercise of discretion would be to communicate that possession under those circumstances does not deserve punishment.

Id.

65. *Cf.* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 557 (2009). The traditional concept of fair notice demands that no person be held to account under a law the content of which he was unable to know beforehand. By seeking to discern the most reasonable, plain meaning of a statute, textualism by its very definition seeks to satisfy this dictate of fair notice

Id.

66. Evaluating the sorts of policy concerns inherent in line-drawing should be done by the legislature when enacting the law. Nonenforcement makes the most sense when a situation arises that the legislature, reasonably, did not anticipate.

possible. Selective transparency is problematic; it is unfair if insiders (say, former employees) know enforcement practices while others do not. To prevent that situation, at least in theory, it may make sense for prosecutors to divulge enforcement practices more broadly, even in situations where there are no “deserving” violators, despite the fact that doing so will result in less overall compliance with the law. Likewise, without transparency, there may be more biased enforcement (across any number of dimensions) because public scrutiny is more limited. Ultimately, the solution will be normative—hopefully based on empirical data that, as of yet, has not been collected. How much leakage of secret information occurs? How much inequality occurs with and without transparency? And how much should society value fairness in this context? These issues merit more thinking and, hopefully, empirical study.

CONCLUSION

Nonenforcement discretion is both valuable and dangerous.⁶⁷ That insight from administrative law is relevant to criminal law. When it comes to choosing which violations to pursue, prosecutors have a great deal of discretion. Agencies also often have discretion whether to bring an enforcement action. Thus, the lessons learned from administrative law may benefit criminal law too.

These lessons are not especially shocking. Legislators should endeavor to draft laws that do not prohibit unobjectionable conduct. Because it is impossible to do that perfectly (even if legislators are being careful), it also makes sense to create systems that allow those who wield government power to excuse unobjectionable conduct that technically violates overbroad legal prohibitions. When prosecutors regularly excuse the same sort of conduct, perhaps the law should change. And transparency can also be valuable, although it has costs of its own and may sometimes create difficult dilemmas.

Implementing these lessons will not solve all that ails criminal law, just as doing so will not turn administrative law into a perfect system. The world is too complicated for easy fixes. Yet perfection should not be the standard. What matters is that these lessons may better allow criminal law to benefit from discretion while, at the same time, minimizing its abuse.

67. *Cf. Mach Mining, LLC v. Equal Emp't Opportunity Comm'n*, 135 S. Ct. 1645, 1652–53 (2015) (explaining that when discretion is unchecked, “legal lapses and violations occur” more often).
