

How Criminal Law Dictates Rules of Prosecutorial Authority

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Abstract

Choices about criminal law and punishment have implications for procedural rules and institutions, and vice versa. Some criminal procedure rules are recognized as fundamental to the rule of law, individual rights, or fair administration of criminal justice. They are constitutive of criminal justice and should hold regardless of changes in substantive criminal law. Others are merely instrumental; other procedures could accomplish the same thing just as well. But a third type of procedural rule are required or highly favored by a jurisdiction's choices about how to define its criminal law and its punishment policies. These rules can be critical to legitimacy because choices about crime definitions and punishment policies have made them necessary for legitimate implementation of criminal law. In this way, substantive law and procedure are interdependent: a particular account of criminal law requires corresponding procedural features and is incompatible with others. Likewise some procedural institutions reflect a specific theory of criminal law or punishment.

The paper explores this substance-procedure interdependence by focusing on two rival enforcement rules—whether to grant prosecutors wide discretion in enforcing criminal law, or to constrain their authority with a mandatory prosecution duty. If criminal law is understood to inevitably define liability in ways that do not always match individual culpability, prosecutorial discretion is one way—and by far the dominant way in common law jurisdictions—address that gap. This paper explores some of the challenges of this remedy for failures of substantive criminal law as well as the conditions necessary for adopting the alternative, mandatory prosecution rule.

I. Introduction

Because its broad range of rules, structures, and practices serve a variety of functions and competing values, criminal procedure has not proven amenable to unifying theories. Some criminal procedure rules, such as pretrial disclosure requirements, are justified primarily on prudential or instrumental grounds. Others stand on grounds of political principles or values, independent of their efficacy, because they are recognized as fundamental to the rule of law, individual rights, or fair administration of criminal justice.¹ Abandoning, say, the presumption of innocence, prohibitions on

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¹ For procedural rights understood as fundamental, see *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968) (jury trial); *Gideon*, 372 U.S. at 343-44 (right to counsel); *Malloy v. Hogan*, 378 U.S. 1, 18 (1964) (self-incrimination privilege); *Palko v. Conn.*, 302 U.S. 319, 327 (1937) (punishment only after trial); *Faretta v. California*, 422 U.S. 806, 820 (1975) (self-representation); *United States v. Nixon*, 418 U.S. 683, 713 (1974) (right to compel evidence).

coerced testimony, assistance of counsel is inconceivable even if alternatives somehow demonstrably improved outcomes.

Most components of criminal procedure are at least somewhat amenable to change.² Discovery requirements, the grand jury's role (if any), and judicial authority over sentencing all vary widely.³ Differences in the status of procedural rules mark a distinction in how procedure relates to criminal law. Some procedures are understood to be constitutive of criminal law and punishment. The legal and political legitimacy of criminal law requires, as a matter of principle, not only appropriate criteria for liability and sentencing (such as proof of culpability) but also that it be administered through certain procedural practices.⁴ Procedure is integral to the rule of law,⁵ and both substantive law and procedure define conditions for when the state may legitimately punish. On the other hand, many procedural rules do not play this constitutive role and represent ordinary policy choices among various reasonable options—such as the decision to screen charges by grand jury or judicial hearing. The requirements of substantive criminal law have nothing to say about those rule choices.

In this article, I consider a third type of procedural rule, those that are required or highly favored by a jurisdiction's choices about how to define criminal offenses and to specify the purposes of punishment. These rules are not necessarily constitutive of criminal law legitimacy because of their fundamental nature. But they can be critical to legitimacy because choices about crime definitions and punishment policies have made them necessary for (or their alternatives

² Although some statutory rules implement constitutionally required procedures. See, e.g., Fed. R. Crim. P. 6 (rules for grand jury composition and practice).

³ On discovery rules, compare S.C. Crim. P.R. 5(a) and N.J. Ct. R. 3:13-3. On grand jury rules, see generally Sara Sun Beale & William C. Bryson, *Grand Jury Law and Practice* (2012); *Grand Jury 2.0: Modern Perspectives on the Grand Jury* (Roger Fairfax ed., 2011). On sentencing, see discussion of 21 U.S.C. §§ 841, 851, *infra* notes ____.

⁴ See Andrew Ashworth and Lucia Zedner, Preventive Orders: The Problem of Undercriminalization?, in *The Boundaries of the Criminal Law* 87 (R.A. Duff et al. eds., 2010); Markus D. Dubber, The Criminal Trial and the Legitimation of Punishment, in 1 *The Trial on Trial* 85 (R.A. Duff et al. eds., 2004) (discussing the role of the trial process in legitimizing criminal law and punishment in terms of autonomy principles).

⁵ See, e.g., Jeremy Waldron, The Concept of the Rule of Law, 43 *Ga. L. Rev.* 1 (2008) (arguing for the “importance of the procedural and argumentative aspects of legal practice” to the rule of law).

incompatible with) legitimate *implementation* of criminal law. I argue that rules of prosecutorial charging authority are examples of this type of rule.

Aside from fundamental, constitutive rules of procedure, the substantive terms of liability and punishment ought to set the agenda for procedure. Procedure should follow from and implement criminal law's core aims and commitments; at a minimum, it ought not to undermine substantive law. Yet procedures can be resistant to change. Having opted for a particular procedural model, policy makers can undermine its efficacy in serving criminal law and punishment principles if they amend the code and sentencing policies with insufficient attention to the procedural regime in which it will be implemented. When they do not, procedure can ill-serve substantive law by authorizing or facilitating liability and punishment decisions that conflict with criminal law's central purposes and premises.⁶

II. Rules of Prosecutorial Charging Authority

a. *Rules of discretionary versus mandatory prosecution.*

In some form, all common law jurisdictions and some civil law-based systems employ a rule grants prosecutors wide discretion about whether to charge when evidence is sufficient to do so.⁷ The rule varies somewhat across jurisdictions. In U.S. justice systems, prosecutorial discretion is

⁶ For scholarly attention, see, Jonathan Rogers, The Role of the Public Prosecutor in Applying and Developing the Substantive Criminal Law, in *The Constitution of Criminal Law* 53 (R.A. Duff et al. eds., 2013); Donald A. Dripps, The Substance-Procedure Relationship in Criminal Law, in *Philosophical Foundations of Criminal Law* 409 (R.A. Duff & Stuart Green eds., 2011); R.A. Duff et al., 3 *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* 102-10 (2007) (arguing criminal law's expressive function can imply certain procedures, such as exclusionary rules as a response to the prosecution's lack of moral standing); William J. Stuntz, The Uneasy Relationship between Criminal Procedure and Criminal Justice, 107 *Yale L.J.* 1 (1997).

⁷ For a typical state statute, see Rev. Code Wash. § 9.94A.411 ("A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question, or would result in decreased respect for the law."). See also *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996) (tracing federal prosecutors' "broad discretion" to enforce the Nation's criminal laws" to Article II's Take Care Clause). Even jurisdictions that retain the mandatory-prosecution rule for serious offenses now usually authorize prosecutorial discretion for lesser offenses. See *Strafprozeßordnung [StPO] § 153 (Ger.)* (authorizing prosecutorial discretion for lower level offenses). See also Folker Bittmann, Consensual Elements in German Criminal Procedural Law, 15 *German L.J.* 15, 17 (2014) (describing expediency or opportunity principle); Mirjan Damaska, The Reality of Prosecutorial Discretion: Comments on a German Monograph, 29 *Am. J. Comp. L.* 119, 120 (1981).

almost wholly unregulated by judicial review or enforceable guidelines.⁸ England and Wales regulate charging decisions modestly through the *Code for Crown Prosecutors* and other sources, including common law doctrines that enable some judicial review of prosecutors' charging (and non-charging) decisions.⁹

In contrast, some civil law jurisdictions have long adopted a mandatory or compulsory prosecution rule for police and prosecutors.¹⁰ The duty to investigate attaches when police or prosecutors receive plausible evidence indicating commission of a crime; the duty to prosecute arises once prosecutors have sufficient evidence to prove guilt.¹¹ The rule sharply limits the grounds on which executive officials may decide not to enforce criminal law; the only reasons for not prosecuting are a conclusion—after reasonable investigative efforts—that evidence of guilt is insufficient evidence, or (much the same thing), a conclusion that no criminal law applies to the suspect's conduct. Thus, the rule seeks to prohibit precisely what the common law rule of discretion allows. Law enforcement officials still have discretion to determine whether evidence is sufficient, and the evidentiary record depends partly on their own investigative diligence.¹² They also may have interpretive leeway in defining the law's precise meaning and applicability to facts.¹³ Nonetheless, the mandatory prosecution duty is a significant constraint, reinforced both by judicial authority to review

⁸ Federal constitutional doctrines imposes only nominal limits on selective prosecution. *Armstrong*, 517 U.S. at 463-65 (equal protection bar on race-based selective prosecution); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (violations of equal protection in death penalty prosecutions require proof of purposeful racial bias in defendant's case, regardless of the strength of statistical evidence of racial disparities); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (due process bar on selectivity in retaliation for exercising fundamental rights).

⁹ For an overview, Andrew Ashworth & Mike Redmayne, *Criminal Process* __ (4th ed. 2011).

¹⁰ See *Strafprozeßordnung* [StPO] §§ 152 & 170 (Ger.) (mandatory prosecution rule applies only to the most serious class of offenses). Other jurisdictions with similar rules include Austria and Italy. See Cost. art. 112 (Italy); *Strafprozeßordnung* [StPO] § 34 (Austria); see also Josef Zila, *Prosecutorial Powers and Policymaking in Sweden and Other Nordic Countries*, in E. Luna & M. Wade eds., *Prosecutors in Transnational Perspective* 235, 241-47 (2012) (noting mandatory prosecution rules prevail in “a majority of criminal justice systems on the European continent” and in Sweden and Finland, but describing many exceptions).

¹¹ See, e.g., *Strafprozeßordnung* [StPO] §§ 152 & 170 (Ger.).

¹² S. Boyne, *supra* note __, at 43-44 (summarizing and quoting German prosecutor's views that investigative initiative is a critical skill and that “prosecutors must be able to determine ... what are the critical facts of the case. ... The most difficult questions [in a case] are factual, rather than legal ones.”).

¹³ See Damaska, *supra* note __, at 120 (describing this point and noting its recognition by a German legal scholar in Thomas Weigend, *Anklagepflicht und Ermessen* [Prosecutorial Duties and Discretion] (1978)).

decisions not to prosecute and, potentially, by criminal liability for prosecutors who breach their statutory duty to charge.¹⁴

Several reasons motivate jurisdictions to opt for one rule or the other. One relates to how much trust jurisdictions have in executive officials' unregulated (or lightly regulated) discretion. The mandatory charging duty seeks to ensure equal treatment by minimizing arbitrary or discriminatory enforcement decisions.¹⁵ In the common law tradition, making instrumental, policy-based charging decisions is considered the special competence of prosecution agencies.¹⁶ The choice also turns on background assumptions about whether criminal codes (that is, legislatures) are capable of providing sufficiently precise and fine-grained criteria for criminal liability such that little further judgment is necessary, at the level of individual cases, to assure that only the culpable are sanctioned and that punishment fulfills its intended purposes. Jurisdictions adopting mandatory-prosecution rules have more faith that legislation is capable of specifying sufficiently fine-grained criteria; discretionary charging is justified by the belief that it is not. Another reason for choosing one charging rule over the other follows from views of whether it is legitimate to treat some *culpable* offenders differently from others for a variety of instrumental reasons. Discretionary charging reflects the view that it is legitimate to forgo punishing the guilty in the absence of instrumental justifications *to punish* (e.g., because punishment purposes would not be fulfilled as to a particular offender), or (perhaps more commonly) in light of instrumental reasons *not to punish*. (Such reasons might be that an offender

¹⁴ Strafprozeßordnung [StPO] §§ 172-175 (Ger.) (authorizing victims to petition court for an order to compel prosecution); Strafgesetzbuch [StGB] [Penal Code] § 339 (Ger.) (*Rechtsbengung*, offense, punishable by one to five years in prison); see also id. §§ 258, 258a (punishment for failure to investigate or prosecute colorable offenses). See Isabel Kessler, A Comparative Analysis of Prosecution in Germany and the United Kingdom: Searching for Truth or Getting a Conviction?, in *Wrongful Convictions: International Perspectives on Miscarriages of Justice* 213, 216 (Ronald Huff & Martin Killias eds., 2008).

¹⁵ S. Boyne, *supra* note __, at 8-10 & 91-92; Joachim Herrmann The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany, 41 U. Chi. L. Rev. 469 (1974).

¹⁶ See *Armstrong*, 517 U.S. at 464; *Wayte*, 470 U.S. at 607 (enforcement decisions "ill-suited to judicial review"); *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 ¶ 43 (Can.); Prosecution of Offences Act 1974, § 2(5) (Republic of Ireland).

provided assistance to the state in other cases, completed a rehabilitation program, or agreed to pay civil damages).¹⁷

III. The Relation of Offense Definitions and Sentencing Laws to Prosecutorial

Authority

a. The distribution of sentencing authority.

Sentencing authority can be distributed variously between legislatures, prosecutors, and judges. The familiar model gives judges discretion to define sanctions within a range of options dictated by a legislature or a sentencing council. Legislatures can take primary control and limit or eliminate judicial authority through mandatory sentence laws. And legislation can shift sentencing decisions from judges to prosecutors through fixed penalties that apply only if the prosecutor triggers them.¹⁸ A prominent (notorious) example in the federal code is the sentence enhancement based on an offender's prior convictions in 18 U.S.C. § 851. In 1970 Congress amended the statute to put the fixed sentence enhancement within prosecutors' discretion; judges are allowed to impose it only if the prosecutor files a document to trigger it by listing the offender's prior convictions. But when prosecutors do so, judges *must* impose the greater sentence upon confirming the prior convictions. Congress' intention was the prosecutors would invoke the harsher sanction only against a subset of offenders who are guilty of the offense and whose graver culpability is not captured by the elements of the offense. Needless to say, that sentencing rule—one that calls for distinctions on grounds not specified in the statute—is incompatible a rule of mandatory prosecution.

¹⁷ See, e.g., U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-27.250 ("In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors"; official comment adds: "criminal process is not necessarily the only appropriate response to serious forms of antisocial activity"); Crown Prosecution Service, *Code for Crown Prosecutors* § 4.8 (2013) (When evidence to prove guilt is sufficient, "prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.").

¹⁸ For an example of legislation that aims to restrain *prosecutorial* discretion on sentencing issues, see Fl. Stat. § 775.0843(2) ("All reasonable prosecutorial efforts shall be made to persuade the court to impose the most severe sanction authorized").

Regardless of which branch of government controls sentencing decisions, individual sanctions should be imposed on offenders in accord with a jurisdiction's punishment principles. The choice about which officials will control case-by-base implementation, then, should be a choice about procedure that is dictated by substance: sentencing decisions should be assigned to the actors or institutions best suited to ensuring individual sanctions are in accord with the punishment policies and principles. When those decisions require discretionary, case-specific judgments (especially among offenders liable under the same offense definition), that leaves as possibilities only prosecutorial or judicial discretion. It eliminates prosecutors bound by mandatory charging rules, along with legislatively mandated sentences tied to offense definitions.

b. The problem of crime definition.

Aside from sentencing administration, one rule of prosecutorial authority may be more suitable than another depending on how legislatures meet the challenge of defining criminal offenses so that proof of the statutory elements authorize liability only for those with individual culpability. Inevitably, "one can violate the terms of an offence without being morally blameworthy."¹⁹ This problem is part of a more general challenge stemming from the nature of legal rules, especially from the fact that clear rules are inevitably under- or over-inclusive.²⁰ This holds for crime definitions as for other statutes.

Criminal offenses defined with great specificity are often under-inclusive, meaning the conduct subject to liability does not include all the wrongful conduct that the statute's drafters aspire to prohibit. This feature effectively leaves loopholes, or opportunities to avoid liability for something

¹⁹ Berman, *supra* note __, at 448. See also Larry Alexander & Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* 317 (2009) (arguing for reforms that eliminate "overinclusive laws that punish innocent actors").

²⁰ L. Alexander & K. Ferzan, *supra* note __, at 297-98 ("Rules may be overinclusive."); Frederick Schauer, *Playing by the Rules* (1993). I distinguish this debate from others about criteria for liability defined in criminal statutes, such as whether all grades of criminal liability should require proof of culpability, and to what degree offenses should strive for proportionate liability. See Andrew Ashworth & M. Blake, *The Presumption of Innocence in English Criminal Law*, 1996 *Crim. L.R.* 306 (documenting English offenses with strict liability elements); Andrew Ashworth, *A Change of Normative Position: Determining the Contours of Culpability in Criminal Law*, 11 *New Crim. L. Rev.* 232 (2008); Jeremy Horder, *A Critique of the Correspondence Principle of Criminal Law*, 1995 *Crim. L.R.* 759.

substantially the same as what the statute prohibits. This is a continual challenge for drug regulation, for example, which defines drugs by specific chemical compositions that sometimes can be circumvented by new chemical structures.²¹

The bigger problem is over-inclusive statutes. To avoid leaving harmful or risky conduct un-criminalized (or sometimes due to careless drafting), legislatures commonly adopt broadly defined offenses, which could be applied to convict nonculpable actors. Examples abound of statutes that are deliberately or inadvertently overinclusive. Statutes that do so through broadly worded definitions include organized-crime statutes²² and federal fraud offenses, which prohibit any incidental use of mail or electronic communications to further “any scheme or artifice to defraud.”²³ Specific, unambiguous statutes can also cover non-culpable or marginally culpable actors. Many courts concluded the federal false statements statute was such a statute,²⁴ because it imposed felony liability on insufficiently blameworthy individuals to simply answered “no” if federal investigators asked whether they had committed a crime (when investigators already had proof and were not misled by the denial).²⁵ The U.K.’s Sexual Offences Act 2003 is another example. The statute prohibits any intentional touching of a sexual nature (including kissing) of a person under age 16. Because it expressly applies to perpetrators under age 18, it unambiguously criminalizes kissing between two 15-year-olds.²⁶

²¹ See, e.g., Drug Enf’t Adm’n, Lists of: Scheduling Actions, Controlled Substances, Regulated Chemicals (May 2016), <http://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf>.

²² See N.Y. Penal Law §§ 460.00 through 460.25 (2016) (“enterprise corruption” organized crime); 18 U.S.C. §§ 1961–1968 (racketeering organized crime).

²³ See 18 U.S.C. § 1341 (2016) (mail fraud); 18 U.S.C. § 1343 (2016) (wire fraud). Another well-known example is 15 U.S.C. § 1 (2016), which criminalizes “[e]very contract, combination . . . , or conspiracy, in restraint of trade or [interstate] commerce.” *Nash v. United States*, 229 U.S. 373, 376, 378 (1913) (limiting application only to conduct that “unduly” restricts trade, but noting that the statute could still be applied to “no more than ordinary acts of competition” to “convert what at most would be small local offenses into [federal] crimes”).

²⁴ 18 U.S.C. § 1001 (up to five years in prison for whoever, among other things, “knowingly and willfully . . . makes any materially false statement” to any federal official or agency).

²⁵ See *Brogan v. United States*, 522 U.S. 398 (1998) (summarizing then rejecting lower court interpretations that excluded such “exculpatory ‘no’” statements from the statute).

²⁶ Sexual Offences Act 2003 §§ 9, 13 (U.K.), <http://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/child-sex-offences>. This “kissing” example as an

In sum, criminal offense definitions routinely fail to apply to *only* culpable wrongdoers (as well as *all* culpable wrongdoers). The problem is widely acknowledged by legislatures, prosecutors, courts, and scholars.²⁷ The New York legislature acknowledged this in its own organized-crime statute, which states that the statute’s aims “cannot readily be codified in the form of restrictive definitions or a categorical list of exceptions” and so “discretion ought still be exercised. Once the letter of the law is [met] ... the question whether to prosecute ... is essentially one of fairness. The answer will depend on the particular situation.”²⁸ Both England and U.S. prosecutor guidelines concede that proving criminal liability does not always mean the offender is culpable commensurate to the statutory degree of liability.²⁹ It is important to recognize that this problem is not only a matter of statutory *ambiguity* that can be resolved by *judicial* interpretation. Judicial decisions can resolve problems of ambiguity by applying the rule of lenity, inferring limitations from legislative intent, construing a statute to avoid unconstitutional overbreadth, or other interpretive strategies.³⁰ But under some statutes, at least, possibilities remain that actors can violate an offense despite lack of moral blameworthiness, even when a statute’s meaning is clear and after judges have done all that is plausibly within the judicial role to specify the statute’s scope.

c. Solutions to statutory liability that exceeds culpability.

There are two basic paths toward solutions—minimizing the incongruence between liability and culpability by drafting better offense definitions, or relying on enforcement discretion. The

example of the statute’s overinclusiveness appears in Victor Tadros, *The Ideal of the Presumption of Innocence*, 8 *Crim. L. & Phil.* 449, 454-56 (2014).

²⁷ For unusually forthright legislative acknowledgement, see N.Y. Penal Law §§ 460.00 (2016). For examples of judicial recognition, see *Abuelhawa v. United States*, 556 U.S. 816, 823 n.3 (2009) (“Of course, Congress legislates against a background assumption of prosecutorial discretion ...”); *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (“It would be too treacherous to define or even to indicate by way of illustration” those punishable under the statute. “To attempt a formula embracing the variety of conduct ... forbidden by an Act of Congress ... would be mischievous futility.”); *Nash*, 229 U.S. at 378. For an extended scholarly examination of this problem and a proposed solution, see A. Alexander & K. Ferzan, *supra* note __; see also Berman, *supra* note __, at 448 (describing the problem of potential liability for nonculpable acts as “notorious[]”).

²⁸ N.Y. Penal Law § 460.00 (2016).

²⁹ See Code for Crown Prosecutors ¶ 4.12(b); USAM § 9-27.230.

³⁰ See Caleb Nelson, *What Is Textualism?*, 91 *Va. L. Rev.* 347 (2005); Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 148-70 (2012).

choice in common law jurisdictions³¹ is the latter. They address problems of over-inclusiveness by relying on prosecutors' discretionary charging authority. In theory, reliance on discretion need not be lodged with prosecutors; two other actors could exercise discretion to ensure that only culpable actors are punished—judges and juries.³² But the institutional roles of both judges and juries have been constructed to minimize this kind of discretion. Jury “nullification” and prosecutor decisions not to charge are equivalent decisions in the face of convincing evidence of guilt. But contemporary law does all it can to suppress jury nullification, notably by not informing juries of that power and instructing them that they “must” convict if they find offense elements proven.³³ (Not to mention that, for other reasons, juries adjudicate only a small fraction of criminal cases in all common law countries.) Equivalent power could lie with judges if they exercised the power to stay or dismiss prosecutions “in the interest of justice” to the same degree that prosecutors decline to charge in the interest of justice. But even in U.S. jurisdictions that grant judges this power by statute, courts have concluded they cannot independently exercise it and must defer to prosecutorial discretion.³⁴ Other aspects of the judicial role—especially when judges act as fact-finders a trial, or when they interpret

³¹ The real-world jurisdiction with lawyers and judges who come closest to retaining confidence that careful code drafting and proper judicial interpretation solves most of the problem is probably Germany. The German traditions of *rechtswissenschaft* (often translated as “legal science”) and *rechtsdogmatik* (legal dogmatics or doctrine) describes a system in which proper legal methodology and recognized principles provide objectively correct answers, doctrines or interpretations of a code. See S. Boyne, *supra* note __, at 21-22 & 37; Boyne, *supra* note __, at 1311; Damaska, *supra* note __; Markus Dubber, *New Legal Science: Toward Law as a Global Discipline* (June 2014 unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462224. See also German Constitutional Court decisions cited *supra* note __.

³² *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (In light of broadly defined offenses, “the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on ‘conscience and circumspection in prosecuting officers’....”) (quoting *Nash v. United States*, 229 U.S. 373, 378 (1913)); *United States v. Park*, 421 U.S. 658, 669-70 (1975) (same). One could expand the list of discretionary authorities to include executives and parole boards with power to pardon offenders (even before trial) to commute sentences. On judges’ power to acquit despite evidence of guilt, see *Fong Foo v. United States*, 369 U.S. 141 (1962) (holding judicial acquittal is final even though prosecution had not presented all of its evidence).

³³ See *Sparf and Hansen v. United States*, 156 U.S. 51 (1895) (juries need not be informed of their power to acquit despite proof of guilt); Nancy J. King *Silencing Nullification Advocacy inside the Jury Room and Outside the Courtroom*, 65 U. Chi. L. Rev. 433, 475 & n158 (1998) (describing judicial efforts to discourage nullification, including “must convict” instructions).

³⁴ See Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 Mo. L. Rev. 629 (2015) (surveying statutory authority for judges to dismiss charges and describing courts’ rare use of that power); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). For a typical state court position, see *State v. Vixamar*, 687 So. 2d 300, 303 (Fla. Dist. Ct. App. 1997) (“[It is] the prosecutor’s exclusive discretion to decide whether a criminal case should be discontinued”).

criminal statutes—are similarly conceptualized to deny judges discretionary authority to remove the nonculpable from liability authorized by a criminal statute. Those limitations on institutional roles, together with over-inclusive offenses, compel reliance on broad prosecutorial enforcement discretion to limit liability to deserving cases.³⁵

The second path to closing the gap between liability and culpability is the reverse: rely less on discretionary enforcement and instead more precisely draft offense definitions to ensure liability does not exceed culpability. One example of this kind of effort is the Model Penal Code, which attempted to devise a set of substantive criminal law principles, interpretive rules, and carefully crafted offense definitions, organized on the premise that liability must require proof of culpability.³⁶ But the MPC was at best moderately influential on real criminal codes.³⁷ Another strategy for addressing the liability-culpability gap takes very nearly the opposite approach. ... Alexander and Ferzan’s proposal is the most radical in this direction. They would replace the traditional code’s long list of specific offenses with a simple standard that broadly defines the conditions for criminal liability such as: “one is liable when one acts with insufficient concern for others’ legally protected interests—that is, when one acts recklessly and creates a substantial, unjustified risk to another.”³⁸ This solution succeeds in conceptual precision. Accepting that reckless disregard of protected interests describes culpability, only (and all) the culpable can be held liable. The challenge, of course,

³⁵ Nominally or ironically, the “purpose of a jury is to guard against the exercise of arbitrary power ... [and be] a hedge against the overzealous or mistaken prosecutor.” *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

³⁶ Model Penal Code § 2.02 (Am. Law Inst. 1962) (defining four mental state terms for proving culpability and defining “recklessness” as the default culpability standard).

³⁷ For an overview of which states adopted parts of the Model Penal Code, see Brown, *supra* note ___, at 294-97 & 317-21; see also *id.* at 298-309 (analyzing state court decisions that avoid or undermine MPC provisions adopted by their state legislatures). For a broader critique of contemporary criminal codes, see Douglas Husak, *Overcriminalization* (2007).

³⁸ See A. Alexander & K. Ferzan, *supra* note ___, at 263-306 (describing the strong version of such a proposal as ideal theory then exploring accommodations necessary for practical implementation); see also Larry Alexander & Kimberly Kessler Ferzan, *Beyond the Special Part*, in *Philosophical Foundations of the Criminal Law* 253 (R.A. Duff & Stuart P. Green eds., 2011) (elaborating and defending the same proposal).

is that its high level of generality still demands case-by-case specification in the context of innumerable types of conduct in myriad circumstances.³⁹

Either approach in principle, if successful, eliminates need for enforcement discretion to ensure that offenses are enforced only against the culpable. Because both models require adjudication that determines individual culpability, neither has need for a procedural device to avoid liability for cases in which evidence of culpable wrongdoing is convincing.⁴⁰ That is, a well-defined code that lacks over-inclusive offenses is compatible with a procedural system that includes mandatory prosecution. Yet while most common law scholars believe criminal statutes could be much better drafted, there is a limit to their faith that is captured in the consensus among criminal law theorists that “one can violate the terms of an offence without being morally blameworthy.”⁴¹ Anglo-American courts and lawyers widely share that view and view the aspiration for such statutory precision as “treacherous”⁴² and a “mischievous futility.”⁴³ That perspective explains the entrenched commitment to rely on procedural regimes with discretionary enforcement to solve the substantive law problem.

In civil law jurisdictions, on the other hand, it has been a traditional article of faith that well-drafted codes can and should eliminate most of the need for discretionary application as well as statutory interpretation of criminal laws. Others have described in detail relevant premises of the civil law tradition.⁴⁴ It is enough here to sketch the outline of the standard story that civil law jurisdictions strive to enact comprehensive, carefully drafted statutory codes that eliminate as much

³⁹ For one critic developing this point, see Green, *supra* note __ [Golden Rule Ethics]. Alexander and Ferzan offer the proposal as an ideal and concede that some greater specification, perhaps in the form of legislative commentary and definitions of protected interests, would be needed in practice. See Alexander & Ferzan, *supra* note __ [Beyond] at 273.

⁴⁰ There still might be legitimate reasons not to *punish* the culpable, but discretion would no longer necessary to ensure that those not *eligible* for punishment avoid it.

⁴¹ Berman, *supra* note __, at 448. See also Larry Alexander & Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* 317 (2009) (arguing for reforms that eliminate “overinclusive laws that punish innocent actors”).

⁴² *Id.*

⁴³ *Dotterweich*, 320 U.S. at 285.

⁴⁴ An influential overview is J. Merryman & R. Perez-Perdomo, *supra* note __.

as possible any call for judicial interpretation to a statute's meaning or scope, or executive discretion to ensure its proper application.⁴⁵ In addition to this priority for legislation over judicial and prosecutorial discretion, lawyers and judges are trained in a mode "legal science" that, in the strongest accounts, provides objective answers to any questions of statutory ambiguity or of how a rule applies to particular facts.⁴⁶ Ideally, this makes the job of the judge (or lawyer, including the prosecutor) more technical, administrative, or mechanical, which in turn leaves little need or justification for policy-based discretion.⁴⁷

Caseload and resource pressures in recent decades have compelled civil law justice systems to adopt an "opportunity" or "expediency" principle that allows prosecutorial charging discretion, especially for lower-level offenses. But even if civil law officials no longer hold to the strongest form of this ideal with respect to every statute and case, enough of this general view remains in contemporary legal traditions to resist a turn to such an expansive procedural fix for substantive law's flaws as granting wide enforcement discretion to prosecutors.⁴⁸

IV. Conclusion

At a general level, certain procedural rights understood as fundamental serve the legitimacy condition for criminal sanctions. But criminal law can be dependent on other procedural features in a different way. Some procedural rules are necessary accompaniments to substantive laws, because they compensate for deficiencies in substantive law (such as overbreadth) or because they are needed otherwise to ensure that specific provisions operate in accord with broader principles and

⁴⁵ J. Merryman & R. Perez-Perdomo, *supra* note ___, at 27-55.

⁴⁶ *Id.* at 61-67.

⁴⁷ *Id.* at 34-55.

⁴⁸ *Id.* at 34-55; *id.* at 52 (citing two statutes in civil law jurisdiction that delegate equitable power to judges, and describing them as examples of legislatures conceding that statutes cannot dictate certain outcomes for all cases in advance); see also Strafgesetzbuch [StGB] [Penal Code] ¶ 42 (Austria) (for crimes punishable by less than three years imprisonment, judicial discretion to acquit when a defendant's blameworthiness is low and harm minimal); Strafprozeßordnung [StPO] § 153 (Ger.) (prosecutorial discretion permitted for less serious offenses).

goals. This is true with regard to specific laws, such as the § 851 drug-offender sentence enhancement or New York's racketeering statute. And it is true with regard to the perceived nature of substantive criminal law generally.

In practice, this interrelation of substance and the procedural device of prosecutorial discretion poses at least two kinds of risks. One is that, as legislatures grow comfortable in their reliance on prosecutorial discretion as a solution for poor statutory drafting, they have less incentive to draft statutes carefully.⁴⁹ Trust in the procedural fix aggravates problems in substantive law by encouraging legislatures toward greater overbreadth, and use of strict liability, in criminal codes.⁵⁰ U.S. and U.K. legislators draft criminal offenses in reliance on prosecutorial discretion. Enforcement discretion does not simply remedy *inevitable* gaps between culpability and statutory criteria for liability, it aggravates it.

There is a second risk for criminal justice systems that depend on discretionary enforcement to keep criminal law administration in accord with its principles. Discretionary regimes are vulnerable to the risk of being insufficiently *lawful*—that is, insufficiently regulated by *law*. It is possible, of course, for discretionary authority can be regulated and reviewed. That is routine in many public administration contexts outside of prosecution, and England and Wales provide the leading confirmation of this among common law criminal justice systems. But the U.S. jurisdictions are far from that model and so at much greater risk of a kind of lawless administration that undermines criminal law's principles and purposes. Discretion that is unregulated and unsupervised (outside local offices or the executive branch) is for that reason more subject changes in professional

⁴⁹ For a now-classic argument that prosecutorial discretion, in conjunction with other political incentives, encourages legislatures to adopt more expansive criminal laws, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

⁵⁰ By contrast, German criminal law, enforced under a mandatory prosecution rule for serious offenses, rejects strict liability crimes, a drafting choice that reduces the prospect of convicting nonculpable actors. See J. Blomsma, *supra* note __, at 210-31 (analyzing strict criminal liability in common law and civil law systems including Germany); Darryl K. Brown, *Public Welfare Offenses*, in *Oxford Handbook of Criminal Law* 862 (Markus Dubber & Tatjana Hörnle eds., 2014) (comparing strict liability usage in common law and European civil law jurisdictions and noting that Germany uses civil rather than criminal sanctions for regulatory offenses).

norms or practical incentives faced by officials that work against exercising discretion on grounds that policy makers originally intended. The track record of how exercises of prosecutorial discretion under the § 851 sentencing law are a cautionary lesson. Intended as means to ensure that harsher sanctions were imposed only the most deserving, prosecutors have widely—openly and unabashedly—turned that authority instead into a means to pressure defendants to plead guilty. Professional norms no longer seem even to acknowledge that the practice subverts legislative intent and criminal law principle by distributing more severe sentences to the noncompliant instead of the most culpable.⁵¹

⁵¹ See *United States v. Kupa*, 976 F.Supp.2d 417, 421-27 (E.D.N.Y. 2013) (providing detailed evidence of this prosecutorial practice).