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ESSAY

THE ASCENT OF THE ADMINISTRATIVE STATE  
AND THE DEMISE OF MERCY

*Rachel E. Barkow*

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## THE ASCENT OF THE ADMINISTRATIVE STATE AND THE DEMISE OF MERCY

Rachel E. Barkow\*

There are currently more than two million people behind bars in the United States.<sup>1</sup> Over five million people are on probation or some other form of supervised release.<sup>2</sup> Prisoners are serving ever-longer sentences.<sup>3</sup> Presidential and gubernatorial grants of clemency are rare events. The use of jury nullification to check harsh or overbroad laws is viewed by judges and other legal elites with suspicion. These are punitive, unforgiving times.

Although a great deal of scholarship has sought to explain the incarceration boom and the rise in punishment,<sup>4</sup> very little work has focused on the reasons why forms of mercy have been on the decline.<sup>5</sup>

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\* Professor of Law, New York University School of Law. I owe thanks to Tony Barkow, Doug Berman, Sam Buell, Barry Friedman, Jim Jacobs, Richard Pildes, and Carol Steiker for their helpful comments on earlier drafts. David Carey and Nicholas Almendares provided first-rate research assistance. I acknowledge with gratitude the financial support of the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at NYU.

<sup>1</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, Prison Statistics (Dec. 16, 2007), <http://www.ojp.usdoj.gov/bjs/prisons.htm> (noting that at the end of 2006, there were 2,258,983 prisoners in federal and state prisons and in local jails).

<sup>2</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, Probation and Parole Statistics (Dec. 5, 2007), <http://www.ojp.usdoj.gov/bjs/pandp.htm> (reporting that at the end of 2006, more than five million people were under the jurisdiction of federal, state, or local parole or probation; of these, about 4,237,000 were on probation, and 798,200 on parole).

<sup>3</sup> See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 839 (2006) (noting that average sentences are "significantly higher than in previous periods in this country").

<sup>4</sup> See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001) (describing cultural and sociological factors that are driving the rise in punishment); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 53–55 (2003) (explaining that American punishment is harsher than European punishment because of America's democratic history and its zealous commitment to formal equality in sentencing); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (examining the political incentives that lead to overcriminalization and harsh sentencing).

<sup>5</sup> Many scholars have thoughtfully examined the theoretical relationship between mercy and justice. See, e.g., KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* 131–78, 188–92 (1989) (evaluating when exercises of mercy are consistent with justice and when they are not); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1453–73 (2004) (arguing that mercy is incompatible with retributive justice); Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 162, 169–80 (1988) (discussing the relationship between mercy, individuation, and justice); Carol S. Steiker, *Tempering or Tampering?*, in *FORGIVENESS, MERCY, AND CLEMENCY* 16, 22–30 (Austin Sarat & Nasser Hussain eds., 2007) (summarizing competing views on the relationship between mercy and justice); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1417–21

Specifically, scholars have not done much to explore why two of the last remaining forms of the unreviewable power to be merciful — executive clemency and jury nullification — are currently looked upon with such disfavor. Perhaps this question has been ignored on the theory that the rise in punishment and the decline in mercy are two sides of the same coin, both outgrowths of the same phenomenon. That is, the political climate that produces greater punishment must also depress mercy. While it is true that the political economy of punishment is an important reason for the decline in nullification and clemency that should not be discounted or ignored, it is not a complete explanation. As this Essay explains, skepticism about jury nullification and executive clemency has its roots in another development as well: the rise of the administrative state and the key concepts of law that have emerged alongside it.<sup>6</sup>

This Essay argues that administrative law has weakened these exercises of mercy in two key respects. First and foremost, the rise of the administrative state has made unchecked discretion an anomaly in the law, and a phenomenon to be viewed with suspicion. The expansion of the administrative state has showcased the dangers associated with the exercise of discretion. Without a check on the power of agencies, benefits could be bestowed and sanctions imposed on the basis of an array of inappropriate factors. Racial discrimination, favoritism to campaign contributors, and cronyism are only a few examples of the

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(2004) (noting that recent scholarship has criticized mercy as inconsistent with various theories of justice, including retributivist and restorative justice). This Essay takes no position on the proper way to characterize mercy and its relationship to individualized justice; rather, the term “mercy” is used here simply to encompass jury nullification by acquittal and executive clemency, regardless of the bases for these decisions.

<sup>6</sup> There are, of course, other actors who have the power to deliver mercy in the criminal justice system. Parole boards, where they exist, can release offenders, and judges can exercise discretion in some cases to lessen sentences. Like jury nullification and executive clemency, these exercises of mercy have also faced criticism, and that criticism has strong links to administrative law concerns. Because of space limitations, this Essay largely ignores those forms of mercy and focuses on nullification and pardons for two reasons. First, jury nullification and executive clemency are enshrined in the Federal Constitution and many state constitutions, so those forms of mercy cannot simply be abolished or ignored. Parole can be and has been abolished in many jurisdictions, and judicial discretion over sentencing can be and has been eliminated in many jurisdictions through mandatory sentencing laws or guidelines. Jury nullification and clemency therefore represent the last remaining forms of unreviewable mercy in some places, and as a result, they have taken on added importance. Second, the link between the administrative state and the diminished status of jury nullification and clemency is less obvious than the link between the administrative state and reforms in parole and judicial sentencing. This Essay therefore seeks to explain an otherwise overlooked connection between administrative law and criminal justice. The use of commissions and boards to regulate sentencing and parole through guidelines is directly tied to administrative law, so less explanatory work is necessary. But to the extent that the link is clear in the case of parole and judicial sentencing, it further supports the claims made here. Administrative law is a pervasive force in criminal law today, and its effect on a variety of forms of mercy should not be ignored.

numerous extralegal factors that could influence an agency's unchecked exercise of discretion. The solution has been the curtailment of discretion through judicial review. Courts insist that agencies operate within legally defined boundaries and give explanations for their actions. Unlike the rational basis review that gives legislative acts the benefit of the doubt, the "hard look" review of agency decisions is more skeptical of discretion. With the rise of administrative law, our legal culture has come to view unreviewable discretion to decide individual cases as the very definition of lawlessness. Jury nullification and an unqualified executive power to grant clemency sit uneasily beside an administrative state that faces such scrutiny, for these exercises of mercy are precisely the type of unreviewable exercises of discretion that administrative law seeks to control. This concern about unchecked discretion takes on even greater importance in criminal law because of the many examples in the history of criminal justice where actors have exercised discretion in racially discriminatory ways or to produce racially disparate results.

The rise of administrative law undercuts executive clemency power and jury nullification in a second, related respect: the development of the administrative state is a significant part of the reason that our legal culture focuses on the courts — and courts alone — to prevent unfair applications of the law. The dominance of agencies has necessarily been accompanied by an increase in statutes that govern those agencies; concomitantly, courts have faced an ever-growing number of regulatory cases involving statutory interpretation. Through their power to ensure that agency actions are consistent with statutes, courts have been given the authority to oversee the entire regulatory state — from the securities market to the environment, from labor relations to emerging technologies. And in exercising this power, courts use a variety of interpretive tools to ensure that individual exercises of agency decisionmaking are consistent with legislative intent. Legal academics and society at large have, in turn, looked to courts to guarantee that laws are fairly applied. In this legal culture, it is viewed as the role of courts, through statutory interpretation, to fix unfair applications of the law. A layperson juror or an elected executive has no obvious expertise in this world of statutes, so it is hard to understand why these actors should be permitted to operate unchecked.

This Essay begins in Part I by describing the rise of administrative law and explaining how its central premises are at odds with both clemency and jury nullification — a tension that has led many scholars and jurists to seek limits on these powers. Part I also turns to administrative law to explain why prosecutors' discretion to be merciful by not bringing charges has not faced the same broad-based criticism as have clemency and nullification, despite their commonalities. Part II then describes how the court-centered focus of administrative law similarly stands at odds with clemency and nullification inasmuch as

these exercises of mercy rely on nonjudicial actors to exercise legal power. Part III concludes by highlighting key differences between administrative power and the exercise of mercy in criminal cases and by offering some preliminary thoughts on why unreviewable decisions to grant mercy should still have a place in the criminal justice system.

### I. TAMING DISCRETION: THE DEVELOPMENT OF ADMINISTRATIVE LAW AND THE DECLINE OF UNREVIEWABLE POWER

The rise of the administrative state brought with it a new emphasis in the law on the importance of predictable processes, reasoned decisionmaking, and judicial review. As these cornerstones of administrative law have become embedded in our legal culture, actions in tension with this model have fallen out of favor unless they are similar to the rare exceptions to these principles that exist within administrative law itself. The rise of administrative law therefore offers a key window to understanding the decline of nullification and clemency and the relative acceptance of prosecutorial discretion.

#### *A. The Development of Administrative Law and the Importance of Judicial Review*

The birth of administrative agencies posed a dilemma for traditional constitutional and legal analysis. These agencies challenge the nation's commitment to separation of powers by combining executive, legislative, and judicial power under one roof. Moreover, the scope of agencies' authority is vast; their decisions have profound consequences for the nation's economy and for individual rights and liberties. The puzzle for the law has been how to keep this potential Leviathan in check. If the officials at these agencies could exercise their authority without oversight, citizens would become subjects to unelected bureaucrats and democracy would be compromised.

This dilemma is familiar to anyone with a basic understanding of administrative law, as the overriding purpose behind almost every doctrine in administrative law is to control the exercise of agency discretion. Indeed, that is why most legal scholars writing in administrative law are preoccupied with the central question of whether agencies are accountable for their exercises of discretion and are therefore legitimate.<sup>7</sup>

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<sup>7</sup> See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003) (explaining that accountability is a disproportionate focus of administrative law scholarship); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 406–16 (1996) (emphasizing the importance of preserving political accountabil-

To the extent scholars and jurists have concluded that agency power is consistent with our legal values — and that is the overwhelming consensus at this point in our nation's history<sup>8</sup> — it is because agencies are governed by a set of requirements that ensure their decisions are transparent and reviewable by both political actors and the judiciary. The Administrative Procedure Act (APA) dictates that agency decisions are generally subject to judicial review to ensure that the agency does not act in an arbitrary and capricious manner.<sup>9</sup> The Supreme Court has concluded that the APA requires agencies to state the reasons behind their decisions, to provide support in the administrative record for their conclusions, and to justify any departure from a prior practice or policy.<sup>10</sup> The APA mandates additional procedural requirements for informal and formal rulemaking and formal adjudication, and additional laws such as the Freedom of Information Act<sup>11</sup> and the Federal Advisory Committee Act<sup>12</sup> make agencies further accountable by giving the public access to their decisionmaking processes.<sup>13</sup> These procedural requirements and judicial oversight are central to the acceptance of the administrative state.<sup>14</sup>

If these core ideas of predictable processes, reasoned decisionmaking, and judicial review governed a small subset of legal actors, perhaps their existence would be unremarkable. But our government is now dominated by agencies. There are several hundred federal agen-

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ity in the face of the executive and legislative reform of the administrative state in the 1990s); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 695–709 (2005) (examining the threat to agency accountability posed by global regulatory regimes).

<sup>8</sup> Some scholars remain unconvinced that agencies are constitutional. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–49 (1994) (arguing that the post–New Deal administrative state is unconstitutional).

<sup>9</sup> See 5 U.S.C. § 706(2)(A) (2000).

<sup>10</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417–20 (1971).

<sup>11</sup> 5 U.S.C. § 552 (2000 & Supp. IV 2004), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

<sup>12</sup> 5 U.S.C. app. §§ 1–16 (2000).

<sup>13</sup> For a summary of these and other requirements, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1021–23 (2006).

<sup>14</sup> *Id.* at 1023–24; see also Mark Fenster, *The Birth of a “Logical System”: Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 82–83, 89 (2005) (noting the importance of judicial review and agency procedures to the acceptance of the administrative state by early administrative law scholars); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1248 (1982) (describing the APA as a “working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671–81 (1975) (noting the importance of judicial review, procedural safeguards, and “reasoned consistency” to the acceptance of agency discretion).

cies,<sup>15</sup> charged with everything from “assur[ing] so far as possible every working man and woman in the nation safe and healthful working conditions and preserv[ing] our human resources”<sup>16</sup> to creating “a national policy which will encourage productive and enjoyable harmony between man and his environment.”<sup>17</sup> States are similarly awash in agencies.<sup>18</sup> Indeed, administrative law has become a global phenomenon.<sup>19</sup>

With the prevalence of agencies, the principles of administrative law are likewise pervasive in public law. Judicial review, reasoned decisions, and regularized processes have become the hallmarks of acceptable legal action.<sup>20</sup> The importance of these concepts to modern legal culture can be seen time and time again in judicial decisions covering a wide range of legal doctrines and in scholarship encompassing the sweep of law. It is the increasingly rare legal issue that falls outside the scope of judicial review. The Supreme Court has all but abandoned the political question doctrine.<sup>21</sup> Courts go out of their way to read statutes to allow for judicial review.<sup>22</sup> Judges do not often find that a matter is committed to agency discretion and therefore unreviewable under the APA.<sup>23</sup> Due process cases emphasize the im-

<sup>15</sup> LSU Libraries Federal Agencies Directory (July 23, 2007), <http://www.lib.lsu.edu/gov/fedgov.html> (listing more than 800 executive agencies and more than 100 independent agencies).

<sup>16</sup> 29 U.S.C. § 651(b) (2000) (OSHA).

<sup>17</sup> 42 U.S.C. § 4321 (2000) (EPA).

<sup>18</sup> For example, even in a state as small as Connecticut or as sparsely populated as North Dakota, there are scores of agencies. See State of Connecticut, Index of All State Agencies (Nov. 27, 2007), <http://www.ct.gov/ctportal/cwp/view.asp?a=843&q=246466>; State of North Dakota, Agency Index, <http://www.nd.gov/agency.htm> (last visited Feb. 9, 2008).

<sup>19</sup> See Alfred C. Aman, Jr., *Introduction: Symposium on Globalization, Accountability, and the Future of Administrative Law*, 8 IND. J. GLOBAL LEGAL STUD. 341, 341–46 (2001) (describing the evolution of global administrative law); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS., Summer–Autumn 2005, at 15 (surveying issues in global administrative law).

<sup>20</sup> Administrative law has become such a bedrock of our legal system that top law schools, such as NYU and Harvard, currently mandate that first-year students get an overview of the basic doctrines.

<sup>21</sup> Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267–73 (2002).

<sup>22</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (noting the “strong presumption in favor of judicial review of administrative action”); *id.* at 327 (Scalia, J., dissenting) (arguing that the Court “fabricates a superclear statement, ‘magic words’ requirement for the congressional expression” to preclude review that is “unjustified in law and unparalleled in any other area of our jurisprudence”); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (Congress’s intent to preclude review “must be clear”); *Bartlett v. Bowen*, 816 F.2d 695, 699–700 (D.C. Cir. 1987) (“[I]t has become something of a time-honored tradition for the Supreme Court and lower federal courts to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.”).

<sup>23</sup> See 5 U.S.C. § 701(a)(2) (2000); see also Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes “Clearly Established” Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 791 n.280 (2005) (noting that the

portance of regularized processes and of decisionmakers who give reasons.<sup>24</sup>

Legal commentators, in turn, find it increasingly difficult to accept those pockets of law that fall outside this realm. For example, scholars have criticized courts' failures to review agency decisions not to bring enforcement actions,<sup>25</sup> the Supreme Court's recent standing decisions that make it difficult for some matters to get before a judge,<sup>26</sup> and the reluctance of courts to get involved in matters involving foreign relations.<sup>27</sup>

### B. *The Threat of Unreviewable Discretion*

In a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent. Yet those are the hallmarks of three central means by which mercy is exercised in criminal matters: jury nullification, executive clemency, and prosecutorial discretion not to charge. The first two have faced criticism because they fall outside this administrative

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"committed to agency discretion by law" doctrine has been interpreted narrowly). Indeed, even though the Supreme Court concluded in *Heckler v. Chaney*, 470 U.S. 821 (1985), that agency decisions not to bring enforcement actions are committed to agency discretion, *id.* at 837–38, that exception has been narrowly construed. See, e.g., *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459 (2007) (distinguishing decisions not to bring enforcement actions from refusals to promulgate rules and holding that the latter are subject to judicial review).

<sup>24</sup> See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) ("[D]ue process requires [agency decisions to] be justified by reasons . . ."); *Pollock v. Baxter Manor Nursing Home*, 706 F.2d 236, 237 (8th Cir.) (McMillian, J., dissenting) ("[D]ue process protects against error based upon inaccurate or incomplete information by requiring the government to comport with regularized procedures that are subject to judicial review."), *rev'd on reh'g*, 716 F.2d 545 (8th Cir. 1983) (*per curiam*).

<sup>25</sup> See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658–61 (2004) (arguing that agency inaction raises the same concerns for administrative arbitrariness as does agency action and that lack of review of inaction is "inconsistent with the founding principles of the administrative state"); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 683 (1985) ("Whatever the defects of judicial review, they do not justify a one-way ratchet against regulation, which may skew regulatory processes in directions inconsistent with the governing statute.").

<sup>26</sup> See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43, 1751–58 (1999); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1480 (1988).

<sup>27</sup> See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 4–5 (1992) (arguing that the "abdicationist tendency" in foreign affairs is "wholly incompatible with American constitutional theory"); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 320 (1990) ("To permit the Executive to proceed [in foreign-affairs decisionmaking] unencumbered by judicial review would work a radical reallocation of constitutional power.").



law paradigm.<sup>28</sup> While prosecutorial discretion also lies outside the core framework, it has fared better because of its parallels to one of the few matters accepted by administrative law as permissibly evading judicial review — namely, agency decisions not to enforce the law. Administrative law therefore helps to explain the status of all three of these modes of mercy.

1. *Jury Nullification.* — Jury nullification occurs when a jury votes to acquit a defendant despite the fact that the defendant is guilty under the letter of the law. A jury may opt to nullify because it believes the law is generally unfair or unjust, because it believes applying the law in the particular case would be unfair or unjust, or because it believes the punishment is too harsh. The jury's power to nullify stems from the fact that it does not need to give a reason for its decision and its vote of acquittal is unreviewable.

The contrast between jury nullification and the core principles of administrative law is stark. No two juries are the same, and there is no particular process that they must follow when conducting their deliberations and reaching their conclusions, which are unreviewable when the result is an acquittal.

It should therefore come as no surprise that this broad power has faced criticism as the principles of administrative law have become entrenched in our legal culture. And the criticism has focused precisely on the fact that jury nullification does not measure up to administrative law standards. For example, Professor Andrew Leipold has said of jury nullification that:

[It] is startling . . . that the decisions are not subject to any review, that no explanations are ever required from the decisionmakers, and that the aggrieved party — the community that is unable to punish a lawbreaker — has no recourse. In virtually no other context is a government-sanctioned decision given such deference, and in no other area would such unfettered decisionmaking be tolerated.<sup>29</sup>

Other critics have similarly argued, for example, that to allow nullification is to endorse “a system of justice where the fate of both society and a defendant is left to the arbitrary and capricious notions of at most twelve individuals.”<sup>30</sup> To those commentators, jury nullification defies the rule of law,<sup>31</sup> with the defining features of the rule of law

<sup>28</sup> Unreviewable judicial discretion over sentencing has faced similar criticism for the same reasons, sparking the movement toward guidelines. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 741–42 (2005).

<sup>29</sup> Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 307 (1996) (emphasis omitted) (footnote omitted).

<sup>30</sup> Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109, 1111–12 (1996).

<sup>31</sup> See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150–51 (1997) (describing criticisms of nullification).

having been critically shaped and influenced by developments in administrative law.

But it is not just legal scholars who have expressed worries about jury nullification because of concerns grounded in administrative law principles. Despite the fact that the Constitution protects jury nullification by making verdicts of acquittal unreviewable under the Double Jeopardy Clause of the Fifth Amendment, courts have sought limits on the jury's power that roughly track the emergence of the administrative state and the growing prevalence and influence of administrative law.

The most significant limitation on the jury's power to nullify came just as the administrative state was forming. In 1895, shortly after the birth of the first major federal agency,<sup>32</sup> the Supreme Court held in *Sparf v. United States*<sup>33</sup> that juries do not have a right to ignore a court's instructions on the law.<sup>34</sup> This case was decided in an era characterized by a widespread belief that there were right answers to be found by professionals with training and expertise.<sup>35</sup> The relevant professionals on questions of law were, according to the Court in *Sparf*, judges, not "jurymen, untrained in the law."<sup>36</sup> If jurors were permitted to decide legal questions, the Court worried that "our government [would] cease to be a government of laws, and become a government of men."<sup>37</sup> The Court instead trusted judges to bring uniformity to the law,<sup>38</sup> and emphasized that judges would be constrained from abuse of power because they "express their opinions publicly" and "stand responsible for them."<sup>39</sup> *Sparf* emerged in large measure

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<sup>32</sup> The Interstate Commerce Commission was created by the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

<sup>33</sup> 156 U.S. 51 (1895).

<sup>34</sup> *Id.* at 101 ("Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves.").

<sup>35</sup> Although the "expertise" rationale for agency decisionmaking was not dominant until the New Deal era, see Stewart, *supra* note 14, at 1677–78, "faith in the ability of experts to develop effective solutions to the economic disruptions created by the market system . . . served as a foundation for early railroad regulation and as a basic tenet of Progressive thought" at the end of the nineteenth century. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1266–67 (1986).

<sup>36</sup> *Sparf*, 156 U.S. at 101–02.

<sup>37</sup> *Id.* at 103.

<sup>38</sup> See *id.* at 77 (citing approvingly the notion that judges should decide questions of law for the sake of "a uniform exposition and interpretation of the law of the United States").

<sup>39</sup> *Id.* at 107 (quoting *United States v. Morris*, 26 F. Cas. 1323, 1336 (Curtis, Circuit Justice, C.C.D. Mass. 1851) (No. 15,815)). *Sparf* was a critical turning point in the relationship between the jury and legal elites — particularly judges. The case has stood as a key precedent for later limits on jury nullification that were the outgrowth of other suspicions of jury power.

because the practice of law had become professionalized.<sup>40</sup> Although the link is not a perfect one, the general importance of deferring to experts was taking shape in the administrative sphere at the same time.

The tie between judicial doubts about jury nullification and developments in administrative law is more obvious when one looks at courts' rejections of defendants' requests to have jurors instructed about their power (as opposed to their right) to nullify the law.<sup>41</sup> These requested instructions were rejected contemporaneously with the courts' endorsement of hard look review of agency decisionmaking, perhaps the most significant development in administrative law because it required agencies to give reasons for their decisions that could be scrutinized by courts. The link can be seen clearly in two decisions of the D.C. Circuit. That court rejected a request to inform juries of their nullification power during the same period that it was creating hard look review; in both cases, the court was focused on arbitrary and capricious decisionmaking. In 1972, the D.C. Circuit refused to inform juries about their nullification power in order to "avoid[] . . . intolerable caprice."<sup>42</sup> At the same time, the D.C. Circuit was seeking to avoid caprice and arbitrary decisionmaking by agencies by insisting on procedures that encouraged the agency to consider all sides of an issue<sup>43</sup> and by taking a "hard look" at its substantive rationales,<sup>44</sup> the latter doctrine gaining acceptance by the Supreme Court.<sup>45</sup>

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<sup>40</sup> See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 211-25 (1989) (discussing the professionalization of lawyers in the late nineteenth century).

<sup>41</sup> "The courts that have considered the question have almost uniformly held that a criminal defendant is not entitled to a jury instruction [on nullification]." *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983); see also Dianah L. Pressley, Recent Development, *Jury Nullification: The Inchoate Power*, 20 AM. J. TRIAL ADVOC. 451 (1996-1997) (collecting cases opposing instructions on jury nullification).

<sup>42</sup> *United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972). The Court also cited approvingly Roscoe Pound's worry about jury power based on "the invalidity of the popular assumption that anyone is competent for the task of administration of justice." *Id.* at 1134 n.46.

<sup>43</sup> See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524, 541 (1978) (concluding that the D.C. Circuit rejected the agency's decision because of what it perceived to be "inadequacies of the procedures employed in the rulemaking proceedings" and reversing the circuit court because "reviewing courts are generally not free to impose [procedures] if the agencies have not chosen to grant them."), *rev'g* *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 633, 645 (D.C. Cir. 1976).

<sup>44</sup> See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) ("[The court's] supervisory function calls on the court to intervene . . . if the court becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." (footnote omitted)).

<sup>45</sup> See cases cited *supra* note 10.

With aggressive review of agencies now a defining and accepted feature of administrative law, it is no wonder that courts have also been emboldened to employ more aggressive mechanisms to limit jury nullification. Recently, courts have permitted the removal of a juror during deliberations when the juror has a different view of the law than the judge.<sup>46</sup> Indeed, in extreme cases, jurors who fail to follow a judge's instructions during deliberations have been prosecuted for contempt.<sup>47</sup> Judges have also pursued charges of contempt, obstruction, or tampering against individuals who have attempted to inform prospective jurors that they have the right to nullify.<sup>48</sup> In addition, courts have rejected attempts to inform juries about the sentencing consequences of their decisions for fear that jurors might use that information to engage in compromise verdicts or base their decision on anything other than their findings of fact.<sup>49</sup>

The public, too, seems to accept these limits on nullification. Voters have rejected ballot initiatives that would have allowed defendants

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<sup>46</sup> See *United States v. Thomas*, 116 F.3d 606, 614–18 (2d Cir. 1997); *People v. Feagin*, 40 Cal. Rptr. 2d 918, 923 (Ct. App. 1995).

<sup>47</sup> See Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 440–41 (1998) (describing the prosecution of a juror who failed to reveal during voir dire her involvement in an organization that seeks to inform jurors about their power to nullify). That juror's contempt conviction was later overturned on appeal. *People v. Kriho*, 996 P.2d 158, 164–65, 178 (Colo. Ct. App. 1999).

<sup>48</sup> See King, *supra* note 47, at 492–94.

<sup>49</sup> See Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury about Mandatory Sentencing*, 95 COLUM. L. REV. 1232, 1242 (1995); see also *Shannon v. United States*, 512 U.S. 573, 579 (1994). Recently, the Court has recognized that the Constitution's jury guarantee forecloses legislative attempts to allow judges to increase the maximum sentence to which a defendant is exposed on the basis of judicial as opposed to jury factfinding. See *Apprendi v. New Jersey*, 530 U.S. 466, 485–90 (2000) (holding that any fact other than the offender's recidivism that increases a crime's penalty beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296, 301–08 (2004) (requiring a jury finding of facts that increase the defendant's maximum sentence exposure even if the facts that increase the maximum sentence exposure are contained in statutory sentencing guidelines); *Cunningham v. California*, 127 S. Ct. 856, 868–71 (2007) (finding unconstitutional a sentencing scheme granting power to judges to find aggravating circumstances that increase a criminal penalty beyond the maximum sentence a judge may impose without additional factual findings). Nevertheless, the Court has not articulated a theory as to why the jury has such a power when laws mandate an increase but lacks the power when laws give judges discretion to increase sentences. I have argued elsewhere that the only theory that explains the different treatment is that judges can correct failings in discretionary laws, but mandatory laws require the corrective of jury nullification. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 85–86 (2003). The Court's reluctance to embrace this logic is likely a reflection of its ambivalence about or disdain for jury nullification. Moreover, recent decisions have cut back on the sweep of the Court's proclaimed respect for the jury. See *Rita v. United States*, 127 S. Ct. 2456 (2007); *United States v. Booker*, 543 U.S. 220, 244–68 (2005) (Breyer, J., delivering the opinion of the Court in part).

to make nullification arguments directly to jurors.<sup>50</sup> Popular press accounts are also skeptical of nullification.<sup>51</sup>

It is not possible, of course, to prove definitively that the entrenchment of administrative law principles of judicial review, reasoned decisionmaking, and predictable processes is a cause of greater distrust and discomfort with jury nullification among legal scholars, jurists, and the general public.<sup>52</sup> The link could be attributed instead to the greater hostility toward criminals that has permeated society in recent decades. But the inference that administrative law concepts are also playing a role in the greater distrust of jury nullification is warranted for three reasons: First, there is a substantive inconsistency between the two frameworks. Second, the greatest limits on jury nullification

<sup>50</sup> See, e.g., Molly McDonough, *Ballot Initiatives Shot Down*, A.B.A. J. E-REPORT, Nov. 8, 2002, LEXIS, ERPORT File (noting that only twenty percent of voters in South Dakota supported a law that would allow defendants to argue that a law under which they were charged was unfair). Bills that would require judges to instruct juries about their power to nullify have also failed to pass in many other states. See Fully Informed Jury Ass'n, Mission Statement (May 9, 2006), <http://www.fija.org/index.php?page=staticpage&id=3> (indicating that despite the efforts of an organization dedicated to nullification to get legislation passed, none of the proposed bills has been enacted).

<sup>51</sup> See, e.g., Brown, *supra* note 31, at 1149, 1151 (noting that "criticism of perceived nullification verdicts has reemerged in the wake of several well publicized acquittals"); Mona Charen, *Can No One Be Convicted of Anything Anymore?*, ST. LOUIS POST-DISPATCH, Jan. 31, 1994, at 7B (criticizing the application of jury nullification in high-profile cases); James P. Pinkerton, *Nullification: Wrong in 1832 and in 1995*, L.A. TIMES, Oct. 12, 1995, at B9 ("In the wake of the Unabomber, Ruby Ridge, Waco, Oklahoma City and now the Arizona train terror, homegrown law-nullifying crazies on all sides have eroded the common ground upon which our civil society rests.").

<sup>52</sup> It is also unclear whether the increased discomfort with jury nullification correlates with greater reluctance on the part of juries to nullify in actual cases. Because jurors do not give reasons for their acquittals, it is not possible to be sure that a vote in any case can fairly be labeled as nullification. Some empirical studies have attempted to measure this by asking judges for their views on whether juries have nullified. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 429-30 & tbl.112 (Univ. of Chi. Press 1971) (1966) (finding that 9% of acquittals were viewed as meritless in the estimation of the responding judges); Daniel Givelbar, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1184 n.83 (2005) (citing a recent National Center for State Courts study that found that judges were very dissatisfied with jury verdicts of acquittal in 5.5% of the cases). Although these measures indicate only a slight decline in nullification rates between the period before hard look review of agencies was established and a time after it had been in place for years, one must be careful in interpreting these studies. Judges' reported disagreement with jury verdicts may be based on a reasonable disagreement over how to interpret the law or its application to the facts in the case, so these measures are imperfect proxies for nullification in the absence of a statement of reasons by the jury itself. In addition, it is not sufficient to look only at cases that go to trial. If prosecutors and defense lawyers believe that nullification is less likely, this belief will influence plea bargaining as well as trials. So, even if these studies were accurately measuring nullification at trial, they might be missing the fact that the cases not going to trial are being influenced by litigants' views that jury nullification is less likely. Defendants might be less willing to risk trial and more willing to accept less favorable plea deals than in the past, so if one looked at the cases not making their way to trial, one may find a difference between the time before courts more aggressively reviewed agency decisionmaking and afterward.

have come alongside the birth of the administrative state and the most significant developments in administrative law. Third, those in the best position to feel the tension — scholars and jurists — have expressed skepticism about jury nullification in terms that resonate with administrative law principles, so at the very least, administrative law is providing a framework for these criticisms. Because these legal elites are often in the position to protect or hinder exercises of mercy by shaping legal rules,<sup>53</sup> their use of administrative law to support limits on nullification cannot be ignored as irrelevant.

2. *Executive Clemency*. — The jury is not the only actor vested by the Constitution with unreviewable power to dispense mercy. In the federal system, Article II, section 2 of the Constitution gives the President the power to “grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”<sup>54</sup> The Court has recognized that this power is sweeping:

The power thus conferred is unlimited, with the exception [for impeachment] stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.<sup>55</sup>

In another opinion, the Court declared that “[t]he executive alone is intrusted the power of pardon; and it is granted without limit.”<sup>56</sup> The President can use this power to issue a conditional or full pardon or to commute a sentence, and relief can be granted either before or after conviction.<sup>57</sup> The President need not follow any particular process or provide reasons for his decision, and the decision is largely immune from judicial review.<sup>58</sup> Clemency decisions at the state level likewise

<sup>53</sup> For example, when judges refused to inform juries of their power to nullify, they undoubtedly believed that refusal would curtail nullification.

<sup>54</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>55</sup> *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867). The Framers rejected proposals that would have limited the President’s power to pardon by requiring the consent of the Senate or by exempting treason from the list of pardonable offenses. See Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1228–35 (2003) (discussing the history of the pardon power).

<sup>56</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872).

<sup>57</sup> *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.”).

<sup>58</sup> The Court has noted that pardons can be reviewed to ensure that the granting of the pardon does not violate a substantive protection in the Constitution. See Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 594 (2001) (noting the constitutional limits on the pardon power recognized by the courts); James N. Jorgensen, Note, *Federal Executive Clemency Power: The President’s Prerogative To Escape Accountability*, 27 U. RICH. L. REV. 345,

“have not traditionally been the business of courts.”<sup>59</sup> The pardon power, like the jury’s power to nullify, is therefore a means of checking overbroad laws or overly harsh sentences<sup>60</sup> and is similarly at odds with the traditional administrative law model.<sup>61</sup>

Like jury nullification, the clemency power has faced increasing criticism for its inconsistency with the fundamental values of administrative law.<sup>62</sup> For example, in a departure from its previous approach to clemency, the Supreme Court recently indicated that it may be willing to review clemency procedures for some minimum level of process under the Due Process Clause. In *Ohio Adult Parole Authority v. Woodward*,<sup>63</sup> five Justices agreed, in separate opinions, that the Due Process Clause provides a check on the exercise of the clemency power.<sup>64</sup> Writing for herself and three other Justices, Justice O’Connor expressly disagreed “with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards.”<sup>65</sup> These four Justices signed on to the view that “some mini-

361–62 (1993) (stating that courts will “review the president’s exercise of clemency power in order to ensure that it is in compliance with the Constitution”).

<sup>59</sup> Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981).

<sup>60</sup> “Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.” *Ex parte Grossman*, 267 U.S. at 120; *see also* Hoffstadt, *supra* note 58, at 585 (“Clemency was conceived in part as a way to lighten, in appropriate circumstances, the sting of harsh sentences required by sentencing laws.”); *The Supreme Court, 1974 Term—Leading Cases*, 89 HARV. L. REV. 49, 63 (1975) [hereinafter *Leading Cases*] (describing the pardoning power as a “means of achieving ‘individualized’ justice in situations where the law is otherwise inflexible” that “may be used to mitigate or quash severe sentences that have resulted from prejudice or misunderstanding”). Presidents may also use the pardoning power to “quell[] public unrest,” for instance by granting amnesty to those involved in civil disturbances. *Leading Cases, supra*, at 63.

<sup>61</sup> *See* Hoffstadt, *supra* note 58, at 567 (“There is therefore a stark contrast between the level of discretion enjoyed by the Executive in clemency decisions and the amount of discretion with which he has been entrusted in making executive decisions regulated by the APA and FOIA.”).

<sup>62</sup> The pardon power has faced criticism since the American revolutionary period because of its tension with America’s commitment to egalitarianism. *See* WHITMAN, *supra* note 4, at 181. But the exercise of the pardon power did not plummet until after significant developments in administrative law, such as hard look review by judges — which is itself an outgrowth of America’s commitment to egalitarianism and a concern with unchecked discretion.

<sup>63</sup> 523 U.S. 272 (1998).

<sup>64</sup> *See id.* at 288–89 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 291 (Stevens, J., concurring in part and dissenting in part). Justice Kennedy was not among those five Justices. He recently urged the American Bar Association to “consider a recommendation to reinvigorate the pardon process.” Justice Anthony M. Kennedy, Keynote Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html). The ABA responded with some modest recommendations for increasing pardons on the basis of post-sentencing circumstances. JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, Resolution 121C (2004), *available at* <http://www.abanet.org/media/kencomm/rep121c.pdf>.

<sup>65</sup> *Woodward*, 523 U.S. at 288 (O’Connor, J., concurring in part and concurring in the judgment).

mal procedural safeguards apply to clemency proceedings.”<sup>66</sup> Justice O’Connor noted that due process would be threatened, for example, when “a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.”<sup>67</sup> Justice Stevens wrote separately but provided a fifth vote for the view that “[o]ur cases also support the conclusion that if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause.”<sup>68</sup> Although the Court has yet to take the further step of striking down a clemency decision for failing to comply with the Due Process Clause, its rhetoric indicates that it stands ready to do so. This willingness is a stark departure from its prior approach to clemency, and the motivating rationale for the switch is clearly grounded in concerns about arbitrary and capricious decisionmaking.

Most legal scholars who write on the subject are also dismissive of the current approach to clemency,<sup>69</sup> and their critique is similarly grounded in concerns about process and the need for more administrative law checks. Critics worry that the “absence of procedural and substantive constraints on the clemency power . . . permits arbitrary decisionmaking by the Executive that is, for most intents and purposes, unreviewable.”<sup>70</sup> They have argued that “an unlimited power to make exceptions to the law depends for its legitimacy upon a process that at least appears to limit it.”<sup>71</sup> They express unease about the “potential for arbitrary decisionmaking that inheres in the unfettered clemency power.”<sup>72</sup> The exercise of mercy, in their view, “must not be arbitrary or capricious but must rather rest upon some good reason.”<sup>73</sup>

<sup>66</sup> *Id.* at 289 (emphasis omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 292 (Stevens, J., concurring in part and dissenting in part). Justice Stevens’s view may be limited to clemency proceedings in death penalty cases. *See id.* at 293–95.

<sup>69</sup> “To the extent that scholars think about it, pardon is regarded as a constitutional anomaly . . .” Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, LITIGATION, Winter 2006, at 25, 25.

<sup>70</sup> Hoffstadt, *supra* note 58, at 597.

<sup>71</sup> Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton’s Last Pardons*, 31 CAP. U. L. REV. 185, 217 (2003); *see also* Victoria J. Palacios, *Faith in Fantasy: The Supreme Court’s Reliance on Commutation To Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 332 (1996) (“[T]he ultimate critiques are that commutation is discretionary and operates largely without standards or review.” (footnote omitted)).

<sup>72</sup> Coleen E. Klasmeier, Note, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1535 (1995).

<sup>73</sup> Murphy, *supra* note 5, at 181; *see also* Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT’G REP. 119, 124 (2000–2001) (preferring rules to guide the discretion of those who can mitigate sentences); Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 254 (2003) (noting that some critics of clemency power “view the act of pardoning [as] anachronistic in a legal regime that



The discretion to grant clemency has been criticized in other quarters as well. Members of Congress have proposed restrictions on the President's pardon power and have held numerous hearings on limiting its exercise.<sup>74</sup> Media accounts have also questioned the pardon power.<sup>75</sup>

As with jury nullification, it is not possible to prove that administrative law is a direct cause of all of these critiques of clemency. Certainly it is important to acknowledge that administrative law is at most a contributing factor because politics plays a central role, particularly if one looks not to the rhetoric about clemency but to the actual rates of its exercise. At both the state and federal level, grants of executive clemency have plummeted in recent decades. For much of the nation's history, clemency was used routinely at the federal level.<sup>76</sup> But the percentage of federal grants of clemency applications has de-

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dwells on rules and is wary of discretion"); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 622-24 (1991) (recommending a clemency commission that would follow guidelines and give reasons for its decisions); Markel, *supra* note 5, at 1432, 1477 (advocating for judicial review of pardons to make sure they are not given for "arbitrary and capricious reasons").

<sup>74</sup> For examples of proposed restrictions on pardons, see S. 2042, 106th Cong. (2000); H.R. 3626, 106th Cong. (2000); S.J. Res. 3, 106th Cong. (1999); and H.R.J. Res. 32, 103d Cong. (1993). See also William F. Duker, *The President's Power To Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 537 (1977) (discussing a constitutional amendment proposed by Senator Walter Mondale that would have rendered pardons ineffective if two-thirds of each house of Congress voted to disapprove the pardon). For a discussion of historical instances of congressional oversight hearings of the presidential pardon process, see Peterson, *supra* note 55, at 1260-62, 1265-66.

<sup>75</sup> See, e.g., Kurt Eichenwald & Michael Moss, *The Privilege of Kings Becomes That of Presidents*, N.Y. TIMES, Jan. 29, 2001, at A18 (quoting an expert on pardons stating that "[i]t doesn't fit into the checks and balances concept" because it "appears to be almost an unfettered power"); Kathleen Dean Moore, Op.-Ed., *When Mercy Weakens Justice*, N.Y. TIMES, Aug. 10, 1989, at A23 ("Because pardons single people out for special treatment, every pardon is potentially . . . a violation of the principle of equal treatment under the law."); John Tierney, *Just Forgive, and Forget the Big Bucks*, N.Y. TIMES, Feb. 23, 2001, at B1 (noting that "it's strange that any president has the power to arbitrarily overrule the judicial system"). Margaret Colgate Love describes the "popular view of the pardon power as a remnant of tribal kingship, rather than an integral part of our constitutional scheme." Love, *supra* note 71, at 185. Not all accounts are negative. Occasionally newspapers highlight particular cases that merit clemency. See, e.g., Alan Berlow, *What Happened in Norfolk?*, N.Y. TIMES, Aug. 19, 2007, § 6 (Magazine), at 36 (arguing for clemency for a prisoner in Virginia); Jim Dwyer, *One Man's Plea for Mercy, with a Recent Precedent in Mind*, N.Y. TIMES, July 7, 2007, at B1 (laying out the case for a New York man's pardon); Richard B. Schmitt, *An Epic Fight for Clemency*, L.A. TIMES, Sept. 15, 2007, at A1 (favorably describing one of President Bush's commutations).

<sup>76</sup> See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT'G. REP. 125, 125 (2000-2001) (noting that from early on in the nation's history, "pardon was pressed into service as a regular player in the federal justice system" and "the meat and potatoes of pardoning was the ordinary criminal case in which the legal system had produced too harsh a result").

clined sharply,<sup>77</sup> with the biggest drop occurring from President Nixon's presidency until today.<sup>78</sup> State level pardons have also fallen in recent decades.<sup>79</sup> "Pardons are granted on more than a token basis in only 13 states and are a realistically available remedy in only about half of those."<sup>80</sup> This same time period has been characterized by the dominance of tough-on-crime politics, and one cannot deny the relationship between this trend and the decline of executive clemency. No governor or President wants to be viewed as soft on crime or to be blamed if a pardoned individual goes on to commit another crime. Moreover, restrictions on pardons in some states — such as the prohibition on pardons for certain offenses like drug trafficking and sex offenses and mandatory victim notification before pardons are granted — have arguably limited the number of pardons granted, and these restrictions are an obvious outgrowth of get-tough politics.<sup>81</sup>

But to acknowledge the role of tough-on-crime politics does not mean that administrative law is not also playing a key role. First, although the decline in clemency correlates with the get-tough era, this era is also the one in which hard look review of agencies emerged. Second, while the rates of clemency are important, it is also important to look beyond the numbers to what is being said about clemency. And the discourse on clemency is not simply dominated by get-tough

<sup>77</sup> Parole and probation took over some of the functions of pardons in the 1930s, but pardons "remained vital through the 1970's." *Id.* at 125–26.

<sup>78</sup> President Nixon granted 36% of his petitions for clemency, President Ford granted 27%, President Carter granted 22%, President Reagan granted 12%, President George H.W. Bush granted 5%, and President Clinton granted 6%. See U.S. Dep't of Justice, Presidential Clemency Actions by Administration: 1945 to 2001, [http://www.usdoj.gov/pardon/actions\\_administration.htm](http://www.usdoj.gov/pardon/actions_administration.htm) (last visited Feb. 9, 2008). Before his final year in office, President Clinton had granted only 3% of the clemency applications received during his administration. See *id.* As of the end of 2007, President George W. Bush had pardoned 142 people and commuted five sentences, Kirk Semple, *In Twilight of Life, a Former Moonshiner Finds Mercy*, N.Y. TIMES, Dec. 13, 2007, at A37, one of which was the commutation of I. Lewis Libby's sentence, Michael Kranish, *Bush Not Ruling Out a Pardon for Libby*, BOSTON GLOBE, July 4, 2007, at A1. President Bush's pardons are "the fewest pardons of any president [serving more than one term] since World War II." Associated Press, *Bush Issues Pardons, but to a Relative Few*, N.Y. TIMES, Dec. 22, 2006, at A31.

<sup>79</sup> See Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY, *supra* note 5, at 36, 37 (citing a survey of all commutations from 1995 to 2003 that found that "most states averaged fewer than one hundred commutations per state, with thirty-four states . . . having dispensed twenty or fewer"); Eric R. Johnson, Student Article, *Doe v. Nelson: The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. REV. 156, 179 (2005) (noting that "[a] similar downward trend" to the one at the federal level "can be found at the state level").

<sup>80</sup> Love, *supra* note 69, at 26.

<sup>81</sup> Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 433, 437 (1999) (noting that some states have "lengthy lists" of types of offenses that are ineligible for pardons, that victim notice requirements tend to make states more reluctant to grant pardons, and that these requirements "fit well within the 'get tough on crime' ideology").

rhetoric. On the contrary, much of the criticism of clemency focuses on the process and not on the substantive merits of particular cases. When President Clinton granted a number of controversial pardons on his last day in office, for example, a large portion of the criticism focused on the fact that the President bypassed the review process of the Office of the Pardon Attorney.<sup>82</sup> The concurring Justices in *Woodard* similarly focused their criticism on clemency procedures, not substantive outcomes.<sup>83</sup> Margaret Colgate Love, a former Pardon Attorney, has argued that “[p]eople are most likely to be persuaded that a particular pardon is in the public interest if they trust the process by which it was produced.”<sup>84</sup> Those attacking clemency are therefore using key administrative law concepts to frame their critiques. Even if this rhetoric masks a real motivation to be tough on crime, the fact that administrative law concepts are employed shows that these principles are thought to have resonance.

Third, administrative law provides a better explanation than raw politics for the existence and perceived importance of the elaborate administrative procedures, regulations, and institutions many jurisdictions employ for clemency decisions.<sup>85</sup> Roughly two-thirds of the states use administrative boards that either provide the governor with nonbinding advice about pardons or share power with the governor in making pardon decisions.<sup>86</sup> Five states vest the ultimate pardon decision in a board instead of the governor.<sup>87</sup> These pardon boards can be viewed as “attempt[s] to guard against arbitrary and capricious exer-

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<sup>82</sup> “The main concern that surfaced in light of the Clinton pardons is that President Clinton bypassed the normal pardon procedures . . . .” Paul J. Haase, Note, “*Oh My Darling Clemency*”: *Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287, 1298 (2002); see also Kurt Eichenwald & Michael Moss, *Rising Numbers Sought Pardons in Last Two Years*, N.Y. TIMES, Jan. 29, 2001, at A1 (noting that “several legal experts said the midnight rush by Mr. Clinton was deeply troubling”).

<sup>83</sup> See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring in part and concurring in the judgment).

<sup>84</sup> Love, *supra* note 71, at 188.

<sup>85</sup> Other factors are at play as well. For example, politics helps drive the creation of pardon boards because boards provide political insulation for governors. Boards are also useful to address the ever-expanding criminal caseload. Cf. CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* 11, 23 (1922) (noting that boards were created in many states because of the governor’s increased workload). To the extent that regulations aim to limit discretion and regularize the process, however, the primary motivating factor is the same one that drives administrative law: controlling discretion. See *id.* (noting boards were also created based on “a feeling in a number of states that the clemency power had not been wisely administered by the governor” and that “the system needed further regulation and safeguarding”).

<sup>86</sup> See Dorne & Gewerth, *supra* note 81, at 427–28 (finding that twenty-six states “allow the governor to make a pardon decision with the *a priori* non-binding advice of a board” and that nine states “have a shared power model where the governor actually sits on the pardon board” or “in some other way makes the decision in concert with members of the board”).

<sup>87</sup> *Id.* at 427.

cise[s] of the pardoning authority.”<sup>88</sup> Indeed, most state pardon advisory boards were created contemporaneously with the birth of the administrative state,<sup>89</sup> and after the New Deal, some states modeled their boards after independent regulatory agencies.<sup>90</sup> At the federal level, regulations governing the issuance of pardons were similarly established around the time of the creation of the first major federal administrative agency.<sup>91</sup> Thus, the expansion of clemency’s regulation correlates with the rise of the administrative state.

Finally, and perhaps most importantly, it is not just tough-on-crime politicians, interest groups, and voters who have targeted pardons for criticism. As noted, legal elites — scholars and jurists — have challenged clemency, and they have done so in the language of administrative law. These individuals are critical in shaping the legal response to clemency, so their resistance based on administrative law concerns is important in its own right.

3. *Prosecutorial Discretion.* — Jurors and the executive are not, of course, the only actors in the criminal justice system with the authority to be merciful to those facing criminal charges. Prosecutors possess a similar power because of their broad control over charging decisions.<sup>92</sup> Prosecutors’ broad power to be merciful is perhaps even more significant because prosecutors are centrally involved in more criminal cases than are jurors, governors, or the President, and because prosecutors exercise their power to be merciful more frequently than these other actors do.<sup>93</sup> Prosecutors need not follow any particular protocols be-

<sup>88</sup> *Id.* at 425.

<sup>89</sup> See generally JENSEN, *supra* note 85, at 11–16 (summarizing creation of advisory boards in states in the late nineteenth and early twentieth centuries).

<sup>90</sup> See, e.g., Act of May 25, 1967, Pub. Act No. 152, §§ 48–55, 1967 Conn. Pub. Acts 185, 201–05 (codified as amended in scattered sections of CONN. GEN. STAT. tit. 54, pt. III) (creating a Connecticut council of correction and a board of parole); Ala. Bd. of Pardons and Paroles, History of the Agency, <http://www.pardons.state.al.us/ALABPP/Main/History.html> (last visited Feb. 9, 2008) (describing the Alabama legislature’s creation of an independent board in 1939); Ga. State Bd. of Pardons and Paroles, History of Parole in Georgia, [http://www.pap.state.ga.us/opencms/export/sites/default/home/history\\_of\\_parole.html](http://www.pap.state.ga.us/opencms/export/sites/default/home/history_of_parole.html) (last visited Feb. 9, 2008) (noting that Georgia created “an independent agency to administer executive clemency” in 1943).

<sup>91</sup> President McKinley signed the first federal pardon regulations in 1898. Love, *supra* note 71, at 190 n.15. The Interstate Commerce Commission was established by the Interstate Commerce Act of 1887. See *supra* note 32. Federal pardon regulations are merely advisory, but they act as important political limits because the President faces condemnation for ignoring them.

<sup>92</sup> See King, *supra* note 47, at 455 (noting similarities among the jury’s power to nullify, the President’s power to pardon, and the executive’s power not to prosecute).

<sup>93</sup> See Markel, *supra* note 5, at 1439 n.57 (noting that in fiscal year 1976, federal prosecutors declined to bring charges in more than half the cases referred to them). As noted above in note 52, it is impossible to reach a firm conclusion about the relative frequency of instances of each type of mercy because nullification numbers are not possible to obtain. Nevertheless, it is clear that prosecutors have more opportunities to be merciful than do jurors because prosecutors handle all criminal cases, whereas ninety-five percent of cases resulting in criminal convictions never

fore reaching a decision not to bring charges, nor must they provide reasons for their decision. The Supreme Court has concluded that “the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”<sup>94</sup> Although prosecutors cannot engage in unlawful discrimination — such as discrimination on the basis of race or religion — the Supreme Court has made it almost impossible for such discrimination claims to be evaluated by a court because a challenger cannot even obtain discovery from a prosecutor’s office unless he or she can “produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not.”<sup>95</sup>

Despite its similarity to nullification and clemency, prosecutorial discretion has not faced the same intensity of attack or criticism that pardons and nullification have. To be sure, legal scholars have expressed concern about prosecutorial discretion,<sup>96</sup> but most commentators worry more about the coercive power of prosecutors rather than their power to be lenient.<sup>97</sup> More importantly, courts have refused to police prosecutorial charging decisions,<sup>98</sup> and prosecutorial power is rarely highlighted in the press as a cause for concern. As Professor

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even reach a jury. See Bureau of Justice Statistics, U.S. Dep’t of Justice, Criminal Case Processing Statistics (Aug. 6, 2006), <http://www.ojp.usdoj.gov/bjs/cases.htm>.

<sup>94</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>95</sup> *United States v. Armstrong*, 517 U.S. 456, 469 (1996).

<sup>96</sup> See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

<sup>97</sup> For an exception, see Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921–23 (2006) (describing how prosecutors’ “assessment of just punishment tends to soften over time” and criticizing the disjunction this creates with the views of the public). The lead prosecutors in a jurisdiction, such as the attorney general or district attorney, have sometimes expressed concern with the discretion of line assistants to be lenient. See, e.g., Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors 2 (Sept. 22, 2003), available at <http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrgmem.pdf> (noting federal prosecutors’ general duty “to charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General”). But this concern is a classic principal-agent problem that is internal to the prosecutor’s office. The office heads have made no claims that they themselves should be dispossessed of the discretion to be lenient. Their claims relate only to how they want their subordinates to proceed in the absence of their approval. See *id.* (noting that an Assistant Attorney General, United States Attorney, or designated supervisory attorney is authorized to make exceptions to the general policy, including for “other exceptional circumstances” that are not detailed in the memo).

<sup>98</sup> In addition to *Bordenkircher v. Hayes*, 434 U.S. 357, see *Wade v. United States*, 504 U.S. 181 (1992) (holding that a prosecutor’s discretion over substantial-assistance motions is reviewable only for unconstitutional motives); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (recognizing prosecutors’ broad power to decide what charges to bring); *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (noting that whether to prosecute and what charges to bring “are decisions that generally rest in the prosecutor’s discretion”); *Santobello v. New York*, 404 U.S. 257, 260 (1971) (accepting prosecutors’ power to plea bargain); and *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379–83 (2d Cir. 1973) (noting prosecutors’ broad discretion).

William Stuntz has noted, prosecutors' power to be lenient is "widely seen as necessary, and frequently as a good thing: It permits mercy, and it avoids flooding the system with low-level crimes."<sup>99</sup>

What explains the difference in treatment between these categories of mercy? Why are the jury's power to nullify and the executive's power to grant clemency viewed with suspicion while prosecutorial power to be lenient is seen "as a good thing"? One possibility might be that prosecutors are seen as more accountable for their actions than jurors or even the executive. Most local prosecutors are elected,<sup>100</sup> so voters ultimately police the decisions of most prosecutors. Juries, in contrast, answer to no one. And even though the executive is also elected, clemency decisions are such a small part of the executive's decisionmaking portfolio that it might not be realistic to say that voters can hold the executive accountable for clemency decisions when other types of decisions are more important to voters. Moreover, clemency decisions are often made in the waning days of an administration that is not facing reelection. Prosecutors, in contrast, are likely to be selected or rejected on the basis of decisions about prosecutions.

But while accountability might explain part of the varying treatment of different actors exercising mercy, it does not offer a full explanation. First, not all prosecutors are directly accountable. Federal prosecutors are not elected, yet they have received the same deferential treatment as state prosecutors who are elected. More fundamentally, even if prosecutors are accountable in an election, there is reason to doubt that they are being judged on their decisions not to charge as opposed to their affirmative charging decisions. Put another way, one reason why prosecutors have not received the same scrutiny as these other actors may be that fewer noteworthy examples of improper exercises of discretion come to the public's attention because a prosecutor's decision not to charge is sequestered from *any* kind of review, not just judicial review.<sup>101</sup> Decisions not to charge are generally unknown to

<sup>99</sup> William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000); see also Pamela Baschab, *Jury Nullification: The Anti-Atticus*, 65 ALA. LAW. 110, 113 (2004) (criticizing jury nullification but approving of the fact that prosecutors have similar discretion not to prosecute); Jamie S. Gorelick & Harry Litman, Keynote Address, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L. J. 967, 973 (1995) (praising federal prosecutorial discretion because it is "the most important and effective brake on the federalization of crime"); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2139 (1998) ("Discretion in enforcement permits rapid adjustment of priorities as the extent and perceived obnoxiousness of . . . offenses wax and wane.").

<sup>100</sup> Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't of Justice, *Prosecutors in State Courts*, BUREAU JUST. STAT. BULL., July 2006, at 1, 2, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psco5.pdf> (noting that all chief prosecutors are elected except those in Alaska, Connecticut, New Jersey, and the District of Columbia).

<sup>101</sup> This contrast in transparency might explain in part why the President's unreviewable power to pardon has faced more criticism than federal prosecutors' unreviewable decisions not to

any actor other than the defendant or, if relevant, the victim. Unless the crime received media attention and the press has followed the prosecutor's investigation, or the victim can somehow raise the profile of the case, the public and elected officials will have no knowledge of the facts that support bringing charges. Juries, in contrast, sit in public trials, so the evidence in favor of a conviction is there for all to see. Pardon decisions also typically take place after a conviction, so the case against the defendant is similarly accessible. This openness makes it much easier to identify cases where the jury or an executive has abused its discretion, which in turn can cast doubt on why discretion rests with that actor in the first place.

But there is an additional reason why prosecutorial discretion is viewed with less suspicion than the other mechanisms of mercy, and it is one that rests firmly in administrative law. 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.<sup>102</sup> Indeed, the Supreme Court cited the parallels between prosecutorial decisions not to indict and agency decisions not to bring enforcement actions when it determined that the latter are not subject to judicial review.<sup>103</sup> Thus, one of the rare pockets of administrative decisionmaking that lies beyond court oversight can be understood to justify a similarly discretionary feature of criminal decisionmaking.<sup>104</sup> It is therefore not

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bring charges even though federal prosecutors are subordinate executive officers and are not themselves elected. See Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 114 (2005) ("It seems analytic that a subordinate executive officer cannot exercise a greater measure of discretionary authority than the principal from whom that authority is derived."). Another explanation, though, is that presidential pardons usually come after conviction, so the President's decision often amounts to second-guessing of a jury's verdict or a prosecutor's decision to seek a plea; a decision not to charge, in contrast, does not contradict the judgment of another actor in the system.

<sup>102</sup> See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (noting that an agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise"). Moreover, if law enforcement is seen as a joint enterprise of prosecutors and police officers, as Professor Daniel Richman has effectively pointed out, Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003), the professionalization of police forces in the second half of the twentieth century lends additional support to a theory that sees deference to prosecutors and law enforcement as based on a notion of administrative expertise. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1742–45 (2005) (describing the "second wave" of police professionalism).

<sup>103</sup> See *Heckler*, 470 U.S. at 832.

<sup>104</sup> While *Heckler* has been criticized for giving agencies broad leeway in deciding whether to prosecute, see sources cited *supra* note 25, criminal prosecutors' discretion has not faced the same scrutiny.

surprising that prosecutorial power to be lenient has not undergone the same level of scrutiny as the other pockets of mercy, for it is the only one that is consistent with current administrative law doctrine.

## II. THE CENTRALITY OF JUDGES: THE RISE OF ADMINISTRATIVE LAW AND THE INCREASE OF JUDICIAL POWER

With the growth of the administrative state, agencies have obviously gained increasing power. Although they may be the obvious beneficiaries of a bureaucratic regime, they are not the only ones. In particular, judges have become increasingly important because of their central role in interpreting the statutes under which all agencies must operate. Judges have used this power to interpret statutes to correct perceived deficiencies with a law's application in a particular case. The legal community has, in turn, come to view judges as the proper — indeed the only — institutional actors to correct shortcomings in statutory law.

To understand how administrative law has contributed to the primacy of judges, it is important to recognize the centrality of statutes to administrative law. Agencies are creatures of statutes, and the non-delegation doctrine insists that Congress establish an intelligible principle to guide agencies.<sup>105</sup> It is then up to courts to determine whether agencies have obeyed their statutory mandates.

Although the Supreme Court has rejected nondelegation challenges to notoriously vague standards,<sup>106</sup> courts frequently reject agency actions as inconsistent with even broad statutory mandates.<sup>107</sup> While scholars debate whether the use of legislative history or a statute's purpose should override the text,<sup>108</sup> courts overwhelmingly embrace

<sup>105</sup> See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971).

<sup>106</sup> See *Am. Trucking*, 531 U.S. at 474 (“In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’” (citing *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935); and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935))).

<sup>107</sup> See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30–31 & fig.A (1998) (reviewing a sample of federal appellate cases involving the application of the two-step framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and finding that 38% were resolved at *Chevron* “step one,” with the agency’s position rejected in 58% of those cases).

<sup>108</sup> Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 107–27 (2001) (advocating for the “faithful agent” model of judicial power and arguing that the modern rejection of “the equity of the statute” will not lead to rigidity, literalism, or absurdity in textualist interpretation), with William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1087–



these interpretive sources to determine whether a statute is clear on a particular issue.<sup>109</sup> This methodology gives judges leeway to interpret statutes to accord with their own policy preferences. And, in fact, there is evidence that judges are doing precisely that, rejecting agency interpretations that do not correspond with the judges' ideological views.<sup>110</sup>

Even when courts conclude that an agency is operating within its statutory mandate, they have additional authority over the agency by virtue of the fact that courts take a hard look at an agency's justifications for its policies. Courts look to see whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"<sup>111</sup> The Court has characterized this inquiry as a "thorough, probing, in-depth review."<sup>112</sup> This, too, allows judges to reject outcomes they view as unfair or unwise.

As the judiciary's power over administrative statutes has increased, so too has the judiciary's view of its authority under the Constitution.<sup>113</sup> And it is probably not a coincidence. Consider, for example,

1106 (2001) (describing the historical origins of judicial power as supporting dynamic interpretation techniques).

<sup>109</sup> In *Chevron*, the Court noted that courts should "employ[] traditional tools of statutory construction," 467 U.S. at 843 n.9, which include legislative history, a statute's purpose, and consistency with other statutes. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (analyzing the overall regulatory scheme and later legislation to determine whether a statute granted the FDA the authority to regulate tobacco); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (looking at a combination of text, legislative history, and significance of a subsequent amendment to the statute in determining the meaning of "taking" an animal); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321-22 (1990) (arguing that judges do, and should, use varying methods to interpret statutes).

<sup>110</sup> Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825-26 (2006) (finding that "on both the Supreme Court and the courts of appeals, the application of the *Chevron* framework is greatly affected by the judges' own convictions. Whatever *Chevron* may say, the data reveal a strong relationship between the justices' ideological predispositions and the probability that they will validate agency determinations.").

<sup>111</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

<sup>112</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

<sup>113</sup> The Court takes an expansive view of its role in substantive constitutional interpretation, see, e.g., Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353 (1981) (noting that "many judges, and perhaps most academic commentators view the constitution as authorizing courts to nullify the results of the political process on the basis of general principles of political morality not derived from the constitutional text or the structure it creates"); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257 (2004) ("The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements."); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996) (defending pragmatic judging,

the inverse relationship between the strength of the political question doctrine and the role of courts in reviewing agency decisions; the political question doctrine has fallen out of favor as the role of judges in policing the administrative state has increased. It is easy to see the driving force behind both developments: the worry about arbitrary application of the law and the notion that judges are the appropriate checks on this unguided discretion. Justice Souter's concurring opinion in *Nixon v. United States*<sup>114</sup> provides a vivid illustration. Even though the Constitution gives the Senate the power to try impeachments — a prototypical political question — Justice Souter reserved a place for judicial review “[i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss.”<sup>115</sup> In that situation, he noted, the abuse of power would be “so far beyond the scope of [the Senate’s] constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.”<sup>116</sup> Justice Souter worried about discretion run amok and saw a role for the courts in guarding against arbitrary and capricious decisionmaking. Of course he could envision such a role for the courts, for that is what they do every day in reviewing all kinds of agency actions.

As a result of judges’ broad powers over the statutes that govern the administrative state and their willingness to interpret such statutes to ensure justice in particular cases — not to mention the judiciary’s similar approach to interpreting the Constitution — our legal culture looks to judges as uniquely qualified to solve inequities in a law’s application. Professor Ronald Dworkin’s theory of judicial interpretation of statutes, for example, vests judges with broad authority to interpret statutes to achieve a just result.<sup>117</sup> Professor William Eskridge’s theory of dynamic interpretation similarly relies on judges to update stat-

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which means viewing statutes and constitutions “merely as sources of information and as limited constraints on [a judge’s] freedom of decision”), and of the scope of questions that are appropriate for courts, *see, e.g.*, Barkow, *supra* note 21.

<sup>114</sup> 506 U.S. 224 (1993).

<sup>115</sup> *Id.* at 253–54 (Souter, J., concurring in the judgment).

<sup>116</sup> *Id.* at 254. Justice O’Connor in *Woodard* used the same coin-toss scenario when she noted that due process concerns should limit executive power over pardons. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring in part and concurring in the judgment).

<sup>117</sup> *See* RONALD DWORKIN, *LAW’S EMPIRE* 313–54 (1986).

utes to accommodate new and unforeseen problems.<sup>118</sup> Other scholars embrace comparably expansive views of the judicial role.<sup>119</sup>

Because judges stand ready to police failings in the legal system and seemingly have the power to correct what might be wrong with a law in the administrative context, which covers an extremely wide range of government action, it is difficult for lawyers and the public to see why there might be a need for someone without expertise in the law — for example, a lay jury, a governor, or the President — to have the same power in criminal cases. Indeed, if even the experts who work at agencies in highly technical fields are subject to oversight by the courts, why should a group of laypersons or the President escape judicial oversight for their decisions? This impulse explains why legal scholars who identify problems with the administration of criminal justice tend to look to judges to provide the answers.<sup>120</sup>

### III. THE LIMITS OF THE BUREAUCRATIC STATE AND THE PLACE FOR MERCY

Faced with the tension between jury nullification and executive clemency on the one hand and administrative law principles on the

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<sup>118</sup> See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496 (1987) (outlining theory); see also William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 642–43 (2002) (arguing that “[s]tatutory interpreters should construe laws to reduce the risk of unanticipated error costs of a large magnitude”).

<sup>119</sup> See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 58 (1988) (endorsing a “nautical” model of interpretation that asks judges to interpret statutes as if they had been recently enacted on the theory that “fundamental understandings, such as right and wrong, entitlement, responsibility, fairness, and duty” are norms that should be furthered by interpretation); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 462–503 (1989) (advocating a broad role for judges when they interpret regulatory statutes). Professor Henry Monaghan has observed a similar tendency among legal scholars to view judges as empowered to interpret the Constitution to promote justice and fairness. See Monaghan, *supra* note 113, at 358–60.

<sup>120</sup> See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 587 (2001) (advocating greater court oversight as the “probably best” solution to criminal law’s “pathological politics”). Capital punishment provides a vivid illustration of this dynamic in the criminal sphere. Scholars such as Professors Carol Steiker and Jordan Steiker have observed that one reason that executive clemency rates in capital cases have declined so sharply in recent decades is that there is now a perception among governors and other actors in the criminal justice system that the Supreme Court is providing the necessary regulation of these cases. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 435 (1995) (noting how the Court’s regulation of capital punishment serves a legitimating function and may lead, among other things, to governors “feel[ing] that any sentence that survives both state and federal review is not an appropriate vehicle for exercising the power of clemency”); see also Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7, 17 (1992) (“Executive clemency all but disappeared in the United States in the era of hands-on federal court involvement.”).

other, the temptation for legal elites has been to bring clemency and nullification into line with the administrative state. Before applying administrative law principles to the pockets of leniency in the criminal law, however, it is important to recognize key distinctions between the two fields that justify treating them differently.

The administrative state rests on the notion that agencies, which are otherwise unaccountable, must be held to the laws that govern them. The assumptions are that the laws governing agencies represent a balancing of the relevant interests, and to the extent provisions of these laws are not drafted perfectly or do not seem to fulfill the larger purpose of the legislation, judges can interpret these laws to correct any failings, or the legislature can fix the laws with subsequent legislation.

Neither of these assumptions holds true for criminal law. The process that produces criminal laws is far less balanced than the one that produces administrative laws because in criminal law, the powerful groups uniformly line up in favor of greater government power and harsher penalties.<sup>121</sup> Criminal laws will therefore be more likely to yield unjust results in particular cases unless there is a check that can operate outside the laws themselves.

And while judges might be the appropriate check in the context of administrative law, they have far less leeway with today's criminal laws. Modern criminal laws are written in broad terms that give prosecutors broad charging discretion. Most cases never go to trial. Once a defendant admits guilt, laws often dictate a particular sentence — and a particularly harsh sentence. Today's determinate sentencing schemes in many jurisdictions "severely limit[] the government's ability to take into account extraordinary facts or circumstances in particular cases."<sup>122</sup> Judges therefore often have little freedom to provide individual justice.<sup>123</sup>

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<sup>121</sup> I have written about this in greater detail elsewhere. See Barkow, *Administering Crime*, *supra* note 28, at 723–35 (comparing political pressures faced by commissions regulating sentencing to those faced by agencies regulating noncriminal fields); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278–83 (2005) (describing the politics of criminal sentencing); Barkow, *Separation of Powers and the Criminal Law*, *supra* note 13, at 1028–31 (explaining the differences between the political dynamics of criminal law and administrative law). In addition to this political economy explanation for why criminal punishment is disproportionately harsh, Professor Carol Steiker has explained that the leading theories of punishment — retributivism and social welfare theory — also push toward "an ever-upward tending ratchet of punishment." Steiker, *supra* note 5, at 30–31.

<sup>122</sup> Love, *supra* note 69, at 30.

<sup>123</sup> For much of the nation's history, judges had discretion to set punishments based on a defendant's individual circumstances. That authority gave judges discretion to calibrate sentences based on the facts of an individual's case instead of generalized and often uninformed notions about punishment that tend to infect the legislative process. Barkow, *Federalism and the Politics of Sentencing*, *supra* note 121, at 1280–83. This judicial corrective was far from perfect, however.

Both nullification and clemency allow individualization, which becomes increasingly important as judges lose authority to tailor sentences. Just as jury nullification and executive clemency played an important role in checking mandatory laws that constrained judges during the country's early history,<sup>124</sup> these same safety valves are critical today.<sup>125</sup> As Alexander Hamilton wrote in the Federalist Papers, pardons are important because "[t]he criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."<sup>126</sup> Indeed, executive clemency is even more relevant today than in the past because of the decline of parole and probation and the increasingly harsh collateral consequences of incarceration.<sup>127</sup> The jury, "as spokesman for the community's sense of values," similarly provides the "particularized justice" that is

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For even when judges possessed discretion to check broad laws through their sentencing authority, they often failed to do so, either because the judges were also elected and faced political pressure or because they tended to side with the government. See Barkow, *supra* note 49, at 57–58, 72 (explaining why judges might be partial to the government); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (finding that judges give harsher sentences closer to their reelection).

<sup>124</sup> See Barkow, *supra* note 49, at 79 (noting that jury acquittals led to reforms in sentencing laws); George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT'G REP. 212, 220 n.20 (2004) (noting that "[p]ardoning was a regular practice for the early Presidents" and providing statistical support; for example, between 1801 and 1828, 596 defendants were found guilty at the federal level and, of those, 148 were ultimately pardoned) (citing DWIGHT F. HENDERSON, CONGRESS, COURTS AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, at 46–47 & 53 n.94 (1985)).

<sup>125</sup> Lardner & Love, *supra* note 124, at 212 (noting the "importance of having a safety valve in any system of mandatory punishments, one that is both readily accessible and politically accountable"). As James Iredell noted in the debates over the Constitution, "[i]t is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice." James Iredell, Address in the North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 17, 17 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>126</sup> THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS, ch. 46, at 111 (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press 1995) (1764) ("Clemency . . . should be redundant in a perfect administration where punishments are mild and the methods of judgement are regular and expeditious. This truth will seem hard to one who lives amid the chaos of a criminal system in which amnesties and pardons are called for in proportion to the absurdity of the laws and the awful severity of the sentences."); 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 298 (1939) [hereinafter ATTORNEY GENERAL'S SURVEY] (noting that clemency has "historically always been used . . . to take care of cases where the legal rules have produced a harsh, unjust, or popularly unacceptable result" and that "[s]uch cases will continue to arise under any legal system").

<sup>127</sup> See JUSTICE KENNEDY COMM'N, *supra* note 64, at 8 (arguing that "pardon[s] must remain an essential component of any just system of punishment" in part because they represent the only viable mechanism for removing collateral consequences of a conviction and addressing changed circumstances that might arise after sentencing).

necessary because “[t]he drafters of legal rules cannot anticipate and take account of every case where a defendant’s conduct is ‘unlawful’ but not blameworthy.”<sup>128</sup>

Jury nullification and executive clemency are also important because they can prompt attention to systemic failures in the criminal justice process that make the need for individualization even more pressing. Jury nullification has led, for example, to reforms in police practices,<sup>129</sup> substantive criminal law,<sup>130</sup> and the death penalty.<sup>131</sup> Grants of clemency have also brought about reforms in the law of self defense and insanity,<sup>132</sup> and in the death penalty. To take a notable recent example, former Illinois Governor George Ryan granted clemency to all of the defendants on death row because of his concern about systemwide errors in the administration of the death penalty.<sup>133</sup> Although the wisdom of his blanket clemency decision can be debated,<sup>134</sup> his decision triggered a closer examination of capital cases.<sup>135</sup> Judges are

<sup>128</sup> *United States v. Dougherty*, 473 F.2d 1113, 1142 (Bazelon, C.J., concurring in part and dissenting in part).

<sup>129</sup> The O.J. Simpson verdict, for instance, was widely viewed as an example of jury nullification, see, e.g., John Leo, *The Color of the Law*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 24, 24; Pinkerton, *supra* note 51, and it led to a close examination of racism in the Los Angeles police department, see Patrick McGreevy, *Post-Fuhrman Reforms in Place, Parks Declares*, DAILY NEWS (L.A.), Aug. 26, 1998, LEXIS, News Library, LAD File; Jim Newton, *Police Scandal To Test City Leaders*, L.A. TIMES, Sep. 20, 1999, at A1.

<sup>130</sup> For example, jury nullification in prohibition cases, *KALVEN & ZEISEL*, *supra* note 52, at 76, 291–92 & n.10 (reporting that acquittal rates in federal cases for liquor violations were as high as 60% in some parts of the country), can be linked to the repeal of those laws.

<sup>131</sup> See Leipold, *supra* note 29, at 298 (noting that “the frequent exercise of the nullification power” was part of the reason that the Supreme Court concluded that mandatory capital punishment schemes violated the Eighth Amendment).

<sup>132</sup> ATTORNEY GENERAL’S SURVEY, *supra* note 126, at 295–96 (noting that “the almost wholly unrestricted scope of the [pardon] power . . . has been the tool by which many of the most important reforms of the substantive criminal law have been introduced,” including the introduction of self-defense and insanity defenses, and also attributing the advent of parole, furloughs, and good-time credits to pardon practices).

<sup>133</sup> Alexia Elejalde-Ruiz, *Illinois Governor Empties Death Row*, BOSTON GLOBE, Jan. 12, 2003, at A1; Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1.

<sup>134</sup> See Markel, *supra* note 5, at 1424 nn.11–12 (collecting sources praising and criticizing the Ryan commutation).

<sup>135</sup> Editorial, *Clemency Action Draws Scrutiny*, ADVOCATE (Baton Rouge, La.), Jan. 19, 2003, at 8B (“Gov. George Ryan’s mass clemency has not only cleared death row in Illinois, but ignited anew the debate over the death penalty in America.”); see also John Charles Boger, *Foreword: Acts of Capital Clemency: The Words and Deeds of Governor George Ryan*, 82 N.C. L. REV. 1279 (2004) (introducing a colloquium on capital punishment and clemency, inspired by Governor Ryan’s act); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1308–09, 1332–44 (2004) (examining the debate surrounding Governor Ryan’s clemency).

As Michael Heise has noted, “clemency fulfills an especially crucial function in the death penalty context” because of the stakes involved. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 241 (2003). Clemency is par-

poorly positioned to spark broad criminal law reform in the same way because those very laws constrain them.

Before any attempts are made to bring jury nullification or clemency within the framework of the administrative state, then, it is critical to ask if some other corrective could take their place. With judges out of the picture as a viable option, the only other actor that can check overbroad or overly punitive criminal laws is the prosecutor, who, as noted, also possesses broad power to be lenient.<sup>136</sup> Prosecutors do not have the same incentives to exercise this power, however, because it conflicts with their own interests.<sup>137</sup> Prosecutors are unlikely to want to curb overbroad laws because those laws are used as bargaining chips to make obtaining convictions easier. Systemic reform is therefore unlikely to come from them. Nor can they be relied upon to act as a sufficient check on the application of the law to individual cases. Prosecutors often judge their success based on how many convictions they obtain, not the cases they dismiss or the charges they do not bring.<sup>138</sup> And after investing time and energy in investigating a case, they are far less likely to decide to exercise mercy than is a jury or executive that has not expended the same effort. Thus, even though prosecutors possess the same discretion as jurors and executives to show leniency, they face institutional pressures that push against its exercise.

Moreover, although prosecutors have more expertise in criminal law than do jurors or the executive, the question of what constitutes justice in a particular case is one on which the entire polity has the relevant expertise. Jurors and the executive bring particularly useful perspectives. Jurors are not repeat players in the criminal justice system, a fact that makes them uniquely suited to act as a “necessary

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ticularly important for claims of actual innocence because the Court has made those claims difficult to bring in a habeas action. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (disallowing habeas relief for actual innocence claims unless there is an independent constitutional violation). And there is evidence that many death row inmates, along with inmates serving time for non-capital offenses, have meritorious innocence claims. Two hundred twelve U.S. convicts have been exonerated through DNA evidence. The Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/> (last visited Feb. 9, 2008).

<sup>136</sup> See *supra* pp. 1351–53.

<sup>137</sup> In the federal system, where the prosecutors work for the President, the President shares prosecutors’ law enforcement interests to some extent. Even there, however, the President is more likely to take into account competing values because, unlike prosecutors, he is responsible for more than just law enforcement. At the state level, the governor does not exercise oversight over the district attorneys, so their interests are even more disparate.

<sup>138</sup> See Kenneth Bresler, Essay, “*I Never Lost a Trial*”: *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 538–46 (1996) (examining and decrying “prosecutorial score-keeping”); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004) (“Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.”).

counter to case-hardened judges and arbitrary prosecutors.”<sup>139</sup> And because they are drawn from the community where a trial takes place, jurors are the best representatives of that community’s sense of what justice would require in a particular case.<sup>140</sup> The executive’s perspective on mercy is also valuable because he or she must balance law enforcement interests against other values of his or her constituents, whereas prosecutors tend to focus solely on law enforcement concerns.

Jurors and the executive therefore bring valuable perspective and individualization that are otherwise lacking from the application of criminal law. In an ideal world, defendants would receive leniency only for laudable reasons, making the fact that jurors and the executive operate without oversight costless. The real world is more complicated. The exercise of prosecutorial discretion, the granting of clemency, and decisions by juries to nullify have all been tainted at one time or another by racial discrimination.<sup>141</sup> But unless it is possible to control improper discrimination without dampening the ability of jurors or the executive to operate outside the law, that risk is the price of having an opportunity for individualized justice in every case.<sup>142</sup>

The checks most often proposed — reasoned decisionmaking and judicial review — would greatly undermine nullification and clemency. Review would transfer power from the jury or the executive to the reviewing body. The jury is valuable precisely because it acts as a non-governmental check that functions outside the law. Any scrutiny of

<sup>139</sup> *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972) (quoting *Follow-Up/The Jury*, CENTER MAG., July 1970, at 59, 61 (providing the remarks of Justice Abe Fortas)) (internal quotation marks omitted); see also Alan W. Schefflin, *Jury Nullification: The Right To Say No*, 45 S. CAL. L. REV. 168, 181 (1972) (“Jury discretion in this context may be a useful check on prosecutorial indiscretion.”).

<sup>140</sup> Professor Darryl Brown likens the jury’s nullification power to dynamic theories of statutory interpretation. Brown, *supra* note 31, at 1169.

<sup>141</sup> WHITMAN, *supra* note 4, at 185 (noting that the pardon power was used to free persons charged with “kukluxing”); Barkow, *supra* note 49, at 75–76 & nn.191–92 (discussing racial discrimination by prosecutors and jurors); Kobil, *supra* note 79, at 46 (giving examples of racial discrimination in the issuance of pardons).

<sup>142</sup> Individualization does not necessarily mean that there will be more racial discrimination. Many of the crimes for which individuals could be pardoned, such as violations of drug laws, lead to discriminatory effects, so individualization could curtail discrimination. Moreover, although there is a lack of rigorous empirical evidence on jury nullification, there is some anecdotal support for the notion that jury nullification occurs more frequently in communities of color where a disproportionately high number of minorities face criminal charges. See Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679–80 (1995) (noting that some black jurors may vote to acquit black defendants on the basis of race and arguing that “racial considerations by African-American jurors are legally and morally right”); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 899–901 (1999) (discussing so-called “Bronx juries”). These jurors could therefore be combating racially disparate application of the criminal law. In addition, there is evidence that the exercise of the pardon power is not being used to discriminate on the basis of race, even in capital proceedings. See Heise, *supra* note 135, at 307–08.



the reasons for a jury's decision by a governmental body (either an agency or a court) would therefore compromise the jury's ability to provide individualized justice based on the community's values. As for clemency, in this political climate, executives already face disincentives to exercise it. If an executive had to provide reasons and face a review process, it is likely that the already depressed numbers of pardons and commutations would fall still further.<sup>143</sup>

More fundamentally, review requires that there be some specified standard to allow good reasons for leniency to be sifted from bad ones. But *ex ante* specification of when mercy is appropriate contradicts the reason for having mercy in the first place: it is because not all factors can be anticipated in advance that the discretionary check is important.<sup>144</sup> Nor is it a solution to identify and prohibit only those factors that are inappropriate bases for decision. For example, even if review were limited to ensuring that mercy was not granted in a manner that discriminated on the basis of race, it would be hard for review to be anything other than *pro forma*. Coming up with race-neutral reasons is not difficult.<sup>145</sup> Only if the reviewing body were allowed to probe deeper would the review be meaningful, but that would require the reviewing actor to second-guess the decision to grant mercy. That, in turn, would require some advance specification of when mercy is appropriate — once again undercutting the reason mercy is necessary in the first place.

<sup>143</sup> Professor Daniel Kobil argues that “the lack of consistent, principled standards governing the exercise of executive clemency has led not to the expansive use of the pardoning power, but to its atrophy.” Kobil, *supra* note 73, at 602. He therefore proposes standards and procedures with the hope of increasing, not decreasing, the use of the clemency power. But it is hard to imagine that generous standards for pardons or commutation would be approved in the current political climate, so any standards implemented by a reviewing body would more likely end up restricting the pardon power.

<sup>144</sup> See ATTORNEY GENERAL'S SURVEY, *supra* note 126, at 298–99 (noting that “[a] criminal code can only define antisocial conduct in general terms” and “can never take into account all the special circumstances which may be involved in a given case,” thereby continuing to justify the necessity of pardon as a safety valve); Linda Ross Meyer, *The Merciful State, in* FORGIVENESS, MERCY, AND CLEMENCY, *supra* note 5, at 64, 86–87 (pointing out the shortcomings of rules and arguing that “[t]he only way to achieve the pardon as equity is to keep it ruleless and thereby lawless”).

<sup>145</sup> The experience with lawyers' peremptory challenges of prospective jurors is a prime illustration. See Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 272 (2007) (presenting an empirical study that concludes that peremptory challenges are often based on race but “decision-makers are remarkably facile at recruiting race-neutral characteristics to justify jury selection judgments”); Amanda S. Hitchcock, Recent Development, “*Deference Does Not By Definition Preclude Relief*”: *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328, 1334 (2006) (“[I]f a prosecutor need only some race-neutral reason to justify her challenge, it is not difficult to find one, and even less difficult for a judge to accept it as valid.”).

Thus, the cornerstones of administrative law — reasoned decisionmaking and judicial review — are costly tools if applied to nullification and clemency because they would act to depress mercy. That is a high price in today's political climate, in which legislators succumb to get-tough politics, write harsh laws, and tie the hands of judges. Other administrative solutions might be more promising. In the case of clemency, for example, agencies might be employed to supplement — not replace — executive power over clemency by providing an additional check on overbroad criminal laws.<sup>146</sup> To avoid racial discrimination by juries, perhaps commissions could examine how juror rolls are created and jury selection is performed.

Whatever administrative framework might improve executive clemency or jury decisionmaking, finding it will require attention to important differences between administrative law and criminal law. Reformers should seek those administrative law solutions that will correct the political process failures endemic to criminal law, not those that will exacerbate the systemic problems that already exist. Any administrative model in criminal justice must therefore find a space for mercy.

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<sup>146</sup> There is some evidence that pardons are more numerous in jurisdictions with independent pardon boards because they are insulated from political pressure. See JUSTICE KENNEDY COMM'N, *supra* note 64, at 7 (noting that “pardons tend to be granted more regularly and generously” in states with an independent board than in states “where the governor exercises the power subject to no procedural constraints”); Dorne & Gewerth, *supra* note 81, at 444 (observing that pardon boards provide a “‘political cushion’ for the governor”).

In this scenario, the executive is likely to leave the politically unpopular decisions with the agency. Professor Michael Heise has found that states that vest clemency decisions exclusively in administrative boards were more likely to grant clemency in death penalty cases than states that give clemency authority only to the governor. Heise, *supra* note 73, at 244. This finding might suggest limiting executive pardon power altogether and vesting all authority with a board. But it is possible that, as these boards continue to grant clemency at a greater rate, they will attract legislative attention or greater public scrutiny, and their discretion will be curtailed or their process otherwise skewed toward denying petitions for clemency. For example, the U.S. Department of Justice pardon process has moved toward a model that grants more authority to prosecutors. See U.S. Dep't of Justice, United States Attorney's Manual Standards for Consideration of Clemency Petitions § 1-2.111, <http://www.usdoj.gov/pardon/petitions.htm> (last visited Feb. 9, 2008) (noting that “[t]he views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President”). The history of the U.S. Sentencing Commission is also illustrative, as it was ostensibly set up to be independent but has, in fact, been subject to extensive political oversight. See Barkow, *supra* note 28, at 758–71.