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THE PITFALLS OF PROFESSIONALIZED PROSECUTION: A RESPONSE TO JOSH BOWERS'S "LEGAL GUILT, NORMATIVE INNOCENCE, AND THE EQUITABLE DECISION NOT TO PROSECUTE"

*Stephanos Bibas**

Response to: Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 Colum. L. Rev. 1655 (2010).

Prosecutors wield tremendous power in deciding whom to charge. Scholars focus on the most visible injustices, as when police arrest, and prosecutors pursue, capital defendants who turn out to be factually innocent of murder.¹ But as Josh Bowers rightly notes, the sliver of visible, serious felonies is dwarfed by the mountain of minor, low-visibility misdemeanors and violations.² Prosecutors are reasonably good at classifying crimes based on legal guilt and on administrative criteria, such as how much time and effort they will have to invest. In Bowers's evocative terms, they are good at thinking inside the box, at putting cases into legal pigeonholes. They are much worse, however, at thinking outside the box, at weighing all the particulars and exercising equitable discretion.³ Our consistent faith in prosecutors' expertise, Bowers argues, is not only misguided, but backwards; we should value outsiders' fresh perspectives over insiders' jaded expertise.⁴ In Part I of this response, I largely praise Bowers's diagnoses of the illness. It is far easier to diagnose a malady than to treat it, however. Thus, Part II then presses Bowers on possible solutions and offers a few of my own.

* Professor, University of Pennsylvania Law School. Thanks to Josh Bowers for our fruitful conversations on these topics.

1. See generally Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* (2003) (chronicling stories of innocent defendants sentenced to death for felonies).

2. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *Colum. L. Rev.* 1655 (2010).

3. *Id.* at 1689–92.

4. *Id.*

I. PROSECUTORS' BLINDERS, OR THINKING INSIDE THE BOX

Bowers's Article is illuminating in many ways. Most obviously, his typology of legal, administrative, and equitable discretion makes us think about what prosecutors are doing and what their strengths are. In an overcriminalized system, where almost everyone is factually guilty of something, prosecutors effectively decide who deserves punishment and how much. Such deeply moral issues of desert are ones that busy, legal-minded prosecutors are ill-suited to decide unilaterally.

Moreover, Bowers eschews hackneyed criticisms of bad apples and overzealous prosecutors. He specifically avoids imputing "bad faith or ill will" to prosecutors.⁵ His focus is a modern, institutional one on police and prosecutors' incentives, mindsets, and procedures for charging, plea bargaining, and the like. Yet he is not seduced by the fantasy that bureaucratic reforms can turn prosecutors into adjudicators.⁶ The solution to overprosecution and overcriminalization lies not in enacting yet another law, but in bringing a fresh perspective and commitment to equitable particularism in law. Bowers argues powerfully that on this account, discretion and mercy perfect justice, rather than undercut it.⁷ He likewise defends a measure of informalism in law, as against the Procrustean rule-bound due process on which Warren Court enthusiasts too often rely.⁸

Another welcome aspect of Bowers's Article is its effort to reconnect criminal procedure with foundational issues of blameworthiness. As I have repeatedly argued, for too long criminal procedure has been divorced from the substantive justifications for punishment that it is supposed to serve.⁹ By focusing on who morally deserves prosecution, Bowers seeks to reorient procedures to serve the values of substantive criminal law.

Bowers's vision of justice is not new, but quite old. The common law depended on juries to inject the community's moral views into justice. Now that plea bargaining has all but displaced juries, the challenge is to find other ways to recreate lay roles within a professionalized system.

At points I think Bowers is too hard on the approach of police and prosecutors. After all, many a neighborhood is ruined by quality of life offenses, causing law-abiding residents to flee and letting the remainder of the neighborhood slide into chaos. As Randall Kennedy has argued,

5. *Id.* at 1660.

6. Cf. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2123–51 (1998) (envisioning such a system based on internal system of appeals in white-collar criminal cases in U.S. Attorney's Office for the Southern District of New York).

7. Bowers, *supra* note 2, at 1669–73, 1680–83.

8. *Id.* at 1673–78.

9. See, e.g., Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 *Cornell L. Rev.* 1361, 1362–64, 1389, 1400–08 (2003).

minority communities ought to worry about underenforcement that leaves their communities unprotected.¹⁰ Hostility to minor charges could impede this valuable enforcement. Yet, it is not easy to devise mechanisms cheap enough, fast enough, and workable enough to check the myriad charges filed in the most minor cases.

I also find Bowers's use of New York and Iowa's declination statistics far from compelling. Sure, prosecutors are less likely to decline charges based on police testimony than those based on civilian witnesses, and they are less likely to decline minor than major cases.¹¹ So what? It is entirely rational to weigh the likelihood of conviction and the victim's wishes where there is a victim. Without much more information, we cannot know whether the problems of civilian complaining witnesses are substantial enough to warrant declinations in most of those cases. And of course prosecutors invest more time and effort in screening major cases; any rational system would spend far more where felony convictions and imprisonment are on the line.

Though Bowers criticizes lawyers' formalism as "infantil[e]" or "childish[],"¹² prosecutors and judges are just doing their jobs. Justice Scalia might fairly reply that he is supposed to uphold "the rule of law as a law of rules."¹³ Justice Scalia would be the first to admit that formalist judging is itself less flexible, but the point of formalism is to constrain his undemocratic discretion. Formalists would say that needed discretion and equity in the system ought to be the job of jurors.¹⁴ The problem is not that judges or prosecutors are misbehaving, but that there are no jurors or other laymen left to counterbalance them. The professionalization of the assembly line has removed these vital checks and balances.

II. LOOSENING PROFESSIONALS' MONOPOLY ON CRIMINAL JUSTICE

Unfortunately, it is far easier to diagnose a chronic disease than to cure it. Bowers tantalizes us by referring repeatedly to his next article without giving us a preview of what fixes he plans to propose.¹⁵ One is left to wonder about various possibilities.

One problem Bowers notes is that prosecutors have too little information early on to gauge the equities of individual cases.¹⁶ A few prosecutors' offices respond to this problem by having specialized screening units conduct early, probing investigations and assessments of

10. Randall Kennedy, *Race, Crime and the Law* 19–20 (1997).

11. Bowers, *supra* note 2, at 1712–20.

12. *Id.* at 1690–91.

13. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175, 1176–80 (1989).

14. See *id.* at 1180–81.

15. Bowers, *supra* note 2, at 1661 & n.21, 1672 n.70, 1676 n.91, 1687 n.144, 1688 n.148, 1698 n.197, 1724 n.330, 1725 & n.335.

16. *Id.* at 1701–02.

the proper charges.¹⁷ Granted, these systems primarily have been used to screen out cases for legal and administrative reasons, but perhaps they could be used for equitable screening as well. Early investigations and screening systems might not be practical for the large-volume, low-seriousness dockets Bowers addresses, however. Also, improved prosecutorial screening systems would still be staffed by jaded prosecutors, albeit ones with fewer self-interests in hoarding plea-bargaining chips to avoid trial.¹⁸

Bowers notes other specific problems with insiders' incentives, such as arrest quotas and awards.¹⁹ To some extent, one could mitigate these problems by changing the metrics of success. I have suggested moving to an eBay-style reputational feedback system, with awards, rewards, and promotions tied to peer and customer satisfaction, rather than arrests and charges.²⁰ But these solutions, too, would amount to tinkering. They could pare down some of the excesses prized by our quantity-crazed punishment assembly line, but at root, the systems would still be run by insiders and dominated by their quantity mindset.

The root problem here is that our system punishes in the name of the community, but prosecutors and other insiders imperfectly represent the community. They think they are doing justice by formalistically treating like cases alike; formal equality is an article of faith among lawyers.²¹ But lawyers, paralyzed by fear of discrimination, overrate rule-bound equality. And in learning to think like lawyers, we grow callous, much as emergency room doctors do. The trick is to see our own blindness, to marry laymen's freshness to lawyers' expertise. It will require large structural reforms to bring laymen back into power as a check. Bowers hints that he wants to include laymen at charging, whereas I would find a way to empower laymen at sentencing, by giving sentencing juries greater leeway notwithstanding the constraints of plea bargains.²² Either way, however, he has set himself a huge but important task. The trick will be pulling it off in our cash-strapped, overwhelmed criminal justice system.

17. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *Stan. L. Rev.* 29, 61–65 (2003) (noting New Orleans District Attorney's Office under Harry Connick, Sr. pioneered this early screening approach).

18. *Am. Bar Ass'n, ABA Standards for Criminal Justice, Prosecution Function and Defense Function* 3-3.4, at 61–62 (3d ed. 1993) (discussing desirability of experienced prosecutors staffing screening units).

19. Bowers, *supra* note 2, at 1695.

20. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *U. Pa. L. Rev.* 959, 1011–15 (2009); Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 *Ohio St. J. Crim. L.* 441, 443–47 (2009).

21. See, e.g., James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* 13 (2003) (“[T]he strong tendency of the last twenty-five years has been toward a formal equality of nearly Kantian severity . . . [W]e display a powerful drive to hit every offender equally hard.”).

22. See Stephanos Bibas, *Assembly-Line Criminal Justice* (forthcoming 2011) (proposing creation of lay sentencing juries, which would consider plea bargains' sentencing recommendations but ultimately decide for themselves what sentences to impose).

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