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## *ESSAY*

WHAT'S WRONG WITH SENTENCING EQUALITY?  
SENTENCING LEGALITY: A RESPONSE TO PROFESSORS  
BIERSCHBACH & BIBAS

*Josh Bowers\**

IN 2005, I was a public defender in Bronx County, New York. Contemplating a transition to academia, I developed an idea for an article about plea-bargaining and innocence.<sup>1</sup> Early on, I came across a tremendously helpful paper, written by Professor Stephanos Bibas.<sup>2</sup> Several months later, I began a teaching fellowship. On the first day, I was pleased to find Bibas's name on the office door next to mine. Unfortunately, Bibas had already left for another institution. Our paths seemed destined not to cross. Still, I took a chance and emailed him. Bibas responded with warm words and constructive advice. Over the next decade, our relationship would become one of the most valuable of my professional career. His generosity is unparalleled, and my scholarship is demonstrably better for it. Sometimes we disagree, though perhaps less so recently (which only speaks to the great influence he has had on my thinking).

Coincidentally, I knew Professor Rick Bierschbach even before I left criminal practice. We were acquaintances—at opposite ends of a large

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\* F. Palmer Weber Professor of Law, University of Virginia School of Law. Thanks to the editors of the *Virginia Law Review* and to Professors Bierschbach and Bibas for all their help and support. All errors are mine.

<sup>1</sup> Josh Bowers, Punishing the Innocent, 156 U. Pa. L. Rev. 1117, 1117 (2008).

<sup>2</sup> Stephanos Bibas, Bringing Moral Values into a Flawed Plea-Bargaining System, 88 Cornell L. Rev. 1425 (2003).

circle of thirty-something lawyers. Rick's reputation preceded him. He was (and is) a *mensch*.<sup>3</sup> And, true to his kind nature, he has always been available to lend an ear and to offer useful feedback.

What is the point of these brief testimonials? It is, of course, a law review convention to begin a response with kind words for the article's authors. But that is not my principal aim. By this genuine and personal expression of affection for two profoundly decent individuals, I hope to show the power of narrative—the capacity for detail to reach comparatively more than form. The entrenched form is merely to celebrate the authors' professional qualifications and achievements. But my narrative aspires to reach something deeper and richer. The evaluation of an academic's worth (or lack thereof) entails much more than a recitation of her accomplishments. Similarly, the evaluation of an offender's blameworthiness (or lack thereof) entails much more than legal and factual guilt. No single set of criteria—promulgated *ex ante*—is competent to tell the complete story in all its intricacies.

Bierschbach and Bibas understand this, of course. Indeed, it is a central premise of their remarkable article, *What's Wrong with Sentencing Equality?* They explain that positive sentencing law has unduly prioritized sentencing “math” over other relevant (indeed, potentially more relevant) moral and prudential considerations.<sup>4</sup> Mandatory rules operate to sort offenders into predetermined boxes and types, typically defined by criminal records and crimes of conviction.<sup>5</sup> Like outcomes are thereafter imposed for each offender of every broad type.

The authors trace the source of the prevailing approach to the equality principle—or, rather, to our dominant conception of it. But I am not so sure. The first-order question is *why* our criminal justice system has settled upon such a formalistic conception of equality. The unanswered question is what makes sentencing math so attractive, as compared to

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<sup>3</sup>“Mensch” is the Yiddish word for a good person. See Mensch, Dictionary.com, <http://www.dictionary.com/browse/mensch?s=t> [<https://perma.cc/9W9M-C3CK>].

<sup>4</sup>Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?* 102 Va. L. Rev. 1447, 1455, 1465 (2016) (“Where moral disagreement was endemic, math supplanted morality.”).

<sup>5</sup>Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum. L. Rev. 1655, 1688–92 (2010) [hereinafter Bowers, *Legal Guilt*]; see also Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 703 (1998) (“Crime is now typically conceived solely in terms of the relative seriousness of a given offense, to the exclusion of offender culpability.”).

some alternative qualitative approach to equality that might accommodate more detail. The answer to that question lies with another contested principle—the legality principle, which Professor Herbert Packer famously termed “the first principle of criminal law.”<sup>6</sup> The root of what is wrong with sentencing equality arises from our positive conception of this first principle, *not* from our positive conception of equality itself. Our fetish for formal legality is what drives our commitment to formal equality.<sup>7</sup> But equality *qua* equality is tangential, at best.

### I. THREE CONCEPTIONS OF EQUALITY

Bierschbach and Bibas recognize that there may be more than one viable conception of equality<sup>8</sup> They distinguish between our positive (and problematic) substantive conception, which aims to guarantee *equal results*, defined formally; and a procedural conception, which aims to guarantee *equal opportunities* to argue for defendant-favorable results.<sup>9</sup> They use the descriptor “outcomes-oriented” to describe the prevailing substantive approach, and they discuss its underappreciated tradeoffs.<sup>10</sup> Likewise, they defend alternative procedural approaches to equality (even random processes, like lotteries and dice rolls) as consistent with what John Rawls called “pure procedural justice.”<sup>11</sup>

<sup>6</sup> Herbert L. Packer, *The Limits of the Criminal Sanction* 79–80 (1968).

<sup>7</sup> On our overly formal conception of the legality principle, see Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”*, 66 *Stan. L. Rev.* 987, 996–98 (2014) [hereinafter Bowers, *Pointless Indignity*]; Josh Bowers, *Legality & Rough Justice* 6–7 (May 30, 2014) (unpublished manuscript) (on file with author); Josh Bowers, *Understanding the Police 1* (Oct. 5, 2016) [hereinafter Bowers, *Understanding the Police*] (unpublished manuscript) (on file with author).

<sup>8</sup> Bierschbach & Bibas, *supra* note 4, at 1492 (observing that “many alternative conceptions of sentencing equality” exist); cf. Peter Westen, *The Empty Idea of Equality*, 95 *Harv. L. Rev.* 537, 537 (1982) (tracing the endurance of the principle to its ability to shift shape).

<sup>9</sup> Bierschbach & Bibas, *supra* note 4, at 1447.

<sup>10</sup> *Id.* at 1456–57 (“[O]ur main goal is to show how sentencing equality, as it has come to be conventionally understood in outcomes-oriented terms, interacts with the institutional structure and goals of punishment, and how exposing that interaction complicates the tradeoffs that inhere in sentencing design.”).

<sup>11</sup> John Rawls, *A Theory of Justice* 75 (rev. ed. 1999) (defining “pure procedural justice” as a “fair procedure” that produces a result that is “likewise correct or fair, whatever it is, provided that the procedure has been properly followed”); see Bowers, *Legal Guilt*, *supra* note 5, at 1677 (“[T]here is no persuasive reason why equal treatment must be measured according to substantive outcomes only.”); Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 *New Crim. L. Rev.* 277 (2012).

Nevertheless, they fail to appreciate that there are, in fact, two very different strands of “outcomes-oriented” equality. There is a *formal* strand and an *equitable* strand. Pursuant to the equitable strand, there is no necessary tradeoff between individualization and equality. To the contrary, individualization is the means by which equitable equality is achieved. As I have explained elsewhere:

A justice system that admits equitable considerations is premised on the fact that legally identical cases should sometimes be handled differently for normative reasons. This does not mean, however, that equitable [variation] deviates unduly from a defensible notion of equality. . . . [A] contextualized approach to criminal justice necessarily demands more than just a rigid application of legal rules pursuant to formal designations. It demands an evaluation of relative blameworthiness to ensure that *equitably* distinct cases are recognized as such, even if those cases happen to be *legally* identical under insufficiently discriminating statutes.<sup>12</sup>

With respect to both the formal and equitable strands of equality, case outcomes provide the relevant reference points. In this way, both approaches remain substantive. The difference is only whether these outcomes are determined to be equitably or formally distinct or alike.

The reason for the misconception—for describing equitable equality as *procedural* equality—is the pivotal role that narrative plays in “equitable judgment.”<sup>13</sup> Narrative is, of course, a procedural endeavor. But the practice is only a means to the decisive end—a means “to look into things more deeply, to see whether we may have missed some unusual impediment that deformed the process of character formation.”<sup>14</sup> It is only once we have attended to the complete “narrative history” that we can determine whether a given penalty really fits the particular crime—or

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<sup>12</sup> Bowers, *Legal Guilt*, supra note 5, at 1673–74; Logan, supra note 5, at 703 n.108 (“All defendants are not alike, just as all crimes, even if given the same label, are not identical.” (internal quotation marks and citation omitted)).

<sup>13</sup> Martha C. Nussbaum, *Equity and Mercy*, 22 *Phil. & Pub. Aff.* 83, 85–86, 92 (1993) (defining “equitable judgment” as “judgment that attends to the particulars,” and as “a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story”). My conception of equitable judgment is consistent with what Aristotle called *epieikeia* or “fair-mindedness.” Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *Metaphilosophy* 178, 205 (2003).

<sup>14</sup> Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269, 368–70 (1996) (comparing mechanistic and evaluative approaches).

whether the prescribed sentence, instead, has failed to account for some “unusual hardship or inequality.”<sup>15</sup> On this reading, the stories we tell shape the sentences we impose. We contrast one story with the next to realize whether we have adequately grasped the differences between them.<sup>16</sup>

Thus, there are (at least<sup>17</sup>) three conceptions of equality: a procedural conception that promises like opportunities to argue; a substantive *equitable* conception that promises like normative results; and a substantive *formal* conception that promises like legalistic results. Results matter only with respect to the two substantive conceptions. But each substantive conception entails a radically different method by which to discover and ultimately compare blameworthiness.

The preceding is, to some degree, no more than a small taxonomical quibble. But I think it necessary to define our terms correctly in order to discern properly why the criminal justice system is so allergic to equitable equality. Bierschbach and Bibas do not make clear enough that the problem with positive sentencing law is not its focus on outcomes, but rather its fixation *with law*—a fixation that has produced results that are more obviously ordered than equal.

## II. WHAT’S EXCEPTIONAL WITH CRIMINAL JUSTICE?

Sentencing was once different. Sentencing law “traditionally permitted the story of the defendant’s character-formation to come before the judge or jury in all its narrative complexity . . . .”<sup>18</sup> Over time, however, determinate sentencing regimes have reduced or eliminated the judge’s opportunities for “sympathetic assessment” and “merciful mitigation”—

<sup>15</sup> *Id.* In any event, even our conventional legalistic conception of equality depends upon procedural methods. Here, the means consist of the conventional (and relatively technical) deconstructive craft of legal analysis, as opposed to the constructive craft of narrative. Bowers, *Legal Guilt*, *supra* note 5, at 1690–91 (describing what it means to think and reason like a lawyer).

<sup>16</sup> Packer, *supra* note 6, at 88 (“It is not enough to say: this man goes to jail because he did something bad. There is obligation to relate the particular bad thing that this man did to other bad things that have been created as criminal in the past.”).

<sup>17</sup> *Cf. infra* note 30 and accompanying text (discussing Peter Westen’s view that equality is secondary to—and defined by—other enumerable moral principles).

<sup>18</sup> Kahan & Nussbaum, *supra* note 14, at 367; see also Bierschbach & Bibas, *supra* note 4, at 1473 (“[T]he criminal justice system once did and could again make a point of promoting remorse, apology, forgiveness, and reconciliation . . . about treating victims and offenders with dignity and respect . . . . But these considerations . . . require context-specific judgments of real human beings . . . .” (footnote omitted)).

and, for that matter, for penalty enhancements for particularly bad actors and heinous acts.<sup>19</sup> Ironically, our most severe punishment—the death penalty—describes the one constitutional context in which the practice of narrative has continued to hold sway.<sup>20</sup>

What changed? Bierschbach and Bibas take as given the conventional wisdom that mandatory sentencing regimes developed as compromises between progressives (intent on reining in racial, ethnic, and class discrimination) and conservatives (intent on reining in lenient judges).<sup>21</sup> But the conventional wisdom is incomplete. It provides only an explanation for why both sides prioritized equality over other principles and values, but it does not account for why they settled on a *formal* conception of substantive equality. The answer to that question depends on an older trend.

Going back to the Enlightenment, political theorists have championed the legality principle as an “important prophylaxis against the arbitrary and abusive exercise of discretion in the enforcement of the penal law.”<sup>22</sup> The classical liberal view is that well-defined rules are the best means to achieve legality’s objectives—that, to the extent possible, the terms of criminal culpability and punishment must remain prospective

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<sup>19</sup> Kahan & Nussbaum, *supra* note 14, at 367.

<sup>20</sup> *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (“[P]unishment must be tailored to . . . personal responsibility and moral guilt.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the capital sentencing jury is entitled to consider “as a *mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); see Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in *Life Without Parole: America’s New Death Penalty?* 25, 25 (Charles J. Ogletree Jr. & Austin Sarat eds., 2012) [hereinafter Bowers, *Mandatory Life*].

<sup>21</sup> Bierschbach & Bibas, *supra* note 4, at 1459; see Michael Tonry, *Sentencing Matters* 6, 9, 147 (1996). I do not reject the conventional story entirely. Indeed, I have even articulated it previously. Josh Bowers, *Contraindicated Drug Courts*, 55 *UCLA L. Rev.* 783, 825 (2008) (“Stakeholders of varied political stripes came together to counteract what some saw as racist inequities in sentencing and what others saw as overly lenient discretionary sentencing.”); Bowers, *Mandatory Life*, *supra* note 20, at 30 (“Left-liberals saw determinate sentencing to be an antidote to racial and economic inequalities in discretionary sentencing. Law-and-order conservatives saw determinate sentencing to be an antidote to lenient liberal judges.” (footnote omitted)).

<sup>22</sup> Richard J. Bonnie et al., *Criminal Law* 81 (3d ed. 2010); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 *Va. L. Rev.* 189, 201, 212 (1985) (“The rule of law signifies the constraint of arbitrariness in the exercise of government power.”).

and precise.<sup>23</sup> And that view gained greater currency in response to the atrocities committed by last century's totalitarian powers.<sup>24</sup> Thus, even as the rest of the law witnessed a "revolt against formalism," the law of crime—including sentencing law—grew more rule-bound.<sup>25</sup> This is the idea behind "the rule of law as a law of rules"—an idea grounded in legal formalism.<sup>26</sup> And it is this same impulse that also informs our formal conception of equality and, by extension, our rule-bound sentencing law.

The authors seem genuinely curious as to why we speak pejoratively about sentencing "disparities," while we have elsewhere defended variability as the acceptable (or even virtuous) byproduct of "localism," "pluralism," or "laboratories of democracy."<sup>27</sup> But there is no mystery. The "law of crime" is thought exceptional precisely because criminal justice

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<sup>23</sup> Christine Sypnowich, *Utopia and the Rule of Law in Recrafting the Rule of Law: The Limits of Legal Order* 178, 179–80 (David Dyzenhaus ed., 1999) ("[T]he rule of law . . . refer[s] to the idea that law should meet certain procedural requirements so that the individual is enabled to obey it . . . [It must] be relatively certain, clearly expressed, open, . . . adequately publicised . . . [and] prospective . . . The practical effect . . . is to set limits to the discretion of legislators, administrators, judges and the police.").

<sup>24</sup> Bonnie et al., *supra* note 22, at 83 ("Would a Puritan theocracy or an Islamic state or a Marxist dictatorship have a comparable commitment to protecting . . . the principle of legality as a fundamental ideal of the penal law dictated by liberal democracy and its underlying assumptions about the relation of the state to individual citizens?"); cf. Packer, *supra* note 6, at 86–87 (describing development of the legality principle and concluding that "after centuries of retrospective law-making by judges, . . . the process of judicial law-making in the criminal field has . . . come to a halt" (emphasis omitted)).

<sup>25</sup> Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 *J. Contemp. Legal Issues* 97, 98, 101, 103 (1996) ("[A]lthough realism's lessons for criminal law seem obvious, formalism continues to dominate criminal jurisprudence.").

<sup>26</sup> Jeffries, *supra* note 22, at 212 (describing the "quite conventional" prevailing conception of the rule of law and the principle of legality); Antonin Scalia, *Essay, The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175 (1989). According to Professor John Jeffries: "[T]he agencies of official coercion should, to the extent feasible, be guided by rules" as a means to promote "regularity and evenhandedness in the administration of justice and accountability in the use of government power." Jeffries, *supra* note 22, at 201, 212 (explaining that "appeals to the 'rule of law,'" as they apply to the penal law tend to entail "the resort to legal formalism as a constraint against unbridled discretion"); Bowers, *Pointless Indignity*, *supra* note 7, at 989–98 (examining and critiquing the prevailing perspective); Bowers, *Understanding the Police*, *supra* note 7, at 1 (same).

<sup>27</sup> Bierschbach & Bibas, *supra* note 4, at 1450–51, 1489 ("One might even argue that the arguments and observations of Gerken, Leib, and Schragger should have special purchase at sentencing, with its lack of easy policy answers, difficult moral tradeoffs, and inextricable connection to community norms."); see also *id.* at 1487 ("The assumption in all of this is that punishment should not turn on local views."); *id.* at 1490–91, 1495 (arguing that "normative variation" may be "a virtue, not a vice").

is exceptionally harsh and stigmatic.<sup>28</sup> The coercion of conviction and sentence carries with it a corresponding “especial need for certainty,” which is considered essential to prevent liberal punishment from slipping into rank oppression.<sup>29</sup> Ultimately, then, it is our prevailing notion of the rule of law that is doing the bulk of the work. Indeed, Professor Peter Westen has observed that there is *always* some equality-independent principle—some alternative “moral standard”—that is doing the bulk of the work:

Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. . . .

. . . .

Relationships of equality (and inequality) are derivative, secondary relationships; they are logically posterior, not anterior . . . . To say that two persons are the same in a certain respect is to presuppose . . . a prescribed standard for treating them . . . . Before such a rule is established, no standard of comparison exists.”<sup>30</sup>

Bierschbach and Bibas commit a category error. They mistake the triumph of a formal conception of legality with the triumph of a formal conception of equality. In fact, our obsession is not with *equal* outcomes as much as *highly predictable* and *ordered* outcomes. This is what the authors do not quite grasp. Consider this observation: “The *stale sentencing debate*[] of . . . rules versus standards needs to stop treating equality as if it were a single concept.”<sup>31</sup> But the rules-standards debate is neither stale nor peripheral. To the contrary, our false impression that

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<sup>28</sup> Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 *Am. Sociological Rev.* 699, 700 (1967) (“[C]rime belongs wholly to the law, and its treatment is exhaustively based on considerations of legality . . . .”); Seidman, *supra* note 25, at 97.

<sup>29</sup> Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 *Oxford J. Legal Stud.* 215, 256 (1987); see also H.L.A. Hart, *Legal Responsibility and Excuses*, in *Punishment and Responsibility* 28, 44–47 (1968) (comparing certainty in criminal punishment to certainty in private law); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *Calif. L. Rev.* 1, 37 (1974) (discussing criminal law’s long tradition of “strict adherence to rules”); cf. Sherry F. Colb, *Freedom from Incarceration: Why is This Right Different from All Other Rights?*, 69 *N.Y.U. L. Rev.* 781, 821 (1994) (explaining that criminal justice is different in kind from other forms of legal regulation and that “liberty from confinement cannot be relegated to the status of unprotected aspects of daily life”).

<sup>30</sup> Westen, *supra* note 8, at 545, 547–48 (footnotes omitted).

<sup>31</sup> Bierschbach & Bibas, *supra* note 4, at 1520 (emphasis added).



equality is a single concept is a direct byproduct of our fidelity to rules. Equality comes in different shapes and sizes, but the dominant conception of legality is built to perceive just one—a breed of equality born of rules. When the authors celebrate a “more elastic approach[]” to sentencing equality, they are only pushing a “more elastic approach[]” to legality.<sup>32</sup> The equality question is a mere echo of the legality debate.

### III. WHAT’S RIGHT (AND NATURAL) ABOUT SENTENCING EQUITY?

In the space provided, I cannot possibly defend thoroughly the ambitious claim that an “elastic approach” to legality is nonetheless consistent with the rule of law. Elsewhere, I do more to support this bold proposition.<sup>33</sup> I have argued even that a softer conception of legality might provide better protection against rough punishment, at least in some contexts.<sup>34</sup> To be sure, there are limits to any workable and defensible equitable approach, as even committed moral particularists have recognized.<sup>35</sup> No system is competent to attend to *every* relevant detail.<sup>36</sup> Legal standards set the outer boundaries. And, because resources are finite, sentencing proceedings can accommodate only so much scrutiny. But even within these practical parameters, an evaluative system necessarily has the capacity to perceive more than a mechanistic system. The process is imperfect, but not obviously arbitrary.<sup>37</sup>

The misapprehension—that equitable evaluation is incompatible with legality—is based upon the tendency of particularistic methodologies to reveal unwelcome disparities. But there is a difference in kind between *creating* a disparity and *exposing* what was always there. Formal legality paves over incongruence; its methods are mechanistic, facile, and

<sup>32</sup> Id at 1514.

<sup>33</sup> Bowers, *Pointless Indignity*, supra note 7, at 1030–43; Bowers, *Understanding the Police*, supra note 7, at 1.

<sup>34</sup> Specifically, I claim that equitable oversight is critical to regulating appropriately the enforcement and adjudication of low-level crimes. Bowers, *Pointless Indignity*, supra note 7, at 1036–37; Bowers, *Understanding the Police*, supra note 7, at 20.

<sup>35</sup> Bowers, *Legal Guilt*, supra note 5, at 1670 (citing sources).

<sup>36</sup> Id. at 1670–72; Nussbaum, supra note 13, at 93 (“[T]he ‘matter of the practical’ can be grasped only crudely by rules given in advance, and adequately only by a flexible judgment suited to the complexities of the case.”); Solum, supra note 13, at 206 (“[T]he infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules.”).

<sup>37</sup> Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 21 (1969) (“[T]he conception of equity that discretion is needed as an escape from rigid rules [is] a far cry from the proposition that where law ends tyranny begins.”).

somewhat fictive. Equitable legality engages incongruence; its methods are evaluative, complex, and relatively honest. Formal legality promotes a conception of equality that is predictable but thin. Equitable legality promotes a conception of equality that is indeterminate but thick. When it comes to the equitable approach, what we construe to be cacophony may just be consistency by another name—succinctly, individualization in the service of a thoroughgoing qualitative comparison. According to Professors Martha Nussbaum and Dan Kahan, “It’s when the law falsely denies its evaluative underpinnings that it is most likely to be incoherent and inconsistent; it is when the law refuses to take responsibility for its most contentious choices that its decision makers are spared the need to be principled . . . .”<sup>38</sup>

There is, after all, nothing inherently equality-enhancing about a rule that provides: sell *X* grams of heroin; receive *Z* years in prison. To the contrary, commentators have long observed that “sentencing math” promotes inconsistency by failing to account meaningfully for the offender’s genuine role in the offense.<sup>39</sup> Little fish are treated like big fish, and big fish trade information for undeserved cooperation pleas.<sup>40</sup> One response is that prosecutors retain the charging and bargaining discretion not only to use over-inclusive sentencing rules as threats, but also to cor-

<sup>38</sup> Kahan & Nussbaum, *supra* note 14, at 274, 373–74 (noting that evaluations of normative blameworthiness “are better because they are brutally and uncompromisingly honest,” whereas “[m]echanistic doctrines . . . tend to disguise contentious moral issues”); William J. Stuntz, *Unequal Justice*, 121 *Harv. L. Rev.* 1969, 2039 (2008) (“[W]hen prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. . . . [I]nstitutional competition curbs excess and abuse.”). In this vein, Professor Bill Stuntz argued that even localism is compatible with equality. *Id.* at 1995, 2031–33 (noting that “equality and local democracy [may] go hand in hand”).

<sup>39</sup> *United States v. Justice*, 877 F.2d 664, 666 (8th Cir. 1989) (describing federal sentencing as a “mechanical process”); Douglas A. Berman, *The Virtues of Offense/Offender Distinctions*, in *Criminal Law Conversations* 611, 615 (Paul H. Robins, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) (criticizing federal sentencing guidelines as “a sentencing process that [has] been drained of its humanity”); Bowers, *Mandatory Life*, *supra* note 20, at 29 (“[T]he vagaries of life outstrip ‘sentencing math’ that tends to count most that which can be counted most easily—like drug weight and monetary loss, as opposed to moral blameworthiness.” (emphasis omitted) (citing Berman, *supra*, at 615)); Jack B. Weinstein, Comment, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 *S. Cal. L. Rev.* 357, 364 (1992).

<sup>40</sup> Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 *Fed. Sentencing Rep.* 292, 292 (1996). The authors understand this, of course. They emphasize “more granular” approaches that turn on “less-quantifiable values” than determinate facts and figures, like drug weight and monetary gain. Bierschbach & Bibas, *supra* note 4, at 1455.

rect for these rules' overreach. Thus, they may *choose* not to treat little fish like big fish, even if the law ostensibly commands that they do so. Put differently, they may pursue individualized "substantive justice," even (or especially) within mandatory regimes.<sup>41</sup>

But this prospect is hardly comforting. As Bierschbach and Bibas recognize, even if prosecutors "have the perspective and power to balance individual blameworthiness against systemic demands," they are also subject to "incentives to clear cases quickly," as well as other institutional and cognitive biases that may undercut their willingness (or even their ability) to exercise equitable discretion consistently, fairly, and effectively.<sup>42</sup> The problem is not only that the prosecutor is a professional, but also that she is partial. Here, the authors generously reference my scholarship to support the proposition that prosecutorial "decisions often turn on *legalistic habits* of charging and plea bargaining."<sup>43</sup> But I am equally troubled (if not more so) by the manner in which prosecutors may indulge their *extra-legalistic habits*—their "nonlegal impetus" to pursue their own vested interests and their own idiosyncratic notions of moral or prudential blameworthiness.<sup>44</sup>

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<sup>41</sup> Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* xix (1979); Bowers, *Legal Guilt*, supra note 5, at 1708. It is well understood that determinate sentencing empowers prosecutors. Rachel E. Barkow, *Institutional Design and Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 877 (2009) ("With the prevalence of mandatory minimum laws, a prosecutor's decision to bring or not bring charges can dictate whether a defendant receives a mandatory five-, ten-, or twenty-year term, or whether he or she is sentenced far below that floor."); David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 *J.L. & Econ.* 591, 593–95 (2005); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 *Harv. L. Rev.* 2548, 2564 (2004).

<sup>42</sup> Bierschbach & Bibas, supra note 4, at 1482; see also Bowers, *Legal Guilt*, supra note 5, at 1687 ("[P]rosecutors possess the human capacity for practical reason. But, in their professional roles, they are first and foremost legally trained institutional actors. And their position and profession may profoundly limit the degree to which they are willing and able to exercise equitable discretion—particularly in the petty cases where such discretion is most warranted."); Bowers, *Mandatory Life*, supra note 20, at 36 (observing that a "mechanistic, impersonal, lawyerized criminal justice" may interfere with what some have identified as an intuitive "deep human need" to humanize and particularize retributive questions" (quoting Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 *Ohio St. J. Crim. L.* 347, 348 (2007))).

<sup>43</sup> Bierschbach & Bibas, supra note 4, at 1482 (emphasis added) (citing Bowers, *Legal Guilt*, supra note 5, at 1701–02).

<sup>44</sup> Bowers, *Understanding the Police*, supra note 7, at 22 (quoting Frederick Schauer, *Analogy in the Supreme Court*, *Lozman v. City of Riviera Beach, Florida*, 2013 *Sup. Ct. Rev.* 405, 429 (defining a "nonlegal impetus" as, inter alia, an "idiosyncratic reaction to . . . the very particular facts of the case"))).

If nothing else, the scope of prosecutorial power reveals a profound truth about almost any purportedly mandatory rule. It is destined, by some degree, to fail. The discretion we stamp out at one stage reappears at another. The authority we strip from one stakeholder works its way to another.<sup>45</sup> Like water through a weak dike, discretion finds the cracks—and there are always cracks. With this in mind, it makes little sense to construct a sentencing system that serves to delegate equitable authority to the least transparent and most biased parties—specifically, the prosecutors who control the pivotal decisions over whether to file mandatory charges (and whether to negotiate around them, thereafter).

I do not mean to suggest that the authors fail to appreciate this concern. To the contrary, they note, “[s]ome of the blameworthiness factors . . . inform low-visibility but influential decisions by . . . prosecutors . . . to decline or divert charges, to plea bargain, and to strike cooperation deals, among other things. But the hydraulic pressures to dispose of cases quickly make these decisions invisible, unchecked, unaccountable, and highly variable.”<sup>46</sup> Yet the inevitability of discretion reveals something more profound still. Discretion is *natural*, whereas rule-bound reasoning is artificial. At best, rule-bound reasoning is infantile and small-minded.<sup>47</sup> The mature mind strives to understand

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<sup>45</sup> Bierschbach & Bibas, *supra* note 4, at 1470 (observing that individualization that is “omitted” from sentencing “show[s] up elsewhere in the system”); Bowers, *Legal Guilt*, *supra* note 5, at 1687 n.146 (“[D]iscretion is a hydraulic force. An effort to eradicate it may play out like an attempt to squeeze air out of a partially inflated balloon: What disappears from one spot pops up in another.”); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551, 593 (1997) (“Limiting the discretion that police exercise on the street simply by demanding specificity in the laws that they enforce is so hopeless . . . ‘Elimination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system.’” (quoting Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81, 97 (1985))).

<sup>46</sup> Bierschbach & Bibas, *supra* note 4, at 1470 (footnote omitted); see also Stephanos Bibas, *Essay, Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. Rev.* 911, 914, 931 (2006) (“On average . . . [professional] insiders are more concerned with and informed about practical constraints . . . [Lay] [o]utsiders, knowing and caring less about practical obstacles and insiders’ interests, focus on . . . offenders’ just desserts. . . .” They “care about a much wider array of justice concerns than do lawyers, including . . . blameworthiness, and apologies.”).

<sup>47</sup> Jerome Frank, *Law and the Modern Mind* 178 (Transaction Publishers ed. 2009) (“The constant effort to achieve a stable equilibrium . . . is regressive, infantile, and immature.”); Bowers, *Legal Guilt*, *supra* note 5, at 1690–91.

things more deeply.<sup>48</sup> The criminal justice system is a human system, and no human system is prepared to dispense with context wholesale. This, then, seems to be what Bierschbach and Bibas mean when they write that “laymen care about a good deal more” than rigid sentencing rules.<sup>49</sup> Laymen also care about motive, social circumstance, and character (and also, for that matter, innumerable other moral and prudential questions and considerations).

Don’t get me wrong. As between a system stripped free of equity and a system that assigns equitable discretion exclusively to the executive, I prefer the latter—but only because one is impossible and even less desirable than the other. But neither is all that attractive. One of Bibas’s most important contributions is his brilliant book, *The Machinery of Criminal Justice*.<sup>50</sup> He hit upon certain fundamental realities—that the “machinery of criminal justice” is the province of neither sovereign prerogative nor the unbending rule.<sup>51</sup> In truth, liberal criminal justice is not machinery at all.

#### CONCLUSION

A mandatory sentence is like a store-bought greeting card. It strives to express a moral sentiment. But, except by rough fit, it cannot manage a genuine connection. It is just an abstract product of what typical people typically feel about typical groups. Preset categories are all that describe who should be considered similarly situated to whom. The core problem, however, is not that the mass-produced sentence (or, for that matter, the mass-produced greeting card) says the *same things* to everyone, but rather that it says *empty things* to everyone. The mandatory sentence is shallow.

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<sup>48</sup> Nussbaum, *supra* note 13, at 94 (“[T]he equitable person is characterized by a sympathetic understanding of ‘human things.’”); Kahan & Nussbaum, *supra* note 14, at 287 (observing that an Aristotelian conception of appropriate conduct in a particular context requires “asking what a person of practical wisdom would do and feel in the situation,” not by asking mechanistically what the law commands).

<sup>49</sup> Bierschbach & Bibas, *supra* note 4, at 1473; David Garland, *Punishment and Modern Society: A Study in Social Theory I* (1990) (noting that punishment falls short of societal expectations because “we have tried to convert a deeply social issue into a technical task for specialist institutions”).

<sup>50</sup> Stephanos Bibas, *The Machinery of Criminal Justice* (2012).

<sup>51</sup> Bierschbach & Bibas, *supra* note 4, at 1483–84 (“No one institutional player should hold all the cards. . . . An outcomes-focused conception of equality bent on centralizing sentencing and reducing discretion is in tension with this checks-and-balances approach.” (footnote omitted)).

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Bierschbach and Bibas still need to identify the source of equality's shallowness, as it applies to positive law. The authors' point of attack is a particular approach to the principle. But by giving such primacy to the dominant conception of equality, they unintentionally buy into it. The real problem is legality, as conventionally formulated and expressed.