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The people's hired guns? Experimentally testing the motivating force of a legal frame

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ABSTRACT

Legal realists expect prosecutors to be selfish. If they get the defendant convicted, this helps them advance their careers. If the odds of winning on the main charge are low, prosecutors have a second option. They can exploit the ambiguity of legal doctrine and charge the defendant for vaguely defined crimes, like "conspiracy". We model the situation as a signaling game and test it experimentally. If we have participants play the naked game, at least a minority play the game theoretic equilibrium and use the broad rule if a signal indicates that the defendant is guilty. This becomes even slightly more frequent if a misbehaving defendant imposes harm on a third participant. By contrast if we frame the situation as a court case, almost all prosecutors take the signal at face value and knowingly run the risk of losing in court if the signal was false. Our experimental prosecutors behave like textbook legal idealists, and follow the urge of duty. The experiment demonstrates the strong behavioral force of a legal frame.

1. Introduction

A bread and butter public choice model assumes a conflict between individual and social rationality. Those holding an office strive for some personal benefit, be it of pecuniary, reputational or ideological nature, and exploit whatever leeway they have to achieve this personal goal (Tullock, 1965). This rent-seeking assumption has repeatedly been put to the experimental test, with mixed results (for a survey see Houser and Stratmann, 2012). From the angle of public choice theory, prosecution is just another public office. If this helps them advance their personal career, prosecutors will exercise whatever discretion they have (for an illustration see Bandyopadhyay and McCannon, 2011). Yet arguably, prosecution illustrates an opportunity structure that differs from exercising ordinary political power. Whatever a prosecutor does, is regulated by law. The law may not always be very precise. It is the ambiguity of legal doctrine that gives the prosecutor power that is hard to control. Yet the prosecutor knows that society constructs her action as the application of laws to facts. In this experimental paper, we test in which ways the embeddedness of a public official's action in law affects her behavior, even if incentives for rent-seeking remain untouched.

The institution of the prosecutor holds a great deal of esteem. Prosecutors are fighting for a noble cause: the People's desire to see criminals convicted, for the sake of deterring future crime, but also to restore justice and to alleviate victims' sufferings. Yet for prosecutors, losing in court is quite likely, given the standard of proof in criminal matters is "beyond a reasonable doubt": the legal order is much more willing to accept that a guilty defendant is acquitted, rather than tolerating that an innocent is convicted. If there is serious doubt, the presumption of innocence trumps society's wish to convict criminals. At the same time, the law obliges prosecutors to go to court if only it is "sufficiently likely" that the defendant will eventually be convicted.[1] Despite the presumption of innocence, the law wants borderline cases to be dealt with by the courts. As a consequence, the law expects prosecutors to endure frequent failure.

This exposes prosecutors to a conflict between justice and incentives. Justice calls for respecting the presumption of innocence. Yet in many respects, the individual prosecutor is better off if she prevails in court. Prosecutors stand a better chance to be re-elected, or promoted to higher-ranking positions, if the defendant is convicted.

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[1] See for instance § 152 II German Code of Criminal Procedure: "Prosecution is [...] obliged to accuse the defendant for all crimes provided evidence is sufficiently suggestive", or in the German original „Sie [prosecution] ist, soweit nicht gesetzlich ein anderes bestimmt ist, verpflichtet, wegen aller verfolgbaren Straftaten einzuschreiten, sofern zureichende tatsächliche Anhaltspunkte vorliegen".

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She may come under pressure from the district attorney who also wants to be re-elected, or from the press who urges the prosecutor "to be tough on crime". These incentives are compounded by a psychological effect. Criminal procedure is organized as a tournament. It is natural for prosecutors to see themselves as adversaries of defense, and to aim at winning the combat.

Nominally, prosecutors' room for strategically tilting the odds of winning is limited. Criminal charges are strictly defined by law. Yet prosecutors select the inculpating evidence, and they define the charge. Different charges are differently easy to prove to the requisite standard. One important reason why some charges are strategically appealing to prosecution results from legal doctrine. While crimes like fraud, embezzlement, insider trading or forgery are reasonably well defined in legal doctrine, another set of criminal offenses is laid down in very vague terms. Prominent examples include "obstruction of justice" (18 U.S.C.S. § 1503), "conspiracy" (21 U.S.C. § 846) and "false statements" (18 U.S.C. § 1001). Observers have repeatedly suspected prosecution to append a charge that is vague to more narrowly defined charges in order to lead to the conviction of a defendant who would otherwise escape conviction. Arguably the less well defined the crime, the more promising prosecution fishing expeditions.

If prosecutors give in to such temptations, they become "the People's hired guns." That this is not a merely theoretical possibility is reflected in the fact that, in the U.S., prosecutors as individuals are largely immune to legal action (Brink, 2009).[2] The immunity privilege would be superfluous if prosecutors may not, at least, be suspected to overstep the legal boundaries. In this study, we attempt to determine if incentives do indeed lead to litigious prosecutions or to which degree, in contrast, the sense of duty and responsibility for the sake of justice prevails. We use empirical methods to ascertain whether justice or incentives come out on top.

In the field, it is difficult to show whether prosecutors do indeed append charges to promote their performance, or gaining a conviction. It is next to impossible to measure how frequently such practices are used. One would at best spot a few of the most salient cases, which could just be exceptions that prove the rule of prosecutorial impartiality. At best, one would show correlations between, say, the fact that prosecutors are elected in a jurisdiction and the frequency of convictions for certain crimes, without being able to prove causality. To overcome these limitations to observability and identification, we create a prosecution-like situation in the lab.

Our identification strategy relies on framing. The law expects prosecutors to act in a way that runs counter their (narrowly defined) incentives. Prosecutors should do so because they would otherwise violate the duties of a person to whom society has entrusted an office in the judicial system. We manipulate this contextual information. In the *baseline*, participants in the role of authority are exposed to the naked incentive structure. A second participant takes action, of which authorities are informed via a signal. They choose between two reactions. One reaction is conditional on how the other participant actually behaved. If they get it right, authorities make more money. The other reaction is completely disconnected from the true behavior of the second participant. The second participant is exposed to a random sanction. Incentives are such that choosing this reaction is more profitable for authorities. In the *frame* treatment, we call a spade a spade. We label the authority a prosecutor, the other party a manager, and tell a cover story of (room for) fraud. Additionally, fraudulent activities inflict harm on a third participant, labeled the shareholder. In the interest of isolating the effect of social preferences, we also implement an intermediate *harm* treatment, where the actions by the potential addressee of sanctions impact on the profit of a passive outsider, but no (label) framing is used.

Our experimental authorities are generally reluctant to expose other participants to random sanctions. Yet if they only learn the incentive structure, i.e. in the *baseline*, a minority does. The fraction is even slightly larger if selfish sanction addressees inflict *harm* on a passive outsider. Yet this fraction goes down to almost zero if we use a *frame* and tell authorities that they assume the role of a prosecutor. The data suggest that experimental prosecutors see inflicting a sanction at random as strikingly unjust, and refrain from it. At least in our experiment, the basic assumption of public choice theory is strikingly rejected.

Any experiment is the result of a trade-off. It is set up to generate evidence on a policy problem. Yet to make this evidence valid, it must abstract from many features that are likely to matter in the field. Our experiment is no exception; we lack many of those features. In the concluding section, we discuss these limitations. We are, however, convinced that our experiment addresses the key feature of the issue in the field: is a person who is entrusted with prosecuting perpetrators willing to rely on vaguely defined charges if she has an incentive to do so? Clearly, persons entrusted with this responsibility do not rely on the "broad rule" (i.e. the random sanction), even though in expectation they benefit from it. Even if the situation is neutrally framed (the *baseline* treatment), only a minority of prosecutors use this "broad rule". This number becomes extremely small if we let participants know that they assume the role of a prosecutor. At least the treatment difference must be attributed to prosecutors' sense of responsibility. If they know they hold the public office of a prosecutor, they suppress personal incentives and listen to the call of prosecutorial duty. At least in the lab prosecutors are not the People's hired guns.

In the next section, we explain the legal background. We then introduce the design of the experiment (Section 3) and derive the hypotheses to be tested (Section 4). We report the results (Section 5) and conclude with discussion (Section 6).

2. Legal background

The central question of this paper is whether prosecutors follow justice or selfish incentives. Historically, criminal procedure had been inquisitorial. The judge not only held power to adjudicate. He also was the investigator. It has been one of the major advances of rule of law to separate these functions. In modern (U.S.) criminal procedure the jury is responsible for deciding guilt or innocence and the judge is responsible for sentencing. There is a separate authority representing the government's interest in convicting criminals. It is the responsibility of the prosecution to apprehend alleged criminals, to spot incriminating evidence, and to fight for the People's cause.

Through separating roles, the law acknowledges the inherently partisan character of prosecution. This is not to say, though, that the law just cares about convictions. The presumption of innocence is the cornerstone of criminal procedure. False positives, i.e. convicting an innocent, carry much more weight than false negatives, i.e. acquitting a guilty defendant (leading case: *Addington v. Texas*, 441 U.S. 418, 422 (1979)). The standard of proof is strict. The defendant may only be convicted if his guilt has been established beyond reasonable doubt (see e.g. Pa. SSJI (Crim) 7.01). This translates into rules about prosecutor impartiality (e.g. Rule 3.8 New Jersey Rules of Professional Conduct) or neutrality (Green and Zacharias, 2004).

Observers, and prosecutors themselves, are divided over the question to which degree prosecutors live up to the normative expectation of being "litigant but impartial" (Yaroshefsky, 1999). There is casual empiricism of prosecutors being unduly wedded

[2] Note, however, that other legal orders even prosecute prosecutors if they bend the law, see e.g. § 339 German Criminal Code, and the related ruling of the German Supreme Court in Criminal Matters BGHSt 32, 357.