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Accuracy in Public Law Enforcement Under Political Competition: Comment

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Comment on “Accuracy in Public Law Enforcement under Political Competition”

*Francesco Parisi**

1. INTRODUCTION

Marie Obidzinski’s (2019) article analyzes from a theoretical perspective the effects of political competition on the accuracy of law enforcement and criminal justice. The existing literature, both theoretical and empirical, is rich and the author provides a valuable contribution by developing an economic model to explain the empirical findings of Lin (2007) and McCannon (2013). The model generates novel insights, showing that political competition does not foster optimal enforcement and accuracy in criminal justice and that distortions are generated by political competition relative to Becker’s (1968) optimality benchmark by a benevolent social planner. The model shows that when law enforcement actors operate under the pressures of political competition, they engage in lower than optimal levels of enforcement and accuracy for smaller crimes and higher than optimal levels of enforcement and accuracy for larger crimes.

2. THEORY AND EVIDENCE

In conventional law and economics, theory papers are often self-standing. Economic models of tort law, contract law, and even criminal law are built upon stylized assumptions on the preferences and rationality of the parties. Results are derived on the basis of such assumptions. Propositions are formulated, but they are not aimed at

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explaining existing empirical findings or at fostering empirical tests. Articles at the intersection of political economics and law and economics on the contrary exhibit a greater interaction between theory and empirical evidence. This happens in either of two ways. Some articles develop theory models to explain empirical findings presented in the existing literature. Other articles are empirical in nature and provide valuable testing of existing theoretical models. The article by Obidzinski (2019) falls in the first of the two groups, developing a novel theoretical model to explain the empirical findings of Lin (2007) and McCannon (2013) who respectively noted that deterrence for major crimes and reversal rates of criminal convictions on appeal decreased with democratic pressure and political competition.

In addition to providing a plausible theoretical explanation for the empirical literature, Obidzinski's model offers numerous novel insights and conjectures on the workings of elected actors of the criminal justice system under political competition. In the following, I suggest that her article should also serve as a springboard for future empirical research to test some of the additional theoretical results of her model.

Let me begin my substantive comment by focusing on the core assumption of her model. This assumption requires that "the proportion of individuals abiding by the law is lower than half of the population when the level of accuracy is 0 [and that] the proportion of individuals abiding by the law is higher than half of the population when the level of accuracy equals 1" (Obidzinski 2019, in this issue). This assumption is at the same time critical and questionable for the results of the model.

The author cites no evidence to support this assumption. The reader naturally thinks of counterhypotheticals. There are probably many social settings in which the majority of citizens are likely to be law-abiding even with low levels of law enforcement and/or accuracy. The vast literature on lawmaking and norm internalization (Carbonara, Parisi, and von Wangenheim 2008), expressive law (Cooter 1998), and focal-point theory of law (McAdams 2000) provides ample foundations for such counterhypotheticals. There could also be other social settings with opposite dynamics in which we could observe a majority of law offenders even with high levels of enforcement and accuracy. The literature on the backlash effect of legal enforcement (Depoorter, Parisi, and Svanneste 2005) and countervailing norms (Carbonara, Parisi, and von Wangenheim 2012) provides numerous examples in which human behavior could lead to such counterhypotheticals. In both situations considered earlier, the core assumption of Obidzinski (2019) would not hold, and the main results cited in her article, as motivated to explain the findings of Lin (2007) and McCannon (2013), would implode.

Obidzinski's (2019) article could indeed be enriched by relaxing the initial assumption and more transparently unveiling the additional results of the model when the two counterhypothetical scenarios are considered. What would be the political equilibrium generated by political competition when a majority of the population is law-abiding even with low levels of enforcement and accuracy? And what would be the political equilibrium generated by political competition when the majority of the population might be offenders even with high levels of enforcement and accuracy? These extensions of the model would likely generate results that do not support the empirical findings of Lin (2007) and McCannon (2013) and would entail the need to engage in empirical testing of Obidzinski's model in social environments characterized by different proportions of law abiders and law offenders.

3. OTHER CONSIDERATIONS

As it is often the case, the results of a theory article hinge on a stylized model that explicitly or implicitly assumes away several elements of reality. In the following, I point to some of the elements that I think should be considered in future work on this subject to develop a more complete understanding of the behavior of elected actors of the criminal justice system under political competition.

Time Lag: Type I versus Type II Errors

A time lag occurs between the initial conviction of a criminal and a possible reversal on appeal. If political elections happen between these two moments, political players would get the immediate payoff from the criminal convictions (for both small crimes and big crimes) and only partially internalize the future cost of possible future reversals on appeals.

Ceteris paribus, this should lead to a drift toward more type I errors (false convictions) shortly before elections. This should further lead to an asymmetric enforcement and accuracy with a changing ratio of type I and type II errors under political competition. McCannon's (2013) data do not provide enough information to test this hypothesis because (false) acquittals are not generally appealed and type II errors are therefore not measurable in the manner of McCannon (2013).

Deterrence—Time Elasticity of Offenders' Reaction

The model implicitly assumes that all criminals react to changes in enforcement and accuracy in the same way and with the same speed. But this may not be the case. The model and the underlying narrative

seem to overlook the different time elasticities of offenders’ reaction. Small and large criminals may react differently to changes in enforcement and accuracy. For example, it may be the case that small offenders adjust more rapidly to changes in enforcement and/or accuracy. This may be because of the greater opportunities they have to revert back to noncriminal living. Likewise, it may be the case that violent criminals and other big offenders have a slower speed of adjustment to changes in enforcement and/or accuracy. If that is the case, the effect of accuracy on deterrence will not be uniform across types of crimes, and accuracy and deterrence will no longer be necessarily correlated as Obidzinski’s electoral model requires.

Opening the Enforcement Box: Who Is the Producer of Accuracy?

Who are the criminal process actors who are influenced by political competition? The previous empirical literature looks at various players in the criminal justice system, ranging from the role of police (Levitt 1997) and prosecutors (McCannon 2013) to judges (Lin 2007).

Obidzinski’s model does not openly explain how accuracy in criminal justice is effectively produced. Overturning a decision on appeal is detrimental for the reputation of the prosecutor as well as the trial judge who issued the decision, as it sends a negative signal of quality that may compromise future elections. The increase in accuracy under political competition may thus be driven by reputational reasons that are independent from the law-abiding proportions of the electorate. Relevant criminal justice players may invest greater resources to avoid negative signals in high-visibility cases under political competition. Hence, accuracy increases for big crimes or more sensitive crimes relative to small crimes, as shown respectively by McCannon (2013, 2019).

The model could also be extended to consider the natural trade-offs between quality and quantity in law enforcement. Greater levels of accuracy in criminal justice come at a cost. In the short term, if constraints in the criminal justice system (e.g., workforce size) are exogenously set, greater quality can only be achieved at the expense of lower quantity. This may likely materialize as a trade-off between accuracy and filing rates as observed by McCannon (2019), who showed a reduction in the volume of filings prior to elections for rape cases.

Given that trade-off—namely, accuracy versus filing rates—greater accuracy may not necessarily lead to greater deterrence, as Obidzinski’s (2019) model assumes. The driving force of Obidzinski’s model of elected criminal justice actors targeting the voter’s preference for greater deterrence would no longer explain the rise in accuracy under political competition.

4. MODEL VERSUS REALITY— MOVING FORWARD

Journal editors and reviewers of law and economic articles occasionally have easy decisions to make when evaluating submissions. They occasionally come across submissions with (maybe, beautiful) models in the search for a legal application. Those submissions are easy rejections, as there is nothing that can be learned from those virtuous technical exercises. In other instances, they come across submissions with (maybe, less beautiful) models that explain a legal reality. There is something that can be learned from those articles. The article by Marie Obidzinski (2019) falls in the latter category as the development of an elegant model that provides a valuable building block toward understanding the changes triggered by political competition on the criminal justice system.

As suggested by my comments, the model is stylized and the assumptions are restrictive, and as such the article cannot provide a definitive explanation of the evidence discussed by Lin (2007) and McCannon (2013). There are alternative theories and models that can explain those same empirical findings. But that is often the case. More often than not, there is more than one plausible theoretical explanation of a single factual reality. Obidzinski's (2019) theoretical model provides a plausible explanation of the empirical evidence at hand, but further theoretical extensions and empirical research should be encouraged to foster a deeper understanding of this important building block in the political economy of criminal justice.

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