Comment on “Wrongful Convictions, Deterrence, and Stigma Dilution”

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1. INTRODUCTION

Whenever a defendant gets convicted in a criminal proceeding, it is well documented that the defendant will not only be responsible for the consequent legal sanctions, such as incarceration, monetary penalty, and so forth, but also be subject to nonlegal penalties. Nonlegal penalties can include restricted employment opportunities, lower wages, difficulty finding housing, and more general “reputational” harm, including being shunned by family, friends, and acquaintances. These types of nonlegal sanctions, imposed by agents outside of the criminal law system, are well known. What is, however, interesting is whether such nonlegal sanctions are based on other agents’ “rational” behavior and, if we presume that the other agents are acting rationally, why such nonlegal sanctions occur (in equilibrium) and what the legal system can or should do in response. It is in that vein that I found Murat Mungan’s (2017) “Wrongful Convictions, Deterrence, and Stigma Dilution” to be an extremely informative and thought-provoking article.

Ostensibly, the article addresses a somewhat narrower question of whether a particular kind of wrongful conviction, where one agent can be held responsible for some other agent’s crime (the case of mistaken identity), can affect deterrence. Lando (2006) argued that mistaken identity-based wrongful convictions do not affect deterrence because they increase the expected punishment cost associated with

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committing crime and not committing crime equally. That is, holding everything else the same, when an agent is deciding whether to commit a crime, because the agent knows that there is a chance that he or she may be punished for a crime committed by someone else, regardless of whether the agent commits the contemplated crime, the possibility of such wrongful conviction will not affect the decision. What Mungan convincingly shows in his article is that this irrelevance (or neutrality) result will disappear when we take into consideration the “stigma” attached to criminal convictions. The core insight of the article is that when rational agents impose nonlegal sanctions (e.g., lower wages, fewer employment opportunities) against agents with criminal records, wrongful conviction reduces the informational content of a conviction and, therefore, dilutes the impact of nonlegal sanctions. This stigma dilution, in turn, will affect deterrence.

As a person who principally deploys economic analysis to law, I found the article, written in the tradition of law and economics style, a real pleasure to read. The theoretical model has been reduced down to the core elements so that the reader does not have to deal with (or wonder about) how and why certain variables or analyses are being presented; the mathematical analysis (along with the proofs) is clean, elegant, and thorough; and the main insights from the model are presented in an easy-to-understand format that, I expect, even the non-law-and-economics audience can access relatively easily. The surrounding discussion is also well organized, to the point, and succinct, allowing the reader to get the core insight without having to read through unnecessary digressions. Furthermore, this thoughtful article has given me a chance to think about broader issues associated with legal versus nonlegal sanctions (including stigmatization), and this comment attempts to share some thoughts on such issues.

2. OPTIMAL LEGAL DETERRENCE REGIME

The article’s primary objective is to examine, in the presence of “stigmatization,” what effect wrongful conviction will have on deterrence. Stigmatization is modeled as agents with criminal conviction receiving lower wages ($W_C \leq W_N$ where the subscripts $C$ and $N$ stand for “conviction” and “nonconviction,” respectively). Paying lower wages is rational in the model because criminal conviction leads to lower productivity: for instance, $q(b, 1) \leq q(b, 0)$ for all $b$ where $q(\cdot)$ measures one’s (marginal) productivity, $b$ stands for the benefit the agent receives from committing the crime, and the second argument $a \in \{0,1\}$ denotes whether the agent has been convicted or not. Given that there is a possibility of wrongful conviction, the other agents in the economy will infer the average productivity of the agent with
criminal conviction and set the wage in accordance ($W_C$ or $W_N$). Also, when an agent is convicted, he or she will have to pay the monetized penalty of $s$. The article examines what happens to the level of deterrence as the probability of false conviction (represented as $\varepsilon \geq 0$) rises, when the other agents rationally update their beliefs about the impact of conviction on productivity and set the wage in accordance, while holding everything else the same.

Although the focus of the article is on the effect of wrongful conviction on deterrence, I was intrigued by the possibility of designing the optimal legal sanctions in light of the stigmatization effect. That is, when we know that such a stigmatization effect exists and the impact of stigmatization on deterrence, how should we think about modifying the legal sanctions mechanism? Instead of holding the size of legal sanctions ($s$) and the litigation mechanism ($p$ and $\varepsilon$) the same, the social planner (or the government) can design the sanctions in response to the effect of stigmatization. One possibility is to think about the absolute size of $s$. In the presence of stigmatization, should we increase or lower $s$? Another possibility is to think about whether we should condition $s$ on multiple convictions. At least in the model, only the agents who commit crime can be convicted twice, once for their own crime and second for someone else’s crime, whereas innocent agents can be convicted only once (for someone else’s crime). From the designing perspective, this implies that we should perhaps impose a harsher penalty on the repeat offenders or those who are convicted multiple times. Although the fact that only the agents who commit crime can be convicted twice comes from the stylized nature of the model, I think this point can be made more generally. Perhaps this can lead to the justification about systems such as the “three strikes” rule.

The other possibility is to think about what the legal system can do in terms of affecting the probabilities of conviction, represented by $p$ and $\varepsilon$ in the model. Again, the central focus of the article is to see the effect on deterrence as the probability of wrongful conviction ($\varepsilon$, along with the probability of correct conviction, $p$) changes. Presumably, however, the changes in probability must be stemming from some underlying changes in the legal system. This renders another possible avenue for further exploration. Should the legal system be designed to generally increase or decrease the probabilities of conviction? Should we make it easier or more difficult for the prosecutors to obtain a guilty judgment or a guilty plea? What about the burden of proof? Should the system impose a higher or lower burden on the prosecutor to show whether the defendant has, in fact, committed a crime? In the presence of stigmatization (and other nonlegal sanctions), how should we think about Blackstone’s ratio (“It is better that ten guilty persons escape than one innocent suffer”)? In short, the
article lends itself some nice research questions about design of the legal sanctions in the presence of stigmatization and other nonlegal sanctions.

3. INTERACTION BETWEEN LEGAL AND NONLEGAL SANCTIONS

Another interesting avenue of research and discussion that the article stimulates is the idea about how legal and nonlegal mechanisms are intertwined and interact with each other. The primary nonlegal sanction that the article explores is the poorer employment outcome (in the sense of lower wages, $W_C \leq W_N$), and this, in turn, in equilibrium, is justified based on lower productivity for those who have been convicted. The article suggests motivation for the lower productivity based on two rationales: [1] a person who commits a crime may simply have a weaker sense of morality and a higher propensity of not abiding by law; and [2] a person who commits a crime becomes a “better criminal” or becomes more efficient in committing crime and imposes a larger cost on the workplace. The first rationale is based on simple correlation, whereas the latter invokes some type of “learning by doing” story. I would guess that there could also be a third rationale: when a person is convicted and is imprisoned for some time, the person loses the (productive) human capital accumulated prior to conviction and may also learn, within the prison system, other ways of committing future crime. Although the learning story would be similar to the second rationale proposed in the article, the human capital atrophy story could provide a different basis for the lower productivity story.

What is interesting is that depending on which story we decide to adopt, how we should think about the criminal justice system differs. If, for instance, we adopt the correlation story (the first justification), unless we can design a system in which we could change the preferences of criminals (or their “characteristics”), the optimal response by the legal system would likely be to increase the accuracy of the conviction, adjust the sanctions appropriately, and let the public be aware of one’s past criminal history. Alternatively, if the justification is based on some type of learning or human capital atrophy, new possibilities emerge, particularly through the system of rehabilitation. One possibility is to reduce the chances and the length of prison sentence and focus more on retraining and rebuilding of human capital. By giving the convicted agents a chance to rebuild human capital, the legal system can change their marginal propensity to commit (future) crime. Furthermore, if incarceration and prison sentence were to lead to destruction of human capital (or becoming
more efficient at committing crime), perhaps the better system would be to encourage the prosecutors to rely less on prison sentences and more on nonprison rehabilitation, possibly through deferred or nonprosecution sentences. To the extent that a criminal record creates a stigmatization effect, we can also combine the rehabilitation program with the system that makes it more difficult for the public to uncover one’s past criminal record. The latter, for instance, can also be done by allowing guilty pleas to be subject to a nondisclosure arrangement.

Lower or restricted employment outcome is certainly an important element of nonlegal sanctions, but the article also encourages us to think more broadly about other types of nonlegal sanctions and, perhaps more importantly, how the nonlegal and legal sanctions interact. An important contribution made by the article is the informational value created by legal sanctions: how a criminal record can allow the public to update their belief about an agent’s productivity. This idea suggests that the relationship between nonlegal and legal sanctions can be quite complementary: information produced by a legal sanction can trigger or facilitate nonlegal sanctions. In a couple of articles I wrote with Scott Baker, we examine this issue more broadly in a repeated game theoretic framework (see Baker and Choi 2015, 2018). There, we argue that oftentimes the information generated by the liability regime (e.g., being found liable in a product liability suit) can facilitate more efficient nonlegal, reputational sanctions by allowing the other agents to tailor their sanctions based on the information. We also suggest that the informational benefit can also flow in the opposite direction: how one’s past behavior can inform the legal system in determining liability issues. One intriguing possibility here, in the context of criminal conviction, is whether to take into consideration one’s past behavior in determining conviction and sentencing. This is, at least briefly, mentioned above in thinking about how to treat repeat offenders. But, more broadly, should an agent’s preconviction behavior be taken into consideration when the court is determining liability and subsequent sentence?

Finally, although the article’s primary focus is on the employment outcome for agents convicted of crime, the article also encourages us to think about other types of nonlegal sanctions. People with criminal convictions are known to suffer not only worse employment outcomes but also face restricted access to housing, poorer chances of marriage, and other types of adverse “reputational” consequences. Sometimes the nonlegal sanctions can work in the opposite direction. Tax lawyers who have been found guilty of creating ingenious tax shelters can possibly find better postconviction employment opportunity in helping legislature fill the gaps in the tax code or a convicted securities trader,
with intricate knowledge of the securities market, can perhaps find better opportunities in operating a hedge fund. Depending on the type of nonlegal sanctions (and their magnitude), one could think about designing a different legal system. For instance, should we design a more lenient system for people who have suffered serious restriction in housing choices? How should the legal system respond when we expect the criminal to have an even better employment outcome after conviction? These are all intriguing avenues for future research.

4. CONCLUSION

Mungan’s (2017) article, “Wrongful Convictions, Deterrence, and Stigma Dilution,” adds an important and valuable insight into how we should think about the interaction between legal sanctions (e.g., criminal convictions) and nonlegal mechanisms (e.g., employment outcomes or other reputational sanctions). The law and economics analysis in the article is elegantly executed and makes a very convincing case. Although the article focuses on a narrow question about stigma dilution, it presents many avenues for future research from which, I believe, other scholars can benefit.

REFERENCES