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Should the Wealthy Be Able to "Buy Justice"?

John R. Lott, Jr.

Rice University

This paper shows that allowing wealthy individuals to influence the outcome of their trials through the purchase of legal services can be consistent with the optimal penalty literature. Using this analysis, I review some of the advantages and disadvantages of varying the length of jail terms versus varying the probability of conviction. Finally, implications for the bail, prosecutorial, and plea bargaining systems are examined.

I. Introduction

A common complaint lodged against the American legal system is that it favors the wealthy, who are willing to purchase high-priced and usually quite effective legal services. At first glance, this seems inconsistent with the optimal penalty literature: that individuals guilty of identical crimes should face the same expected level of punishment. However, when the length of imprisonment is not allowed to vary inversely with the opportunity cost of the criminal, varying the probability of conviction might come closer to the optimum level of deterrence. Varying the probability of conviction can be preferable to explicitly varying the length of imprisonment when it is sufficiently costly for others to determine the subjective opportunity costs of a criminal. Setting sentences solely as a function of the crime is shown

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to be a method of eliciting a criminal's subjective evaluations of the cost of imprisonment. The institutional arrangements we observe may actually result in a legal system much closer to the ideal advocated by Becker (1968) and Posner (1977) than commonly believed.

The following section shows why the probability of imprisonment should vary with the wealth of an individual. Section III explores justifications for why the government does not explicitly assign different lengths of imprisonment based on opportunity costs for people committing the same crime. Finally, Section IV extends the model's implications to the bail, prosecutorial, and plea bargaining systems.

II. The Model

The penalty (Ω) society levies on criminals maximizes a nation's wealth if a crime is not deterred when the benefit to the criminal of a particular crime is greater than the total social cost of that crime (C).¹ Criminals internalize the social cost from a crime when this cost equals the probability that the guilty party will be convicted (P) times the penalty. Thus under the assumption that society's goal is to maximize total social wealth, it follows that society will act to set

$$C = P\Omega. \quad (1)$$

The size of the penalty that any convicted criminal actually receives depends on the length of imprisonment (T), the opportunity cost of imprisonment (e.g., forgone wages, W), and also the amount spent on one's own defense (D). If the probability that the trial will take place equals one, so that the expected defense expenditures equal D , then²

$$\Omega = f(T, W) + \frac{D}{P}. \quad (2)$$

Longer prison terms, higher opportunity costs of prison, and larger defense expenditures increase the actual penalty. I shall use the term

¹ See Becker (1968), Stigler (1970), Posner (1977, 1983), Rubin (1978), Friedman (1979, 1981, 1984), and Polinsky and Shavell (1979, 1984) for the case for optimal criminal sanctions. An alternative view is presented by Seidman (1984), who claims that this is not the correct formulation since the utility of criminals should be given zero weight. Friedman (1981) and Polinsky and Shavell (1984) also provide very interesting formal analyses of the optimal choice of sanctions when punishment takes the form of imprisonment. However, neither paper investigates possible efficiency explanations for the current institutional arrangement of the legal system nor how defendants invest in their own defense. I will take as given that punishment will assume the form of imprisonment and not fines, but the argument presented here will apply equally well to any system of penalties in which the penalty increases with the opportunity costs of the defendant. (An efficiency explanation for why imprisonment is used instead of fines for certain types of crime is provided by Fremling and Lott [1987].)

² The expected penalty ($P\Omega$) a criminal faces is thus $Pf(T, W) + D$.

"wealth" interchangeably with the "opportunity cost of confinement" since the two are probably highly correlated.³

Once a criminal is arrested, both he and the state prosecution can influence the outcome of the trial. The probability that the penalty will be imposed (P) varies negatively with the level of defense expenditures and positively with the level of the state's prosecution expenditures (S). Both defense and prosecution expenditures should affect P at decreasing rates in the relevant range. Thus

$$P = P(D, S) \quad (3)$$

and

$$P_{DD} > 0, P_{SS} < 0. \quad (4)$$

Finally, the defendant will choose higher defense expenditures if he has higher opportunity costs of incarceration

$$D = D(W). \quad (5)$$

Suppose that the length of confinement, given conviction, is determined by the crime and is applied uniformly regardless of the individual's wealth. The forgone earnings and consumption of the criminal are thus explicitly ignored in setting sentence. The courts look only at the information provided as to the innocence or guilt of the accused and not his wealth per se in determining the verdict. Wealth enters only indirectly into the process through the strength of the defense presented.

If the length of the sentence is fitted to the crime, any individual's expected penalty ($P\Omega$), regardless of opportunity cost, will still equal the total cost of his crime (C) when⁴

³ The subjective nature of these opportunity costs will be dealt with in Sec. III. One reason for discussing the opportunity costs of incarceration in terms of wealth (and not just income) is that even if an individual's wealth is derived solely from bequests, convicted criminals rarely spend the remainder of their lives in prison with their wealth being transferred to others; imprisonment therefore creates an efficiency loss by forcing a criminal to defer his consumption until he is released from prison. An effect working to make the opportunity cost of imprisonment move in the opposite direction of wealth is that wealthy people tend to live longer. Thus any given sentence is a larger percentage of a poor person's life. The assumption of diminishing marginal utility of the time spent outside of prison works to make this time more valued for the poor person. However, this is probably of a second-order nature since discounting greatly reduces the weight a young person (the typical criminal) attaches to life 40 or 50 years in the future.

⁴ Restriction (6), which ensures that $C = P\Omega$ holds across opportunity cost groups, is derived by setting $P(d\Omega/dW) + \Omega(dP/dW) = 0$. We could easily have made the additional assumption that $C = C(D, S)$, where C_D and $C_S > 0$. If so, eq. (6) becomes

$$\frac{-C_D D_W}{C} + \frac{\Omega_W + \Omega_D D_W}{\Omega} = \frac{-P_D D_W}{P}. \quad (6')$$

$$\frac{\Omega_W + \Omega_D D_W}{\Omega} = \frac{-P_D D_W}{P}. \quad (6)$$

As long as the decline in the probability of punishment from additional defense expenditures due to higher opportunity costs is proportional to the increase in the penalty from higher forgone opportunities and larger defense expenditures, potential criminals of all levels of wealth will face the correct incentives in deciding whether to commit a crime.

Preventing wealthy people from influencing the opinion of the court in their favor will lead to expected punishments that are too large for the wealthy, assuming that they are at the correct level for the poor. Similarly, if the expected level of punishment equaled the total social cost for wealthy criminals and the probability that punishment will be imposed is the same for both the poor and the wealthy, too much crime will be committed by the poor.⁵

Therefore, allowing wealthy people to do what on first glance may seem like "subverting" the legal system can be efficient. It allows society to come closer to obtaining the optimum expected penalty for a larger group of people without having to vary the jail term for any given crime according to the opportunity cost of the criminal. It is possible that the legal system may be even closer to the ideal advocated by Becker (1968) and Posner (1977) than commonly believed.⁶

Recent empirical studies provide some support for this implication of the optimal penalty literature: that the probability of incarceration is lower for individuals with high opportunity costs. For instance, if the death penalty imposes greater costs on the wealthy than on the poor (e.g., because of larger forgone incomes), Zeisel's (1981) study of the enforcement of the death penalty in Florida finds evidence consistent with this effect of opportunity costs on the probability of conviction. He shows (pp. 466–68) that after controlling for the "social status" of the victim, the probability of conviction is higher for "low-status" (generally black) individuals than for "high-status" (generally white) individuals. Landes (1971) also shows that the higher the aver-

This formulation would imply that resources used in these legal proceedings represent a net social cost. As discussed in Sec. III, however, these expenditures might also produce social benefits through the information they produce.

⁵ Equity considerations do not present a plausible justification for higher expected penalties for wealthy criminals than for poor ones. Taxation is a much more direct means of making the wealth of the rich and the poor less unequal. In any case, it is not clear why we would want to "tax" so heavily the crime of wealthy individuals and "subsidize" it for poor ones.

⁶ The definition of "efficiency" used in this paper is the same as that used by Demsetz (1969, pp. 1–3).

age income of those living in a court district, the lower is the probability of conviction for sentences with prison terms. Hagan's (1974) literature survey indicates a persistent sentencing bias in favor of defendants with high socioeconomic status for capital cases and a similar, but smaller and less significant, relationship for noncapital cases.⁷

While the preceding discussion obviously applies when a criminal's opportunity costs arise from legally obtained income, the theory can apply equally well when the income is obtained illegally. The literature on optimal criminal sanctions weights the utility of the final consumer of illegal goods as highly as that of the final consumer of legal goods. The criminal who earns income from producing criminal services is just a middleman. In the case of professional criminals, a society's wealth is maximized when those crimes whose *combined* benefits to the consumers and producers of illegal activity that are greater than the total social costs are not deterred. It makes no difference whether the criminal is the final purchaser of the service or not.

One cautionary note should be made that, to the extent a professional criminal's high income arises *only* because he is better at avoiding detection and *not* because he can produce the good at lower costs because of other superior abilities (e.g., more skills as drug producers, better management skills, etc.),⁸ the probability of conviction

⁷ I have been examining the case in which criminals are imposing the same cost on society. If the wealthy murder the wealthy and the poor murder the poor, we should want larger expected penalties for wealthy criminals. In fact, Zeisel (1981, p. 467) provides evidence that, even after controlling for the social status of the criminal, the probability that the death penalty is imposed varies *positively* with the social status of the victim. This is consistent with what the literature on optimal penalties should predict. The argument presented in Sec. II thus provides an efficiency explanation for the recent 1987 U.S. Supreme Court decision in *McClesky*, in which the Court decided that statistical findings of discrimination were not sufficient evidence of improper judicial procedures.

⁸ More efficient producers of crime earn a return to these abilities in the form of a larger producer surplus and thus will expend more resources to avoid arrest and conviction. This is "efficient" since there is a social loss to having the least efficient criminals producing the crime. Imposing the largest expected penalty on the lowest-cost producers will tend to drive them out of the industry. Given that criminals face optimal sanctions so that they internalize the social cost of the crime, society's wealth is increased through the lower prices of illegal goods (i.e., larger consumer surpluses) and the larger rents the producers of these goods receive when the more efficient producers are producing. Taxing firms for the pollution they produce is no different since such a tax also ensures that a firm produces such a product only if consumers value it more than the total social costs of producing it. Society's wealth is increased when the most efficient firms are producing the output, even if it means that the optimal tax on efficient firms results in increased output and greater pollution. It is quite possible that there is little or no correlation between a criminal's income and the level of rents that he receives from the illegal activity. For instance, if a brain surgeon were to enter a life of crime, it is entirely possible that, despite his ability to direct great human capital resources to the pursuit of crime, his cost curve for producing crime may be so high because of the opportunity cost of his forgone income as a surgeon as to offer him little rents as a criminal. Despite his relatively small rents, he will still spend a relatively large

will be too low. As we can readily see from equation (6), reductions in the probability of conviction, without a corresponding increase in the penalty, would result in too low of an expected punishment for the criminal per crime committed.

III. An Explanation for Why Punishment Does Not Vary with the Opportunity Cost of the Criminal

Up to now we have ruled out varying the length of jail sentences with the opportunity costs of the criminal. This assumption may simply follow from the costliness of informing voters that fixed lengths of prison terms imply systematically different penalties for different people. However, varying the length of jail terms explicitly with the wealth of the criminal is not necessarily preferred to a constant jail term with varying probabilities of conviction. Since the opportunity costs of imprisonment are subjective and the wealth and wage incomes are only approximations of this true cost,⁹ it is not clear that governments can more accurately or at a lower cost equate the total social cost of a crime with its expected punishment by varying the length of imprisonment. Fixed sentences have the advantage of eliciting from the criminal the proper expenditure to lower his probability of conviction. The higher the subjective opportunity costs, the larger is the return to spending more money on defense to lower the probability of conviction. Fixed sentences allow us to elicit people's subjective evaluations of their opportunity costs.¹⁰

amount on his defense because of his large forgone income and thus face a relatively small probability of conviction. However, this is still efficient because the social cost of imprisonment is not just his forgone criminal rents but the entire forgone return to his human capital.

⁹ There are several factors that make it difficult to measure these subjective opportunity costs: (1) that wages provide information only on the marginal and not the inframarginal value of leisure, (2) the disutility of imprisonment, and (3) forgone investments while in prison. Not only could explicitly using wage income as an estimate of a criminal's value of time introduce a potentially costly new stage to trials to determine what that wage income is, but such an explicit rule will also alter individual behavior. For instance, potential criminals would substitute away from jobs that offer nonpecuniary attributes that they would normally prefer and into those that offer higher nominal salaries.

¹⁰ Even if governments possessed the information necessary to vary sentences perfectly with opportunity costs, this poses its own problems since it would be necessary for both poor and wealthy individuals to face the same probability of conviction. While perfectly varying sentences will help in equalizing this probability by making the return to purchasing defense the same for all criminals, the additional assumption that all criminals face the same cost of acquiring legal services must also be made. However, this last assumption is not immediately obvious. For instance, if wealthy criminals have more human capital and are involved in producing their own defense, wealthy individuals should produce more of a defense. While this effect works in the desired direction

IV. Other Aspects of Sentencing

The bail system has been criticized for discriminating against poor defendants. The evidence suggests that high-income people have a greater probability of making any given level of bail (e.g., Clarke, Freeman, and Koch 1976)¹¹ and that making bail lowers the probability of conviction (e.g., Zeisel 1982). Using cross-sectional data, Landes (1971) finds that making bail lowers the probability of conviction even after controlling for the direct effects of income.¹² He convincingly argues (p. 72) that detention increases the costs of defendants both in consulting with their attorneys and in assisting in their own defense through investigative activities.

Various proposals have sought to correct this perceived problem by suggesting greater reliance on releasing defendants without using bail and instituting "preventive detention" for those who are considered a significant threat to the community regardless of the defendant's ability to make bail (U.S. President's Commission 1967; Zeisel 1982, pp. 212–13).¹³ Landes (1971, p. 74) points out that this would not effec-

with a system of constant jail terms, it would result in too low of an expected penalty for the wealthy in a system of sentences varying perfectly with opportunity costs. Thus the intuition many people seem to have that varying prison terms will result in too low of a penalty for wealthy people may be correct. In addition to the arguments presented by Becker (1968) and Posner (1977), this discussion provides yet another reason to prefer fines: the reduction of court costs that signal one's opportunity cost of imprisonment. While these authors argue that fines are the first-best solution, my explanation provides a possible reason why a system of fixed prison terms is adopted, or at least continued, despite all its social costs. Replacing fixed terms of imprisonment with fines or varying sentences would remove the return to producing this signal and in turn lower the returns to producing legal services. This change would impose a capital loss on lawyers. Why the transfer may take this particular form is beyond the scope of the present paper.

¹¹ Besides having a greater incentive to make bail, higher-income criminals have an additional advantage in financing bail over poorer criminals because they are more likely to have a relatively greater portion of their wealth in the form of physical assets and not human capital and since current bankruptcy laws make loans based on human capital very risky. Poorer criminals must therefore pay bondsmen a premium to compensate these bondsmen for the greater risk incurred in putting up a bond for them.

¹² A possible objection to Landes's empirical findings is that making bail does not itself affect the probability of conviction but is simply negatively correlated with that probability because making bail is positively correlated with income and higher income reduces the probability of conviction. However, even if no causal relationship exists between making bail and the probability of conviction, the system can still increase the expected punishment of the guilty poor who are eventually acquitted by imposing some prison time when they fail to make bail.

¹³ Recently, the U.S. Supreme Court upheld the 1984 Bail Reform Act, which institutes preventive detention at the federal level when no condition of release will reasonably assure the safety of the community. The law allows for a detention hearing with an appeals process when bail is denied (Lacayo 1987). If our discussion is correct, we expect that those with the highest opportunity costs will invest more in these hearings and face a lower probability of being denied bail. Neither the law nor the court decision interferes with the traditional use of bail in cases in which the defendant does not

tively eliminate the bail system's discriminatory nature. Instead, he proposes a system of monetary compensation that increases with the length of detention for those who are unable to make bail. Detained suspects would then have additional resources to offset the higher marginal costs of defense and thus reduce their probability of conviction. The discussion in Section II suggests an efficiency explanation for the bail system's current form and why the reforms proposed above have not been adopted. Since defendants with the highest-valued use of their time are the most likely to make bail, the bail system helps to ensure that high-opportunity-cost criminals face a relatively lower probability of conviction than low-opportunity-cost ones.

Prosecutorial agencies may also be behaving in an even more efficient way than previously thought. Posner (1972, pp. 311–13) points out that a "perfectly rational" prosecutorial agency, attempting to maximize deterrence given politically imposed budget constraints, "will devote a 'disproportionate' amount of its resources to relatively minor cases" because such defendants will put up less resistance (see also Easterbrook 1983, p. 296). In terms of the discussion here, if high-opportunity-cost people spend more on their defense and thus represent "harder" cases, prosecutors could substitute into easier cases against individuals with low opportunity costs and low defense spending.

The plea bargaining system also works to adjust the expected penalty in the desired direction through its effect on the length of sentence. Since the probability of conviction is lower for wealthy individuals, their expected utility from trial is higher and the maximum sentence they will accept through plea bargaining is lower. Likewise, the lower probability of conviction will reduce the sentence that the prosecution is willing to offer wealthy individuals (see also Landes 1971, p. 71; Rhodes 1976, p. 336).

Current bankruptcy laws also cause the legal system to discriminate against the poor since relatively more of their wealth is in the form of human capital. These laws make loans based on human capital as collateral very risky. In the absence of such capital market "imperfections," poorer defendants would be able to internalize the costs and benefits of their own defense. The imperfections resulting from bankruptcy laws thus might explain government provision of public defenders. It should be noted, however, that in-kind subsidies do not

present a threat to public safety. A bankruptcy-type argument might explain preventive detention: if an accused criminal faces such high expected penalties that the cost of any additional penalties is meaningless (e.g., he already expects to spend the rest of his life in prison), detention may be the only way to prevent additional crimes until he is sentenced to prison.

always work to increase the amount of the good in question (Peltzman 1973; Lott 1987). If it is costly to privately supplement the in-kind subsidy for defense (e.g., you lose the subsidy if you can purchase private provision) and private provision is of a higher quality than public (e.g., less shirking), this subsidy can cause some people to switch to public provision even if it lowers the amount of defense purchased and thus increases the probability of conviction. The bankruptcy laws and the effect of in-kind subsidies both may work in the same direction as the argument discussed in Section II. Unlike in-kind subsidies, if defense vouchers were ever used, they would unambiguously work to reduce the probability of conviction of poor criminals whenever defense was a normal good.

V. Conclusion

Setting prison terms with regard to the nature of the crime alone can produce the correct expected penalty only if people with high opportunity costs are able to affect the probability of conviction by purchasing legal services. Courts do not explicitly have to treat wealthy people differently but merely base their decisions on the information they receive.

The term "justice" in criminal proceedings usually connotes the belief that two people committing the same crime should receive the same punishment.¹⁴ Those who seek to change the present system should realize that some changes, like equalizing the probability of conviction, may actually move us away from the goal of equality under the law.

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¹⁴ Rhodes (1976, p. 335) seems to use a similar definition of justice.

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