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# Flying Blind: Voter Information and Prosecutor Behavior

## A Comment on Ronald Wright's "Prosecutor Institutions and Incentives"

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The prosecutor is a pivotal figure in the U.S. criminal justice system. They have, to a large extent, unfettered discretion on case handling. They decide whether to file charges, which charges to file, and what sort of deals to offer in plea bargains. State-level prosecutors in the U.S. account for 95% of all criminal prosecutions (Simmons, 2004). Their decisions affect societal well-being through both their impact on public financing and the deterrence of crime. The quality of their decision making is, therefore, crucial for this important system's efficacy.

Wright (2017) looks at two "negative" features of prosecutors in the United States, namely that they work without adequate information on overall trends in case processing, prevention programs, corrections costs, and voter concerns about public safety—"flying blind"—and without consulting other actors in the criminal justice system (e.g., judges, defense attorneys, and community groups) who, consequently, have little influence in their decision-making—"flying solo." These two features, he argues, leads to prosecutors failing to do their job well. A number of important reforms are discussed, which involve both externally-imposed rules and procedures as well as internally-imposed rules for prosecutors to follow.

Our purpose in this comment piece is to make a conceptual distinction in understanding how the two features may have come about: Are these features the result of institutional constraints that the prosecutor is unable to change (i.e., s/he must fly solo and blind), or does the system incentivize prosecutors to want to fly solo and blind? As we will articulate, this distinction is important as the success of the various policies for reform will differ depending on which dominates. While it may appear that flying blind may be more of an institutional constraint, while flying solo is a choice, we will argue that the two features are in fact closely linked.

To expand, one potential reason why we may see prosecutors fly solo and fly blind is the limitations imposed from external constraints. For example, there may be a lack of information about the overall impact of case processing. The conditions within overcrowded prisons may not be fully understood. The impact of the decisions on the victim, the accused, their families, and their communities may be difficult

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to appreciate. The answer lies in overcoming that constraint by, to continue with the example, creating a database that can make it easy for prosecutors to track the overall impact of their actions. Information sharing across various criminal justice agencies should be encouraged so that prosecutors become more aware of the systemic impact of their actions. This would be an example of a policy intervention that attacks the exogenously-imposed institutional shortcoming that leads prosecutors to fly blind.

However, there is at least some reason to believe that the institutional incentives may be what causes prosecutors to want to fly solo and fly blind. For example, while prosecutors may be constrained by inadequate information about the impact of their actions on the criminal justice system and must fly blind, it is far from clear that they have an incentive to lobby for changes which would make information more readily available. A more transparent system is harder to manipulate and may not be in the best interest of the prosecutor. More detailed information collection and dissemination also opens up the possibility of criticisms of prosecutorial output and decision making.

Thus, while a number of external constraints can hamper the work of prosecutors, it is worth examining whether these constraints a least partly arise endogenously from wider institutional features. A striking institutional feature that comes to mind is that in the United States the primary mechanism for prosecutor accountability is popular, typically partisan, elections. Although this may promote more accountability via prosecutors being more responsive to the will of the people, it is far from clear what the welfare effects would be in a world where voters have considerably less information than the prosecutor. Voters have limited information on the skills the incumbent prosecutors possesses and the prosecutor may be incompletely informed as to the policy preferences of the electorate. Thus, both voters and prosecutors may be flying blind. Bandyopadhyay and McCannon (2014) analyze an environment with asymmetric information between prosecutor and voter. While the prosecutor knows his/her ability, voters do not. This provides the opportunity for an incumbent to make case processing decisions that impact voter's beliefs about the prosecutor. Since jury trials are newsworthy, they focus on the decision to take a case to trial, rather than reach a negotiated plea. They show empirically that prosecutors respond to electoral pressure by taking more cases to trial than would be socially optimal. However, Bandyopadhyay and McCannon (2015) show that this is not a necessary feature of an environment of asymmetric information about prosecutorial quality, but instead stems from voters using limited metrics for evaluating prosecutors. Indeed, they show that even with asymmetric information it is possible to achieve socially-optimal outcomes provided voters have information on a multi-dimensional metric of prosecutor performance. However, voters having recourse to such information would lead to incompetent prosecutors being replaced. Given this, it is far from clear that prosecutors have incentives to lobby for easily available data on the impact of their actions on society. Thus, 'flying blind' and keeping the citizenry blind may be in the best interests of the prosecutor.

One can of course argue, that elections may induce better performance (Huber & Gordon, 2002). However, there is compelling evidence that it can instead increase delays in the criminal justice system expanding the case backlog (Bandyopadhyay & McCannon, 2017) or induce more mistakes (McCannon, 2013), as measured by decisions on appeals of felony convictions. As a more general point, while the popular election of prosecutors and judges could, in principle, improve democratic accountability, akin to the arguments made for "issue unbundling" via citizens initiatives (Besley & Coate, 2008), in a world where agents are boundedly rational (i.e., they cannot foresee all the consequences of their action or make fully rational choices in a complex environment), such elections can induce distortions as each agent tries to maximize her well-being without considering the externality it imposes on others. Hence, a prosecutor, even if partly civic-minded, may find it in her best interest to have a less than well-informed citizenry.

Similarly, while flying solo is a choice the prosecutors make, institutional constraints can make it worse. For example, low thresholds for binding defendants over via pretrial detention, reluctance of judges to overturn agreed plea bargains, and rules that do not necessarily require the defense to be given all evidence gathered are concerns. Even changes that potentially favor a movement away from processing within the criminal justice system such as restitution, diversion, treatment, or community sentences give the persecution wide discretion and as Wright (2017) argues amounts to a form of pre-conviction sentencing without inputs from a judge.

Of course, not all prosecutors may want to fly blind or fly solo. In particular, more competent prosecutors gain in not just having more information, but also sharing it with the voter and consulting other partners in the criminal justice system. They may indeed lobby for creating a more data rich environment and may, through their actions, also signal their competence. It is also likely that such prosecutors are also the ones who would be most open to consulting other actors as they have more confidence in their ability to 'read' cases correctly. Indeed the encouraging signs Wright (2017) notes of early changes in both sides (prosecutors and voters) suggests even within the electoral environment that may skew incentives of prosecutors, change is possible.

It is however worth noting that even without the complexities of strategic interaction and asymmetric information, one may need to define what success (and thus failure) means. While it is reasonably persuasive that flying blind and solo are unlikely to result in optimal outcomes, we still need to define optimality or success somewhat carefully. One can of course define this to mean socially optimal outcomes, but as we know (see Arrow, 1950) there is no guarantee that we can define a social welfare function that can aggregate individual preferences in a desirable way. Nor are there clear ways to be able to elicit individual preferences in a diverse society. So any measure of success or failure must needs address the question "success" (or failure) for whom and when there are diverse groups, how are their conflicting claims aggregated. For sure, one can come up with precise measures such as conviction rate which are known to be flawed or manipulable or broader criteria such as equal justice under the law which are hard to measure. However, practical criteria can be devised and Wright (2017) discusses a number of them in the paper. In particular, he rightly focuses on the need for external enforcement to go hand in hand with change from within. As he persuasively argues, "proposals for new, specific legal standards are most realistic when they empower *other* criminal justice actors rather than reducing the range of legal options available to the prosecutor" (Wright, 2017, p. 7). And while important reforms allowing judges more say can motivate undesirable outcomes to an extent, political constraints such as judicial elections may nonetheless limit the incentives for judges to overturn prosecutorial overreach. In this context externally imposed rules (from the legislature) requiring the use of internal standards while not constraining the prosecutor to any specific course of action may nonetheless incentivise her to cause adoption of standards that discourage her from flying solo or flying blind.

It is also worth commenting that external enforcement (e.g., externally imposed substantive rules) can lead to a shift in incentives. This would result in internal changes to how prosecutors go about their work. Thus, external constraints and internal incentives can be complements—a change in one changes the other. Finding the right mix will require a careful appraisal of the predicted changes in the environment with carefully designed empirical study of their impact.

Wright (2017) attacks an important issue in the criminal justice system—prosecutor behavior. The research into their behaviors is organized into questions regarding their informational imperfections and their interactions with other interested parties namely, flying blind and flying solo. This is a useful framework to guide future research as well as policy interventions. Our comment—that flying blind and solo vary by the source, either through exogenously-imposed institutional constraints and endogenously-determined deliberate action—is just one example of the value of the conceptualization provided by Wright (2017).

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