“And that is why”:
An experimental study on the impact of “giving reason” in legal decision making

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LONG ABSTRACT

Introduction
In this paper, we study the effects of “giving reason” for legal decision making in two different scenarios (with some extensions) by means of economic experiments. In particular, we examine the role and impact of giving reason regarding (i) “naked punishment decisions” in so-called third party altruistic punishment games and (ii) in scenarios involving “legal review” of punishment decisions by a second (vertically superior) punishment layer (= review of the punishment decision by an “instance”). The first scenario allows us to study the impact of “giving reason” on the incidence and amount of altruistic costly punishment (i.e., “rationalized punishment decisions”) and also on the underlying “stealing behaviour”, the second scenario allows us to examine whether and how reasons provided by the punisher (in the first instance) influence the outcome of legal review in the second instance (and again possible influences on the underlying “stealing behaviour”). In a variant to this second scenario, we also test for an “expressive” giving of reason, namely such that it reaches the “second instance” only after it has already taken its review decision, and thus has no “instrumental value” (= value in influencing the outcome of the judicial review). We also examine (in a non-incentivized way) the satisfaction of all players with the experiment in all scenarios. To the best of our knowledge, the impact of giving reason for legal decision making has, until now, not been studied experimentally.

“Giving reason” is generally considered a fundamental feature of decision making under the rule of law. A huge pertinent legal literature exists (both regarding the national laws of the respective countries and the international literature, see e.g., Fuller, The forms and limits of adjudication, HLR 1978, 409). The European Court of Human Rights considers “giving reason” a fundamental element of the “fair-trial”-guarantees.

Regarding the economic literature, there is a recent literature on the question how “the public” views the quality and legitimacy of rulings in the light of different set of reasons (Simon/Scurich, Lay Judgement of Judicial Decision Making, JELS 2011, 709), and there is a working paper on the substitution between harshness of punishment and the “shaming aspect” of reasons (Engel/Zhurakhovska, Words substitute fists: Justifying Punishment in a Public Good Experiment). Public Choice literature has shown “expressive voting” in a variety of experimental settings (e.g., Fischer, Public Choice 1996, 171). Quite some literature discusses the dichotomy of “deliberative” versus “intuitive” decision making and the different impact of “rationalization” on these two different sets (see e.g., Guthrie/Rachlinski/Wistrich, Blinking on the Bench, CLR 2007, 101). However, there is, so far, no systematic study as to the impact of “giving reason” on legal decision making as such, neither regarding the impact on the decision maker herself (compared with no reason being required), nor on the way, how a “second instance” views a reasoned versus a not-reasoned decision, nor on the impact that the introduction of a requirement of giving reason on the side of an enforcer has on the underlying “illicit” behaviour. Our experimental study aims at providing a first view on this set of issues.
The paper draws upon existing “standardized” experimental settings that have been tested out in previous experiments, namely, on the one hand, “altrustic third party punishment” (see e.g., Lewisch/Ottone/Ponzano, Free-Riding on Altruistic Punishment? RLE 2011, 165; Ottone/Ponzano/Zarri, Power to the People? An Experimental Analysis of Bottom-Up Accountability of Third-Party Institutions, JLEO 2015 forthcoming) whereby two individuals are paired in a “stealing/giving scenario” and a third party is given the right to impose costly punishment on the “wrongdoer” and, on the other hand, “review scenarios” whereby the decision taken by the punisher in the aforementioned setting is subject to “legal review” by a “second instance” (see Lewisch/Ottone/Ponzano, Third Party Punishment under Judicial Review, RLE 2015 in print). We use these established scenarios as baseline treatments, against which we test the impact of a “reasoned opinion”.

The section below describes the experiment. In this extended abstract, we are unable to already present results, because the actual experiments will be carried out only in May/June. This time frame will allow us to collect all available data for a full paper well before its due date for this conference. The EALE conference in Vienna would then be one of the very first occasions to present these then brand new research results.

**Experimental design and procedure**

**The treatments.** The experiment consists of six treatments. More specifically:

a. Trial Treatment (Baseline treatment – TT). Each session involves 5 players A, 5 players B and 15 players C. In each session players participate in 3 rounds. At the beginning of each round, all the players receive their initial endowment. The first round consists of two stages. In the first stage, A and B are paired and participate in a Theft Game, in which A is offered the option to take away (“steal”) 50 tokens of B’s initial endowment. In the second stage, 5 out of 15 players C are randomly selected and each of them is assigned to a couple who has played the theft game in the first stage. Each player C who has been selected has to decide whether he wants to spend X tokens of his endowment to punish A in case of stealing is involved. The 10 players C who are not selected to participate in the second stage are asked to wait. At the beginning of the second round, As and Bs are rematched and paired according to a stranger protocol. The second round is exactly the same as the first one, with the peculiarity that other 5 out of 15 players C are selected to make their choice in the second stage. In the third round, couples are rematched again and the remaining 5 players C participate in the second stage.

b. Appeal Treatment (AT). Each session involves 5 players A, 5 players B, 15 players C and 5 players D. In each session players participate in 3 rounds. At the beginning of each round, all the players receive their initial endowment. The first round consists of three stages. In the first stage, A and B are paired and participate in a Theft Game, in which A is offered the option to take away (“steal”) 50 tokens of B’s initial endowment. In the second stage, 5 out of 15 players C are randomly selected and each of them is assigned to a couple who has played the theft game in the first stage. Each player C who has been selected has to decide whether he wants to spend X tokens of his endowment to punish A in case of stealing is involved. The 10 players C who are not selected to participate in the second stage are asked to wait. In the third stage, each player D is assigned to a triplet (A, B and C) and may hence confirm C’s decision either to punish or not to punish or may correct it. The decision to confirm or modify C’s punishment decision comes at a cost of Y tokens for D. The “appeals-decision” by D directly determines A’s ultimate payoff (meaning that the punishment decision of the first instance is set aside by the appeals decision). The appellate decision (realistically) also affects the “first-instance-punisher” C in the sense that modifying decisions by the instance (D) lead to a reduction of Z tokens in C’s payoff while confirming decisions leave C’s payoff unchanged. At the beginning of the second round, As and Bs are rematched and paired according to a stranger protocol. The second round is exactly the same as the first one, with the peculiarity that other 5
out of 15 players C are selected to make their choice in the second stage. In the third round, couples are
rematched again and the remaining 5 players C participate in the second stage.

c. Trial Treatment with motivation (TT_Mot). This is exactly the same as the TT, with the only
difference that now, each player C has to write down the motivation of her choice. This motivation is
communicated to players A and B in the group. Player C knows before making her choice that she will have
to justify her decision.

d. Appeal Treatment with motivation (AT_Mot). This is exactly the same as the AT, with the only
difference that now, each player C has to write down the motivation of her choice. This motivation is
communicated to players A and B in the group and, obviously, to the assigned player D before she makes
her choice. As in the TT_Mot, player C knows before making her choice that she will have to justify her
decision and that it will be communicated to player D.

e. Trial Treatment with motivation after decision (TT_Mot_After). This is exactly the same as the TT,
with the only difference that now, each player C, after deciding whether to punish or not player A, has the
opportunity to pay a small amount Y to write down the motivation of her choice. This motivation is
communicated to players A and B in the group. Player C is not informed before making her choice that she
will have the opportunity to justify it.

f. Appeal Treatment with motivation after decision (AT_Mot_After). As in TT_Mot_After, each player
C, after deciding whether to punish or not player A, has the opportunity to pay a small amount Y to write
down the motivation of her choice. This motivation is communicated to players A and B in the group and,
obviously, to the assigned player D before she makes her choice. Again, player C is not informed before
making her choice that she will have the opportunity to justify it.

In a previous work (Lewisch et al., forthcoming), we showed that the presence of a second-instance of
punishment induces a higher level of punishment. This new design allows shedding light on some issues
concerning the reason why it happened. In particular, the introduction of the two treatments TT_Mot and
AT_Mot allows understanding whether the first instance decision to punish stronger when a second
instance punisher exists, is due to the fact that the trial judge is forced to rationalize the crime and the
consequent punishment due. If it is the case, we expect to observe that the difference between the level of
punishment in the TT_Mot and in the AT_Mot is lower than the difference between the level of
punishment in the TT and in the AT.

Moreover, the introduction of the two treatments TT_Mot_After and AT_Mot_After allows checking
whether giving reasons is an instrumental or an emotional good.

The level of satisfaction of each type of player will be detected at the end of each session.

The sessions. We will run three sessions for each treatment. This means that during the experimental
campaign we will collect observations of 45 players C – our target – in each treatment. This is a Lab
experiment and we will run the experimental sessions at the University of Milano-Bicocca (EELAB).
Experimental subjects will be undergraduate students.

Key words: Giving reason, third party punishment, judicial review, two-tier punishment system, deterrence.

JEL-Classification: D03, K14, K40.