

# Law Enforcement, Malfeasance, and Compensation of Enforcers

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## Abstract

A positive theory of legislation. Section I discusses the general circumstances that influence the vigor of enforcement and the frequency of violations. Section II considers the consequences of weak enforcement for the operation of the legal system. Section III makes two approaches for improving the incentives given enforcers. One is to penalize malfeasance and the other is to reward successful enforcement.

## 1 The Market in Enforcement

Lets step behind from the judgement of whether the law is a failure or not, since it is always the case that (from basic economic principle) when some people wish to behave in a certain way, they will pursue that wish as long as the amount they gain from it exceeds their willingness to pay for it. So if a person violates a law carrying a punishment equivalent to a fine of \$10,000 he would be willing to spend up to that amount to avoid apprehension and conviction (bribe the officials etc). So how much should the level of enforcement be? It will depend upon four factors.

First, the level of enforcement will depend upon the degree of honesty of the enforcers. For a given bribe, some enforcers will condone offenses that other men would prosecute. This degree of honesty will not only depend upon the supply of honesty in the population, but also on the amount spent to ascertain how honest a given person is.

Second factor is the structure of incentives to honesty embedded in the remuneration of enforcers. The correlation between the gain to enforcers from enforcing laws and the gain to violators from successful violation is positive. But the variation in the gain to violation is often much greater than that to enforcers from preventing or punishing violations, so that the quality of enforcement would tend to decline as the gain to violators increased. This is one of the reasons why the effective enforcement against petty crimes is more common than it is against major antitrust or other “big” violations.

The third factor is the temporal pattern of violations. it is difficult to bribe enforcers in a non-repetitive crimes, but in repetitive crimes, such as prostitution, gambling etc, the substantial transaction costs of ascertaining that the other party is reliable become manageable for both violators and enforcers.

The fourth factor is on whether a violation has a “victim”, a person who bears the large part of the cost of violation. Enforcement is generally more effective in violation which have victims, since the victims have a stake in apprehending violators.

## 2 The Quality of Enforcement and the Effectiveness of Laws

Take the case for corruption. Consider a crime with \$5,000 of fine. The violator would be willing to bribe up to \$5,000 to the enforcer. If \$5,000 were paid by the violator, it can be said that the violation

is fully punished, since the violator paid the amount equivalent to the fine. Consequently, the deterrent effects of the bribe and the fine would be the same. Moreover, if the enforcers anticipate the \$5,000 bribe, they will be willing to work for \$5,000 less than they otherwise would. Then in this case, the state is in fact collecting the bribe.

Effectiveness could be improved if a bribe of \$5,000 were alternative to punishment by a prison term with a monetary equivalent of a \$5,000 fine. If the punishment was in the payment form (not a prison term), then the state would be collecting the fine (in the form of money). The monetization of punishments by bribery would improve the operation of the punishment system.

Effectiveness would be reduced if the amount paid in bribes were significantly less than the monetary equivalent of the punishment. Bribes might be less because of competition among the enforcers, or because the marketable resources of violators are less than the monetary value of punishment. In these cases, bribery reduces punishment and thus deterrence.

### 3 How to Improve Enforcement

#### 3.1 Punishing Malfeasance

If the state knew precisely whether if enforcers did perform adequately or not, and enforcers who are discovered not acting adequately are dismissed, enforcers could be induced to perform adequately simply by being paid what they could get in other jobs requiring comparable skills. But this assumption that the state will know everything is not realistic. How then can corrupt enforcement be discouraged when detection is uncertain?

The answer is to raise the salaries of enforcers above what they could get elsewhere, by an amount that is inversely related to the probability of detection, and directly related to the size of bribes and other benefits from malfeasance. A difference in salaries will impose a cost of dismissal equal to the present value of the difference between the future earnings stream in enforcement and in other occupations. This cost can more than offset the gain from malfeasance.

#### 3.2 Rewarding Enforcement

Consider victim enforcement. Examples of victim enforcement would be; persons charged in excess of the legal ceiling on rents report their landlords because they anticipate a reduction in their rents. Laws against shoplifting are enforced primarily by stores, because they anticipate compensation etc. The amount of victim enforcement would be optimal if successful enforcers were paid the amount that they had suffered in damages, excluding their enforcement costs, divided by the probability that they are successful. If this amount were levied in fines against convicted violators, so that, in effect, violators compensated victims, the gain to victims from enforcement would be the same as the punishment to violators; hence these enforcers could not be corrupted.

Most victims will not literally become enforcers, but they would hire “enforcement firms” to gather evidence and argue their cases. Free competition among these firms would ensure that enforcement was provided at cost. Moreover, these firms would not wait passively until contacted by victims, but would seek out evidence and bring it to the attention of victims.

Free competition among enforcement firms (as explained above) have many advantages. First, society would use fewer resources to detect malfeasance because payment for performance reduces the gain from malfeasance. In addition, the right amount of self-protection by potential victims is encouraged, not the excessive (wasteful) self-protection that results when victims are not compensated, or the inadequate self-protection that results when they are automatically compensated. Further, rewards of innovation will spur technical progress in private enforcement as in other economic callings.