**Incentive to Enforce**

If nobody benefits by enforcing a legal rule, the rule will not be enforced. If someone benefits too much by convicting someone else of violating a legal rule, we may try too hard, spend more on law enforcement than the resulting improvement is worth. We may also find that enforcers are punishing people for crimes they have not committed. The problem is the same whether the benefit comes as a reward, the collection of tort damages, career advancement for a police officer who gets his man, favorable publicity for a politically ambitious prosecutor, or not being punished for the failure to catch a criminal.[[1]](#footnote-1) In modern American criminal law, the issue of too much incentive to convict shows up as the problem of civil forfeiture,[[2]](#footnote-2) in tort law as the controversy over class actions and punitive damages.

Getting the incentive to convict correct involves balancing the benefits of enforcing the law against the costs. One cost is the use of resources, labor and capital, that could be used for other purposes. We could get almost perfect enforcement of speed limits if every road had a cop car every few miles, but it would take a lot of cops and cars. A second cost of convicting more who are guilty is convicting more who are not. If we get a higher conviction rate by increasing the reward to cops who arrest speeders, we have increased the incentive to cops to cheat, to arrest drivers who they falsely claim were speeding. If we get a higher conviction rate by lowering the standard of proof, we will acquit fewer guilty defendants but convict more innocent ones. If a fixed percentage of those convicted are innocent, doubling the conviction rate will double the number of innocents convicted. The problem of getting the right incentive to convict is thus closely connected to the problem of making sure that only the guilty are convicted and punished.

One way of trying to solve the latter problem is to adopt legal rules that make it harder to convict the innocent than the guilty. In theory that is how the modern trial mechanism is designed. It is unclear how well the theory fits the facts. We have no good measure of what fraction of those convicted of crimes are innocent, but various attempts at indirect measures suggest that it is at least three to five percent, perhaps more.[[3]](#footnote-3)

One feature of the modern American legal system that may increase the frequency of false convictions is the practice of providing indigent felony defendants with defense attorneys selected for them by the state, the same organization that chose the prosecutor and judge.[[4]](#footnote-4) Another is plea bargaining. An innocent defendant facing a ten percent risk of conviction on a charge likely to lead to a life sentence might find it prudent to plead guilty to a lesser charge, be sentenced to six months in prison and released for time served awaiting trial. That is an unjust outcome but arguably better than, in the absence of plea bargaining, convicting one innocent out of ten on the more serious charge.[[5]](#footnote-5)

One example of the problem of overenforcement was described in Chapter XXX. In England in the mid 18th century, both Parliament and the Crown established rewards for conviction for offenses for which it was feared that private prosecution was inadequate.[[6]](#footnote-6) The result was a series of scandals in which a party was either entrapped into committing an offense or framed for an offense he did not commit. Eventually rewards for conviction were replaced by partial compensation for the expenses of a successful prosecution—not enough to make prosecution profitable, merely less costly.[[7]](#footnote-7)

Even if we knew how to design rules that did a better job of separating innocent from guilty, it is unclear that it is in the interest of those who create the rules to do so; when someone is convicted of a crime he did not commit, it is not the judge who pays the penalty. And even with well designed legal rules, it may often be possible to find, out of the universe of all potential suspects, someone easier to convict than the actual offender. Hence, even with well designed rules, increasing the incentive to convict someone can be expected to increase the number of false convictions.

One approach to the problem is to make it harder to convict innocent defendants. Another is to find ways of making it in the interest of prosecutors not to prosecute them. An example is provided by Athenian law. The equivalent of criminal cases could, like criminal cases in 18th c. England, be privately prosecuted by any adult male citizen. Conviction usually led to a large fine, a share of which went to the successful prosecutor. To deal with the risk that a prosecutor would target an innocent but wealthy defendant, Athenian law provided that a prosecutor who failed to get at least 20% of the jury to vote for conviction was himself fined.[[8]](#footnote-8) That gave potential prosecutors an incentive to try to avoid prosecuting defendants who had a substantial chance of proving their innocence.

The Athenian approach could be applied to a modern legal system by penalizing a tort plaintiff or public prosecutor who failed to get more than some minimum number of jurors to vote for conviction. Alternatively, one might impose a penalty on prosecutors responsible for convictions later shown to be mistaken, as in the case of DNA reversals.

Both versions have problems. The first provides an incentive for prosecutors who suspect the defendant may be innocent to conceal the evidence from the jury. The second gives a prosecutor who suspects that he may have convicted an innocent defendant an incentive to prevent the error from being discovered.

That, again, is not a purely theoretical problem. In the current U.S. legal system there is no legal penalty for a prosecutor who turns out to have gotten an innocent defendant convicted, but there are reputational penalties. Reading accounts of attempts by innocence projects to check the results of old cases using a technology, DNA testing, that was not available when they were tried, one is struck by how reluctant the authorities controlling access to the evidence are to make it available.[[9]](#footnote-9)

For a different approach to protecting the innocent, consider prosecution motivated by private deterrence as in 18th century England. Arresting the first feeble minded beggar found near the site of a crime and railroading him to the gallows works just as well as hunting down the actual perpetrator from the standpoint of a private prosecutor motivated by a reward or a police officer angling for promotion and it may be a lot less work. But if potential felons are reasonably well informed as to the guilt or innocence of those convicted, as the guilty felon surely is, private deterrence depends on convicting the right person.

**Feud**

Someone considering a demand for compensation has two incentives for making it, compensation and deterrence. He has one incentive not to—the cost of the violent conflict that may result, including both the immediate clash if he tries to carry out his threat and subsequent conflicts if the other party retaliates. The clearer it is that he is in the right and the other in the wrong, as judged by potential allies of both, the more likely the other is to give in to his demand and the lower the expected costs of conflict. How likely a pure feud systrem is to punish the right people thus depends on how accurately others in the community can judge guilt. In the case of a feud system with courts, such as saga period Iceland, it also depends on how reliably the court process can distinguish guilt from innocence.

The same considerations come in on the benefit side of the calculation. Starting a feud only provides deterrence against future wrongs if those who might commit them believe that you really have been wronged, hence take your response as evidence that it would be prudent for them not to wrong you in the future. The less clear the evidence for your position is, the less the benefit you get from demanding compensation or, if it is not forthcoming, carrying out the threatened violence. If your neighbors consider your action entirely unjustified, it becomes evidence not that it is risky to wrong you but that it is risky to have anything to do with you.

**Reputational Enforcement**

Tort law, criminal law and feud deter offenses by imposing penalties on offenders.[[10]](#footnote-10) In each, the offender is punished due to the actions of someone trying to punish him. Reputational enforcement also imposes costs on an offender, but doing so is not the motive of those who impose them. The costs are an indirect effect of individuals choosing to protect themselves by not dealing with parties that they believe cannot be trusted.

If their judgement is correct, their action benefits them; if they are wrong, they are giving up opportunities for potentially beneficial transactions. That gives them an incentive to distinguish innocent from guilty and, unlike prosecutors who will be rewarded for a conviction, no incentive to convict the innocent. But while there is no benefit to convicting the innocent, there is in most cases only a small cost to doing so, since there are other department stores and diamond merchants to deal with. Hence the third parties whose acts provide reputational enforcement have only a weak incentive to avoid convicting the innocent.

How serious this problem is depends on how easily third parties can determine who is at fault in a dispute. If there is a significant cost to doing so and only a small benefit, they may instead assign some probability of guilt to the offender, some to the complaining victim, and avoid dealing with both—in which case complaining becomes a losing strategy and reputational enforcement breaks down.

**Ostracism**

Punishing rules violators by ostracism has one attractive feature in common with reputational enforcement: The punishment is costly for those who impose it as well as the one it is imposed on,[[11]](#footnote-11) giving the former some incentive to get it right. On the other hand, it is easy to imagine circumstances where one member of a community can benefit by expelling another, perhaps a rival in love or communal politics. If the former is influential or very persuasive and the latter unpopular, there is an incentive for, and risk of, false conviction.

**Divine Enforcement**

If potential offenders believe in a supernatural power that punishes those who violate divine law, they have an incentive not to do so. The potential offender has inside information about his own actions. Religion provides the perfect mechanism for punishing the guilty and only the guilty, provided that the religion is true and the divinity omniscient. The mechanism works even if the religion is not true, provided that potential offenders believe in it. A traditional gypsy has an incentive to avoid polluton even if he is sure nobody is watching, and similarly, mutatis mutandis, for a Jew or Muslim.

This approach as well, if implemented without the assistance of an actual divinity, can lead to overenforcement. Religious law must be interpreted by someone. If the interpretation is by the individual believer, he may refrain from actions that ought not to be deterred in the mistaken belief that they are sinful. If interpretation is by others, they may use the threat of divine punishment to serve mundane objectives.

**The Origin of the Law of Torture: A Cautionary Tale**

People in the past worried about convicting the innocent too. In the early Middle Ages, they had a solution–let God judge. A defendant could be subjected to an ordeal, such as plunging his hand into boiling water, carrying a red hot iron, being dumped bound into water. Various passages in the Bible were interpreted to imply that God would reveal guilt (hand injured or body sank) or innocence (not injured, floated). Since God was omniscient, it was an approach that guaranteed a correct verdict.

The use of ordeals was eventually abandoned on theological grounds. A more careful examination of the biblical passages found little support for it, and it could be viewed as an attempt by humans to compel God to serve them, religiously dubious. In 1215, the fourth Lateran council rejected the religious legitimacy of judicial ordeals and banned priests from participating in them. Over the next few decades most European countries abandoned their use.[[12]](#footnote-12)

That left medieval judicial systems with the problem of finding another way of being certain a defendant was guilty. The solution was to impose a very high standard of proof, evidence “clear as the noonday sun.” Conviction required either two unimpeachable eyewitnesses to the crime or a voluntary confession. Circumstantial evidence, however strong, was insufficient.

In the history of Western culture no legal system has ever made a more valiant effort to perfect its safeguards and thereby to exclude completely the possibility of mistaken conviction. But the Europeans learned in due course the inevitable lesson. They had set the level of safeguard too high. They had constructed a system of proof that could as a practical matter be effective only in cases involving overt crime or repentant criminals. Because society cannot long tolerate a legal system that lacks the capacity to convict unrepentant persons who commit clandestine crimes, something had to be done … .(Langbein 1978)

The solution was the law of torture. Once the court had half-proof, one eye witness or the equivalent in circumstantial evidence, the defendant could be tortured into confessing. A confession under torture was not voluntary, but that problem could be dealt with. Stop the torture and the next day ask the defendant if he is willing to confess. Since he is now not being tortured, the confession is voluntary. If he doesn’t confess, torture him again.

John Langbein, my source for this account, offers a parallel story in modern law. Two hundred years ago, jury trials were short.

In the Old Bailey in the 1730s we know that the court routinely processed between twelve and twenty jury trials for felony in a single day. A single jury would be impaneled and would hear evidence in numerous unrelated cases before retiring to formulate verdicts in all. Lawyers were not employed in the conduct of ordinary criminal trials, either for the prosecution or the defense. The trial judge called the witnesses (whom the local justice of the peace had bound over to appear), and the proceeding transpired as a relatively unstructured “altercation” between the witnesses and the accused. In the 1790s, when the Americans were constitutionalizing English jury trial, it was still rapid and efficient. “The trial of Hardy for high treason in 1794 was the first that ever lasted more than one day, and the court seriously considered whether it had any power to adjourn… .”

Over the years since, trials have become longer and much more complicated, at least in part to reduce the risk of convicting the wrong person. Patricia Hearst’s trial for bank robbery lasted forty days. That was unusually long, but the average felony jury trial in Los Angeles in 1968 took 7.2 days, more than a hundred times the length of the average felony trial in the Old Bailey in the 1730’s. If every felony conviction in the U.S. took that long, felony trials alone would require the full time efforts of more than the total number of judges in the state and federal systems.[[13]](#footnote-13) Also the full time efforts of close to a million jurors, court attendants, and the like. Not impossible, but very expensive.

The American legal system found a less expensive alternative. Like its medieval predecessor, it substituted confession for trial. The medieval confession was motivated by the threat of torture. The modern version, a plea bargain, is motivated by the threat of a much more severe sentence if the defendant insists on a trial and is convicted. Like the medieval version, it preserves the form–every felony defendant has the right to a jury trial, a lawyer, and all the paraphernalia of the modern law of criminal defense–while abandoning the substance. Conviction after a lengthy and careful jury trial is, arguably, evidence of guilt beyond a reasonable doubt. The willingness to accept a sentence of a year, possibly a year already served while awaiting trial, instead of the risk of ten years if convicted is not.

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1. “For failure to arrest a thief or a robber within a month, he was to be punished with seven or seventeen blows with a light stick, respectively; for two months, seventeen or 27 blows, respectively; and for three motnhs, 27 or 37 blows, respectively. On the other hand, he was to be rewarded for arresting a thief or robber within the deadline.” Ch’en 1979 on the rules for “archers,” drafted police officers, under the Yuan dynasty. [↑](#footnote-ref-1)
2. Mast et. al. 2000, September. Benson et. al. 1995. See also https://fee.org/articles/highway-robbery/. The problem may also appear in high profile cases where the prosecutor needs a conviction to further his political ambitions. [↑](#footnote-ref-2)
3. Gross et. al. 2014 give 4.1% as a conservative estimate for the fraction of defendants sentenced to death who were innocent. Their conclusion is based on data on exonerations. A guilty defendant may be exonerated on the grounds that the evidence on which he was convicted was inadequate for criminal proof but still be guilty, but the authors believed that the bias in their numbers from counting all exonerations as implying innocence was more than outweighed by biases in the opposite direction.

   Risinger 2007, counting actual DNA exonerations for capital rape-murders, crimes particularly likely to have left DNA evidence, and assuming that convictions from the period before DNA testing came into use, found a false positive rate (innoccent defendants convicted) or would by now have had surviving tissue evidence tested, found a rate of false positives of 3.3% to 5%.

   Roman et. al. 2012 made use of a cohort of 634 Virginia cases dating from 1973 to 1987 for which tissue evidence happened to have survived. Their results suggest that in about 16% of the cases the evidence, if analyzed, would have reduced the probability of conviction (my analysis of their results).

   Risinger 2007, looking at capital rape-murder cases from 1982 to 1989 on the assumption that, where usable DNA survived for later testing it would have been tested, found a false positive rate (innocent defendants convicted) of 3.3%-5%. [↑](#footnote-ref-3)
4. For a discussion of that problem and a proposal for reducing it, see Friedman and Schulhofer 1993. [↑](#footnote-ref-4)
5. For further arguments on the effect of plea bargaining, in particular its ability to let the prosecution focus its resources on those defendants who refuse to accept a proferred bargain, see Friedman (2000) pp. 91-92. The result might be to either reduce or increase the chance that innocent defendants will be convicted, depending on the incentives of the prosecution. [↑](#footnote-ref-5)
6. At one point the combined royal and parliamentary rewards for convicting someone who committed a serious crime in or near London came to £140, three years’ income for a journeyman. [↑](#footnote-ref-6)
7. 1818 Bennet’s act, passed in 1818 in response to concerns with the perverse effect of blood money, including juries not trusting prosectors and witnesses, replaced rewards with payment of costs as evaluated by the judge. It “aimed to strengthen that force in the face of the massive increase of offenses that followed the peace in 1815 by compensating officers fully for their efforts, without tainting the arrests they made and the evidence they gave in court as the product mainly of a greedy desire to increase their “blood money.” Beattie 1986 pp. 58-59.

   John Townsend, a prominent Bow Street runner, warned of the corrupting effect on runners of a reward for conviction.Tobias1979 pp. 48-49. [↑](#footnote-ref-7)
8. There was also a procedure by which three cases a year could be initiated for sycophancy, abusive prosecution, but the details of how it worked are obscure. MacDowell 1978 pp. 62-64. [↑](#footnote-ref-8)
9. Scheck et. al. 2000. [↑](#footnote-ref-9)
10. For a much more extensive discussion of this point, of differences between the two approaches, and of whether there is a good reason why modern systems use both in the way they do, see Friedman (2000), chapter 18, webbed at: http://www.daviddfriedman.com/Laws\_Order\_draft/laws\_order\_ch\_18.htm. [↑](#footnote-ref-10)
11. For a discussion of this point in the context not of enforcement mechanisms but of alternative forms of punishment, see Friedman (1999). [↑](#footnote-ref-11)
12. For details see Leeson 2012 [↑](#footnote-ref-12)
13. In the U.S. in 2006, an estimated 1.2 million persons were convicted of a felony. If each of them had had a jury trial of 7.2 days the total would have been 8.6 million trial days. Assuming that courts function five days a week, 52 weeks a year, felony cases alone would have required the full time effort of 33,000 judges. Add in a few more for the trials of defendants who were acquitted. There are about 30,000 judges in the state judicial systems, and another 1,700 in the federal system.

    http://iaals.du.edu/sites/default/files/documents/publications/judge\_faq.pdf.

    [↑](#footnote-ref-13)