# Enforcing Rules

There are many different ways of enforcing rules. If someone breaks your arm you call a cop. If he breaks your window you call a lawyer. Criminal law and tort law are different mechanisms for doing the same work. Someone does something bad to someone, the legal system is called in, something bad happens to him; that is a reason not to do bad things to people. In one case the offender is found and prosecuted by police and public prosecutors, in the other by the victim and his agents, but the logic is in both cases the same. Sometimes either or both approaches can be used; O.J. Simpson was first acquitted of the crime of killing his wife and then convicted of the tort of killing his wife.

Tort and criminal law are familiar parts of the legal systems we live under, but we have now looked at a number of other and less familiar approaches to law enforcement.

## Different Ways of Doing It

Since we are looking at a wide variety of societies, I will try in this chapter to list all the enforcement mechanisms I know of and consider the problems with each. As a first cut at classification it is useful to think of the task to be done as having three parts corresponding, in modern criminal law, to the jobs done by:

1. police and public prosecutors–finding the offender and the evidence of his guilt
2. judge and jury–deciding guilt
3. police and prisons–enforcing the punishment.

### Criminal Law

In criminal law, all three jobs are done by professionals employed by a government to do them. Ideally, everyone involved in the project, from prison guards and police officers up to the politicians responsible for selecting and controlling everyone else, will act in the general interest of the population they serve, doing their best to convict the guilty and acquit the innocent while minimizing the net costs of the process.

That is a desirable outcome but a hard one to achieve. Politicians and police, like the rest of us, are more interested in serving their own objectives than those of other people. If the real criminal cannot be found, there may be much to be said for finding someone else who can be convicted; what the voters don't know won't hurt them. If campaign contributions are needed, organized groups of government employees such as cops and prison guards are one place to get them, which gives the politician an incentive to follow the policies that those interest groups support. In California, the prison guard union routinely, and often successfully, lobbies against policies that would reduce the number of prisoners and thus the demand for their services.

Some costs of enforcing criminal law are paid by the law enforcement agency that incurs them, giving it an incentive to hold them down. Other costs are imposed on other people without compensation and so may safely be ignored, provided that those people have insufficient political influence to make their complaints matter. Criminal law in imperial China provides multiple examples. Torturing a witness or an innocent defendant imposes a cost on him but not on those who impose the torture, so there is little reason for them to take account of that cost in deciding when to employ torture and when to refrain from doing so.

The same logic applies in modern systems. Holding a suspect in jail imposes a cost on him. Shutting down a restaurant where a crime has occurred until all relevant evidence has been collected imposes a cost on the owner and his employees and customers. Seizing computers containing all the copies of important information–the only draft of a book or a doctoral thesis, say (real cases[[1]](#footnote-1))–and holding them until the authorities are certain that they no longer contain anything of interest to them imposes costs, possibly very large costs, on the owner but costs the police nothing. If the police smash down my door, shoot my dog, scare my children half to death and only then discover that they have come to the wrong address, they have no obligation to compensate me for the damage they have done hence little reason to take extra care to avoid such costly (to me, not them) errors.

Not only do they have the option of ignoring costs they impose on others, they have the option of deliberately imposing such costs as a way of punishing people who do things they disapprove of, even if they are not illegal. On a trip a few years back my checked suitcase contained semi-liquid sourdough starter, needed for a class I was going to teach on medieval cooking, safely stowed in a closed container inside another closed container. The suitcase emerged from baggage claim with both containers open and their contents scattered over the other contents of the suitcase. My guess is that that was how the TSA inspectors expressed their resentment at having to go to the trouble of checking out containers with unknown semi-liquid stuff in them.[[2]](#footnote-2) Forty-some years earlier I missed an airplane flight and got a first-hand view of a Louisiana jail as a result of being an accessory, in the New Orleans airport, to the crime of asking a policeman for his badge number.

A related problem is selective enforcement. In one recent case, the mayor of a city wanted to redevelop part of it by bulldozing the houses and transferring all of the property to a developer of his choice. Unable to satisfy the state’s requirements for seizing the houses under eminent domain he instead arranged for code-enforcement citations to be issued to landlords in the area, often for trivial infractions such as tall grass or weeds in their yards. In one case a landlord owing four properties received fines accumulating at the rate of three thousand dollars a day. Landlords were told that if they sold to the Mayor’s chosen developer the developer would take care of the fines. The developer purchased the properties for a price well below their market value and was told by the mayor that once they bulldozed the properties the fines would go away.[[3]](#footnote-3)

Even in cases that do not involve any deliberate malfeasance, it is far from clear how to make a legal system take account of one of the most serious costs it imposes on other people, the cost to defendants who end up punished for crimes they did not commit. For a discussion of that problem, see the next chapter.

A different sort of incentive problem was pointed out in the article by George Stigler and Gary Becker that I discussed in Chapter XX[Iceland].[[4]](#footnote-4) When a cop gets a criminal convicted the cost to the latter is likely to be greater than the benefit to the former, making possible an exchange in their mutual benefit–the criminal bribes the cop to burn the evidence. Preventing that requires additional layers of enforcement. The solution they suggested was to compensate the enforcer with the fine paid by the convicted offender. Becker and Stigler had, without realizing it, reinvented tort law, although not in precisely the current form.

Which brings us to our next topic.

### Tort Law

Tort law is criminal law with the police and public prosecutor replaced by the victim and his agents. It is their job to figure out who committed the tort, gather evidence and convince the court. The police and public prosecutors are professionals who do it because that is the job they are hired to do. The tort victim does it in order to collect damages; what the tortfeasor pays as penalty the successful victim receives as reward. The victim may have the additional incentive of private deterrence, establishing the reputation of being a bad person to commit torts against.

Tort law privatizes part of the job of enforcing legal rules. Doing so solves some, but not all, of the problems raised by criminal law. A tort plaintiff can impose costs on the defendant without compensation, such as the cost of paying for a lawyer to defend against the suit or of responding to a discovery demand, but, not being protected by sovereign immunity, he is less able to do so than a police department. The lawyer representing the plaintiff might, like the corrupt policeman, sell out to the other side, but there is someone directly involved in the case with an interest in making sure that doesn’t happen–the plaintiff. Many of the arguments that suggest that a competitive private market does a better job of producing goods and services than a government monopoly apply here, where the service being produced is that of detecting and proving violations of legal rules. We do not usually think of government enforcement of criminal law as a form of socialism but, economically speaking, that is what it is, government ownership and control of a means of production. The usual arguments for the inefficiency of socialism apply.

Tort law has its own incentive problems. The damage payment awarded by a court is both the penalty to the convicted tortfeasor for committing the tort and the reward to the plaintiff and his lawyer for convicting him of it. There is no reason to expect the same payment to give both the right incentive to avoid committing the tort and the right incentive to prosecute it.[[5]](#footnote-5) Nor is there a reason to expect the amount awarded in our tort system, enough to “make the victim whole,” to be optimal for either.

Consider a tort that is difficult to detect and prove, with the result that half the tortfeasors escape unpunished. The damage done is (say) ten thousand dollars, so that is what convicted tortfeasors pay, making the average penalty five thousand–half the time ten, half the time zero. If the cost to me of precautions to avoid committing it is seven thousand dollars, I am on average better off not taking them. What saves me seven thousand dollars costs you ten, making us, on net, worse off by three thousand dollars. A tort that should be deterred isn’t.[[6]](#footnote-6)

Next consider the incentives of the victim. If spending six thousand dollars on a lawsuit buys him only a fifty percent chance of collecting a ten thousand dollar damage payment, suing you makes him poorer, not richer, so he doesn't. And if he is not going to sue me, the penalty I pay for committing the tort is not five thousand dollars but zero.

One solution might be a probability multiplier for damage awards. If damage done is ten thousand but the probability of successful suit is only fifty percent, set the award at twenty thousand. Now the average punishment is equal to the damage done, giving potential tortfeasors an incentive to prevent any tort whose prevention costs less than the damage it does. Some scholars, including Landes and Posner, have suggested that punitive damages, damage awards greater than damage done, serve just that purpose.[[7]](#footnote-7)

While this might be an attractive solution in some cases, it too has problems. For one thing, the damage award is limited to what the tortfeasor can pay. In the case of a serious offense with only a low probability of successful prosecution that may be less, perhaps much less, than the damage done scaled up to allow for the low probability of conviction.

A second problem is that a probability multiplier may make it profitable to create synthetic torts. Late at night as your car comes around the bend I shove mine into the road and hastily stand back. When the dust has cleared and you have gotten free of the wreckage–I considerately staged my fake accident on a slow road, so that you would survive to be sued–I commence a legal action, claiming five times the value of my car on the grounds that it was only by great good luck that you did not succeed in escaping after smashing my car and that four friends of mine just happened to be lurking in the underbrush to witness the accident and testify against you. In order to frame you I had to create a real accident that really destroyed my car, so it was made profitable only by the existence of a probability multiplier.

So far I have assumed that the tort victim only sues in order to collect damages, hence will not sue if damages come to less than the cost of suit. Under the corresponding assumption for criminal law, privately prosecuted criminal law without rewards, as existed for some crimes in England through parts of the eighteenth century, could not have worked, since there was no damage payment to compensate for even modest costs of prosecution.

Part of the explanation was that plaintiff and defendant together could convert a criminal punishment, such as hanging, into a tort punishment by a covert out-of-court settlement. Part is that potential victims could publicly precommit to prosecute by joining a prosecution association, making deterrence a private good that they were willing to pay for.

Another assumption I have been making is that the tort victim has sufficient resources to prosecute if he chooses to. That may not always be the case. If we shift our story from twenty-first century America to tenth-century Iceland, the man whose son or brother has been killed may be old and feeble, with no remaining relatives willing to help him press his suit against an offender prepared to beat him up when he tries to go through the legal procedures required for a law suit.

The Icelandic solution was to make tort claims transferable. I may not have the resources to press my claim but one of my neighbors does. Successfully prosecuting my claim will result in his collecting a hundred ounces of silver as wergeld, tort damages for the killing. I transfer the claim to him, he prosecutes it successfully, keeps whatever share of the profits we have agreed to and gives me the rest.

### Privately Prosecuted Criminal Law: Athens and England

Privately prosecuted criminal law was intermediate between the first two. Prosecution was by a private party, not necessarily the victim; in both the English and Athenian systems, any adult citizen (in Athens any adult male citizen) could prosecute any crime. In Athens the immediate incentive was a reward, a share of the fine that the criminal defendant paid if convicted. Prosecution could also be motivated by personal hostility or political rivalry.[[8]](#footnote-8) In England during the eighteenth century, incentives included rewards, private deterrence and the possibility of extorting an out-of-court settlement.

The most obvious advantage of privately prosecuted criminal law over publicly prosecuted criminal law is the reduction in state power. Public prosecution makes it possible for enforcers to ignore both criminal offenses they approve of and costs they impose on innocent third parties. Neither is possible in a system where prosecution is private. Arguably that is the reason why England failed to develop a system of publicly enforced criminal law until well into the nineteenth century. The most obvious disadvantage is that it sometimes does not pay any private individual, including the victim, to prosecute a crime, a problem raised by eighteenth-century critics of the system. The Athenian version solved that problem by giving the successful prosecutor a share of the fine, an automatic reward scaled to the amount of the fine and thus the seriousness of the offense, similar to the reward built into a tort system.

That suggests the possibility of replacing criminal law entirely with tort law, the Icelandic system combined with state enforcement of verdicts. One argument against doing so is that criminal law is needed to deal with offenses that affect the society in general rather than a specified victim. But that does not actually describe most crimes in modern legal systems; mugging me is as much an offense against me as denting my car, even if the legal systems treats it as an offense against the state I live in. Another argument is that tort law cannot deal with offenses where the cost of catching and convicting the offender is more than the offender can pay in damages. I have discussed those and other problems with the proposal and suggested ways in which it might be possible to modify tort law to deal with them at length elsewhere.[[9]](#footnote-9)

###  Feud Law

All three of these approaches to law enforcement–tort, publicly prosecuted criminal and privately prosecuted criminal–are broadly similar. Someone violates a rule, someone–police officer, tort victim, or private prosecutor–convinces a court that a rule has been violated and shows by whom, the court delivers a verdict and the state enforces it.

For a very different approach to achieving the same objective consider a primitive feud system such as that of the Romanichal. Jerry violates a rule, harming Larry. Larry threatens Jerry with violence if he does not compensate Larry for the harm. All the jobs of enforcing criminal law are done by the victim. He is simultaneously policeman, prosecutor, judge, jury, and executioner.

Feud law sounds more likely to produce bloodshed than law enforcement, but Larry's ability to use force against Jerry is limited by the existence of Cary, Gary, Harry, … potential allies of both parties. If they believe that Larry's demand is unreasonable and Jerry justified in refusing it, they will be unwilling to support Larry and likely to support Jerry, making the attempt by Larry to carry out his threat hazardous in the extreme. Thus a feud system can successfully enforce a set of rules understood and accepted by the participants. Enforcement depends on the threat of violence, but that is equally true of our form of law enforcement. Violence by one private party against another is constrained by the symmetry of the situation. Unlike the state, the initiator of a feud does not have access to enormously greater resources than the defendant.

The mechanism depends on interested third parties knowing enough about the conflict to judge who is acting reasonably or unreasonably. In a small society everyone knows everyone else. A larger one requires a mechanism such as the Icelandic or Somali court procedures to lower the cost of figuring out who is the bad guy. The same issue arises with a more conventional legal system. In order to know whether the police are arresting people because they have broken the law, because they have resisted police extortion or because they supported the wrong candidate or are of the wrong race, interested third parties require similar information.

Information does not solve the problem unless there is an incentive to act on it. Someone who tries to extort money from innocent people by accusing them of violating his rights might do the same thing to me, which gives me an incentive to avoid dealing with him, possibly to support his victim in resisting his demands. In a system of state law enforcement in a democracy it is similarly in my interest to vote out politicians who appoint law enforcers who behaved badly to someone else and might behave badly to me, but unless the polity is small my vote has little effect on the outcome so the incentive to get information and act on it is weak. For evidence of how weak the incentive to get information about how the system works is, consider the large difference between the popular perception of criminal conviction in the U.S.–by a jury trial–and the reality of a system in which almost all convictions come through plea bargains with no jury and no trial.[[10]](#footnote-10)

In saga-period Iceland as in a modern legal system there was an explicit body of laws and a system of courts to judge whether it had been violated and with what legal consequences. But the final step of enforcing the verdict was done privately by the victim and his allies. He had the option of demanding compensation from the offender with the threat of either a lawsuit or violence. If the defendant refused to settle, lost his case and failed to pay the resulting fine, the plaintiff could have him outlawed and be free to hunt him down and kill him.

What are some of the problems with that system?

One is that it requires commitment mechanisms. The benefit of having it known that if I am injured I will revenge myself whatever the cost may be very great, since by deterring acts against me it reduces the risk both of being injured and of having to bear the costs of revenge. But after I have suffered a serious injury from a formidable opponent, the cost of revenging myself may be more than the benefit is worth–better a live wimp than a dead hero. The solution, as in the parallel case with private prosecution of criminal law, is to find some way of committing myself in advance. In eighteenth-century England it was done by prepayment to a prosecution association. In a less developed society it depended on some combination of social norms and internal incentives.

Seen from this standpoint, the human trait of vengefulness is not an irrational passion but a hardwired commitment strategy. It is irrational after the fact, when I have to do my best to hunt down the killer of my kinsman at considerable risk to myself, but rational *ex ante*, when the knowledge that I will hunt down anyone who kills my kin is one reason my kin do not get killed.

Part of the modern hostility to feud is based on the belief that its violence is unbounded in both time and magnitude, that a minor conflict could be expected to generate a continued cycle of revenge killings as in the legend of the Hatfield/McCoy feud. In an earlier chapter I sketched the real history. The feud consisted of one exchange in which three members of one family killed a member of the other and were themselves killed in revenge and a second, five years later, in which a renewal of the conflict set off by the intervention of the governor of Kentucky resulted in five more deaths, three of them by Kentucky law enforcement. The rest of the famous feud exists in movies and newspaper stories but not in the work of careful historians. That illustrates my rule of thumb for reading history: View with suspicion any anecdote that makes a good enough story to have survived on its literary merits.

Moderns are less familiar with the much more extensive record from societies such as saga-period Iceland. A careless reading of the sagas makes it sound like a violent society. A more careful examination suggests that most feuds terminated either at the first round, when the offender agreed to pay the penalty set by court or arbitrator, or at the second, after the victim of the first clash had reversed roles for the second. Only a few continued beyond that for multiple exchanges–and so, with the boring parts removed, provided the material for sagas.

If I honestly believe that the compensation you are offering me for the damage you and your allies did to me is absurdly low while you regard it as generous, we may have a hard time finding a settlement that does not make at least one of us feel as though he has abandoned his own commitment strategy, making him fair game for any future aggressor. So a well-functioning feud system may require enough commonality among the participants to make it possible for the two sides to agree on terms, whether negotiated between them or arranged by a third party arbitrator. An alternative may be a mechanism whose authority is commonly recognized, such as the Icelandic court system. Even if I believe that what the court awarded me was unreasonably little I can still accept it without signaling my unwillingness to defend my rights against future aggressors, since they will have no reason to expect the court in cases spawned by future clashes to err in their favor.

### Reputational Enforcement

All the forms of law enforcement so far described depend on force or the threat of force. For a very different mechanism, imagine that you have bought a jacket from a department store that guarantees to refund your money if you are not satisfied with what you bought. You discover that the jacket you bought is the wrong size and your wife points out that purple is not really your color. If the store refuses to give you a refund, you are unlikely to sue them–the amount at stake is not enough to make it worth the time and trouble. Nonetheless, stores in that situation are likely to take the jacket back–because they want the reputation, with you and with others, of living up to their promises.

A more elaborate example of the same approach is provided by the New York diamond industry as described in a classic article by Lisa Bernstein.[[11]](#footnote-11) At one point, somewhat before the time she studied it, the industry had been mostly in the hands of Orthodox Jews, forbidden by their religious beliefs from suing each other. They settled disputes instead by a system of trusted arbitrators–rabbis–and reputational sanctions. If one party to a dispute refused to accept the arbitrator’s verdict the information would be rapidly spread through the community, making others in the industry unwilling to deal with him. The system of reputational enforcement survived after membership in the industry became more diverse, with organizations such as the New York Diamond Dealer’s Club providing both trusted arbitration and information spreading.

Reputational enforcement works well for parties engaged in repeat voluntary transactions; once you have obtained a reputation for failing to do what you have promised, people become reluctant to deal with you. Anticipating that, you fulfill your obligations. It does not work for a one-time transaction, a con-man who intends to cheat his victim out of a fortune and then retire. Nor does it work for involuntary transactions; a mugger does not require the consent of his victims. And even in the case of repeat voluntary transactions, there is a risk of end game betrayal, the trader who, having built up a reputation for trustworthiness by twenty years of honest dealing, spends the final year before his planned but unannounced retirement borrowing money he has no intention of paying back and taking payment for orders he does not plan to fill.

But even someone who is only an occasional participant in a particular market routinely engages in other transactions, social, economic, political. If I sell you a car that stops running two days later, there is a reputational penalty even if I never plan to sell another car; the fact that I cheated you over a car will be seen as evidence that I am likely to cheat other people in other ways. One way of making sense of our moral judgments is that we put two different acts into the same moral category precisely because we believe that the willingness to do one correlates positively with the willingness to do the other.[[12]](#footnote-12) Once enough people have heard your story and looked over your car, I find landlords unwilling to rent me a room, employers reluctant to hire me, fathers refusing to allow me to date their daughters. In a society where people know each other well enough for reputational enforcement to work well, a mugger, even if he has never been convicted, even if his society has no courts to convict him in, may find that his loss of reputation costs him in the parts of his life that do not consist of mugging people.

The argument can be expanded beyond the loss of trading opportunities. Humans are social animals; most of us want to be liked, want to be admired, want to be seen as high status. Being viewed as someone who cannot be trusted costs on all those dimensions. That may be a reason to be trustworthy even for someone planning no repeat transactions that depend on trust.

Human beings reveal their feelings, values, thoughts in facial expressions, voice tones, gestures. That makes it difficult, although not always impossible, to maintain the reputation of being an honest, trustworthy, generous person while awaiting a good opportunity to swindle someone. Able con men exist, but they are rare. Reputational enforcement may be harder in the case of firms, which have no faces to show expressions and which can discard a bad reputation by filing a new set of incorporation papers under a new name. One solution is for the firm to post a reputational bond–an expensive advertising campaign whose benefits will be lost if the firm vanishes, a marble-faced bank building with limited resale value.[[13]](#footnote-13)

There is a further problem with reputational enforcement that becomes more serious the larger the society. When you cheat me by failing to fulfill your side of a contract and I complain, you respond by explaining to any who ask that you only pulled out of the contract because I had failed to fulfill my side of the bargain. An interested third party with no easy way to tell which of us is lying may conclude that it would be prudent not to trust either. Anticipating that response I conclude that public complaint will only make a bad situation worse–better to take my losses and keep my mouth shut. This is a problem for a system where deterrence is produced not by people hired to produce it but as a side effect of individuals acting for their own protection.[[14]](#footnote-14)

So one requirement for reputational enforcement to work is that the information cost to interested third parties of figuring out who was at fault is low enough to make it worth their while to do so. One way of fulfilling this condition has already been mentioned–a small society where everyone knows everyone else and has a pretty good idea of whose account can or cannot be trusted. Another is the use of arbitration, ideally prearranged arbitration. If you and I have publicly agreed in advance that any dispute over our gemstone dealings will be settled by the New York Diamond Dealers' Association, all a third party has to learn is their verdict, which takes much less effort than investigating the details of the controversy himself.[[15]](#footnote-15)

A third approach is demonstrated by the dealings of Chinese merchants in Taiwan in an environment largely dependent on reputational enforcement, as described in Chapter XX[Chinese]. Structure your contracts in ways that make it as easy as possible for third parties to tell who was at fault. If my goods are being stored in your warehouse and I complain that you have let them be damaged or that some of them are missing it will be hard for a third party to judge the dispute, so follow the simple rule that ownership goes with physical possession. Make a buyer responsible for inspecting goods before he accepts them and forbid him, save in the most extreme cases, from demanding compensation if he later discovers that their quality is less than he was led to expect–the rule of *caveat emptor*. It is easier to demonstrate whether or not I delivered the goods to him than what happened to them afterwards or what condition they were delivered in.

Reputational enforcement is more effective for some than for others. So design contracts to put the temptation to default on those who can best be trusted not to yield to it. If you can be trusted and I cannot, I pay in advance; you could take my money and fail to deliver what it bought, but won't. Those are the terms on which I routinely buy things from Amazon.com.

### Ostracism

Next consider the same sort of enforcement, this time used as an explicit punishment.[[16]](#footnote-16) A community finds one of its members guilty of violating its rules and pronounces a sentence of ostracism–Romani *marimé* or Amish *meidung*. Other members of the community refuse to associate with the convicted defendant. If ostracism imposes large costs on its target the threat provides a reason not to violate the rules of the community.

The reason not to associate with the convicted defendant is not, as in the previous case, to keep from being cheated but to enforce the rules of the community. That creates a problem. An individual who goes along with the ostracism bears the cost of giving up any mutually profitable dealings he might otherwise have with the defendant. He shares the benefit of enforcing the rules with all members of the community, making ostracism what economists describe as a public good, a good whose producer cannot control who gets it.[[17]](#footnote-17) That makes it less likely that an individual's share of the benefit will be larger than his cost, which may make it hard to get individuals to go along with the ruling.

One solution is the rule: *You shall not associate with anyone who has violated a communal rule–including this one.[[18]](#footnote-18)*

Start at a time when everyone accepts and follows all of the communal rules. Bill violates one of them and is sentenced to ostracism. A second member of the community, John, has to decide whether to help enforce the sentence by refusing to deal with Bill. There is now an additional reason to do so–continuing to associate with Bill will itself be a rules violation and will subject John in turn to ostracism. That cost makes it in John’s interest to refuse to deal with Bill. The members of the community (no longer including Bill) are in what is described in game theory as a Nash equilibrium; each is following the best strategy for himself (refusing to associate with rules violators), given how the others are acting (refusing to associate with rules violators, including violators of the rule that you don’t associate with rules violators). Rewind our film to before Bill violated our rule and the whole community, Bill now included, is in a Nash equilibrium: Given how everyone else is acting, it is in everyone’s interest, Bill included, not to violate the rules.

So far I have been assuming a formal mechanism for imposing ostracism. Informal norm enforcement is a more familiar version of the same logic. There is no legal rule that forbids me from teaching classes stripped to the waist, but doing so would be imprudent. Many of my colleagues would conclude that I was not the sort of person they wished to associate with, in part because, if they continued associating with me, their colleagues might reach a similar conclusion about them.

In addition to the public good problem, there are at least two serious problems with ostracism as a way of enforcing rules. The first is that someone has to decide whom to ostracize, which requires a decision-making procedure whose results practically everyone accepts. If there is no such procedure, an attempt at ostracism may divide the community between those who accept the verdict and go along and those who do neither. The second is that the people participating in the ostracism have to include a large enough proportion of those the target would like to interact with so that their refusal to interact imposes a serious cost on him.

In a large society this is hard to arrange, since only a small proportion of its members need defect to provide the target with an adequate number of trading partners. In a small community embedded in a larger society, the Romani (and Amish and Mormon and …) case, it works only if the barriers to a member of the community interacting outside it are sufficiently high. That condition can be met, as in the case of the Vlach Rom, but at a considerable cost, and it may cease to be met, arguably has for the Vlach Rom in America, due to changes that make either the embedded community or the surrounding society less intolerant of the other. If the barriers are low the threat of ostracism is only a mild deterrent, limiting the community’s ability to enforce its rules on its members.

That suggests that ostracism will be most effective for a small community either entirely isolated, set in a very unfriendly larger society, or itself very unfriendly towards the larger society. Outside of one of those situations it can be used to enforce rules, but only rules that nobody has strong reasons to violate.

### The Community Responsibility System

The community responsibility system described in Chapter XX (Prison law) demonstrates yet another approach to law enforcement. A society is divided into multiple groups–in that case prison gangs–with known membership. It is in the interest of each group to enforce the rules on its own members, in part to avoid costly conflicts with other groups, in part to maintain a group reputation that makes it possible for members to interact with members of other groups in peaceful and mutually profitable ways.

Prison gangs are not the only example. The American Vlach Rom described by Sutherland are divided into *vitsa*, groups of relatives. Membership is not entirely unambiguous, since an individual can choose to identify with the *vitsa* of either his father or his mother and a wife may identify with the *vitsa* of her husband. But most people, most of the time, can be identified as members of one *vitsa* or another.

Each *vitsa* has a reputation in the eyes of the members of other *vitsa.* That reputation affects how eager members of other *vitsa* are to buy daughters from them or sell daughters to them and at what price. It affects the willingness of those outside that *vitsa* to accept its leader as the *Rom Baro*, the big man, the dominant figure in a *kumpania*. In these and other ways, reputation matters.

One result of an individual Romani violating the rules of *romania* is that he becomes *marimé*, polluted, and so ostracized. Another is that his *vitsa* loses status:

Behavior that is shameful (*lashav*) or worse still, *marimé*, creates a reputation for an individual and his family (since the family is considered responsible for the behavior of its members) which ultimately must be borne by the *vitsa* and possibly the *kumpania* as a whole.[[19]](#footnote-19)

That is a reason for each *vitsa* to use social pressure to keep its members from violating the rules and to punish them if they do.

The Somali dia-paying groups provide another example. If one member of such a group commits an offense against an outsider the others will be obliged to either share in the damage payment or help in the resulting feud. That is a reason for them to control their members–for instance by forbidding one too inclined to kill from carrying a rifle. The *‘akila* of Islamic law and the *derbfine* of Irish law are similar institution with similar functions.

The community responsibility system is, as these examples suggest, an old institution. So is academic recognition of its function. Consider Adam Smith’s response to David Hume’s argument in favor of an established religion.

Hume argued that if each religious sect had to support itself on the contributions of its members, ministers would have an incentive to stir up religious passions, leading to conflict.[[20]](#footnote-20)

“And in the end, the civil magistrate will find that … the most decent and advantageous composition which he can make with the spiritual guides, is to bribe their indolence by assigning stated salaries to their profession, and rendering it superfluous for them to be farther active than merely to prevent their flock from straying in quest of new pastures.”

Which explains why Hume, widely believed to be an atheist, was in favor of an established church.

Smith’s reply was that multiple competing sects served a useful function, since it was in the interest of each to maintain its reputation by controlling the behavior of its members.

All his brother sectaries are, for the credit of the sect, interested to observe his conduct, and if he gives occasion to any scandal, if he deviates very much from those austere morals which they almost always require of one another, to punish him by what is always a very severe punishment, even where no civil effects attend it, expulsion or excommunication from the sect.[[21]](#footnote-21)

Very nearly the same system David Skarbek found operating in California prisons more than two hundred years after Smith described it.

In the systems described by Skarbek and Smith different enforcement mechanisms are possible, including violent force (prison gangs) and ostracism (small religious sects). However the rules are enforced, the group needs some decision mechanism, a religious leader or a gang’s shot caller. What is special about the system is the group’s incentive–to maintain the reputation of group members by controlling their behavior. The advantage over an ordinary reputational system is that even if an individual member is not a repeat player the group he is a member of probably is, hence has an incentive to be concerned with its reputation with those its members deal with.

### Divine Enforcement: *In Foro Interno*

Divine enforcement provides not only an independent mechanism for rules enforcement but also a way of facilitating other mechanisms. The point of swearing to tell the truth, the whole truth and nothing but the truth, so help me God, is that the oath makes it more likely that you will actually do it, for fear of divine punishment or out of belief in your obligation to act as God wishes. The reason to allow the defendant in a suit under Jewish law to swear and be quit, defeating the suit (Chapter XX[Jewish]), or the plaintiff, in a case where the evidence is stronger, to swear and take, is that plaintiff and defendant, as believing Jews, will be reluctant to swear falsely. Both the criminal and civil mechanisms for rules enforcement depend on a court being able to judge guilt or innocence. Doing that is easier with the equivalent of a lie detector. The practice of requiring oaths by believers reluctant to swear falsely provides one.

Divine intervention can also substitute completely for a court trial. If God supports the right, trial by combat or ordeal vindicates the innocent and convicts the guilty. Even if divine intervention is only mythical, the belief in it gives an advantage to the party who knows he is innocent over the party who knows he is guilty.

Consider an Orthodox Jew who keeps kosher even when he is sure nobody is watching or a Muslim convert who suppresses his remembered taste for pork. That can be seen as rule enforcement by the threat of divine sanctions, a bolt of divine lightning or post mortem punishment. Or it can be seen as obedience not from fear of punishment but because obedience is what one ought to do. There is a continuum of variants, with the believer in divine punishment at one end, C. S. Lewis’s atheist brought up to believe that gentlemen do not cheat at cards[[22]](#footnote-22) at the other. All depend either on beliefs concerning either what one ought to do or costs, possibly post-mortem, due to supernatural causes.[[23]](#footnote-23)

For another example of the same pattern, consider the mechanism by which the Cheyenne Indians capped the level of physical violence within the tribe.[[24]](#footnote-24) Fighting, even quite violent fighting, was allowable. But a Cheyenne who killed another member of the tribe, for whatever reason, was banished from the tribe, at least for several years–not because he had been wicked but because he now smelled of death and the smell, and its consequences in ill fortune, were contagious. Similarly for *marimé* among the Romani.

There are three different reasons for an individual to obey religious rules, and it may not always be clear which is responsible:

Because he believes they are right.

Because he believes violation will result in supernatural punishment.

Because he believes violation, if observed, will result in social sanctions.

There is a simple test to distinguish the first two reasons from the third: Does he obey the rule when he is certain nobody is looking?

Consider the case of the Romani. So far I have taken it for granted that they obey the *marimé* rules because they believe that pollution results in illness and bad luck as well as ostracism. If so, the rules are self-enforcing.

It is not clear that it is entirely true:

A wife is responsible for the purity of her husband, and she cannot allow him to become polluted by stepping over his clothes or mixing them with women’s clothes when washing them. One wife said defiantly, ‘I’ll step over his clothes any time at home, but I could never do it in front of my father-in-law’, emphasizing the difference between public and private behavior.[[25]](#footnote-25)

That suggests that in that system, and possibly others, enforcement is in part supernatural, in part social.

The pure form of divine enforcement depends on everyone believing in the divinity and his willingness to enforce. That belief may be shaken if violators of the rules are seen to escape unpunished. One way to avoid that is to start with beliefs sufficiently strong to make detected violations rare. Another is to incorporate in the belief system forms of divine punishment that are unobservable from the outside, such as post-mortem punishment in Islamic law, or difficult to observe, such as bad luck. Practically everyone is unlucky in something.[[26]](#footnote-26)

Even if divine enforcement is not a complete substitute for more mundane alternatives, it may make those alternatives more workable. To use oaths as a lie detector it is not necessary that everyone be a believer, only that there is some test to identify unbelievers. Religious practices that are costly and not enforced, hence engaged in only by believers, provide one such test. One function of kosher rules and similar restrictions may be to identify believers whose oaths are to be trusted.[[27]](#footnote-27)

An extreme version of that is a situation where being a member of the group is so costly that nobody would choose to join unless he truly believed in the religion. Arguably that describes those who participated in the early years of the Mormon church when the faithful were fleeing most of the rest of mankind to set up their own refuge in what would become Utah and equally describes the core of believers who accepted expulsion from Mecca in order to join Mohammed in Medina.

That suggests that religions such as Islam or the Church of Latter Day Saints, at least in their early stages, have a significant advantage over less controversial rivals; they know who can be trusted because nobody who can't be will join. Arguably an analogous situation exists for political movements. Being in power has obvious advantages but also an important disadvantage. Since identifying with the party in power pays, there is no easy way of distinguishing dedicated believers who can be trusted from the political equivalent of rice Christians, Chinese who converted because the missionaries had rice, who cannot.[[28]](#footnote-28)

## Conclusion

I have now sketched all of the approaches to enforcing legal rules we have observed in the legal systems discussed here. All have problems, but not the same problems. That suggests that what system works best depends at least in part on the characteristics of the society whose rules it is to enforce. That is one reason that this book is an attempt to understand different legal systems, not to decide which one is best.

[note to beta readers—are there any approaches I have left out?]

1. Sterling 1993 pp. 133-139. [↑](#footnote-ref-1)
2. For details and evidence, see: http://daviddfriedman.blogspot.com/2012/05/tsa-vandalism.html. [↑](#footnote-ref-2)
3. For details from a non-profit public interest law firm involved in the case, see: http://ij.org/action/hands-off-pleasant-ridge/. [↑](#footnote-ref-3)
4. 4 Becker and Stigler 1974. [↑](#footnote-ref-4)
5. For a solution to the problem of providing the optimal incentive to both offender and prosecutor in the context of the response by Landes and Posner to Becker and Stigler, see Friedman 1984. [↑](#footnote-ref-5)
6. I am not offering here anything approaching a full theory of optimal punishment or optimal enforcement; readers interested in the subject will find it in Chapter 15 of Friedman (2000). The simple rule “set average punishment equal to damage done so as to deter any offense that benefits the offender by less than it costs the victim” should be sufficient for our purposes although, as I demonstrate there, it is not strictly correct. A similar approach applied to how rules are enforced suggests avoiding enforcement actions that cost more than the value of the deterrence they provide. [↑](#footnote-ref-6)
7. A discussion of punitive damages, including arguments against that interpretation and for and against others, can be found in Friedman (2000), Chapter 18. [↑](#footnote-ref-7)
8. As when Aiskhines sued Ktesiphon for having proposed a decree conferring a gold crown on Demosthenes “in honor of his merit and virtue and because he continues saying and doing what is best for the people.” Part of Aiskhines' argument was that it was illegal to include a false statement in a decree and it was false to say that Demosthenes' speeches and policies were good for Athens. (MacDowell 1978) [↑](#footnote-ref-8)
9. Friedman 2000, Chapter 18. [↑](#footnote-ref-9)
10. “According to the U.S. Sentencing Commission, over 97% of convictions in the federal system arise from guilty pleas; state systems aren’t far behind at about 95%.” “The Injustice of the Plea-Bargain System,” Lucian Dervan, Wall Street Journal, Dec 3, 2015. [↑](#footnote-ref-10)
11. Bernstein (1992). [↑](#footnote-ref-11)
12. This insight, obvious once stated but not so obvious before, I owe to James Donald. [↑](#footnote-ref-12)
13. For a more extensive discussion of these issues, including their relevance for anonymous online transactions, see Friedman (2005). [↑](#footnote-ref-13)
14. Friedman (2002) includes a simple model of reputational enforcement showing the link between cost to third parties and the amount of cheating. [↑](#footnote-ref-14)
15. The mechanism I am describing works better if arbitrators are chosen in advance, since then third parties do not have to have independent information about the honesty or competence of the arbitrator. It is sufficient to know that a party agreed to abide by the arbitrator's verdict and then reneged on that agreement. [↑](#footnote-ref-15)
16. One might interpret the Fair Courts of medieval Europe as using a mix of this and the previous approach. If a merchant refused to accept a verdict against him others would refuse to deal with him in part for fear of being cheated themselves, in part in order to help enforce the rules of the trade fair. [↑](#footnote-ref-16)
17. For a more extensive discussion of the public good problem and approaches to solving it, see Friedman (1996), pp. 262-5. [↑](#footnote-ref-17)
18. “Church members who refuse to ostracize the moral culprits are themselves expelled and shunned.” Kraybill 1989 p. 117, describing Amish *meidung*. [↑](#footnote-ref-18)
19. Sutherland 1975 p. 148. [↑](#footnote-ref-19)
20. David Hume, History of England from the Invasion of Julius Caesar to the Revolution in 1688, Volume II pp. 501-2 Longman, Green, Longman, Roberts, and Green, 1864 - [Great Britain](https://www.google.com/search?tbo=p&tbm=bks&q=subject:%22Great+Britain%22&source=gbs_ge_summary_r&cad=0).

Or, as Smith puts it: “The clergy of an established and well-endowed religion frequently become men of learning and elegance, who possess all the virtues of gentlemen, or which can recommend them to the esteem of gentlemen: but they are apt gradually to lose the qualities, both good and bad, which gave them authority and influence with the inferior ranks of people, and which had perhaps been the original causes of the success and establishment of their religion.” (Adam Smith, Wealth of Nations, Book V Chapter 1 Part 3 article III, p. 310.) [↑](#footnote-ref-20)
21. Adam Smith, Wealth of Nations, Book V Chapter 1 Part 3 article III, p. 317. [↑](#footnote-ref-21)
22. “I had sooner play cards against a man who was quite skeptical about ethics, but bred to believe that 'a gentleman does not cheat', than against an irreproachable moral philosopher who had been brought up among sharpers.” C.S. Lewis, *The Abolition of Man*. [↑](#footnote-ref-22)
23. For a discussion of the use of divine sanctions in western Europe in the Middle Ages, see Leeson 2012b. [↑](#footnote-ref-23)
24. Llewellyn and Hoebel 1983. [↑](#footnote-ref-24)
25. Sutherland 1975 p. 168. See also a similar comment on p. 266. [↑](#footnote-ref-25)
26. Peter Leeson, in an article on the use of cursing by medieval monks to protect their property, points out that one requirement for it to work is that the curse takes a form not readily falsified. If I curse you to drop dead tomorrow and you don’t, you and others will conclude that my curses don’t work. If I curse you to be unlucky, anything bad that happens to you can be interpreted as evidence that they do. Leeson 2012b. [↑](#footnote-ref-26)
27. Leeson makes the same argument for gypsies obeying *romania.* Leeson 2013. [↑](#footnote-ref-27)
28. http://daviddfriedman.blogspot.com/2012/06/rice-christian-cycle.html [↑](#footnote-ref-28)