



# DETERRENCE

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If asked about how to measure the government's enforcement of the anti-trust laws, many antitrust attorneys – especially those at the U.S. antitrust enforcement agencies and in the antitrust plaintiff's bar – are likely to answer with some version of: "Look at the annual number of government cases that are brought; a larger number means more enforcement." This view is often found in law review articles and in reports that include summaries of the annual numbers of cases that have been brought by the enforcement agencies, with the implication – or sometimes an explicit statement – that a reduced number of cases that have been brought within a given year must mean that less effort has been made to detect and prosecute violations.<sup>2</sup>

One possible assumption that underlies this position is that the antitrust violators are constantly "at work," committing their violations. If more resources are devoted to detecting them, more violators will be caught – hence, the greater number of cases that are brought are an indicator of enforcement.

But that position ignores the role of deterrence: If potential (and actual) violators make rational decisions, then more efforts at detection (and harsher penalties for convicted violators) ought to lead to *fewer* violations. More enforcement effort could thus be associated with *fewer* cases that are brought.

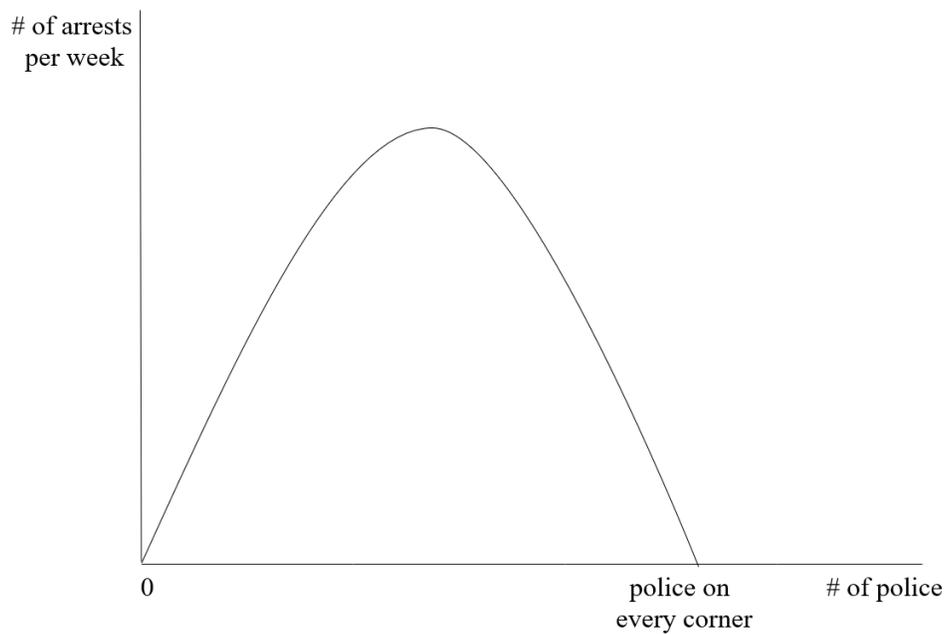
Let's illustrate this point by considering a non-antitrust form of law violation: street muggings of individuals. And let's consider the relationship between enforcement efforts – as measured by the number of police officers on the streets of a town – and the number of arrests. At one extreme, suppose that there are no police officers on the streets; then, although muggings might be rampant, there will be few (if any) arrests. At the other extreme, suppose that there is a police officer on every street corner, around the clock; then few will be the muggers who would dare try to mug anyone, and again, there will be few arrests. And in between these two extremes, there are some police on some street corners at some times – and there are some muggings, and there are some arrests.

This simple example is represented in a stylized form in Figure 1: On the horizontal axis is the number of police officers on the streets; on the vertical axis is the number of arrests per time period (say, per week). At the left-hand side, there are zero officers on the streets and zero arrests; on the right-hand side there are police officers on every corner, and there are zero arrests (because there are zero muggings). And in between there are a positive number of arrests. The relationship between the number of police on the streets and the number of arrests is thus an inverted parabola – a "Laffer Curve" of arrests and enforcement efforts.<sup>3</sup>

<sup>2</sup> See, for example, Michael Kades, "The State of U.S. Federal Antitrust Enforcement," Washington Center for Equitable Growth, September 19, 2019; accessible at: <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?long-form=true>. See also the cites that are contained in that report.

<sup>3</sup> A similar diagram, supported by a more formal and elaborate model, appears in Lawrence J. White, "Litigation and Economic Incentives," in Richard O. Zerbe, ed., *Research in Law and Economics*, Vol. 11. Greenwich, Conn.: JAI Press, 1988, pp. 73-90.

Figure 1: The “Laffer Curve” of Arrests and Police Presence



In this example: More enforcement efforts do result in fewer violations. But the numbers of arrests may well be a poor proxy for enforcement efforts: Yes, on the left-hand side of the parabola, there is a positive relationship between arrests and enforcement efforts (and a negative relationship between the underlying violations and enforcement efforts). But to the right of the peak there is a *negative* relationship between arrests and enforcement efforts. Accordingly, an increase in the number of arrests from one year to the next might be an indication of more enforcement effort (on the left-hand side of the parabola); but it could also be an indication of less enforcement effort (on the right-hand side of the parabola). Conversely, fewer arrests from one year to the next might be indicative of less enforcement effort – or it could be an indication of fewer violations *because of more enforcement effort*.

Equivalently: When a police officer walks the streets but doesn't arrest anyone – *because there are no crimes being committed* – he/she is still *enforcing* the law. To identify “enforcement” solely with arrests is mis-leading at best and is likely to focus too much attention on arrests and not enough on crime prevention through other means.

What is true for street muggings, arrests, and police enforcement should hold as well for antitrust violations, cases brought, and enforcement by the antitrust agencies.

Let us now expand the consideration of antitrust enforcement to encompass merger reviews. Again, there are frequently asserted associations between “antitrust enforcement” and the number of merger challenges that are brought by the antitrust agencies.

But suppose that the legal standards as to the types of mergers that will be challenged as threats to competition and the types of mergers that are considered to be competitively benign are clear “bright lines,” with no ambiguity – and that these challenge standards are sure to be upheld by the courts – and all of the antitrust bar know the location of and understand these “lines.” Then, if we assume that the counsel to potentially merging parties accurately advise their clients and that the clients always heed their advice, only benign mergers will be proposed – since non-benign mergers will always be challenged and the challenges will always be upheld. Thus, there will be zero merger challenges – because of the effectiveness of enforcement and not because of the lack of enforcement.

Note that this zero-challenge-result could hold regardless of where the challenge “line” is located. If, for example, the enforcement agencies believe that entry conditions are always such that merged firms are unlikely to achieve any lasting market power, or if instead the agencies believe that entry is a weak disciplining force such that many mergers are likely to achieve lasting market power – so long as the “lines” that result from these views are clearly conveyed to the antitrust bar and are supported by the courts, few (if any) merger challenges will be observed.

Thus, the observation that there are varying numbers of merger challenges from year to year says much more about the difficulties of conveying where those “lines” are for various industries under various circumstances.<sup>4</sup>

In the context of imperfect knowledge or vagueness about where the “lines” are, and thus of the consequent positive numbers of merger challenges: Suppose that a new presidential administration changes the location of the enforcement “line” but hasn’t conveyed that change with adequate clarity or precision. Then a change to greater leniency as to what is considered anti-competitive would likely be accompanied initially by a reduced number of challenges; and a change to greater stringency would initially be accompanied by a greater number of challenges.<sup>5</sup> But after the initial change in the number of challenges, the merger-advising bar ought to gain a better (though still imperfect) idea of where the new “line” is, and the numbers of merger challenges should return to roughly their previous levels.

Let’s now return to the Laffer Curve of Figure 1. Since the left-hand side of the curve does show a positive relationship between cases that are brought and enforcement efforts, it is possible that someone could believe in deterrence but also believe that even when deterrence is taken into account, the actual state of enforcement efforts is always sufficiently sparse that all observations occur along the left-hand side of the curve. But then the next question should be about the basis for this latter belief.

There is a final implication from this consideration of the effects of deterrence: Conclusions about the effectiveness of an antitrust regime – or of any legal enforcement regime – should not be based on observations of the number of cases that are brought during any time period. Instead, those judgments should be made on the basis of where the enforcement “line” appears to be drawn and whether that “line” embodies excessive leniency or excessive stringency.

These kinds of judgments are more easily made when the actions in question are readily observed: for example, the mergers that are permitted versus those that are challenged;<sup>6</sup> or the vertical restraints that are permitted versus those that are challenged. The judgments are harder when the actions involved are surreptitious, such as price-fixing/bid-rigging/cartel activity. But it is nevertheless the right way to think about the issue.

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4 This is similar to Priest and Klein’s analysis of why some cases proceed to trial rather than being settled: See George L. Priest and Benjamin Klein, “The Selection of Disputes for Litigation,” *Journal of Legal Studies*, 13, January 1984, pp. 1-55.

5 But it is also possible that the merger-advising bar mis-reads the former change and believes that the enforcement “line” has become even more lenient than the new administration intends, so that there could even be more merger challenges initially; similarly, the move toward greater stringency could be mis-read, with the consequence of fewer mergers’ being challenged initially.

6 Kwoka, for example, follows this approach and argues that recent merger policy has been too lenient: See John E. Kwoka, Jr., “Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes,” *Antitrust Law Journal*, 78(3), 2013, pp. 619-650; and John E. Kwoka, Jr., *Mergers, Merger Control, and Remedies: A Retrospective of U.S. Policy*. Cambridge, MA: MIT Press, 2015.

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