

“Incentive as the Precursor of the Law”

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ABSTRACT

The word Incentives creates the idea that Incentive is something that is only to be given in the monetary terms. And the very concept of Incentive is somewhere narrowed with its definition. Incentive is understood only from the perspective of Economics but the area of Incentive consists of so many things. Economic theory provides powerful theoretical tools for predicting the effects of changes in incentives – tools that are hardly matched by any other social science.¹ By comprehending the Incentives with Economics, the person tends to constrain their perspective to very narrow and empirically questionable view of human motivation. Contract theory and principal-agent theory, for example, typically restrict their attention to the motives to achieve income through effort and to avoid risks.² It is the purpose of this paper to make an attempt to understand what the term Incentive would mean in different disciplines and to throw a light on what actually could be the incentive for a person and how the law and legal field is based on the principle of incentive and we would conclude with the argument that when the particular purpose which worked as an incentive for that particular situation, after completion of that the incentive ends.

Keywords: *Incentives as Loopholes, Law making process, Justice.*

¹ This does not mean that the term Incentive should only be understood with the lens of only Economics. It reflects, however when we try to understand the Incentives with accordance of other disciplines then there are multiple ways to understand what actually the Incentive would mean.

² Here the very important aspect of human psychology is being undermined. Sometimes the circumstance of an individual incentivizes him to take some particular decision which that individual would not have taken if that situation would not have arisen.

1. INTRODUCTION

In the discipline of Economics the Incentive could be defined as “Something that induces a person to act”³. In the Economics, incentives help in analyzing how the market works. If the price of a particular commodity increases then the consumer would be incentivized to consume it less and on the same hand the seller would be incentivized to produce more. Here, in the discipline of Economics, Incentive is seen as something that benefits or induces a person to act but in monetary terms. As in the above mentioned example it was the price of that particular commodity that incentivized the seller and the consumer at the same time to act in a particular manner. But the term Incentive is very wide and it could consist various definition in various discipline.

2. INCENTIVE IN DIFFERENT DISCIPLINE

In this section the meaning of the term “Incentive” in relation to different disciplines is being discussed and the main purpose of this section is to throw the light on the actual meaning of Incentive. Here, the section discusses phenomena that could work as an incentive in that particular section. This section would suggest that how a desire to reciprocate on the particular situation and how the desire to avoid the social approval may shape the behavior of the particular individual. This is where the discipline of the human Psychology plays its role. The interactions of three important human motives with economic incentives – the motive to reciprocate, the desire for social approval and the desire to work on interesting tasks. The first two motives are social in nature, i.e., by taking them into account one acknowledges human beings as social beings. The third motive is not related to the social nature of man but originates in the nature of certain tasks. There are many tasks providing intrinsic enjoyment for those who perform them and these tasks are therefore undertaken even in the absence of economic incentives.

The perspective of Psychology provides the different insight to the Incentives. It defines how a particular situation would affect the human behavior and it incentivizes the person to act in the particular manner.⁴

³ Mankiw NG, Ten Principles of Economics from *Principles of Economics*, 7th edition, Cengage Learning India Pvt. Ltd., 2013

⁴ It is not necessary that Incentive could only be in monetary. There are multiple determinants of the situation that can work as an incentive for the person and in this manner, often the monetary incentive does not serve its purpose.

There are three important human motives that is being discussed over here to provide an overview to understand what could work as an incentive. The first one is the desire of the individual to reciprocate in a particular circumstance. For the example, in a particular industry there are some workers who were not properly taken care of. Now when the owner would try to make the owner work more with the monetary incentive there are chances that the workers would not respond to the Incentives as expected because they have the desire to reciprocate the actions of the owner. Here the monetary incentive will not serve the purpose.⁵ Here, the desire of the workers to reciprocate to the actions of their owner becomes an incentive for these workers to not accept the monetary benefits and to somehow show the reluctance towards their work.

The second human motive that would shape the human behavior is the desire of social approval. The person might deny to the incentive in order to achieve the social approval. For example, a person by investing his money on the bigger car gets the social approval of being rich. The person could have bought the smaller car which would not have made any difference.⁶ Money which could have been saved by investing the money on smaller car would have been used on other things. But here the person, in order to achieve the social approval buys the bigger car. The savings of the money, which would be working as a monetary incentive, is not taken by the person to achieve the social approval. That's how the person sometimes doesn't take the monetary incentives in consideration.

The third one is the desire of the person to work on the interesting tasks. Sometimes the person is so much inclined to the tasks they find interesting that they don't need even an incentive to work on that particular tasks. For example, if the person finds the accounting work to be interesting. Now that person would not need an incentive to work for the accounting. The work itself becomes the incentive for the person to act in such a way where the monetary incentive is not needed.

⁵ In the aspect of Psychology, there are many determinants of the behavior of the person that itself would incentivize the person to act or refrain him from doing a particular act. These are the aspects that should be taken in the account when the term Incentive is being interpreted or understood.

⁶ There are many aspects which plays its role. But here, there is an assumption that the other factors like the total number of the person, the distance that a person has to travel with a car and other things remains the same. And these are the purposes that even the smaller car would have served but the person in the desire of the social approval buys the bigger car.

These are the human motive that negates the monetary incentive and here the situation itself works as an incentive for the person.⁷ So in the aspects of the psychology the term incentive is not only constrained to the border of monetary benefits.

After the aspects of the Psychology, incentives should be understood in accordance with the Sociological aspects. In the sociology many scholars have made an attempt to understand what actually incentive is and what actually could work as an incentive. According to the theory given by B.F. Skinner with the name “The Incentive theory of Motivation”, a person is more likely to do an action that is positively received, while he is more likely to avoid an action that is negatively received. The incentive theory is said to be different from other theories of motivation in such a way that it views the stimulus as something that attracts a person toward it, rather than something that prompts a person to reduce it or totally eradicate it.⁸ The Sociological aspect derives that incentive is the situation rather than monetary benefit which induces a person to act in the same manner in which he behaved and got positive response. For example, if an employee of the company receives the award for always being punctual in office. Here the person received a positive reaction so the situation of the award becomes the incentive for the person. Here the person is not receiving any monetary benefits but that particular stimulus of the award would work as an incentive for the person.

Even George Caspar Homans gave the Exchange Theory of an individual where he quotes that “If in the past the occurrence of a particular stimulus or set of stimuli, has been the occasion on which the person’s action has been rewarded, then the more similar the present stimuli are to the past ones, the more likely the person is to perform the action, or some similar action”. Here the past actions of an individual becomes the incentive for him because he has been awarded for the same in past and not necessarily in monetary terms. So apart from the economic incentives even the particular situation or an individual’s thought process or his desire could also incentivize him to act in particular manner.⁹

⁷ It is not necessary that only monetary benefits works as an incentive. There are other aspects of the incentive that are being neglected when the incentive is only understood from the economic lens.

⁸ The Incentive theory of Motivation, <https://explorable.com/incentive-theory-of-motivation>, Oct 3, 2019

⁹ With the aspect of Sociology, the term Incentive could be understood in broader terms. The Incentive not only consists of monetary benefits but also consists the situation which itself becomes the incentive for the individual and they tend to act in the same manner in which they acted while they got the reward.

3. THE PRINCIPLE OF INCENTIVE AND LAW

After understanding the incentive in accordance with the disciplines of the Psychology and Sociology, this section talks about how the law field is working on the incentives. From making of the law to implementing the law, incentives plays its role. To understand the notion better, this section highlights the different area of law and tries to deduct the relation between the law and incentives. But the main idea of this section is to show that when it comes to law, the Negative Incentives plays more role than the positive incentives.

As opposed to positive incentive, negative incentives are provided in order to rectify an individual's mistakes and errors for the sake of achieving better results. More often than not, negative incentives are given if the positive incentives do not work, conditioning the person to act to avoid such negative incentives. These includes penalties, fines etc.¹⁰ the main idea here is to analyze the notion that the field of law works on the negative incentives rather than the positive incentives. A person becomes more rational towards his duty and obligation because he carries a fear that if the proper and due care would not be taken then the law will take the unlikely steps like penalties and fines.¹¹ This section will talk about the different areas of law and the incentives behind that particular law and how a law negatively incentivizes the people to behave more rationally and carefully. For example, there is a punishment for the negligent and rash driving in the MV act. This punishment itself incentivizes the person to drive more rationally and carefully.¹²

3.1 Incentive in Tort Law

Now the discussion starts with the Law of Torts. Before deducing the relationship of law and incentive, this part will highlight the law of torts. Tort is defined as what constitutes a legal injury and establishes circumstances under which one person's wrong may be held liable for another person's injury. There are four objectives of the law of Tort.

1. To provide justice
2. Principle of Appeasement

¹⁰ Ibid pg. no. 5 (8)

¹¹ Here the person follows the law because they have the fear that if they do not follow the law then they would be subject to punishment. This becomes a negative incentive rather than the positive incentive. And according to Homan's theory person is less likely to repeat an action for which he has been penalized or punished before and same has been discussed in the prior section of Incentive and Different Disciplines.

¹² The author is not making an argument that it completely stops the accidents to happen but the only connotation here is that a person behaves more rationally with the fear of law and this defined the idea of negative incentive.

3. To Prove the Deterrence
4. For the Compensation.

For example, Nuisance is the civil wrong under the Tort law. When we talk about the how it incentivizes the people to act more rationally, the negative incentives plays its role. The main idea here is people know that the Nuisance is the civil wrong and if they commit that wrong then they have to face the repercussions of the law. This stock of knowledge makes people to act rationally to take care of the other person's enjoyment of his private property. If this particular law would not have been there then why the person would care about other person's right?

Basically, the law of tort is based on certain principles. Which is that every individual has the duty of care towards the other individuals and if they infringe their duty then they would be the subject of the punishment under the law. This is how the fear of the repercussions incentivizes the people to act in more rational way. In the theory of the Social Cost, economist Ronald Coase gives the reasoning about this particular idea.¹³ For example, there is a locomotive that emits sparks which would damage the sparks alongside the rail-roads. This cost inculcated by the farmers is not the only the private cost but it is the social cost as both farmer and rail-road is the member of the society. Now if there is no law then the rail-road would be too careless in operating locomotives. So here there is the fear of the law that incentivizes the rail-road to operate in more accurate and careful manner.

3.2 Incentive in IPR Laws

Now the discussion comes to the Intellectual Property Rights and how the Incentives are related in the field of IPR laws. Before understanding the relationship of IPR laws and Incentives, the Theory of Protectionism should be understood. Protectionism refers to government actions and policies that restrict or restrain international trade for the benefit of a single domestic economy. Protectionist policies are usually implemented with the goal to improve economic activity within a domestic economy but can also be implemented for safety or quality concerns.¹⁴

The intellectual property works here as the economy for which the theory of Protectionism has been applied. If the person is not getting any exclusive right over his invention then why would anyone invent something new? It is for the benefit of the person who has put in the efforts and hard-work. The

¹³ Coase R.H, The Problem of Social Cost, *TJLE*, 1960; Volume 3: 3-p

¹⁴ Protectionism, <https://www.investopedia.com/terms/p/protectionism.asp>, Oct 3, 2019

IPR law works as both the positive as well as negative incentive. It incentivizes an individual to invent something with the reward of exclusive right over that inventions and on the same hand it negatively incentivizes the person to stop imitating other person's idea and refrain a person from committing the intellectual theft.¹⁵

3.3 Incentive in Contract Law

After the IPR laws, Contract law would be discussed. Before analyzing the relationship of the incentives and the contracts, we need to understand what is contract. Any agreement enforceable by law is the contract.¹⁶ Why do people make a contract? There are certain reason why do people make contracts.

1. Clarity in the obligation of the party
2. Contingency clause
3. Deliverables and Performance of the Contract
4. Legal Sanction

The Contract is always between unequal rather than the equal.¹⁷ Contract law also works on both the positive and negative incentive. The person enters into a contract with the unknown person or firm just because they believe that if something bad happens then the law would help them in getting their money or the value back. And on the same hand the person fulfills the promise and obligations of the contract as they have the fear that if they won't complete the contract then they would be the subject of the repercussions of the law. To better understand this theory of Promise and Consumption should be understood.¹⁸ In this theory the concept of Beneficial Reliance and Detrimental Reliance were given. Here, the promise is the signal of the future conduct. It allows person to increase his present consumption knowing that they will receive the increased wealth in

¹⁵ The person fears the law as if he tries to make the product of invention on his name which has been produced or invented by someone then they have to face the repercussions of the law and on the same hand it incentivizes the person with exclusive right over his product. This is how IPR works on both negative as well as the Positive Incentive.

¹⁶ Section 2(h) of Indian Contract Act, 1872.

¹⁷ The person who lacks something, comes in the contract with the person who has that commodity and this is how the contract is between unequal than the equal.

¹⁸ Goetz C.J, Scott R.E, Enforcing Promises: An Examination of the Basis of Contract, *TYLJ*, 1980; 89(7): 1266 – 1267p

the future. This is known as the Beneficial Reliance. And, if these promises are broken they consider it as the Detrimental Reliance.¹⁹

3.4 Incentive in Criminal Law

After the Law of Contracts, this section talks about the Criminal laws and how the incentive work in the Criminal law. However, in the criminal law the negative incentive plays major role. The fear of the law refrains the person from doing the Criminal act. Here the fear becomes the negative incentive for the people. Due to that fear the person doesn't do certain acts. For example, there is a punishment for assault in the section 351 of the Indian Penal Code.²⁰ If the law would not have been there then the person might commit such criminal acts. So basically here the fear of the law becomes the negative incentive for the person to refrain from particular actions.²¹

3.5 Incentive In Constitutional Law

After the criminal laws, this section will highlight how the incentives were used in the Constitution. The Constitution is based on the Positive Incentive more rather than just the negative incentive. When we talk about the D.P.S.P given in the constitution then the D.P.S.P itself is the bunch of incentive given by the Constitution which needs to be taken into consideration while making the policies. Article 38 to 51 of the Constitution talks about the D.P.S.Ps. These D.P.S.P constitute very comprehensive social, economic and political programmer for modern and welfare of the states. They emphasis on the state that they should try to promote the welfare of people by providing shelter, food and clothing. For example, Article 39(A) talks about the free legal aid. By this the state incentivizes the poor and weaker section to use law while they face any kind of problem. D.P.S.P itself incentivizes the State to make such laws and policies where the greater good would be achieved and all the sections of the society becomes the beneficiary to the policies of the state. And also D.P.S.P after providing the guidelines for the policies and laws, talks about

¹⁹ Here the in detrimental reliance, the person enforces the broken promises with the help of law. And that's how the contract law positively incentivizes the person to induce the contract. And on the same hand the other party somewhere and somewhere fears the law that if they don't fulfill the promise then law would make them complete the contract.

²⁰ Assault is where the person makes any gesture or preparation intending that this action will cause other person to apprehend that he who makes this gesture will use the criminal force against that person.

²¹ We are not saying that it stops the crime completely, the only idea is here that the fear of the law makes person to behave in more rational and careful way.

the incentives that could be given to the children, women, workers and etc. This is how the D.P.S.P. is in itself an incentive and also it provides for the further incentives.²²

This is was discussion in this section where an attempt has been made to deduce the relationship of the law and the incentives and how the legal field works on the incentive and sometimes law provides the negative incentive rather than the positive incentives which refrain person from indulging himself in some kind of activities.²³

The next section will talk about how at certain time the incentive ends after serving its purpose.

4. THE END OF THE INCENTIVE

This section talks about the circumstance where the particular incentive which made the law enforceable at that time stops serving its purpose and the incentive ends at some time. This is time when the particular law would need new amendments. This section will talk about some recent amendments in criminal laws and the MV act and will try to draw the conclusion that the incentive does end at certain time.

If we see the evolution of the rape laws in India then it could be seen that how particular incentive which was needed at the time of the enactment of that particular law stops serving its purpose and we need amendments and new incentives to enhance the laws and legal fields. The first time “Rape” was mentioned in the IPC in 1860. At that time section 375 to 376 (E) was talking about the rape. All in all, the minimum punishment for rape was as lenient as two years in prison (the same as perjury) and the worst-case scenario was a life sentence²⁴. The first amendment in the IPC came after the Mathura rape case.²⁵ On March 26, 1972, a young Adivasi girl named Mathura was raped by two policemen while in custody. Her family lodged a complaint against the two policemen and the trial went all the way to the Supreme Court. The policemen were acquitted because Mathura was apparently ‘habituated to sexual intercourse’, they could prove that she was sexually active but not that she had been raped. The Supreme Court Justices even said that Mathura

²² This was main idea of DPSP that unlike the Criminal law and other aspects of law, DPSP works more on the principle of Positive Incentives rather than the Negative Incentives.

²³ In the law field, the fear of the law becomes the negative incentive for the people.

²⁴ The Evolution in the Rape laws in India, <https://www.youthkiawaaz.com/2018/08/indias-anti-rape-laws-the-evolution/> Oct 3, 2019

²⁵ Tukaram vs. State of Maharashtra, AIR 1979 SC 185

had raised no alarm, there were no visible marks of injury or struggle and because she was used to sex, she might have incited the cops to have intercourse with her. This verdict resulted in outrage across the country. Lawyers observed that instead of relying on hard evidence, the Court has let the cultural taboo of pre-marital sex influence its decision. They said that ‘submission’ during the rape had been misunderstood for ‘consent’ just because of this taboo.²⁶

After this many women groups held protests and marches with the demand of change in law. Finally in 1983 the amendment came in which,

1. Section 114(A) of the Indian Evidence Act was amended where now the court shall presume that the female is saying truth if she says that she did not consent to the sexual intercourse.
2. New category of rape by public servant which is known as the Custodial rape was also introduced which was ignored till date.
3. It made the Consent the integral part of the determining the offence of the rape.
4. It banned the publication of the Victim’s identity and prohibited the character assassination in the court.²⁷

Here, the incentive which made the rape laws in 1860 enforceable stopped serving its purpose and that’s why the situation and the loopholes of the law became an incentive for the amendments.²⁸

Even though the 1983 amendments prohibited the character assassination it was not including the cross examination and due to that the cross examination of the rape victim became a way to humiliate and degrade the moral character of the woman by the defense. This was pointed by the NGO named SAKSHI.²⁹ After this when the law commission referred to the rape laws they found that Section 155 (4) of the Indian Evidence Act 2002, the defense lawyer could discredit a rape victim’s testimony by proving that she was of ‘immoral character’. This scenario included

²⁶ Ibid (24)

²⁷ Ibid pg. no. 11 (24)

²⁸ Here the incentive which made the rape laws enforceable in 1860 stopped serving its purpose and the loophole of the law became an incentive to amend the law. So the incentive ended for the particular law which caused the amendments in the law.

²⁹ Sakshi vs. Union of India, AIR 2004 SC 3566

questioning her about past sexual acts. They identified that it was this specific clause that deterred rape victims from filing a case.³⁰

And in finally in 2002 the amendment came and the cross examination was prohibited³¹. Even though the amendments came in IPC, the sexual offence committed on the children was still ignored. Statistics indicated that India saw a 336% increase in child rape cases from 2001 to 2011. The National Crime Record Bureau statistics state that 48,338 child rape cases were recorded during this period. This alarming trend led to the need for a 'special legal procedure' for child victims of sexual offences. So far, the only mention of sexual offences against children was the 'statutory rape' clause mentioned in the IPC that criminalized sexual intercourse with a girl below the age of 16, regardless of consent.³² After that the amendment of the POSCO came which defined the sexual offences committed on the children and it amended the procedure of such trials. It also empowered the court to commence the trial in-camera and without the revealing the identity of the child. It made the trial procedure more child friendly. Even it made the POSCO act more gender neutral and took the sexual assault of the male children into consideration.³³

In 2013, a girl named Jyoti Singh was brutally raped in the moving bus. This case became the turning point for the anti-rape laws in India. It was not only the time to change the laws but also the time to change the perspective with which the rape laws were looked at. It defined rape and amended the offences like stalking, acid attack and voyeurism as the crime. It made the threat of the rape a crime. Even age for being tried as an adult for violent crimes like rape and murder was changed from 18 to 16, that to the Juvenile Justice Act.³⁴

Just like IPC even there are amendments also in the MV Act. For that this section would discuss what incentivized those amendments. The main reason why the MV act was amended because, people were not having the enough safety measures which increased the number of accidents and the number of deaths per accident. According to the Government data, more than 70 per cent of fatal road crashes in 2017 involved adults in the 18-45 years age group, according to a report. As

³⁰ Ibid pg.no. 11 (24)

³¹ Here the incentive of 1983 amendments stopped serving its purpose and that's why the new amendments were required in the rape laws.

³² Ibid pg. no. 11 (24)

³³ Here the situation of increased offences against children became an incentive to amend the laws.

³⁴ The prior incentives which made the rape laws stopped serving its purpose and the loophole of the law became an incentive for the amendments.

many as 1.47 lakh people died on Indian roads in 4.64 lakh accidents reported during 2017, the report by the Ministry of Road Transport and Highways said. Fatal road accident victims largely constitute young people in the productive age groups. Young adults in the age group of 18 - 45 years accounted for 72.1 per cent of victims during 2017. People in working age group of 18- 60 years accounted for a share of 87.2 per cent in the total road accident fatalities, as per the report from. In terms of accidents on road categories, the National Highways accounted for 30.4 per cent of total road accidents and 36 per cent of deaths in 2017³⁵.

This accidents show that the people were not taking the safety measures properly. And due to that Government had to negatively incentivized people to follow the rules.³⁶ How a particular law can be amended or enforced with an incentive, can be understood by this diagram.

Here in the circle of the *Situation*, the term Situation can be need or the lawlessness of the society. For ex. In prior times India did not have the much technology so we did not have IT Act, but with the time there is a need which incentivized to implement the act. The same way lawlessness incentivizes to implement or amend the laws.³⁷ And as the incentive stops serving its purpose, that inadequacy makes that law itself an incentive for further amendments and enforcements.

³⁵ Ministry of Road Transport and Highways, *Road Accident in India - 2017*, <http://www.indiaenvironmentportal.org.in/content/459084/road-accidents-in-india-2017/> (2017)

³⁶ The incentive which were there at the time of the MV Act 1988 stopped serving the purpose. So the incentive for that particular act ended and increased number of accidents became an incentive to amend the law.

³⁷ The End of an Incentive pg. no. 10, note of criminal law.

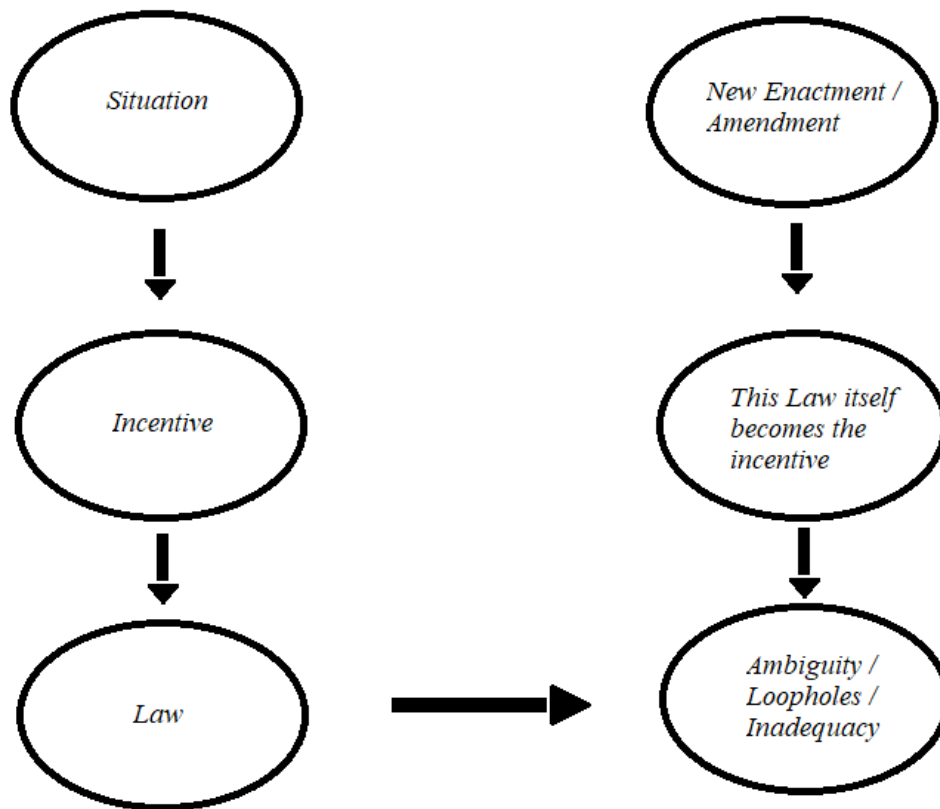


Figure 1. How Incentive Works

CONCLUSION

In the conclusion, this paper wants to highlight that the incentive ends at a particular time. When the incentive stops serving the greater good, it is the time when the incentive stops. So it is the time when a particular law would need an amendment. The loopholes of the law become the incentive for the new amendments or enactments. The main idea was to show that the legal field works more on the negative incentives rather than the positive incentives. And not only monetary benefit but any situation, desire or any fear could work as an incentive for the individual.

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