

The Justice Academy Journal

Law and Justice Executive Series
February 2017 - Volume 1



The Irreducible Complexity of the Law

For years I pondered over the multifaceted nature of the law, then one day it struck like a bolt of lightning as I was preparing a lecture for my class, that I had been approaching the challenge all wrong. The law is not multifaceted. The law is simple and, for the most part, has only one premise and only one conclusion. Arguments don't get any simpler than that. The premise in the argument of almost every statute is simply that "thou shalt not do this or that" and if you do then the conclusion is that you will spend some time in confinement as punishment. It really doesn't get much easier than that, and as I said, I had it wrong for all those years. Well not wrong per se, but I do tend to overthink things. I've even been accused of that shortcoming by the presiding judge of the court that I served, to which I responded, "would you prefer that I under-think things"?

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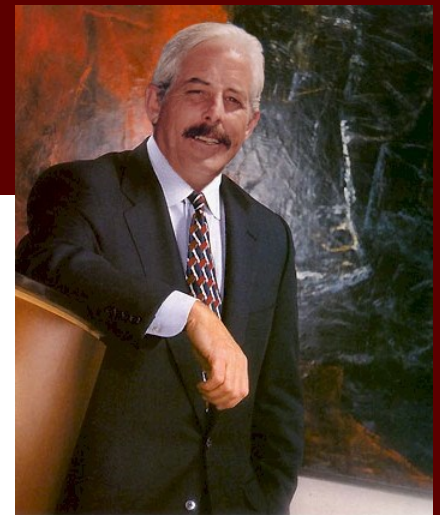
Despite my smart Alek answer, the point he was making is that the law isn't complicated. It is the argument that was debated within the legislature in the first place that led to the enactment of the statute that was complicated. Essentially, the law is an effort to simplify the complexity of the world into a manageable and easy to understand set of rules that apply to us all, so people don't have to think too hard about why they need to conform to social expectation. All you have to do is comply with the law and you'll be fine. Or at least that is the general idea.

Charles Darwin, came up with the notion of irreducible complexity and he even used the term to suggest that if it was ever discovered in nature, his theory of evolution would break down. His reference had nothing to do with the law, but it seems apparent that this is what our legislature strives to achieve when authoring new criminal statutes. The overriding debate in the legislature that leads to the formation of the exact language of the new law needs to, by nature, take into consideration the multivariate aspects of the behavior under discussion. The discourse, at this crucial point of the legislature's deliberation over the structure and content of whether or not to pass a proposed new law, must take into consideration the wider

issues of the behavior, the consequences of the behavior upon the individual, the impact of the behavior upon society as a whole, how such behavior has impacted personal liberty, it's relevance to continued social stability and order, whether prohibiting such behavior impacts Constitutional guarantees, and the value that a new law will have in preserving our nation. These are just some of the relevant premises in the greater multivariate argument that accompanies the enactment of proposed legislation. Or at least they should be the premises that are an active part of every such deliberation, before a law is passed.

We have all heard it proclaimed that legislators don't actually read the language of a newly proposed bill, but rather listen to the arguments in support, or in opposition, to it that are made by the authors of the bill. They then cast their vote whether or not to enact the new legislation based on the persuasiveness of the arguments made on the floor of the Assembly and the Senate. One of the more interesting commentaries on the legislative process and the creation of new laws is that it is allot like making sausage. You never want to see it transpire, but rather just enjoy the outcome of it.

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Hal Campbell currently serves as the Executive Director of JusticeAcademy.org. He also serves as a member of the teaching faculty for the University of Maryland concentrating in the areas of public policy strategy, criminal law, constitutional law, justice administration, empirical analyses, and higher education.

Judge Campbell recently concluded a term of service as a member of the judiciary in the State of Montana. His appointment to the bench was bestowed by the Montana Supreme Court, Commission on Courts of Limited Jurisdiction, Prior to this appointment to the bench, he served for over twenty-five years as a tenured professor and department chair with the California State University. His public policy and law enforcement experience includes a variety of senior management positions with the Los Angeles County Sheriff's Department. From 1978 to 1989 he held positions in the department including Law Enforcement Planning Coordinator, Chief Analyst, and began his career as a Deputy Sheriff.

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There is probably some truth to that notion, especially given the cast of characters involved in the legislative process these days. Lobbyists, special interest groups, so-called experts, junior staffers, legal counsels, ambitious political colleagues seeking to have their name associated with a bill, and those who would rather not run their next campaign on their voting record.

With regard to criminal statutes specifically, it's probably safe to assume that the vast majority of required criminal laws have already been written and probably equally safe to assume that nothing of significance relative to this particular body of laws will be authored in our lifetime. Certainly adjustments will be made to criminal procedure based on case decisions, minor rewrites of statutory language that are offered as clarification of changes to criminal conduct, or perhaps even some significant alterations to existing laws or sentencing mandates might occur because of the elimination of a particular set of laws based on their relevance or a change in social tolerance for such behaviors. But essentially, the complex multivariate arguments that were required to support the authoring and enactment of the criminal laws we use to guide our existence have already played out in the legislatures of the states that created these laws. All that's left is for the courts to interpret and adjudicate these laws, based on whether someone violated the behavior that was prohibited by said law.

We can't leave it there, can we? Surely something else must remain for us to do as a vibrant society of thinking people relative to criminal law and procedure, but what? Oh I know, how about the reconsideration of the complex argument made in the first place that justified the creation of the laws that we use to guide our nation. Doesn't that merit our attention? Isn't that worthy of continual evaluation by our legislatures and our courts that serve the criminal justice system? You would think so, but how many of us can say with certainty that we have seen this happen within the legislature? What were the premises contained within the argument that supported the conclusion that lead to the creation of this statute in the first place? What behaviors did the law seek to prohibit? What was the consequence of the behavior upon society? Is it still relevant today? Did it make sense then and should it continue as a prohibition now?

I am of the opinion that every once in a while, it is important to go through the process of arguing the merits of a law once again, specifically to see if the law makes sense today. Apparently I am not alone. There isn't much we can do about whether the law made sense in the first place, but we can certainly use our enlightened contemporary viewpoint to evaluate the relevance of our criminal statutes today, rather than merely relying on tradition or faith in those who came before us and the presumption that they knew what they were doing when they created the law. As a practical example, let's use the mandatory minimum sentencing requirements that were enacted for crack cocaine possession, versus the penalties prescribed for possession of powdered cocaine that were enacted in the 1980's and 90's. The multivariate nature of the argument against use of either of these drugs is still valid because, we as a society, are still of the belief that drug use lessens personal productivity, which adversely impacts the value of a person as a productive member of society.

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Drug use and dependency also adversely changes behavioral characteristics, they serve as an impediment to self-sufficiency, they render people unreliable, their use places an undue burden upon society for the care and welfare of those dependent upon the drug, as well as those dependent upon the addict for survival, and there are a litany of other valid complex considerations or premises that were probably debated during the legislative process prior to the enactment of the law prohibiting the possession of these two substances.

The distinction between Crack Cocaine and Cocaine Powder is that the former is manufactured into "rocks" that can be smoked, while the latter is a fine white powder that can be inhaled. The demographic patterns typically associated with the use of these two forms of cocaine differ considerably however. Crack cocaine was discovered to be predominantly used by African Americans, while powdered cocaine was more prevalent among Caucasian Americans. The use of either form of the drug violates the complex argument made previously relative to personal health, public safety, and the moral aspects of dependency upon our society, but the mandatory minimum sentences that were prescribed by law makers were very different depending upon which drug you were caught using and how much of it you possessed. So much so that eventually, the U.S. Congress deemed the sentencing mandates as unfair and enacted the Fair Sentencing Act as a result of this reconsideration.

According to US News and World Report, "the act, which passed the Senate with unanimous consent, also passed the House by a simple voice vote after only forty minutes of debate. President Obama said that the bill would help right a long-standing wrong by narrowing sentencing disparities between those convicted of crack cocaine and cocaine powder. Under the current penalty structure, established during the so-called "crack epidemic" of the late 1980s, possession of crack can carry the same sentence as the possession of a quantity of cocaine that is 100 times larger. The Controlled Substances act established a minimum mandatory sentence of five years for a first-time trafficking offense involving over five grams of crack, as opposed to 500 grams of powder cocaine. The law imposed the same ratio for larger amounts. A minimum sentence of 10 years for amounts of crack cocaine over 50 grams, versus 5 kilograms of cocaine. The Fair Sentencing Act amends existing laws by increasing the amounts of crack that trigger these penalties, from five grams to 28 grams for five-year minimum sentences and from 50 grams to 280 grams for ten-year minimum sentences. The act will also eliminate the five-year mandatory minimum prison term for first-time simple possession of crack."

The complex multivariate argument in support of changing the mandatory minimum sentencing strategy for possession of cocaine, in either form, is simply that it is discriminatory in nature to prescribe one set of rules versus another, based on the type and form of processing involved. That is not entirely correct. The rationale used to change the minimum sentencing standards applied to possession of either drug was really more that it was discriminatory based on ethnic profile of who typically gets caught with either form of the drug. Now does that really make sense? Under the legal philosophy of irreducible complexity, it stands to reason that we can avoid future debates over our notions of right and wrong, and our regard for the equity of criminal sanctions, if we avoid the pitfalls of too many qualifications about the form and quantity of such drugs, and simply articulate the distinction possession for use, versus possession for sale, and the punishment based on a standard measure.

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The same irreducible complexity strategy can be applied to virtually any legal definition, any action, intention, motive, efficacy, or measure that we endeavor to use in order to differentiate one statutory distinction of a particular criminal offense from something else that we believe important enough to merit specific codification. Much has been said about the merits of contextualism as a Constitutional interpretation strategy that was popularized by the late Justice Antonin Scalia. Some thought it too literal of an interpretation concept, but the logic of the approach makes perfect sense. In fact it makes a good deal of sense to use such an approach as a means of avoiding the pitfalls of overextension and making false assumptions about the intent of the framers of the Constitution. It also forces the legislative branch to deal with their convictions in full view of their constituency and prevents them from hiding behind some vague reference of the Constitution in order to avoid a potentially unpopular point of view about the enactment a new law.

Justice Scalia was very candid about his feelings on the matter and contextualism has now been adopted as a method of interpretation in some of our finer law schools.. Finding irreducible complexity should also be our goal as legislators, public policy leaders, and members of the criminal justice system. Irreducible complexity, as a measure of the law, stands with contextualism, as an effective means of assuring accuracy and precision in not only the language of the law but its intention. It is when we endeavor to draw too many distinctions without difference, based on an unsubstantiated set of premises, that we cross the line and the blindfolded lady with the scales in her hand takes exception to our oversight and failure to attain precision in the language we use, and the intent of the laws we author, that guide our system of justice.

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