

DUPLICATE CRIMINAL SANCTIONS AND THE RESULTANT “BIG GOVERNMENT” INEFFICIENCIES

Limiting the Inefficiencies of the Tough On Crime “Ratchet Effect.”

- The Ratchet Effect and Governmental Inefficiency
 - Legislators and the special interest groups who appeal to them do not want to be perceived as being “soft on crime.” There is, therefore, a natural tendency to lean towards the passage of additional criminal legislation. This can be referred to as the ratchet effect. More criminal laws are passed while fewer are repealed.
 - Duplicate criminal sanctions are a result. When conduct is already criminal, passing additional legislation outlawing it is inefficient and opens the door to unequal treatment and defense allegations of misuse of prosecutorial authority.
 - Example: In *State v. Hill*, 688 P.2d 450 (Utah 1984) the defendant sold baking soda to an undercover police officer claiming it was cocaine. He was charged and convicted of theft by deception, a second degree felony. Technically he violated that statute. The Utah Supreme Court, reversed and held that he should have been charged with a Class B Misdemeanor under the Imitation Controlled Substances Act.
 - Two statutes proscribed the same conduct. This resulted in the misuse of prosecutorial discretion, it opened the door to defense arguments concerning equal protection, and it resulted in years of needless litigation.
- Principles of Law Concerning Duplicate Criminal Sanctions
 - When an individual's conduct can be construed to be a violation of two overlapping statutes, the more specific statute governs. *Helmuth v. Morris*, 598 P.2d 333 (1979).
 - Where two statutes interdict the same conduct but impose different penalties, the violator is entitled to the lesser punishment. *State v. Shondel*, 453 P.2d 146 (1969); *State v. Arave*, 268 P.3d 163 (Utah 2011).
 - The “*Shondel* Doctrine,” linked to equal protection in an indirect and unusual way, presumes that the legislature is never justified in enacting two criminal statutes with identical elements that impose different penalties, lest they create the possibility that prosecutors may exploit these options and charge similarly situated defendants in different ways. *State v. Williams*, 175 P.3d 1029 (Utah 2007).
 - “[T]he enforcement of criminal laws with overlapping elements or with disparate penalties for identical conduct is limited by fundamental constitutional guarantees, most notably the guarantees against double jeopardy and equal protection of the laws.” *State v. Williams*, 175 P.3d 1029,1032 (Utah 2007).
- Duplicative Criminal Sanctions Give Defendants Constitutional Arguments and Results in Unnecessary litigation
 - Given the foregoing principles, the more statutes there are proscribing the same conduct, the more defense arguments there are available and more litigation ensues. Defendants can alternatively argue about which statute is more specific and which sanction is appropriate.
- Recent Real World Examples

- Sodomy – In *State v. Arrave*, 268 P.3d 163 (Utah 2011) the defendant offered \$20 to a boy to sodomize him. He was charged with Attempted Sodomy, a First Degree Felony. The Utah Supreme Court reversed and held that he should have been charged with Solicitation of Sodomy, a Second Degree Felony.
- Distribution of Pornography – In *State v. Coble*, 232 P.3d 538 (Utah App. 2010), the defendant used a webcam to expose himself in a private internet chat room. He was charged with Distributing Pornography, a felony. The District Court held that, under the *Shondel* Doctrine (see above) he could only be charged with Lewdness, a misdemeanor. Four years of litigation ensued before the Court of Appeals reversed.

- **The Problem With Special Interest Influence on Criminal Legislation.**

- Examining the evolution of the juvenile criminal justice system demonstrates the problems special interests pose to the criminal justice system globally.
 - As one commentator noted, “beneath the surface of benign progressives and idealistic reformers creating and reforming juvenile courts is a darker sea of turbulent tides and strong currents of conflicting political and professional special interests. For example, Professor Sanford J. Fox has shown that government officials' fear of privatization [motivated the creation of juvenile courts] . . . many private agencies (many of them run by or affiliated with religious organizations) were heavily involved . . .” Lynn D. Wardle, *The Fall of Marital Family Stability and The Rise of Juvenile Delinquency*, 10 J.L. & Fam. Stud. 83, 102 (2007).
- Special Interest groups and anti-terrorism legislation, a recent example of special interest interference.
 - “Capitalizing on the post-September 11 momentum in quickly passing legislation under the guise of protecting Americans from future terrorist attacks, several special interest groups spearheaded campaigns to rid themselves of their nemeses – the radical environmental groups. This tactic is best illustrated by the coalition formed between the U.S. Sportsmen's Alliance (USSA) and the American Legislative Exchange Council (ALEC) . . .” Chrystal Mancuso-Smith, *From Monkeywrenching to Mass Destruction: Eco-Sabotage and the American West*, 26 J. Land Resources & Env'tl. L 319, 332 (2006).
- As the foregoing examples demonstrate, special interest consideration has no place in criminal legislation. Rather, the legislation of criminal law must be based on the sound consideration of universally applicable public policy as considered by organizations such as the Judicial Council, the Utah Association of Criminal Defense Lawyers, S.W.A.P., and the Utah Association of Counties. Special Interest lobbying in the realm of criminal law is constitutionally suspect and results in bad policy, needless litigation, and governmental inefficiency.

- **Special Circumstance Exceptions**

- Additional legislation may be appropriate, and even required, in special circumstances. Hate crimes, gang involvement, technological advancement, and changes in sentencing policies are special circumstances that may warrant special legislation.
 - Examples
 - §76-3-203.3 – Penalty For Hate Crimes – Civil Rights Violation

- §76-3-203.1 – Gang Enhancement
 - §76-5-107.5 – Prohibition of “Hazing” (legislative responsive to specific circumstance)
 - §76-4-401 – Enticement of a Minor (legislative response to technological advancement)
- In any case, legislative action in the criminal arena must be motivated by good policy in response to special circumstances or technological advancement. Special interest agenda should not influence legislative action in criminal law.