

## CHAPTER 8

# ICEBERG #4: LEGAL SYSTEMS

*“The greatest crimes in the world are not committed by people breaking the rules, but by people following the rules. It’s people who follow orders that drop bombs and massacre villages.”*

*– Banksy*

*“What has morality got to do with the law?”*

*– Anthony Trollope’s character Archdeacon Grantly*

The big problem with legal systems is that they’re based on the idea that we should recognise the law-makers as wise people who know what’s best.

There’s probably some truth to this, but what’s best for whom?

Early legal frameworks were designed to maintain order by forcing people to behave according to the standards handed down from above. A lot of the legislation was around property and taxes. There was no thought given to human rights, other than subjugating them to keep people in their place. We’ve all heard the tales of people being hung for stealing a loaf of bread to feed their family.

Whether such stories are true or not, the point is that the law was drafted by the elite classes and was framed primarily to protect their interests.

## **What Did the Romans Ever Do for Us?**

Well, they gave us Roman Law for a start!

There are basically two philosophical approaches to designing legal systems: Common Law, where citizens have free will and can do anything that's not expressly forbidden; and Roman Law (also known as Civil Law) which effectively denies individuals any rights other than those expressly granted to them.

That's some legacy they've left us. Still, there's always the roads, sanitation, and let's not forget the wine...

In modern times we mainly work on Common Law principles although there are some exceptions, with totalitarian regimes and other forms of oppression surviving despite the best efforts of the UN Human Rights Council.

And yet, even with the prevailing thinking, there's still a culture of Roman Law in many organisations, and even in our education systems. Workers often aren't allowed to do anything unless the boss says so, and students frequently have to ask permission to go to the toilet.

## **How the Law is Disempowering Us**

The thing with the law is that it assumes we're too stupid to make our own moral judgements.

Perhaps that's true, given that we're taught to comply, rather than to question, as part of our education. Instead of being taught the concept of developing a strong moral compass and using that to guide our behaviour through a shared sense of what's right and wrong, we're made to obey rules.

This is what creates irresponsible behaviour. When we're disempowered by not being responsible for deciding ourselves between right and wrong, it erodes our own sense of morality. Ever heard someone say, "There's no law against it"? That kind of thinking is a direct result of an emphasis on legal frameworks as the primary filter for our decisions.

It's important for the law to be balanced and to highlight individuals' responsibilities as well as their rights. The problem comes in the difficulty we have in recognising what our responsibilities are, when we're institutionally treated as not being responsible.

Responsibility is a skill. It needs to be taught and practiced regularly. The law can severely limit us in that respect.

There's so much legislation that it's impossible for us all to follow all it anyway. And much new legislation creates ever more prescriptive laws that prevent us from thinking for ourselves.

Take in the UK, for example. For years there's been a law that covers 'driving with undue care and attention'. Anyone with any sense will know that driving with one hand whilst talking or texting on the phone with the other is therefore illegal. But no, in 2003 a new law was passed (catchingly titled *The Road Vehicles (Construction and Use) (Amendment) (No. 4) Regulations*) to specifically ban the practice. So does that now mean it's OK to use the phone if it's on the seat beside me (where I'd really have to take my eye off the road to see it)? "There's no law against it!" Well there is actually, and always has been.

The point is, the more we prescribe behaviour, the more we erode individuals' ability to make even the simplest decisions.

We rely on the law instead of our own moral judgement. And that is very dangerous for society, as we'll see later.

### **The Law Creates Criminals**

Is there anyone alive who's not committed a crime?

When the law starts to get involved with the minutiae of our daily lives we all become criminals, often completely unwittingly. We park illegally, we exceed the speed limit if only by a couple of mph, we inadvertently drop a piece of litter and we steal from our employers – even if it's only using their electricity to charge our personal phones.

In the period 1920-1933, prohibition made criminals out of all good, previously law-abiding, citizens who dared to take a tippie. It also enabled the establishment of a network of organised crime, which now flourishes so well serving the drug trade. (Well, they had to find some alternative source of income when prohibition ended, after all!)

Now, having mentioned drugs it's probably worth having a little excursion into the effect drug laws are having on our society.

For some reason, there's a philosophy that tobacco is acceptable but that other drugs aren't. Consider what would happen if tobacco became illegal: you'd create a huge problem with where to house all these criminal smokers.

Funnily enough, we already have exactly that problem. But let's not jump the gun – we'll be discussing prisons in a minute.

The main point is that drug laws create a criminal subculture, and once a person enters that subculture they're on to a slippery slope. They've broken the law by buying some marijuana, so what's the difference if they do a bit of stealing to get the money for their next deal? Or do a bit of dealing to fund their habit? Or shoot somebody's legs out to protect their turf?

And it turns soft drugs users into junkies. It's the easiest up-sell in the world! "No grass today, try this instead." There you go. Simple.

### **"What's Morality Got to Do With the Law?"**

We've talked about drugs, but what about other laws? Should we always obey the law? And if not, how do we decide between laws we choose to follow and those we don't?

Of course we should always follow the law. That's what we're told, that's how we're educated.

But laws, as we mentioned earlier, are often designed to further the interests of the few. What about laws that ban blacks from mixing in white areas, how do we feel about that?

Or laws banning Jews from working as civil servants, and making it illegal for them to marry Aryans (the Nuremberg Laws, 1935)? We all know what that ultimately led to.

Even laws that entitle spouses to 50% of the combined estate in the event of divorce – regardless of whether they brought nothing to the marriage and were only married for a few months.

By creating such an extensive and elaborate legislation (and enforcing it), often with little or no regard to morality, we lose our capacity to make decisions that could enable us as individuals to have a say and prevent the law from undermining our moral values.

When the gap between morality and the law gets too wide there are two possible outcomes: we can go along with the law – and potentially commit atrocities in its name – or we can rebel, as in the French Revolutions for example.

The law needs to be enforced not by the letter, but by testing it against what is right.

### **The Disconnects Between Enforcement, Justice and Penal Systems**

Given that we have laws, they will mean nothing unless they're enforced.

En-force-ment. The word sounds like something quite unpleasant. The Free Dictionary online defines enforcement as, "The act of compelling observance of or compliance with a law, rule, or obligation."

There is a fundamental question here. Why do we need to enforce laws at all? If they made sense, surely we'd all be abiding by them anyway? Of course there will always be exceptions, but in my experience people will mostly, when left to make up their own minds, tend to do the 'right' thing.

However, we do have a fairly rigorous enforcement regime. You do the crime, you serve your time.

But it's this very situation that makes crime justified to many criminal minds. The fact they might get caught and punished justifies the act of committing the crime. Psychologically it creates a balance, it makes sense.

Perversely, people are less likely to do wrong if there are no consequences, because then they have to contend with their own guilt. Imagine you stole money from an old lady. Left to your own devices you'd feel guilty as hell. But just the thought that you *might* get punished if caught makes it seem more like a fair risk/reward balance.

Naturally this won't work in every situation, only where the law in question has a moral basis, or where the perpetrator can't justify it on moral grounds. Stealing from a billionaire, for example, might be considered by some to be morally acceptable, although probably not by the billionaire!

So, we spend billions on policing to enforce laws that often serve no useful purpose for society as a whole.

Then we have to bring our offenders to court. After all, when people do wrong they have to be brought to justice.

### **The Concept of Justice**

The problem with our justice system is, as we've noted, that it creates a sense of balance in the criminal's mind. We want justice when we've been wronged, but in seeking it we validate the very actions we're wanting redress for.

What we're doing here is looking at the tip of the iceberg. We're trying to address the behaviour without any thought about the underlying causes that have given rise to it.

Our adversarial justice system is predominantly focussed on discussion at Levels One and Two. Ultimately this results in a win-lose outcome where the arguments have been presented and a decision made where only one side is victorious.

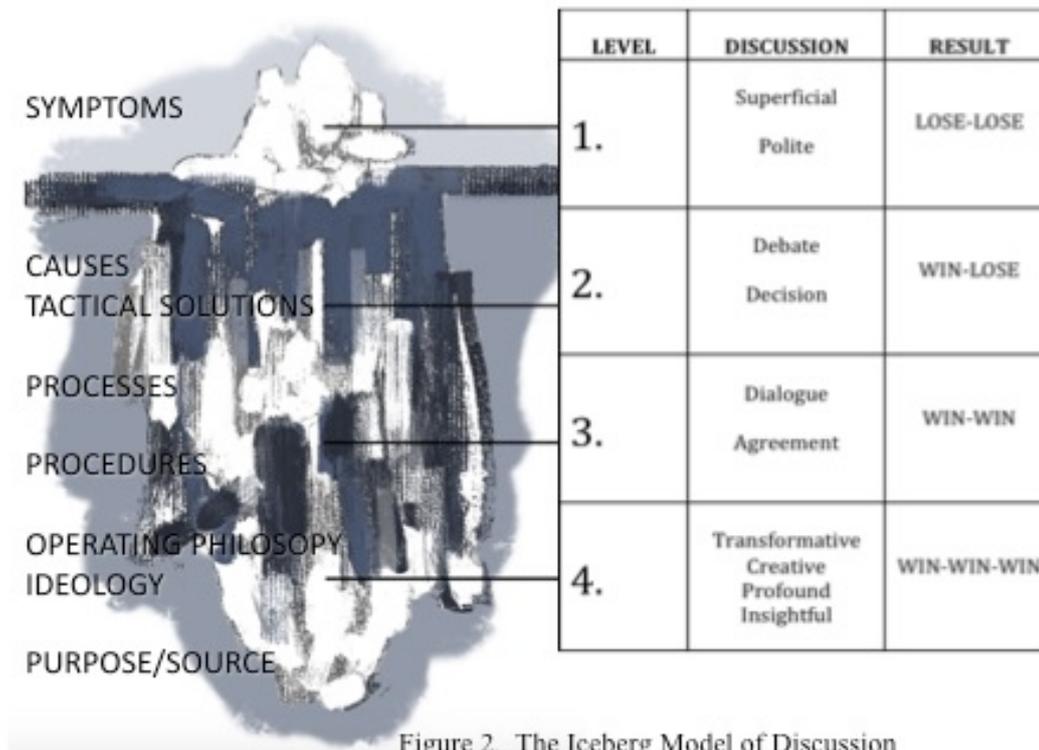


Figure 2. The Iceberg Model of Discussion

Real justice involves diving deeper beneath the surface and looking at removing the conditions that lead to criminal behaviour.

Restorative justice is one such model where the offender and victim are brought together in a dialogue. By helping the offender take full responsibility for their actions and presenting them with the consequences first hand by having to look the victim in the eye, there is a genuine chance for guilt and remorse to bring about permanent change and significantly reduce re-offending.

It also helps the victim to see the offender as a human being rather than a villain – indeed, as a victim themselves of their own unfortunate circumstances.

### Justice and Institutions

We also look for justice when there's institutional wrongdoing. "Heads must roll," we demand.

This approach, which is so prevalent, is very much at Level One. We're working around the problem most of the time by looking for the perpetrator, rather than trying to address the real underlying issues and learn from the mistakes.

I always feel we miss out on critical learning by enacting this process. Instead of firing people, we should be supporting them to use the experience to make better decisions in future. But we continue to look for scapegoats and replace

them with new people who haven't been through the difficult learning experience of the ones they're replacing.

There's a lovely story of Lou Gerstner, who turned IBM round after it made the biggest corporate loss in history in the early 'Nineties. One of his directors made a particularly bad blunder that cost the business many millions of dollars. Scared of what would happen, the executive decided the best approach was to confess upfront.

He went to the boss and told him the facts. Lou asked him what he was going to do about it. Stunned, the exec asked, "Aren't you going to fire me?"

"Fire you?" Lou responded, "I've just invested millions in your education, why would I fire you?"

Unfortunately, our popular press likes to stir things up and encourage a less constructive approach. Millions are spend on public inquiries to unearth the facts, regardless of whether there will be any return. The findings are boringly predictable: if it's someone's fault they get fired; if it's the institution's fault, it's too difficult to make the changes recommended and the findings are largely ignored. Or they set up another inquiry...

Ultimately what we need form our justice systems is a Level Four discourse where there's justice for offenders, victims and, by addressing the underlying issues, society as a whole. That's just not happening at the moment on any meaningful level.

## **Our Prisons are Over-Crowded**

Once justice had been done, offenders have to be punished.

We do this primarily by banging them up, giving them a prison sentence that enables them to rub shoulders with other – often more hardened – criminals and reinforce their self-concept and identity as a member of the criminal fraternity.

Because we've created so many criminals by having such extensive laws, the prisons we send them to are generally over-crowded. This creates poor living conditions and makes it difficult for prison officers to manage, so inmates are locked up for prolonged periods and often get little or no exercise.

In 2014 US prisons held approximately 1,561,500 inmates, and a report by the US Government Accountability Office stated that in 2011 prisons were operating at 39% above capacity levels and expected to increase. Corresponding figures by the UK's Howard League for Penal Reform (who provide weekly updates on their website) are 85,948 prisoners against space for 77,272 in March 2016 – that's 10.5% above capacity.

This issue, while it's related to human rights, is a really huge problem because of this idea of psychic balance mentioned earlier. If offenders feel they've

been overly punished, they'll feel society owes them. It can actually have the effect of legitimising future crimes in their minds even before their release.

## **Rehabilitation**

In the UK nearly 50% of all ex-convicts will re-offend within a year of release, and in the US 60% re-offend within two years.

Whilst writing this chapter I was interrupted by a knock on the door. There stood a rather sad looking and dishevelled young man holding an ID. He explained to me he'd been released from prison four weeks ago and his parole officer had told him to go door-to-door selling in order to earn the money to keep him from crime.

I felt so sorry for him. The odds are completely stacked against him. He's been given a choice: do a soul destroying job where you're going to get constant rejection and very little return, or try a little petty larceny. Surely we can do better than that.

Well, the good news is that we can. Shoe repairer Timpson has over 1400 retail outlets across the UK and is one of the largest employers of ex-offenders. Through the Timpson Foundation they actively recruit and train potential employees whilst still in detention so they're completely ready for employment on release. Then they're treated with trust and respect, being given a free hand in running their part of the business, including profit responsibility. They claim there are just two rules: look the part, and put the money in the till.

James Timpson actually told me they have a third rule, which is: nobody can tell anyone what to do. (Allegedly it's a sackable offence!) Everyone in the organisation is empowered and given equal treatment and opportunity. It's about the person you are, not what you may have done in the past.

We need programmes like the Timpson initiative to be the norm, so that every convict gets the chance to rebuild their self-respect and break the cycle of criminality they're caught up in.

In the meantime, custodial sentences aren't working as an effective deterrent. They merely get the problem off the street for a time. Surely there are better ways of using the vast amount of money involved to give a better return to society.

## **The Effect of Drug Laws**

Over 20% of US and 9% of UK prisoners are drugs related offenders, adding to the overcrowding. In fact, doing away with prison sentences for drug crime would virtually solve the problem in the UK.

What if we repealed all drugs laws and gave individuals the responsibility to decide for themselves how to treat their bodies?

One potential effect could be a significant reduction in the level of hard drug consumption. If drugs were legal people who smoke a bit of grass would no longer become part of the bigger drug sub-culture and less likely to get drawn in to using hard drugs. It would also depress their street value, reducing crime related to individuals funding drug use.

Why do our states feel they have to decide for us? We're allowed to abuse our bodies by drinking, smoking tobacco, tattooing, consuming sugar or fatty foods, or simply by being lazy and not giving ourselves enough exercise.

The effects on the economy would be hugely beneficial. We'd save all that money on policing, prosecuting and incarcerating drug users, and we could tax legitimate drug sales to provide income for health education.

Isn't that a win-win-win?

## **Community and Justice**

Would justice work better if it was carried out closer to the community?

Somehow, a crime against the state feels considerably less personal than a crime against your neighbours. If the crime is against the community, they ought to be the ones to handle it themselves. They are best placed to understand the circumstances of the crime, and to act quickly on it.

According to Yale Law School, the deterrent effect of a criminal sanction diminishes as the time lag between the offence and the punishment increases. So a swift, short sentence can be more effective than a longer one that happens after a lengthy court process. The unwieldy state systems can therefore be considered less efficient than could be possible with faster local justice.

Before the rise of the city states and their legislative systems, justice would have been entirely the responsibility of the community. There was no other authority.

In fact, the idea of restorative justice we mentioned above is nothing new. Howard Zehr – who popularised it in the '90s – actually based it on principles long practiced by Native Americans and the Maoris in New Zealand.

## **Is Education The Way Forward?**

Our aim should be to dismantle or significantly reduce the prison system as it currently stands, and create a society that is largely crime free.

To do this we need to encourage children to take full personal responsibility from an early age so it becomes completely natural to them, instead of educating it out of them by insisting on blind compliance. Why not facilitate discussions in class for the students to come up with their own rules?

I've personally used that approach to incredible effect with young people in the outdoors. On one occasion I was given a group of "no hoppers". At first they were pretty hopeless, so I sat them down and asked them to come up with some rules to govern their behaviour. There was an immediate shift – they suddenly became attentive, well behaved and trustworthy – and by the end of the day had developed to the point of being self-sufficient in the wild.

It's my belief that we really only need two laws:

1. Take responsibility for your actions
2. Respect others

If we all learnt this from an early age, I'm certain things would look very different.