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What You Don't Know *Can* Hurt You

The peril of vague criminal statutes

Harvey Silverglate from the July 2011 issue

The Soviet Union enacted an infamous law in 1922 that criminalized "hooliganism." The crime was in the eye of the beholder, the beholder of consequence being the Soviet secret police. Because it was impossible for dissidents to know in advance whether they were violating this prohibition, they were always subject to arrest and imprisonment, all ostensibly according to law.

In the United States, we have legal safeguards against Soviet-style social controls, not least of which is the judicial branch's ability to nullify laws so vague that they violate the right to due process. Yet far too many federal laws leave citizens unsure about the line between legal and illegal conduct, punishing incorrect guesses with imprisonment. The average working American adult, going about his or her normal life, commits several arguable federal felonies a day without even realizing it. Entire lives can change based on the attention of a creative federal prosecutor interpreting vague criminal laws.

Mail Fraud for Art Supplies

Consider the federal prohibition of "mail fraud," which mainly describes the means of a crime ("through the mails") rather than the substantive acts that violate the law ("a

scheme or artifice to defraud"). In 2004, Steven Kurtz, an art professor at the State University of New York in Buffalo, was indicted on mail fraud charges for what boiled down to a paperwork error. Federal agents, after learning that Kurtz was using bacteria in his artwork to critique genetic engineering, launched a full-scale bioterrorism investigation against him. Finding nothing pernicious about the harmless stomach flora, they resorted to a creative interpretation of the mail fraud statute. Because Kurtz had ordered the bacteria through a colleague at the University of Pittsburgh Human Genetics Laboratory, his "scheme" to "defraud" consisted of not properly indicating on the order form that the bacteria were meant for his own use.

Or consider the Computer Fraud and Abuse Act, a 1986 law whose prohibitions—accessing a computer "without authorization," for example—have been stretched to cover a wide swath of activity never envisioned when the bill was passed. In 2008, federal prosecutors in Los Angeles won a conviction in an online harassment case based on the theory that violating a website's "terms of service" is a crime under this law. Thankfully, the judge rejected this interpretation and threw out the jury's conviction.

The most dangerously far-reaching statutes tend to result from knee-jerk congressional reactions to the threat du jour. Stopping bullies, for example, is all the rage in legislatures as well as classrooms, especially given all the new ways Americans can transmit unpleasant messages. In April 2009, Rep. Linda Sánchez (D-Calif.) proposed the Megan Meier Cyberbullying Prevention Act, which would have made it a felony, punishable by up two to years in prison, to transmit by electronic means any message "with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person." Sánchez named the bill after a 13-year-old Missouri girl who took her own life in 2006 after being taunted by a middle-aged woman who had assumed the online identity of a teenage boy (which led to the aforementioned online harassment case). Testifying in favor of the bill at a September 2009 hearing, Judi Westberg Warren, president of Web Wise Kids, said "speech that involves harm to others is wrong."

That may be so, but using the criminal law to punish upsetting messages is also wrong, as well as inconsistent with constitutional freedom of speech. At the same hearing, testifying on behalf of the Cato Institute, I pointed out that the bill's open-ended language extended far beyond adolescent (or middle-aged) bullies. Reporters, lawyers, even members of Congress are tasked daily, by virtue of their jobs, with what the bill defined as "cyberbullying." A scathing online

exposé, a stern letter emailed to an adversary, or a legislator's principled stand articulated on Facebook might well cause someone, somewhere, to experience emotional distress. Prosecutors easily could argue that such a foreseeable effect was intended. And what about the time-honored American art of parody? If this law were passed, would Stephen Colbert be pulled off the air?

Fortunately, these and other common-sense objections seemed to hit home; the bill never made it out of committee, and it died with the 111th Congress. But the setback hasn't stopped anti-bullying advocates, who last year introduced the Tyler Clementi Higher Education Anti-Harassment Act in response to yet another high-profile tragedy, the 2010 death of a Rutgers freshman who killed himself after his roommate secretly recorded his sexual encounter with another man. Although the bill, which was reintroduced this year, would not create any new criminal provisions, it would dramatically expand the civil concept of peer-on-peer "harassment" at colleges and universities that accept federal funds. The archives of the Foundation for Individual Rights in Education, a nonprofit organization that I co-founded and currently chair, provide ample evidence that the elastic concept of harassment on campus is already the most abused tool in suppressing campus speech and expression.

While Congress has not passed anti-bullying legislation yet, it did react to the financial collapse of 2008 with a complex law that transforms many non-fraudulent financial practices into felonies. The 848-page behemoth known as the Dodd-Frank Wall Street Reform and Consumer Protection Act introduced dozens of new federal offenses, many of which do not include the crucial requirement of criminal intent. For instance, the bill criminalizes any "trading, practice, or conduct" that disregards "the orderly execution of transactions during the closing period." It also criminalizes the practice commonly known as "spoofing"—bidding or offering with the intent to cancel before execution. The Commodities Futures Trading Commission will have to define "orderly executions" and decide when a canceled bid or offer amounts to "spoofing." In other words, dense, changeable rules issued by an unelected regulatory body will determine the difference between a legitimate trader and a felon.

Peaceniks for Terrorism

The federal ban on providing "material support" to a terrorist group, the statute that the federal government uses most frequently in prosecuting terrorism cases, provides another example of how difficult it can be to stay on the right side of the law. In 1998 the Humanitarian Law Project (HLP), a human rights organization based in Los Angeles, asked a federal judge whether the material support ban, which was first enacted in 1996, applied to its planned nonviolent advocacy on behalf of the Kurdistan Workers' Party in Turkey, which appears on the State Department's list of "foreign terrorist organizations." The HLP wanted to train the group's members on how to peacefully resolve disputes through international law, including methods to obtain relief from the United Nations.

Although the HLP's plans were limited to offering advice and training aimed at avowedly peaceful ends, the answer to its legal question was by no means clear. Originally enacted as part of the 1996 Anti-Terrorism and Effective Death Penalty Act, which passed with broad bipartisan support following the Oklahoma City bombing, the material support statute has been amended several times, most notably by the 2001 PATRIOT Act, which added prohibitions on providing "training," "expert advice or assistance," and "personnel." HLP President Ralph Fertig did not want to risk a prison sentence in finding out what the various provisions meant.

Fertig got his answer about a dozen years after initially seeking authoritative guidance, when the Supreme Court ruled that the material support law did indeed cover instruction in peaceful advocacy. In a 6-to-3 decision handed down in June 2010, the Court ruled in *Holder v. HLP* that the statute was not unconstitutionally vague and did not violate the right to freedom of speech or freedom of association. Writing for the majority, Chief Justice John Roberts reasoned that helping terrorist organizations to resolve disputes through international bodies or obtain humanitarian relief from the United Nations inevitably would free up resources for other, more nefarious ends. Hence a "person of ordinary intelligence would understand" that such conduct constitutes "material support."

In a vivid illustration that the material support ban is not nearly as clear as Roberts claims, Georgetown law professor David Cole, who represented the HLP before the Supreme Court, pointed out in a January 2011 *New York Times* op-ed that several hawks in the War on Terror may have unwittingly violated the statute. By speaking at a December 2010 conference in Paris organized by supporters of the Mujahedeen-e-Khalq, an Iranian opposition group, former Attorney General Michael Mukasey, former Homeland Security Secretary Tom Ridge, former National Security Adviser Frances Townsend, and former New York City Mayor Rudolph Giuliani arguably coordinated their speech with a "foreign terrorist organization" and therefore, by the Supreme Court's logic, provided it with "material support."

These examples show that vague laws threaten Americans from all walks of life and all points on the political spectrum. Yet that depressing fact is actually encouraging, because it suggests the possibility of a broad coalition in support of much needed legal reforms, beginning with the basic principle that, absent a clearly stated prohibition, people must not be punished for conduct that is not intuitively criminal, evil, or antisocial. Otherwise we risk creating a modern American equivalent to the ban on hooliganism.

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