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Legal expert's warning: We're all at risk of facing charges

M.D. Harmon: February 1, 2013

The growth in the number of criminal offenses gives prosecutors plenty to choose from.

Suppose you found a group of federal officers on your porch this morning.

"Hello," they say. "You're under arrest."

"Wait!" you protest, bewildered. "What crime have I committed?"

"The prosecutor will tell you that," they reply. "But we know you've done something, because every American violates either a law or a regulation that carries criminal penalties several times every day."

Incredible? Sure it is. But impossible? Not at all, say a number of highly credentialed law professors, former prosecutors and legal defense experts who have been watching the exponential increase in criminal offenses -- many of them carrying substantial fines and prison terms -- under current statutes and rules.

The problem has been growing for decades. In a recent monograph, "Ham Sandwich Nation: Due Process When Everything is a Crime," University of Tennessee law professor Glenn Harlan Reynolds quotes a comment made in 1940 by former attorney general and Supreme Court Justice Robert Jackson.

As Jackson said, "If the prosecutor is obliged to choose his cases, it follows he can choose his defendants," resulting in "the most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted."

(The title of Reynolds' essay comes from the common saying, "A prosecutor can have a grand jury indict a ham sandwich if he wants to.")

Justice Jackson's point has been repeated over the years as the federal government and its regulatory agencies have piled on thousands of laws and regulations. Thus, the scope of potential crimes has extended far beyond the ability of average people to understand their exposure to criminal charges at the discretion of prosecutors.

While most prosecutors use that discretion soundly, Reynolds says, "these limitations on prosecutorial power are likely to be least effective where prosecutors act badly because of politics or prejudice."

The increasing seriousness of the situation was laid out in a number of books in the past decade, including a 2004 anthology edited by the Cato Institute's Gene Healy, "Go Directly to Jail: The Criminalization of Almost Everything," and a 2009 book by civil liberties attorney Harvey Silverglate, "Three Felonies a Day: How the Feds Target the Innocent."

Both authors claim that "virtually every citizen is potentially at risk for prosecution. That is undoubtedly true, and the consequences are drastic and troubling," Reynolds concludes.

The Christian Science Monitor published an article Jan. 26 laying out a couple of Massachusetts cases some see as falling within Reynolds' parameters.

The first was a 2009 attempted federal seizure of a Tewksbury motel where drug deals were conducted in some of the rooms. Prosecutors did not prove the owner was involved in any criminal activity, and the motel, worth more than \$1 million, could have been sold to benefit the government.

However, the case was dismissed this week, with the judge saying, "The government's resolution of the crime problem should not be to simply take (the owner's) property."

The second was the prosecution of an Internet hacker, Aaron Swartz, who committed suicide Jan. 11 as, the Monitor said, "he faced a potentially long prison term for what many in the technology field have noted was nothing more than a breach of a contract involving Internet documents."

Reynolds' monograph laid out a number of potential steps to rein in prosecutors:

- Those charged with crimes bear many risks, ranging from financial or reputational loss, even if not convicted, to long prison terms, if they are. Reynolds proposes shifting currently unlimited prosecutorial immunity to a "qualified, good-faith immunity" standard to provide a minimal level of accountability.

- Because non-indigent defendants bear the entire costs of their defense, a form of "loser pays" allowing reimbursement for not-guilty verdicts would balance things somewhat.

- Since, Reynolds says, "our legal system is a plea-bargain system with actual trials a bit of showy froth floating on top," with some prosecutors piling up 100 charges to force defendants to accept a plea bargain rather than risk worse penalties for being found guilty on just one, he suggests dropping plea bargains entirely, as a means of forcing prosecutors to back up every charge in open court.

- Or, juries could be informed of rejected plea-bargains, so they "might then wonder why they are being asked to sentence a defendant to 20 years without parole when the prosecution was willing to settle for five."

- Finally, he asks "whether mere regulatory violations should bear criminal sanctions at all," because "every citizen is at risk of criminal prosecution for crimes that involve no actual harm or ill intent" in situations where "actual knowledge of all applicable criminal laws and regulations is impossible."

Reynolds says he wants to spur discussion of a system that he believes puts every American at risk. The time certainly seems right.