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Gene Healy: Making criminals out of all Americans

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Examiner Columnist
December 15, 2009

Michael Drebeen, a deputy solicitor general in the Obama administration, had a rough morning last Tuesday. He argued two Supreme Court cases back to back, defending a notoriously vague federal criminal statute -- and the justices worked him over vigorously.

The 1988 law at issue aims at public corruption and corporate misconduct, but sweeps far too broadly, criminalizing schemes to "deprive another of the intangible right of honest services."

If that language seems a little, well, intangible to you, you're not alone. Hurling hypotheticals, the justices strained to find a limiting principle that could prevent the law from covering an employee reading a racing form on the clock (Stephen Breyer) or calling in sick to go to a ballgame (Antonin Scalia). Of some 150 million workers in the United States, Breyer told Drebeen, "I think possibly 140 million of them would flunk your test."

The court's struggle with the "honest services" statute points toward a larger issue: the burgeoning problem of overcriminalization. It's for good reason that our Constitution mentions only three federal crimes (treason, piracy, and counterfeiting).

The Founders viewed the criminal sanction as a last resort, reserved for serious offenses, clearly defined, so ordinary citizens would know whether they were violating the law.

Yet over the last 40 years, an unholy alliance of big-business-hating liberals and tough-on-crime conservatives has made criminalization the first line of attack -- a way to demonstrate seriousness about the social problem of the month, whether it's corporate scandals or e-mail spam.

At one point on Tuesday, Breyer protested: "I thought there was a principle that a citizen is supposed to be able to understand the criminal law." Good luck with that.

There are now more than 4,000 federal crimes, spread out through some 27,000 pages of the U.S. Code. Some years ago, analysts at the Congressional Research Service tried to count the number of separate offenses on the books, and gave up, lacking the resources to get the job done. If teams of legal researchers can't make sense of the federal criminal code, obviously, ordinary citizens don't stand a chance.

You can serve federal time for interstate transport of water hyacinths, trafficking in unlicensed dentures, or misappropriating the likeness of Woodsy Owl and his associated slogan, "Give a hoot, don't pollute." ("What are you in for, kid?" your new cellmate growls.) Bills currently before Congress would send Americans to federal prison for eating horsemeat or selling goods falsely labeled as "Native American."

"Is that the system we have, that Congress can say, nobody shall do any bad things?" an exasperated Scalia asked Drebeen. The system we have comes pretty close, unfortunately. And a federal criminal code that covers everything delegates to prosecutors and the police the power to pick their targets at will, leaving everyone at risk.

But bringing sanity back to federal criminal law is too big a task for the court alone to handle. What's needed is a comprehensive culling of the federal code.

In May 2001, Rep. Donald Manzullo, R-Ill., introduced a bill to create a commission to sunset unnecessary and constitutionally dubious federal crimes. That bill would have been a hard sell in any era, but the events of September 11 ensured it wouldn't get a proper hearing. This year, Sen. Jim Webb, D-Va., has had to fight to get a narrower criminal justice reform bill on the calendar.

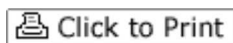
Fighting overcriminalization is a hard sell, politically. No one wants to be tarred as "soft on crime." But decades of reflexive criminalization have brought us vague laws, an impenetrable federal criminal code, and a passel of headline-grabbing federal prosecutors who threaten the rule of law. Surely, fixing that is worth some political risk.

Criminal justice reform will be difficult, but then, most things worth doing are.

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