

Commentary

Daniel J. Popeo: Guilty of commerce

Daniel J. Popeo

2008-03-13 08:00:00.0

Current rank: # 1,214 of 7,326

WASHINGTON -

A small, family-owned juice company's proprietor is criminally prosecuted for "discharging" apple juice-infused rinse water into a stream. Three seafood importers are convicted and jailed for eight years for importing lobster tails in plastic bags, rather than cardboard boxes. A landowner is prosecuted for moving sand on his property without a permit. A medical products manufacturer informs doctors of life-saving uses of its product, and is criminally investigated.

Can our government do all of this to honest American businesses and hard-working individuals?

Yes, it can.

The framers of the U.S. Constitution meant to empower citizens in both their personal and commercial affairs, and protect their basic rights from government abuse. They would be stunned to find that today, business and property owners have become second-class citizens whose civil liberties merit less respect than those of violent criminals, illegal immigrants and foreign terrorists.

On a daily basis, American businesses and their employees must navigate an impossibly complex gantlet of laws and regulations that can be enforced criminally at the whim of an unelected prosecutor.

Any employee's misstep, however innocuous, unintentional, or in blatant violation of company policy, can result in the prosecution of executives, board members and even an entire business. If you're a small company, you can't afford to fight the government's unlimited financial resources. If you're a large or publicly traded business, especially if you have government contracts, an indictment must be avoided at all costs.

These days, those costs are extreme. They include massive civil and criminal fines; handing over documents to the government (which inevitably end up in plaintiffs' lawyers' hands); cutting off indicted employees' legal fees or firing them; being blackballed from government contracts; and paying millions to a prosecutor-appointed "corporate monitor."

Criminal enforcement has become a way to "reform" business behavior and impose policy on entire industries. The Constitution's framers wisely delegated such law making to elected officials rather than relentless, [Eliot Spitzerlike](#) prosecutors.

Something is very wrong when death row inmates can file seemingly unending appeals, but those who create jobs and shareholder wealth are forced to surrender to huge and often unfair penalties in the face of a criminal action.

Such routine surrender means that prosecutors' legal theories and choice of criminal sanctions, rather than more appropriate administrative or civil fines, rarely encounter judicial review. Each unopposed prosecution inspires enforcers to push the boundaries of the law and their discretion even further.

For instance, prosecutors now routinely investigate or file criminal charges against medical product companies for discussing breakthrough "off-label" uses of [Food and Drug Administration](#)-approved drugs or devices with doctors. It doesn't matter if such information constitutes truthful, First Amendment-protected speech, or that use of the drug is lawful and saves lives.

How has the criminal process become a club for bludgeoning free enterprise? The [Washington Legal Foundation](#) will soon be releasing a report on how the increasing criminalization of economic conduct has eroded individual and business civil liberties. It explains how all three branches of government have, over the past century, undermined constitutional rights and basic fairness.

The [Justice Department](#) has forced companies to set aside due process protections and failed to rein in overly ambitious U.S. attorneys. Congress has aggravated the situation by expanding the federal criminal code to cover normal business activities. Federal courts have not only failed to protect business defendants' rights, but they have consistently broadened

criminal liability theories.

What kind of message does all of this send to the next generation of entrepreneurs, as well as anyone toiling today to run or work in a business? At a time when our economy is in recession, government should partner with free enterprise, help it traverse America's legal maze.

Instead, our legal climate resembles a warped, real-life game of Monopoly, where if you work hard and land on Park Place, you "Go Directly to Jail." Fear of being labeled a criminal, along with activists' and plaintiffs' lawyers' relentless drumbeat of free-enterprise demonization and litigation, will continue to deter wealth creation in America. Innovation, profit and investment are not dirty words. They are what once made this country's economy the envy of the rest of the world.

When prosecutors fail to properly exercise their discretion, when Congress and the courts create new corporate criminal liabilities, it is employees, shareholders, pensioners and customers who are the ultimate victims. It is indeed time for a change — a change in the myopic, dangerous notion that business civil liberties don't deserve protection.

Examiner contributor [Daniel J. Popeo](#) is chairman and general counsel of the [Washington Legal Foundation](#).

Examiner