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Legality a la France?

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What's the difference between America and France? In America everything is legal except what is explicitly prohibited, and in France everything is illegal except what is explicitly allowed. This old line is no longer as funny as it used to be, as America's legal system grows increasingly to look like the French.

America has been blessed with the English common law system, or customary law based largely on precedent and statutes in effect in England under James I in 1603. Many of the former English Colonies adopted the common law system. Continental Europe, on the other-hand, and many other countries adopted a civil law system based on detailed written codes.

The civil law system traces its origins to the ancient Roman law system. The most famous of these civil law systems is the "Code Napoleon" of 1804, which serves as the basis for modern French law.

It is widely recognized that the "rule of law" is necessary for a civil and prosperous society. But in order to have a "rule of law," people need to know what the law is and for the laws to be considered reasonable. The Ten Commandments are an example of this principle. Most everyone could memorize 10 rules, but no person can know 10,000 or 100,000 rules. The beauty of the traditional common law system was there were relatively few rules, and the subsequent development of the law was based on the commonly understood first principles. Thou shall not murder, steal, etc.

Unfortunately, in recent decades we have had an explosion in detailed rulemaking that has drifted far from the common law. For instance, 30 percent of all federal criminal laws have been passed since 1970. Before 1950, most Americans could pretty well know whether an action they might undertake would violate the law. That has now changed.

For instance, are you absolutely sure that you have: Not violated any of the tens of thousands of pages of IRS rules and regulations? Never improperly disposed of any item (e.g., trash or even your own bodily waste) according to all of the environmental rules and regulations? Complied with all health and safety rules in your home and workplace, such as proper placement of fire extinguishers and smoke alarms? Known that the source of all funds you have ever received came from non-criminal sources (even though you did not engage in any criminal act) and have been properly reported? Have never told an off-color, ethnic or racial joke that someone might have found offensive; etc. etc? Few adult Americans could pass such a test, which means that anyone can be subject to malicious prosecution.

The problem would be bad enough if people were subject to nothing more than reasonable civil fines for violations of the above-mentioned and other similar laws. But increasingly the Congress has criminalized such conducts by making them felonies subject to imprisonment. Traditional criminal convictions required people to have engaged in a bad act coupled with bad intent. Now under many of the above-mentioned areas, such as environmental crimes, you can be sent to jail for an act that you would be unlikely to know was a crime let alone intending to commit one. For example, people have been convicted for filling in very small occasionally wet areas on their property where their only intent was to stop the breeding of mosquitoes or leveling the land for athletic activities.

As the number of criminal laws grows and moves away from the logic and precedents of the common law system, respect for the rule of law declines, which undermines both civil society and economic prosperity. You are less likely to invest in a productive development where the environmental laws are so subjective or unreasonable that you cannot know with a high degree of certainty whether such investment will be allowed, and where the legal and

time costs of such determination are extensive. If almost anyone can be convicted of a crime because so much is both criminalized and largely unknowable, the moral sanctions associated with criminal convictions are also lessened.

There is no way the number of prosecutors and judges can keep up with the explosive growth of all the newly defined criminal behavior. The result is prosecutions are increasingly selective, allowing prosecutors and judges to engage in legalized extortion ("we know that you are innocent and we will not indict you if you cooperate") and political retribution. This, in turn, has increased the politicization of the judicial selection process and the amount of character assassination on candidates for judicial appointments.

It is no coincidence that many countries with highly detailed civil law systems, like France, tend to have more governmental corruption than countries that have traditionally relied on common law systems. The U.S. is now far down the slippery slope of a politicized and incomprehensible legal system. Pressures largely coming from the states of "Old Europe" for tax harmonization (i.e., no tax competition), financial information sharing, and common environmental laws, will further undermine the rule of law in the U.S. — and ultimately our prosperity.

President Bush needs to expand the current battle over his judicial nominees to the level of a war on the excessive criminalization and politicization of our judicial system. To do otherwise will eventually result in an economy as sick as France's and a future president sipping wine with the tyrant of the day.

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