

APPENDIX

OVERCRIMINALIZATION IN THE 79TH TEXAS LEGISLATURE

Developments on overcriminalization in the 79th Legislature can be divided into the following categories:

- General Business Activities
- Regulated Business Activities
- Occupational Licensing
- Non-Economic Activities
- School Discipline
- Penalties for Different Offense Classes

General Business Activities

Legislation in this category would create a criminal offense, or increase existing criminal penalties, for various business activities. For example, **HB3** by Rep. Jim Keffer, the omnibus tax bill, creates a Class A misdemeanor for businesses that deduct from employee wages the new payroll tax created in the legislation. Aside from the question of whether it is good tax policy to mandate that businesses hide the tax burden that the government is imposing on workers, the bill does not define a “deduction” so it is possible a court could determine a decline in wages, or in the rate of increase in wages, is a deduction even if it is not explicitly indicated as such on an employee’s pay stub. Funds are fungible and many businesses will have no choice but to scale back their budgets in many areas, particularly labor since that is what is being taxed, in order to maintain profitability. Moreover, because this bill also includes civil penalties for deducting the tax from wages, the criminal penalty is arguably unnecessary.

Also, **HB33** by Rep. Rob Eissler makes a deceptive business practice relating to construction or repair of home a state jail felony while offenses in other areas would remain Class C misdemeanor. Deceptive business practices are broadly defined in Texas and would include misstating the composition of a material used in building or repairing a home or its geographical origin. While discouraging misleading business sales tactics is a laudable goal, sending offenders to jail is a draconian remedy, especially since the *Texas Deceptive Trade Practices Act* generally does not require that the consumer prove that the defendant intentionally or knowingly committed a violation.

Perhaps the most high profile debate has occurred on **HB1690** by Rep. Terry Keel, which would rein in the power of cities to charge business owners with maintaining a public nuisance. The bill comes in response to complaints by business owners that the City of Dallas has abused its public nuisance law, under which it may fine the property owner \$500 for each day while the nuisance exists, remove the nuisance by police action if not abated, and place a lien on the real estate. Rep. Keel told *The Quorum Report* that Dallas has used the law to punish local businesses simply because they happened to be located in high-crime areas such as the Stemmons Freeway corridor and that the ordinance is being used by Dallas as a revenue enhancement tool. Rep. Terri Hodge spoke of a case in her district where a car wash in a low-income neighborhood was targeted, even though

those running the car wash had nothing to do with the criminal activity. Many business owners testified before the House Civil Practices Committee about their own experiences. One hotel owner said Dallas police officers told him his problems with the nuisance abatement law would “go away” if the hotel owner were to hire off-duty police officers, rather than a private security company, and suggested that a business contribute to an elected official’s “birthday fund.” A hotel owner was told by another officer to perform constitutionally suspect pat-down searches of employees and run criminal background checks on hotel guests.

Rep. Keel’s bill would make several changes in the state law that authorizes local governments to enact public nuisance ordinances. First, and perhaps most importantly, it would change the standard for conviction from “knowingly maintaining” a place where crime occurs to “knowingly tolerating criminal activity.” Second, it provides that police calls and other affirmative steps taken by property owners to combat crime cannot be used against them. Some business owners testified that the City of Dallas used their police calls against them in municipal court as evidence they were aware of the criminal activity. Finally, **HB1690** would clarify that only managers of condominiums can be held liable, not all individual residents of complexes, since they lack authority to take anti-crime measures. Despite vigorous opposition by Dallas Mayor Laura Miller, **HB1690** has passed the House and is being sent to the Senate.

HB891 by Rep. David Leibowitz would make auto sellers, even private party sellers of used cars, subject to a Class A misdemeanor, and for multiple offenses a third or second degree felony, for failure to provide a written statement to purchasers as to whether an air bag had inflated. This penalty applies without regard to whether or not the airbag had previously inflated, whether it is defective as a result, or whether such defect compromises future occupant protection in any actual collision. The legislation also fails to consider that a seller may have no way of reliably determining whether an airbag had deployed while the vehicle was driven by another owner.

Mechanics also find themselves in the crosshairs of criminal penalties. **SB1746** by Sen. Jon Lindsay and **HB3221** by Rep. Bill Callegari would increase the penalties on mechanics or automobile dealers for failure to keep a registry of all auto repairs. Under this legislation, a violation would be a Class A misdemeanor for the first offense and a state jail felony for subsequent offenses. The legislation does not include a requirement that the violation be committed knowingly or intentionally.

Finally, farmers and ranchers could face criminal penalties under **HB1361** by Rep. Rick Hardcastle and **SB682** by Sen. Mike Jackson if they fail to register their premises and all of their animals with the state. These bills create a Class C misdemeanor, and a Class B misdemeanor for multiple offenses, for failure to register an animal under the new animal identification program created by this bill. The legislation was crafted to address fears associated with mad-cow disease, but its broad language provides unbridled discretion to the Texas Department of Agriculture to impose this registration scheme and its criminal penalties on all types of animals, even pets.

The following bills would also impose criminal penalties on general business activities:

HB39 by Rep. Eissler – makes burning refuse outside a Class C misdemeanor if it is in a neighborhood on a lot less than five acres.

HB217 by Rep. Bailey – allows county commissioners courts in counties with over 3.3 million people to create Class C misdemeanor noise ordinance for unincorporated areas.

HB599 by Rep. Eissler – creates misdemeanor penalty for business signs on rural roads without permit in addition to existing civil penalties and ability of state to obtain injunctive relief.

HB1200 by Rep. Bonnen – creates a Class C misdemeanor for distributors of soft drinks and cigarettes to enter into a promotional agreement with retailers for a special advertising or distribution service.

HB1359 by Rep. Naishtat & **SB564** by Sen. Barrientos – creates a Class C misdemeanor for person who disposes of any electronic equipment in a landfill and requires producers of electronic equipment to create recycling and consumer education programs.

HB1500 by Rep. Joe Moreno & **SB246** by Rep. Gallegos – creates a Class C misdemeanor for selling tickets to an event for more than the face value, unless the person's primary occupation is as a ticket broker.

HB3052 by Rep. Hopson – creates a sliding scale of criminal penalties – up to a state jail felony for amounts over \$1,500 – on buyers who avoid payment on a retail installment transaction.

Regulated Business Activities

Criminal penalties applying to regulated business activities are more common, and perhaps less objectionable, because businesses and individuals involved in these industries might be expected to know that they are subject to extensive state regulation. Moreover, for offenses relating to gambling and obscenity, the majority of Texans may believe that the moral condemnation function of criminal law is an appropriate means to enforce widely shared societal values. Nonetheless, even criminal penalties affecting regulated business activities should be scrutinized to determine whether they are excessive in their scope or degree of punishment and whether civil penalties would be more appropriate.

Alcohol sellers are the targets of several new and increased criminal penalties. **HB13** by Rep. Frank Corte would increase the penalty for multiple offenses of selling alcohol to a minor from a Class A misdemeanor to a state jail felony. While jail time is optional for a Class A misdemeanor, either jail time or felony probation supervision is required for a state jail felony. Consequently, the bill has a fiscal note of over \$1 million. The state of mind for this offense is criminal negligence so the burden is on bar owners and

bartenders to take reasonable steps to prevent underage drinking. Although this is an important social goal, other sanctions, such as civil fines and revocation of state liquor licenses, might be equally effective and less costly than incarceration.

Rep. Eissler has filed several bills imposing criminal penalties on alcohol sellers. In an effort to crackdown on bacchanalian 21st birthday celebrations, he filed **HB36**, which makes it a Class A misdemeanor to sell alcohol to a minor on his 21st birthday. He also filed **HB38**, creating a Class A misdemeanor for the holder of alcoholic beverage permit to sell a drink with more than one-half ounce of absolute alcohol in it. This would effectively ban king-size beer cans, as these contain more than 12 ounces of beer, which is about 4 percent alcohol by volume. Larger glasses of mixed drinks would also be prohibited. This bill does not provide a level of culpability for the offense, which means that under Texas Penal Code Section 6.02, the default minimum of criminal negligence would apply. Both of these bills would burden bars and restaurants, and their employees, with making on-the-spot determinations about the age of the purchaser and the amount of absolute alcohol in a glass and subject them to possible jail time should they make a mistake. Finally, Rep. Eissler has filed **HB193**, which would create a statewide keg registration system with an accompanying Class C misdemeanor for possessing a keg without a sticker.

The Legislature is also considering whether to place new obligations and criminal penalties on sellers of fireworks. **HB1454** by Rep. Tony Goolsby creates a Class C misdemeanor for selling fireworks to an intoxicated person if seller does not make a reasonable effort through breath analysis test or otherwise to determine whether buyer is intoxicated. With most fireworks sold at small roadside stands, it would seem unreasonable to ask such sellers to purchase the equipment to conduct a breath analysis test, obtain training for its employees to conduct this test, and then properly administer such a test to each buyer – or face a criminal penalty.

In addition to weighing whether to expand state-sponsored gambling in the form of video lottery terminals and casinos, the Legislature is also considering **HB103** by Rep. Corbin Van Arsdale. It would increase the penalty for possession of gambling paraphernalia from a Class C misdemeanor to state jail felony. The bill has a negative fiscal note of approximately \$400,000, due to the increased incarceration costs that would result. While the intent of this bill is to stop the proliferation of illegal eight-liner machines, the existing statute defines gambling paraphernalia to include even a betting slip or other writing. Therefore, as currently written, this bill relies on prosecutorial discretion to avoid sending to jail two friends and sports fans who write down their bets on football games.

The following bills would also impose criminal penalties on regulated business activities:

HB1433 by Rep. Goolsby – creates a Class B misdemeanor, and a Class A misdemeanor for multiple offenses, for renting or selling violent or sexually explicit video game to a minor and requires such games to be conspicuously labeled, Referred to Business & Industry.

HB2222 by Rep. Menendez & **SB641** by Sen. Van de Putte – creates state jail felony for involvement in cockfighting.

Occupational Licensing

Several bills filed this session would expand state occupational licensing to cover additional occupations and subject those who fail to obtain such licenses to criminal penalties. The licensing of doctors, lawyers, and other professionals is well-established and generally justified on the grounds of the special training and expertise required, the knowledge asymmetry between the professional and the consumer of services, and the deleterious consequences of an incompetent provider of such services. In extending occupational licensing to new areas, legislators must, before even considering the appropriate penalty, first ask whether these same justifications apply to the occupations at issue, or whether licensure would simply create a barrier to entry, increasing costs for consumers.

HB577 by Rep. Vicki Truitt has been the subject of considerable press attention. It would create a Class C misdemeanor for labeling oneself as a meteorologist without meeting certain training criteria set forth in bill. The Legislature is also considering whether residential property managers and interior designers should be licensed occupations. **SB926** by Sen. Rodney Ellis would create a Class B misdemeanor for failing to register as a residential property manager with the state under the new licensing scheme in the bill. Similarly, **HB1649** by Rep. Vilma Luna and **SB339** by Sen. John Carona would impose a Class C misdemeanor for working as an interior designer without a state license. If licensing is extended to such occupations where it has traditionally not been a requirement, many individuals in these fields may be unaware of the new law and therefore fail to obtain a license.

The following bills would also impose criminal penalties for occupational licensing violations:

SB1245 by Sen. Carona – creates a misdemeanor for violation of regulations governing barber shops.

HB1042 by Rep. Chavez – creates Class A misdemeanor, and Class B for repeat offense, for engaging in business as a real estate self-financer without the state certificate required by this bill – the 1,200 real estate self-financers in Texas would be regulated by the Savings and Loan Department, Referred to Financial Institutions.

HB3304 by Rep. Davis – creates a state licensing scheme for residential roofing contractors and a Class C misdemeanor for practicing without license.

Non-Economic Activities

Several proposed bills would criminalize non-economic personal activities not normally associated with a business purpose. While animal cruelty is already appropriately a

criminal offense under Section 42.09 of the Penal Code, Rep. Tony Goolsby has filed **HB521** creating a Class A misdemeanor, and state jail felony for multiple offenses, for tethering a dog to a tree or other stationary object on a leash less than ten feet in length for eight or more hours in a 24-hour period. Though jail time may be appropriate for animal torture, this well-intentioned legislation to protect dogs barks up the wrong tree.

On the other hand, it is the misbehavior of pets, not their owners, that is the subject of **HB1096** by Rep. Al Edwards and its companion, **SB1111**, by Senator Rodney Ellis. These bills, which apply only to Harris County, create a Class A misdemeanor, and third degree felony if victim is seriously injured or killed, for an owner if his dog attacks someone. In so doing, these bills dispense with any level of culpability and, unlike the current law, apply whether or not dog is categorically dangerous. Moreover, these bills do not exempt a situation where a burglar or other unauthorized person trespasses an owner's property and is bitten by his dog. These bills would also create a Class C misdemeanor, and a Class B misdemeanor, for owners who escort their dogs without a leash on property other than their own, including that of family members and friends. In addition the overly broad language and excessive criminal penalties in these bills, their limited applicability to one county suggests that their aims might be better accomplished through locally enacted regulations.

Finally, high school registrars, of all people, are targeted by a criminal penalty under **HB2056** by Rep. Garnet Coleman. This bill creates a Class C misdemeanor if a high school registrar fails to distribute a voter registration card to each graduating senior who is, or will turn, 18, and creates a Class A misdemeanor if the registrar's failure to do so was intentional. In this instance, a reprimand from that registrar's supervisor would seem more appropriate than a personal criminal offense for a registrar's failure to perform a new job responsibility mandated by the state.

School Discipline

Although seemingly disconnected from the other subjects examined in this report, school discipline is, for several reasons, an important aspect of the overcriminalization problem. First, the traditional requirement of *mens rea* is particularly critical in this context, as children, because they are not fully mature, are more prone than adults to making honest mistakes. Furthermore, children are more impressionable than adults so excessively punishing a child who is not blameworthy can have serious long-term effects on the child's development. Finally, from a political standpoint, this issue provides an opportunity to build non-traditional alliances based on shared principles in different contexts, as the legislators most concerned with guarding against overcriminalization in the school disciplinary context are often those who tend to support more regulation of business.

Unlike most other policy areas examined in this report, there is actually a movement away from overcriminalization in school discipline. In 1995, the Legislature passed the zero-tolerance Safe Schools Act, which required the expulsion of students who possess weapons, including any kind of knife, or prescription drugs without school approval.

School officials interpreted the law as not providing them with the discretion to apply a lighter punishment to a student who had no culpable mental state. For example, the Legislature has heard testimony this session from parents of a student who was expelled for unknowingly bringing a pocketknife to school because it was in the pocket of the same jacket he took to go hunting on the weekend. Another parent testified about the expulsion of her child because he took celebrex for his broken knee at lunch. These students were removed from their schools by police and banished to Juvenile Justice Alternative Education Programs (JJAEPs), which are essentially boot campus run by the Texas Juvenile Probation Commission.

Numerous bills have been filed this session with the goal of making sure that students who make an honest mistake that does not harm anyone are not caught up in the increasingly clogged school to prison pipeline. The Senate has passed **SB126** by Senator Jon Lindsay, which allows school officials deciding whether to expel a student under the Safe Schools Act to consider whether the student acted with any level of intent or in self-defense, and the student's disciplinary history. Similar bills by Rep. Dora Olivo, **HB624**, and Rep. Rob Eissler, **HB603**, have been filed in the House.

Another important reform moving forward is **HB1688** by Rep. Harold Dutton, which provides that a school disciplinary infraction is not automatically a crime if it not otherwise a violation of any law. The Education Code currently classifies any violation of a school district rule, such as a rule of a student code of conduct, as a Class C misdemeanor. As a result, Texas courts are receiving cases regarding violations of a student code of conduct that are not otherwise criminal offenses, such as chewing gum or dressing improperly at school. This bill has passed the House Law Enforcement Committee and has been sent to the floor.

Penalties for Different Offense Classes

Several bills related to overcriminalization filed this session do not address a specific offense. Rather, they would alter the penalties for one or more existing offense classes.

The House has passed **HB970** by Rep. Terry Keel, which prevents cities and counties from enacting Class C misdemeanors that both dispense with any level of culpability and impose a harsher penalty than the \$500 maximum fine set by the Penal Code. For example, the City of Austin imposes fines of \$2,000 for certain Class C Misdemeanors with no culpable mental state required for conviction. At a hearing before the Criminal Jurisprudence Committee, Rep. Keel cited a small business that was repeatedly being fined thousands of dollars by the City of Austin because a neighbor's animals were, unbeknownst to that business owner, entering the property. Many committee members expressed surprise that cities were currently permitted to exceed the \$500 Penal Code cap.

On the other end of the spectrum, Rep. Larry Phillips has introduced **HB1762**, which would increase the penalty for all misdemeanors to the next highest level of offense if it is the second or more conviction for the same offense, unless otherwise specified in the

statute creating the offense. This bill would result in many misdemeanors becoming felonies upon multiple offenses and create either the option or requirement of jail or prison time where it was never intended for the offense in question. Many offenses already include enhanced penalties for multiple transgressions and, where they do not, there may be a good reason for not doing so. This decision is better made as to each specific offense rather than as part of an across-the-board approach that may result in unintended consequences.