

# Policy

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Texas Public Policy Foundation

# Perspective

## Not Just For Criminals

### *Overcriminalization In The Lone Star State*

By Marc Levin

Director, Center for Effective Justice

#### INTRODUCTION

In Texas, criminal law is not just for criminals anymore – at least not criminals as we have traditionally defined them. There are currently 779 Texas statutes that contain the word misdemeanor, but only 64 of these instances are in the Penal Code or Code of Criminal Procedure. Likewise, the word “felony” appears 418 times in Texas statutes, but only 64 of these occurrences are in the Penal Code or Code of Criminal Procedure. Some of the remaining 1,069 references to felony or misdemeanor involve the ineligibility of criminals for certain permits or licenses, but the majority of these references are to the existence of criminal offenses in areas such as agriculture, health care, natural resources, and insurance.

Moreover, the trend towards criminalizing conduct traditionally addressed through the free market or civil law appears to be continuing in the 79th Legislature. Pending legislation would criminalize everything from failure to recycle any piece of electronics equipment to placing a business sign on a rural road, and even leaving a dog tethered to a tree for a total of eight hours in a 24-hour period. Other bills would increase the criminal penalties for existing offenses. For example, legislation would inexplicably make misleading business practices relating to construc-

tion or repair of a home a state jail felony, while such practices would remain a misdemeanor in all other industries.

However, the Legislature may ameliorate a particularly pernicious aspect of the overcriminalization trend – the abandonment of the traditional element of criminal intent in favor of strict criminal liability. First, the House has passed House Bill 970 by Rep. Terry Keel that prohibits municipalities from enacting Class C misdemeanors that both dispense with any level of culpability and authorize a fine of more than \$500, the maximum Penal Code fine for a Class C offense. The default level of culpability in the Penal Code is criminal negligence,<sup>1</sup> but cities and counties are increasingly imposing criminal statutes that explicitly disavow any state of mind requirement. Second, the Legislature may require cities to prove a business knowingly tolerated crime on its premises, not merely knowingly maintained a premises where crime occurs, before charging the business with a public nuisance. Finally, it appears that the Legislature will reform the *Safe Schools Act* of 1995 – better known as zero tolerance – so that the intent of students can be considered before they are expelled and referred to the criminal justice system.

The blurring of civil and criminal law is not a novel development in Texas, but rather part of a national trend. Even

in 1991, Columbia University Law Professor John Coffee observed, “The dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law.”<sup>2</sup> Coffee added, “[T]his blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control.”

This report will:

- ♦ examine the theoretical basis for the historical separation between civil and criminal law;
- ♦ summarize relevant pending legislation in the 79<sup>th</sup> Legislature; and
- ♦ suggest alternatives to criminal law for accomplishing the desired public policy goals.

## THE CIVIL AND CRIMINAL LAW DISTINCTION

In many ways, civil law is a scalpel while criminal law is an anvil. Civil law, commonly referred to as tort law, seeks to balance the benefits and costs of the conduct at issue while criminal law passes moral judgment and therefore generally eschews any such balancing. Because it is based on moral condemnation rather than a weighing of interests, criminal law tends to be an overly blunt instrument for regulating business activities, particularly those not committed with intent to defraud. An example of balancing in civil law is the efficient breach doctrine whereby a party may breach a contract and pay damages when performance would be more costly. Such an approach is entirely foreign to criminal law.

Although the modern trend towards punitive damages has injected a punitive component into civil law, the centrality of punishment remains a distinguishing feature of criminal law. The most notable form this punishment takes is, of course, incarceration. While incarceration is traditionally associated with violent crime, half of all Texans behind bars are there for nonviolent offenses. The Texas Court of Criminal Appeals recently noted that Class C misdemeanors “are still crimes, and the fact is the person charged can be arrested on warrant like any ordinary criminal, forced to travel a long distance to attend the court, remanded in custody and imprisoned in default of payment of the fine.”<sup>3</sup> Moreover, the conviction of a criminal offense, other than

a speeding ticket, also exacts punishment by pinning a scarlet letter on the offender, which often makes it difficult for the individual to obtain employment, housing, and other benefits.

Another distinction between the two systems of law is that criminal law, because it is enforced entirely by state prosecution, tends to minimize the importance of the harm to the victim. In contrast, the victim plays a much larger role in civil law, because it can be enforced through administrative complaints or lawsuits filed by affected individuals. As a result, criminal laws may be less frequently enforced because enforcement is entirely dependent on the discretion of local prosecutors. One Texas legislator recently noted that, despite a few high profile cases, local prosecutors have a general policy of not enforcing criminal violations of Texas election laws.<sup>4</sup>

Traditionally, civil and criminal law have also been distinguished by the requirement that a criminal must have a guilty state of mind, expressed in the Latin term *mens rea*. One court explained, “[T]he concept of *mens rea* can be traced to Plato and, since the Middle Ages, has been an integral part of the fabric of the English common law from which we have drawn our own criminal and constitutional analysis.”<sup>5</sup> Legal scholar Henry Hart has demonstrated that America’s founders were influenced by the writings of Blackstone in their belief that individual blameworthiness is a prerequisite for the application of criminal law.<sup>6</sup>

Indeed, the United States Supreme Court has suggested that some level of culpability is a constitutional due process requirement for conviction of a crime, although the Court has carved out an exception for “public welfare offenses.”<sup>7</sup> The scope of the “public welfare” exception is primarily limited to those cases involving hazardous items, such as toxic chemicals and grenades. The theory is that, because such items are so obviously dangerous, it can be assumed a person would know that they possess them and that they are subject to regulation.<sup>8</sup>

In addition to fundamental fairness, a culpable mental state has traditionally been required for criminal conviction because of its connection to the deterrence function of criminal law. Logic dictates that stiff penalties are more likely to deter acts that are committed intentionally than those that are committed unknowingly or accidentally.

Finally, another traditional difference between civil and criminal law is the role of *respondeat superior* in civil law. Under this principle, a corporation or supervisor can be held liable for conduct committed by an employee in the scope of his employment. While the U.S. Supreme Court has extended this concept to strict liability criminal laws, e.g. public welfare offenses, it remains inapplicable to most criminal law violations by employees.<sup>9</sup> Consequently, criminal laws affecting businesses are more likely than civil penalties to have the often unintended effect of punishing rank and file employees while letting the business and its executives, who may be the ones responsible for instituting the practices, off the hook.

localities from applying their public nuisance laws to businesses that do not knowingly tolerate crime.

***Regulated Business Activities***

Pending legislation would create new criminal penalties and increase existing criminal penalties on alcohol sellers, fireworks sellers, and those involved in gambling. For example, fireworks sellers would be required to administer breath analysis tests to prospective buyers or face criminal liability.

***Occupational Licensing***

Bills have been introduced to expand occupational licensing, and associated criminal penalties for failure to obtain a license, to meteorologists, residential property managers, interior designers, real estate self-financers, and roofers.

***Non-Economic Activities***

The Legislature may impose up to a third-degree felony for the owner of a dog that injures someone, create a criminal offense 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, and criminalize high school registrars’ failure to give graduating 18 year-old students a voter registration card.

***School Discipline***

The Legislature appears inclined to reform the state’s zero tolerance law to give school officials discretion to consider whether the student acted intentionally and repeal the provision that automatically makes many minor school disciplinary violations Class C misdemeanors.

***Penalties for Different Offense Classes***

Several bills would affect the criminal penalties applicable to entire offense classes. The House has passed legislation preventing cities and counties from enacting Class C misdemeanors that both dispense with any level of culpability and exceed the \$500 maximum fine set by the Penal Code. The House is also considering sweeping legislation to increase the penalty for all misdemeanors to the next highest level of offense for multiple convictions, unless otherwise specified in the statute creating the offense.

<b>Criminal Offenses In Texas</b>	
<b>Offense Level</b>	<b>Maximum Penalty</b>
Capitol Felony	Death
First Degree Felony	Life in Prison: \$10,000 fine
Second Degree Felony	20 Years in Prison: \$10,000 fine
State Jail Felony	10 Years in Prison: \$10,000 fine
Class A Misdemeanor	One Year in Jail: \$4,000 fine
Class B Misdemeanor	180 Days in Jail: \$2,000 fine
Class C Misdemeanor	\$500 fine

*Source: Texas Penal Code, Title III, Chapter XII*

**TRENDS IN THE 79<sup>TH</sup> LEGISLATURE**

Legislation pending this session concerning the application of criminal law to non-traditional areas can be divided into six different policy areas based on the businesses and individuals who would be affected. Descriptions of all pending bills in each category, including bill numbers and authors, are contained in an appendix to this report available at [www.texaspolicy.com/pdf/2005-04-overcrim-appendix.pdf](http://www.texaspolicy.com/pdf/2005-04-overcrim-appendix.pdf).

***General Business Activities***

Pending bills would impose criminal penalties on a wide range of industries from electronics sellers and users who dispose of any equipment in a landfill to farmers who don’t register their animals with the state. Other legislation would create a Class A misdemeanor for businesses that deduct a new payroll tax from employee wages, make some practices in connection with home sales and repairs a state jail felony, and prevent

## ALTERNATIVES TO CRIMINAL LAW

The first alternative is to consider whether a state law is necessary, or whether regulation of the subject is best left to the free market or local entities. For example, the market has developed various institutions and mechanisms for protecting consumers from deceptive trade practices, including voluntary certification regimes such as Underwriters Laboratories for Electronics and local Better Business Bureaus. Some residential activities, such as those involving noise, ambient light, and burning refuse, may be better addressed by local governments or deed restrictions.

Second, instead of creating misdemeanors when the intent is only to impose a fine, civil and administrative fines can be utilized. This approach is likely to be more efficient for the state to enforce. Unlike a criminal charge that always requires a prosecution to be brought in court, agencies can impose civil fines through an administrative proceeding. The respondent can appeal to a hearings examiner, administrative judge, and finally to state district court, but because none of these appeals are pursued in most cases, the state can achieve significant savings and clear the dockets of state courts so that they can hear more serious matters without protracted delays.

In addition to civil fines, the state can utilize other civil penalties to enforce civil laws. Among the most effective are suspension or forfeiture of a state license or permit. When the conduct at issue involves an occupation or activity for which such a license or permit is required, this approach is particularly useful.

Finally, for some activities that are criminalized or for which criminal penalties are being considered, creation of a private civil cause of action may be appropriate. One advantage of this approach is that it empowers the victims of the conduct at issue to seek enforcement of the law, rather than simply relying on police and prosecutors. Many legislators are rightfully reluctant to create new causes of action because of the abuses in the civil justice

system, such as class actions where trial lawyers, not plaintiffs, receive the vast majority of the proceeds. However, there are many ways to avoid such excesses. First, the right to sue can be limited to individual cause of actions and exclude class actions. Second, caps on damages and attorney fees' can be included. Lastly, and perhaps most importantly, binding arbitration can be required with any appeal limited to the question of whether the arbitrator's decision was clearly an abuse of discretion.

## CONCLUSION AND RECOMMENDATIONS

In debates on legislation, it seems that the penalty portion is often least scrutinized. When legislators ask the Texas Legislative Council to draft a new law to prohibit some activity or practice, the default approach appears to be the imposition of a criminal penalty. Texas would be better served by the use of specific criteria to determine whether civil or criminal law is a better instrument for addressing the problem. (The Foundation has developed a checklist –

available on the last page of this publication, and online at

[www.texaspolicy.com/pdf/2005-04-overcrim-checklist.pdf](http://www.texaspolicy.com/pdf/2005-04-overcrim-checklist.pdf) – highlighting some of the relevant factors in deciding whether to create a criminal offense.)

If criminal law is to be invoked, legislators should carefully consider whether a culpable mental state should be required and, if so, what level is most appropriate. Criminal

statutes must be drafted with precision so they are not unconstitutionally vague or overbroad and do not cover conduct the Legislature may not intend to outlaw.

In addition to analyzing new legislation, the Legislature could review existing laws to determine whether there are instances where other enforcement mechanisms would be fairer, more effective, and less costly to the state than criminal penalties. An interim committee could be charged with conducting such a review.

Finally, the Legislature must carefully monitor local governments to ensure that they do not extend the scope of criminal law or increase penalties in ways that the

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Legislature has intentionally declined to do. The early success this session of legislation to rein in local laws concerning public nuisances and excessive punishments for unintentionally committed Class C misdemeanors suggests that the Legislature may be becoming more vigilant about appropriately exercising its supervisory role with respect to local governments. 

## ENDNOTES

- <sup>1</sup> Criminal negligence is equivalent to gross negligence, which is a higher standard than ordinary civil negligence. Texas Penal Code 6.03(d) provides: “A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.”
- <sup>2</sup> John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193 (1991).
- <sup>3</sup> *Aguirre v. State*, 22 S.W.3d 463, 472 (Tex. Crim. App 1999).
- <sup>4</sup> Remarks by State Rep. Mary Denny, Republican Club of Austin, March 5, 2005.
- <sup>5</sup> *United States v. Cordoba-Hincapie*, 825 F. Supp 485 515-16 (E.D.N.Y. 1993).
- <sup>6</sup> Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBLEMS 401, 423 (1958).
- <sup>7</sup> *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971). *See also Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”)
- <sup>8</sup> *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).
- <sup>9</sup> See Erin M. Davis, The Doctrine of *Respondeat Superior*: An Application to Employers’ Liability for the Computer or Internet Crimes Committed by Their Employees, 12 ALB. L.J. SCI. & TECH. 683, 707 (2002).

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## ABOUT THE CENTER FOR EFFECTIVE JUSTICE

The Texas Public Policy Foundation’s **Center for Effective Justice** was founded earlier this year to study criminal justice issues and to develop and promote new public policy approaches that work to repair the harm done to victims, reduce recidivism, and minimize the costs to the taxpayer. Additionally, the Center seeks to address the burgeoning problems associated with overcriminalization.

The Center is directed by accomplished author and legal scholar Marc Levin. Mr. Levin can be contacted at (512) 472-2700, or [mlevin@texaspolicy.com](mailto:mlevin@texaspolicy.com).

# CENTER FOR EFFECTIVE JUSTICE

## *Analyze Before You Criminalize: A Checklist for Legislators*



### **Should It Be Against State Law?**

- ◆ Should the conduct be prohibited at all or will the free market provide a sufficient disincentive?
- ◆ Should the conduct be regulated by state government, or might it be better addressed by local government entities that can tailor policies to their own communities?



### **Should It Be A Crime?**

- ◆ Does the conduct present a threat to public safety? If not, civil penalties may be more appropriate.
- ◆ Is the conduct inherently wrong and therefore properly prohibited regardless of its benefits in some circumstances? If not, criminal penalties may be too rigid of an enforcement mechanism.
- ◆ Should enforcement be dependent entirely on the discretion of local prosecutors? Would civil penalties, forfeiture of state licenses and permits, a private cause of action, or other remedies be equally or more effective in providing redress to the victim and discouraging the conduct?
- ◆ If the conduct is part of a business activity, does criminalization unfairly place the burden of personal criminal liability on employees for acts committed within the scope of employment?



### **If It's a Crime, Should There Be a State of Mind Requirement?**

- ◆ Should a culpable state of mind be an element of the offense? Unless the conduct at issue involves an inherently dangerous item such as a grenade or toxic chemical, the U.S. Supreme Court has suggested that imposing strict criminal liability may violate due process.
- ◆ Is criminal negligence sufficient, or is a higher culpable mental state, such as knowingly or willfully, warranted? Consider factors such as whether the penalty would be fairly applied to a mistake made as the result of negligence and the severity of the punishment.



### **If It's a Crime, What Should the Punishment Be?**

- ◆ Does the individual pose a danger to society? If not, incarceration may be an unnecessary expense for the state. Probation, fines, and restitution may provide a sufficient deterrent to prevent recidivism.
- ◆ Should the offense be classified as a misdemeanor or a felony? Felony convictions are more likely to permanently interfere with the offender's ability to obtain employment and housing, undermining efforts to promote community reintegration.