


# Policy Texas Public Policy Foundation

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# Perspective



## Arresting the Growth of Criminal Law in Texas

by Marc Levin, Esq., director of the Center for Effective Justice

### Introduction

Although they cannot compete with their Washington counterparts who have enacted more than 4,000 criminal laws, Texas lawmakers have created over 1,700 criminal offenses. These figures do not include countless criminal offenses created by cities and school districts. We have created the first spreadsheet cataloging all of the state's criminal laws, which is available online at:

<http://www.texaspolicy.com/pdf/2006-08-TXpenalcodecrimes.pdf>.

The traditional criminal offenses like murder, rape, and theft are found in the Penal Code, but the proliferation of criminal offenses now extends to nearly every other body of state law from the Agriculture Code to the Finance Code. In fact, there are 66 felonies other than those in the Penal Code. While some of the conduct that is criminalized may fall within the proper scope of criminal law, many of these statutes concern relatively innocuous individual and business activities that would be better addressed through incentives created by competitive markets or civil penalties.

There are important differences between civil and criminal law, and these differences make it problematic when the two are conflated. Civil law, or tort law, seeks to balance the benefits and costs of the conduct at issue, while criminal law passes moral judgment and therefore generally eschews such balancing. An example of balancing in civil law is the efficient breach doctrine whereby a party may breach

### Policy Recommendations

- Use specific criteria to evaluate whether civil law or market incentives are better instruments than criminal law for addressing a problem.
- Consider whether a culpable mental state should be required when invoking criminal law, and, if so, whether the level of culpability should be criminally negligent, reckless, knowing, or intentional conduct.
- Monitor state agencies to ensure they are not enforcing criminal laws in a broader manner than was intended by the Legislature.
- Oversee cities and school districts to ensure they do not extend the scope of criminal law or increase penalties in ways the Legislature has intentionally declined to do.

a contract and pay damages when performance would be more costly. Compared with civil law, criminal law also is more likely to be applied even when there is no victim, because the case is brought by a prosecutor. 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*.

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Consistent with its purpose of punishment, conviction of any offense greater than a Class C misdemeanor often disqualifies a person from obtaining occupational licenses and permits. The Texas Court of Criminal Appeals has noted that even 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>1</sup>

While criminal law is essential to protect public safety, its indiscriminate use can create a dragnet that ensnares unwitting individuals and businesses. Moreover, overcriminalization diverts law enforcement resources from cracking down on violent crime and dilutes the moral import of being labeled a criminal.

Fortunately, the 79<sup>th</sup> Legislature rejected most attempts to expand the scope of criminal law, but many of these bills are likely to return in the upcoming legislative session, along with new proposals for creating additional crimes. Furthermore, Texas cities are constantly devising new criminal offenses. Although there may be political points to be scored by creating new crimes, the Texas Legislature and local governments should carefully scrutinize attempts to extend criminal law to non-traditional areas.

### Criminal Offenses in Texas

Offense Level	Maximum Penalty
Capitol Felony	Death
First Degree Felony	Life in Prison, \$10,000 Fine
Second Degree Felony	20 Years in Prison, \$10,000 Fine
Third Degree Felony	10 Years in Prison, \$10,000 Fine
State Jail Felony	2 Years in State Jail, \$2,000 Fine
Class A Misdemeanor	1 Year in County Jail, \$4,000 Fine
Class B Misdemeanor	180 Days in County Jail, \$2,000 Fine
Class C Misdemeanor	\$500 Fine

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

## Examples of Questionable State Criminal Laws

Although the need for many of the state’s criminal laws can be questioned, several stand out as particularly dubious. For example, Section 14.072 of the Agriculture Code makes it a separate felony offense for each day a person transacts in the public grain warehouse business without a current state license. Whether or not grain warehouses need to be regulated, it hardly seems necessary to make an infraction of the licensing scheme a third degree felony, which is punishable by up to 10 years in prison.

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There’s also something fishy about Section 436.011 of the Health and Safety Code, which criminalizes selling shellfish and crabmeat that either 1) came from a “closed area,” 2) does not contain every word on the label exactly as required by the state, or 3) was not processed or packaged precisely according to the state’s Byzantine regulations. Again, whether or not the case for government control of this industry holds any water, it can surely be accomplished without putting seafood sellers and processors in prison.

The *Texas Free Enterprise and Antitrust Act* of 1983 is a criminal law with a broad impact that is pernicious both because of its overly broad language and the criminal penalties for running afoul of its almost limitless sweep. The Act provides in part, “Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.” That would presumably include an artist selling her paintings exclusively through one art gallery, a common monopolistic practice that is arguably beneficial to the artist, the gallery, and the public, because otherwise there might be no place where the artist’s work can be viewed. The Act makes any such restraint on trade a felony punishable by up to three years in prison.

Many criminal laws are simply unnecessary, because they involve conduct for which there is an appropriate civil remedy. For example, committing libel against an individual or business has been a tort for centuries. However, the Texas Legislature in 1997 made it a state jail felony for someone to circulate an untrue statement against a bank. This provision was deposited into Section 59.002 of the Finance Code.

Finally, in 2003, the Legislature created no less than 39 separate criminal offenses related to the motor fuel tax, all of which are set forth in Section 162.403 of the Tax Code. Many of them are either second or third degree felonies, including the following offenses where a person:

(25) engages in a motor fuel transaction that requires that the person have a license under this chapter without then and there holding the required license; ... (26) makes and delivers to the comptroller a report required under this chapter to be made and delivered to the comptroller, if the report contains false information; ... (32) makes a sale of diesel fuel tax-free into a storage facility of a person who:

(A) is not licensed as a distributor, as an aviation fuel dealer, or as a dyed diesel fuel bonded user; or

(B) does not furnish to the licensed supplier or distributor a signed statement prescribed in Section 162.206;

(33) makes a sale of gasoline tax-free to any person who is not licensed as an aviation fuel dealer; ... (36) transports motor fuel for which a cargo manifest or shipping document is required to be carried without possessing or exhibiting on demand by an officer authorized to make the demand a cargo manifest or shipping document containing the information required to be shown on the manifest or shipping document.

One problem with many of these offenses is that they do not require that there actually be tax evasion. Some of the other offenses among the 39 not listed above are more reasonable, because they specifically reference conduct that is an attempt to evade taxes, rather than simply forgetting to register or fill out a form, which may have an innocent explanation. Another problem is that many of these offenses, because they do not include a requirement that the con-

duct be committed knowingly, would cover a person who mistakenly in good faith sells fuel to someone they think is a licensed distributor or dealer. Similarly, number 26 mentioned above does not require that the incorrect information filed with the comptroller be knowingly false. While the Penal Code applies a default culpable mental state of criminal negligence, that is a relatively low bar for convicting a person of a third degree felony for not being as diligent as they should have in properly filling out a report.

## Examples of Questionable Local Criminal Laws

In addition to the thousands of state criminal laws, there are countless criminal laws created by cities. Counties, however, do not have the plenary power to enact criminal ordinances, and therefore can only create criminal offenses in a handful of narrow areas that have specifically been permitted by the Legislature. Therefore, overcriminalization is not a problem at the county level. Indeed, the fact that there is not widespread anarchy in unincorporated areas, those areas which are not part of any city, suggests that it is possible to maintain order without a wide array of city criminal ordinances.

Dallas has become the most notorious of the state's large cities for brandishing criminal law against businesses. As discussed below, the 79<sup>th</sup> Legislature acted to rein in Dallas' abuse of their nuisance law, under which businesses' voluntary reports of crime on their premises were then used to charge those businesses, such as hotels and car washes, for maintaining a nuisance.

While the Legislature ended that abuse, Dallas police officers now raid bars and issue criminal citations to the managers on duty if patrons are observed to be dancing. The City Council passed an ordinance requiring bars to pay \$1,400 to obtain a "dance hall permit," and made failure to comply a misdemeanor offense. The citation is issued to the manager on duty when an officer observes customers dancing. Earlier this year, the manager of Rack Daddy's, a pool hall in south Dallas, received a citation when Dallas Police Department and Texas Alcoholic Beverage Commission officers observed a couple dancing. A trial is set for November.

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Dallas has also written citations and filed suit against Lush, a bar on Greenville Avenue where dancing has been observed. Lush's application for a dance hall permit was denied in 2003 on the ground that the property was not zoned for dancing. *The Dallas Morning News* reported earlier this year, "There was clear and convincing evidence that booties were shaking on the night of March 31."<sup>2</sup> The owner of Lush, Marc Andres, wonders why Virgin Records, where customers bob their heads while listening to music samples, and the American Airlines Center, where Dallas Mavericks dancers perform between quarters, are not also cited for permitting people to dance without a "dance hall permit." He adds, "I've been to a lot of bar mitzvah parties and weddings where there's been a lot of dancing." All told, Dallas vice officers have written a total of 63 dance hall citations in 2005 and 2006.

Another recent example of overcriminalization comes from the City of Houston, which is taking a blame-the-victim approach to the pervasive scourge of graffiti. A Houston City Council committee has approved a proposal creating a Class C misdemeanor for the property owner if he fails to clean up the graffiti in 10 days.<sup>3</sup> Under the ordinance, the property owner can obtain assistance from the City to clean it up if he can prove he is "physically unable" to do so—otherwise he may be prosecuted. Gayle Ramsey, a board member of the Museum District Business Alliance, commented, "Business owners are the victims already. So is it fair? No, it isn't." The measure is now pending before the City Council.

If you are in San Antonio, be sure not to consume any food or beverages on a municipal golf course not purchased from the official concession stand. Section 22-131 of the City Code makes it a Class C misdemeanor "for any golf course participant or visitor to

carry on or consume non-concessionaire food or beverages on city golf course property, including parking areas, unless such action is expressly approved in writing by the golf operations manager or other authorized city representative, with the concurrence of the contracted concessionaire." Therefore, if you have water or soda in your car that you take a sip from as you pull into the parking lot, you have committed a crime.

In addition to its golf courses, San Antonio is also very particular about ice. Any person involved with a temporary food establishment is guilty of a misdemeanor with a maximum \$1,000 fine if their ice does not meet the following criteria:

Ice that is consumed or that contacts food shall have been made under conditions meeting the requirements for sanitation as set out in this article and chapter. The ice shall be obtained only in chipped, crushed or cubed form and in single-use safe plastic or wet-strength paper bags filled and sealed at the point of manufacture. The ice shall be held in these bags until it is dispensed in a way that protects it from contamination.

Of course, this example raises the question of whether the details of handling ice really need to be regulated by city governments. However, the other issue is whether a criminal ordinance is needed. It seems unfair to subject an operator or employee to personal criminal liability for a business practice set by another individual or group of individuals that they might simply be carrying out. A certain number of violations of this or other sanitation provisions could simply result in a civil fine or the suspension or, ultimately, cancellation, of a permit to operate a temporary food establishment. By confining such regulations to civil penalties on business themselves, business owners can in turn determine how best to educate their personnel on compliance.

In May 2005, City of Austin voters narrowly passed a smoking ordinance that not only creates a criminal offense for smokers, but also for owner/operators of "public places" that fail to take "necessary steps" to stop or prevent smoking. The ordinance defines "public places" to encompass virtually every type of private property except residences, including private

clubs. The City is not enforcing the ordinance against smokers, but has issued dozens of citations to owner/operators. Some of the citations issued pursuant to the ordinance's ban on undefined "smoking accessories" have been for ashes found in plastic cups, candles, and candleholders, based on the City's position that any object can become a smoking accessory if used while smoking. The ordinance states that no level of culpability is required for conviction, making it a strict criminal liability statute.

In October 2005, U.S. District Judge Sam Sparks issued a preliminary injunction reducing the maximum fine from \$2,000 to \$500 and striking down the ordinance's provision allowing the City Manager to revoke any permit or license held by an establishment where smoking occurs.<sup>i</sup> Earlier this year, the Beaumont City Council passed an almost identical ordinance that also creates a criminal offense both for smokers and bar owners, which is also being challenged in court.

In addition to cities, school districts are also creating new criminal offenses. Section 37.102 of the Education Code, enacted as part of the *1995 Safe Schools Act*, has been interpreted by school boards as empowering them to make some violations of the Student Code of Conduct Class C misdemeanors, even if such conduct is not a criminal offense under state law or city ordinance.<sup>ii</sup> For example, the Pasadena Independent School District Code of Conduct provides that the district "retains the discretion to file criminal charges against a student who is believed to have committed an offense, when deemed appropriate by the administration."<sup>4</sup> The Code of Conduct lists dozens of "offenses" including the catch-all of "any other conduct that substantially disrupts the school environment or educational process."

State Rep. Harold Dutton (D-Houston) has recounted his successful defense of an 8-year-old student in municipal court who had received a Class C ticket from a school police officer for chewing gum in class.<sup>5</sup> Remarkably, some districts have even argued in court that these criminal offenses they create are not subject to the general defenses in the Penal Code, such as self-defense. Students are issued citations for

the school board-created offenses by school police officers, which they are expected to sign promising to appear in court, even though as minors they cannot enter into a contract.

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## Overcriminalization in the 79<sup>th</sup> Texas Legislature

In the 79<sup>th</sup> legislative session that concluded in May 2005, many bills were introduced to criminalize conduct traditionally addressed through the free market or civil law. Proposed legislation would have criminalized 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. Another bill would have made it 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. Licensing schemes for meteorologists and interior designers with accompanying criminal penalties were also proposed.

Other bills would have increased the criminal penalties for existing offenses. For example, legislation would have made unscrupulous business practices relating to construction or repair of a home a state jail felony, while such practices would remain a misdemeanor in all other industries. Another proposal, House Bill 1762, would have increased the penalty for all misdemeanors to the next highest level of offense for multiple convictions for the same offense, unless otherwise specified in the statute creating the offense. This decision is better made as to each specific offense rather than as part of an

<sup>i</sup>In his private legal practice the author represents the plaintiffs in the Austin smoking ban litigation.

<sup>ii</sup>Section 37.102(c) of the Education Code states, "A person who violates this subchapter or any rule adopted under this subchapter commits an offense. An offense under this section is a Class C misdemeanor."

across-the-board approach that will surely result in unintended consequences.

Fortunately, all of the measures described above, along with many other proposals to create new criminal offenses, were defeated. However, the one notable exception was House Bill 1361. This legislation authorizes the Texas Animal Health Commission (TAHC) to implement the National Animal Identification System (NAIS) being forced upon states by the U.S. Department of Agriculture, and creates a Class C misdemeanor for failure to comply and a Class B misdemeanor for multiple offenses. Compliance is problematic for small farmers and ranchers, who must register their premises and tag and register every animal. Moreover, they must report within 24 hours any missing animal, any missing tag, the sale of an animal, the death of an animal, the slaughter of an animal, the purchase of an animal, the movement of an animal off the farm or homestead, or the movement of an animal onto the farm or homestead. After a torrent of criticism from small farmers and ranchers, the TAHC decided in April 2006 to postpone consideration of the program until the winter or spring of 2007. State Rep. Patrick Rose (D-Dripping Springs) has pledged to file legislation preventing any mandatory scheme.

In addition to rejecting numerous bills that would expand criminal law—with the exception of animal identification—the 79<sup>th</sup> Legislature also acted to rein in overcriminalization in several important areas. First, House Bill 1690 limited the power of cities to charge business owners with maintaining a public nuisance. The bill, sponsored by Rep. Terry Keel and signed into law by Governor Rick Perry, came in response to complaints by business owners that the City of Dallas has abused its public nuisance ordinance, which like most nuisance laws has both civil and criminal components. The Dallas ordinance enabled the City to 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 ordinance 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 was 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 Legislature about their own experiences. One hotel owner said Dallas police officers told him his problems with the nuisance abatement ordinance 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.”<sup>6</sup> 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.

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House Bill 1690 made several changes in the state law that authorizes local governments to enact public nuisance ordinances. First, and perhaps most importantly, it altered the standard for conviction from “knowingly maintaining” a place where crime occurs to “knowingly tolerating criminal activity.” Second, it provided 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. House Bill 1690 also clarified 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, House Bill 1690 is now law and the House Criminal Jurisprudence Committee and the House General Investigating Committee have pub-

lished a joint interim report on the bill and the abuses under the Dallas nuisance ordinance that it was designed to remedy.<sup>7</sup>

Second, House Bill 970 by Rep. Keel 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. The default level of culpability in the Penal Code is criminal negligence,<sup>8</sup> but cities and counties are increasingly imposing criminal ordinances that explicitly disavow any state of mind requirement. For example, the City of Austin can impose 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.<sup>iii</sup>

Finally, House Bill 603 was passed to reform the state's zero tolerance law. The legislation, which was signed by Governor Rick Perry, expressly allows school districts to consider whether a student had a culpable state of mind and a prior disciplinary history before imposing a mandatory expulsion. While House Bill 603 was a step in the right direction, bill sponsor Rep. Rob Eissler (R-The Woodlands) continues to hear from parents in his district who say that schools persist in imposing zero tolerance policies without regard to the student's intent or disciplinary history. Eissler, a former school board member, is looking at strengthening this legislation next session, which he had agreed to make voluntary after being assured by school districts that they would adopt this more sensible approach to zero tolerance.

## Conclusion and Recommendations

While the 79<sup>th</sup> Legislature deserves credit for largely refraining from widening the scope of criminal law and reining in local abuses, many of the failed proposals may return in the next legislative session. As legislators prepare to reconvene, several broad recommendations should be considered.

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Legislators and local officials should use specific criteria to evaluate whether civil or criminal law is a better instrument for addressing a problem. A checklist published by the Foundation (available online at <http://www.texaspolicy.com/pdf/2005-04-overcrim-checklist.pdf>) highlights some of the relevant factors in deciding whether to create a crime.<sup>9</sup>

If criminal law is to be invoked, lawmakers should carefully consider whether a culpable mental state should be required and, if so, whether the level of culpability should be criminally negligent, reckless, knowing, or intentional conduct. 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 more fair, more effective, and less costly to the state than criminal penalties. An interim committee should be charged with conducting such a review.

Legislators should also continually monitor state agencies to ensure they are not enforcing criminal laws in a broader manner than the Legislature intended. A recent example was the Texas Alcoholic Beverage Commission's policy of arresting thousands of customers in bars for public intoxication. While public intoxication is a longstanding criminal offense, prior enforcement had focused on individuals driving or about to drive. In making these arrests, TABC attempted to apply the statutory blood-alcohol limit for operating a motor vehicle to non-drivers, arguably exceeding the Legislature's intent. A TABC spokesperson said "being inappropriately loud" is one of the signs their officers look for in determining who in a

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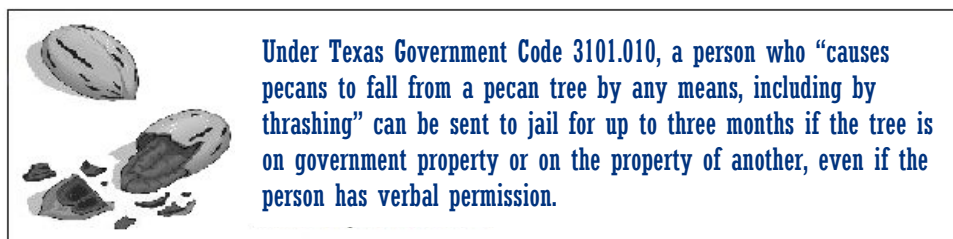
<sup>iii</sup>Under Chapter 3-2 of the Austin City Code, a property owner who harbors an animal that is not in an enclosure is guilty of a Class C misdemeanor, even if the animal does not belong to them.

bar they will subject to a sobriety test.<sup>10</sup> Many of the arrests occurred in hotel bars where tourists attending conventions have been nabbed, even though they were preparing to take an elevator back up to their room. As a result, several conventions told the Dallas Convention and Visitors Bureau they would cancel their plans to come to Texas.<sup>11</sup> After the Legislature announced an interim hearing on the program, the TABC suspended it, illustrating the effectiveness of legislative oversight in controlling excessive agency activity.

Finally, the Legislature must oversee cities and school districts to ensure that they do not extend the scope of criminal law or increase penalties in ways that the Legislature has intentionally declined to do.

While the 79<sup>th</sup> Legislature's actions were largely encouraging, there remain numerous unnecessary state and local criminal laws. Moreover, the recurring proposals for new state and local criminal offenses demonstrates the continued political appeal of using criminal law in an attempt to solve every societal problem. Only an appreciation for the important but limited role of criminal law, and the unintended consequences of its indiscriminate application, can ensure that Texans are not handcuffed by a proliferation of criminal laws. ★

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## Endnotes

<sup>1</sup>*Aguirre v. State*, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999).

<sup>2</sup>Michael Grabell, “Club dared to dance; now it must face the music,” *Dallas Morning News*, 28 April 2006, <http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/042906dnmetfootloose.2ab3ad0.html>.

<sup>3</sup>Alexis Grant, “Proposal makes owners of homes and businesses liable for fines if cleanup is slow,” *Houston Chronicle*, 14 June 2006.

<sup>4</sup>Pasadena Independent School District Code of Conduct 2005-06, <http://www.pasadenaisd.org/Code%20of%20Conduct%2005-06.pdf>.

<sup>5</sup>Audio at <http://www.texaspolicy.com/audio/2005-12-07-pp.html>.

<sup>6</sup>Harvey Kronberg, “Keel clarifies state nuisance abatement law,” *The Quorum Report*, 22 April 2005, <http://www.quorumreport.com/Subscribers/Article.cfm?IID=8096>.

<sup>7</sup>Joint interim study report at [http://www.house.state.tx.us/committees/reports/79interim/joint/joint\\_CriminalJuri\\_GeneralInvest.pdf](http://www.house.state.tx.us/committees/reports/79interim/joint/joint_CriminalJuri_GeneralInvest.pdf).

<sup>8</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>9</sup>*Analyze Before You Criminalize: A Checklist for Legislators*, Texas Public Policy Foundation (Apr. 2005) <http://www.texaspolicy.com/pdf/2005-04-overcrim-checklist.pdf>.

<sup>10</sup>See Note 9.

<sup>11</sup>Associated Press, “Tourism officials worried about public intoxication crackdown,” *Houston Chronicle*, 31 March 2006, <http://www.chron.com/disp/story.mpl/metropolitan/3761367.html>.

