



# Arresting the Runaway Growth in State Criminal Law



**December 13, 2011**

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# Introduction to the Texas Public Policy Foundation

- TPPF Mission: Individual Responsibility, Free Enterprise, Limited Government, Private Property Rights
- We apply these foundational principles to criminal justice, bringing together stakeholders and working with policymakers and allies across the spectrum.

# The TPPF Portfolio

- Fiscal and tax restraint
- Civil justice reform (worked to enact loser pays in 2011)
- Center for Tenth Amendment Studies
- Deregulation of (over)regulated industries like insurance and utilities.
- Center for Effective Justice launched in March 2005, Right on Crime in Dec. 2010

# Right on Crime Enters the Field

- Former Governor Jeb Bush, Speaker Newt Gingrich, Former Drug Czar Bill Bennett, Former A.G. Ed Meese, Grover Norquist, and Other Conservative Leaders Endorse Right on Crime Statement of Principles
- Statement Supports Reining in Growth of Non-Traditional Criminal Laws, Cost-Effective Alternatives for Nonviolent Offenders, Emphasis on Restitution and Treatment, and Performance Measures.





Los Angeles Times

**Conservatives  
Latch on to Prison  
Reform**

January 28, 2011



**Right on Crime Noted  
in “Budget Crunch  
Forces New Approach  
to Prisons”**

February 15, 2011



***National Review*  
Praises Right on  
Crime**

February 21, 2011

# Overcriminalization Challenges at the State Level





# Regulatory Offenses on the Rise

- ▣ No inventory of all state criminal laws is available, which itself adds uncertainty to the business climate.
- ▣ We do know many states have thousands of criminal laws, including some 1,700 statutory offenses in Texas.
- ▣ Texas has 11 felonies relating to harvesting oysters and in the gulf states of Texas, Louisiana, Mississippi, Alabama, and Florida, there are some 715 environmental criminal offenses alone.

# The Withering Intent Requirement

- ▣ Many of these laws dispense with the traditional requirement of a culpable mental state. For example, of the 83 environmental criminal offenses in Florida, 52 are strict criminal liability offenses.



# Penalties Are Often Extreme

- ▣ In Alabama, “disposing of scrap tires in a way not approved by the Environmental Management Act” is a felony punishable by up to ten years in prison, even if no harm.
- ▣ Under the TX. Water Code, “transporting or causing or allowing to be transported for storage, processing, or disposal, any hazardous waste to any location that does not have all required permits” is punishable by up to 10 years behind bars, even if the waste is not actually stored at the location that lacks permits and there is no harm.

# The Dangers of Delegation

- ▣ State offenses often confer virtually unlimited authority on agencies to effectively create new criminal offenses through their rulemaking.
- ▣ For example, in Louisiana, RS 30:2421A creates an offense with a one year prison term for “disposing of white goods (appliances) except in a collection or recycling facility in accordance with the rules and regulations of the department.”

# Vicarious Liability Offenses Make Doing Business Precarious

- Alaska's corporate criminal liability statute exposes organizations to criminal liability for the actions of their agents, as long as agents intended the organization to benefit from their actions.
- It also specifies that organizations cannot disclaim liability through codes of conduct or corporate policies; their liability extends beyond any merger, consolidation, or dissolution; and that convicted organizations can be subjected to larger fines than the convicted individual.

# Solutions to Rein in Overcriminalization at the State Level



# Reduce and Revise Criminal Laws

- ▣ Stop creating new criminal offenses as a method of regulating business activities. Regulation is better handled through non-criminal administrative mechanisms and market forces, not the heavy stigma of criminal sanctions
- ▣ Revise criminal laws to remove ambiguities and consolidate redundant laws to help prevent prosecutorial abuse.

# Narrow What's Criminal and Jailable

- ▣ Convert many regulatory misdemeanors into civil violations or, at the least, remove jail time as an option for such offenses, provided that the non-jail penalty is satisfied.
- ▣ Economic conduct should be criminal only when it results in actual harm or danger, except if there is intentional fraud such as Madoff.

# Establish Interim Committees

- Create interim committees and commissions to develop and submit comprehensive, consensus reform packages to lawmakers at the beginning of legislative sessions.
- These bodies would identify criminal laws that are unnecessary, duplicative, overbroad, excessively vague, lacking an appropriate culpable mental state, create vicarious liability, or are otherwise deficient, and incorporate their work into one omnibus bill.
- An interim commission in 2010 in South Carolina resulted in a package enacted almost unanimously by lawmakers that included significant sentencing and probation reforms relating to traditional criminal offenses.



# Enact ALEC Model Intent Rule

- Applies default rule that the following culpable mental state applies to all elements of the offense if one is not provided in the statute:
  - (a) with the conscious object to engage in conduct of the nature constituting the element;
  - (b) with the conscious object to cause such a result required by the element;
  - (c) with an awareness of the existence of any attendant circumstances required by the element or with the belief or hope that such circumstances exist; and
  - (d) with either specific intent to violate the law or with knowledge that the person's conduct is unlawful.

# Enact ALEC Rule of Lenity Model Bill

- This due process protection provides that state laws are construed against the government when there is doubt as to whether the Legislature intended to criminalize the conduct at issue, ensuring there is fair notice concerning the line between legal and criminal behavior.
- Parallels conservative emphasis on strict interpretation of Constitution.

## Enact ALEC Transparency & Accountability in Criminal Law Measure

- This requires:
  - A detailed state and local fiscal note on all bills creating or enhancing an offense.
  - Reference to new offense or enhancement in caption of bill.
  - Elimination of provisions that delegate power to agencies to create offenses through rulemaking.

# Institute Procedural Safeguards to Slow Growth in New Criminal Laws

- Require approval of new offenses and sentencing enhancements by the legislative committees overseeing criminal justice system.
- Require sunrise review of new proposals similar to the sunset process, which is done for certain measures such as those involving occupational licensing in states like Arizona and Oregon.



# Create Safe Harbor Statutes

- These statutes, such as Section 7.03 of the Texas Water Code, can prevent local prosecutors and the Attorney General from bringing a prosecution when the same conduct is the subject of pending or resolved administrative proceeding before a state agency.



# Deter Prosecutorial Misconduct

- ▣ Remove fiscal incentives to bring criminal cases. Arrangements in some states that allow a division within the office of the Attorney General or prosecutor to keep the “winnings” from settlements or fines in cases should be repealed.
- ▣ Review state bar rules and processes relating to prosecutorial misconduct to ensure there are sufficiently strong statutes and actual enforcement occurs.

# Demand Prosecutorial Transparency

- ▣ Statutes should require that attorney generals, as well as local prosecutors whose offices receive state funds, submit reports similar to other agencies accounting for the time and money spent on various types of cases, separating expenses on criminal cases involving crimes in the Penal Code versus those involving regulatory offenses that do not directly implicate public safety.



# Strengthen Informal Processes

- ▣ Expand the availability of informal processes for expeditious case resolution such as mediation and create a presumption for the use of such processes in appropriate cases.
- ▣ Mediation is confidential, not an admission of wrongdoing, and resolution must be restorative not punitive. Options are restitution and/or community service.

# Suppressing Unnecessary Arresting

- ▣ Prohibit arrest for regulatory misdemeanors unless the charged individual fails to respond to a summons or emergency danger to humans.
- ▣ Being arrested can create a permanent record, compromise an individual's ability to defend themselves, and be used in cases to gather personal information and effects when a court might not have found sufficient basis for a search warrant.

# Taking the Next Steps to Turn Ideas into Action



# Tapping into the Free Market Network

- We partner with State Policy Network member think tanks, which exist in all states, assisting them in blocking unfavorable proposals and advancing a pro-active agenda.
- We are identifying high priority states in 2012 where conditions are ripe.
- Work with SPN counterpart to distribute papers such as the checklist and upcoming “12 steps”, hold events, draft legislation and find sponsor, prepare and deliver testimony, and garner legislative support.

# Building Bridges with Policymakers and the Private Sector

- Continued efforts through ALEC and outreach to NCSL.
- Partner with state business and trade groups and legislative liaison for individual companies to identify threats and opportunities.
- Conduct additional research, issue papers, and identify specific cases to spotlight in policymaker and media outreach.