



Overcriminalization

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THE ISSUE

Criminal law is not just for criminals anymore—at least not criminals as traditionally defined. Texas lawmakers have created more than 1,700 criminal offenses, including 11 felonies relating to harvesting and handling oysters. Moreover, the 1,700 figure does not include the countless criminal offenses that have been created through agency rulemaking pursuant to catch-all statutory provisions that make any violation of any agency rule a crime, as well as the more than 4,000 federal criminal offenses and myriad local criminal ordinances.

Texans once lived under a criminal code that resembled the Ten Commandments. Today, nearly 10,000 federal, state, and local offenses confound more often than command, diluting the traditional focus of criminal law on truly wrongful conduct.

The traditional criminal acts found in the Penal Code—from murder to many types of theft—account for 254 offenses. This leaves about 1,500 byzantine offenses scattered outside of the Penal Code. Many of these relate to ordinary business activities in fields such as agriculture, health care, natural resources, and insurance.

Significant differences between criminal and civil law make criminal law an overly blunt instrument for regulating non-fraudulent business activities. Whereas administrative rulemaking and civil proceedings may utilize a cost-benefit analysis to evaluate the conduct at issue, no such balancing occurs in criminal proceedings, as theoretically criminal law should only cover those activities that are inherently wrong. Also, criminal law, because it is enforced entirely by state prosecution, tends to minimize the role of the victim. Indeed, the prototypical “regulatory” offense, such as mislabeling fruit under Chapter 93 of the Agriculture Code,

does not include anyone actually being harmed as an element of the offense. Finally, civil and criminal law have traditionally been distinguished by the requirement that a criminal must have a guilty state of mind, expressed in the Latin term *mens rea*. An increasing number of regulatory offenses nevertheless dispense with the *mens rea* requirement or require merely criminal negligence rather than intentional, knowing, or reckless conduct.

THE FACTS

- ★ Examples of excessive Texas criminal laws include:
 - Under Agriculture Code, Chapter 76, it is a Class A misdemeanor (up to a year in jail) to use, handle, store, or dispose of a pesticide in a manner that injures vegetation, crops, wildlife, or pollinating insects.
 - Chapter 26 of the Water Code makes it a second degree felony (punishable by up to 20 years in prison) not “to remit any fees collected by any person required to hold a permit under this section.”
 - Occupations Code Section 165.151 makes it a Class A misdemeanor (punishable by up to one year in jail) to violate “any rule” of any professional licensing board.

RECOMMENDATIONS

- ★ Refrain from creating new criminal offenses, especially those regulating non-fraudulent business activities.
- ★ Avoid licensing new occupations and revise laws to eliminate criminal penalties associated with many occupations.

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- ★ Require that all proposals to license new occupations first be reviewed by the Sunset Advisory Commission to evaluate costs and benefits.
- ★ Narrow the scope of catch-all statutes allowing agencies to create rules that are criminal offenses. Offenses should be limited to statutory violations, and non-compliance with rules should be enforced by civil penalties and revocations of permits.
- ★ Eliminate possibility of jail time for first-time conviction of a regulatory misdemeanor.
- ★ Require that each bill creating an offense so specify in the caption, and improve fiscal notes so that they state the full cost of the bill, including prosecutorial and judicial expenditures and the appointment of counsel for indigent defendants.
- ★ Ensure that an appropriate culpable mental state is included in the elements of offenses.
- ★ Abolish excessive and unnecessary offenses and narrow the scope of overly broad offenses.
- ★ Amend the Code of Criminal Procedure to allow for citation without arrest for additional misdemeanors and prohibit arrest for regulatory Class C misdemeanors, unless the suspect ignores the citation.

RESOURCES

Time to Rethink What's a Crime by Marc Levin, Texas Public Policy Foundation (Feb. 2010) <http://www.texaspolicy.com/pdf/2010-01-PP01-rethinkcrime-ml.pdf>.

Audio of Panel entitled "Overcriminalization of Business: More Laws, Less Freedom?" Policy Orientation for the Texas Legislature (Jan. 2010) <http://www.texaspolicy.com/audio/2010-PO-summaries.htm#overcrim>.

Analyze Before You Criminalize: A Checklist for Legislators by Marc Levin, Texas Public Policy Foundation (Mar. 2008) <http://www.texaspolicy.com/pdf/2008-03-PB03-criminalizechecklist-ml.pdf>.

Business Overcriminalization in the 80th Legislative Session by Marc Levin, Texas Public Policy Foundation (Apr. 2007) <http://www.texaspolicy.com/pdf/2007-03-PP07-80thReforms-ml.pdf>. ★

