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BillAnalysis

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A Commission to Review All Criminal Laws Outside the Penal Code

Bill Analysis: House Bill 2804

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Key Findings

- With over 1,500 crimes listed outside the penal code, Texas criminal law is unwieldy and unjust. HB 2804 proposes a commission to review these offenses and to recommend eliminating them or consolidating them in the penal code.

Introduction

With over 1,700 criminal offenses—around 1,500 of which appear outside the penal code—Texas criminal law has grown unwieldy and unjust, with penalties often disproportionate to the severity of the crime. No systematic attempt has been made to create consistency among these offenses in two decades. As a consequence, dredging for oysters at night can be a felony,[1] but hiding a human corpse is a mere misdemeanor.[2] In January 2013, the Legislative Budget Board (LBB) recommended that the state establish a "mechanism to review sentencing policies and control criminal justice costs."[3]

HB 2804 by Rep. Steve Toth proposes to enact the LBB's recommendation by creating a temporary and voluntary nine-member commission to review all the state's criminal offenses except those listed in the penal code, chapter 481 of the health and safety code ("the Controlled Substances Act"), and those related to the operation of a motor vehicle.[4] The commission would evaluate these laws and by November 1, 2014 produce a report recommending the repeal of the laws "unnecessary, unclear, duplicative, overly broad, or otherwise insufficient to serve the intended purpose of the law."[5]

The Impetus Behind HB 2804

A prominent British lawyer, Lord Radcliffe, observed that "every system of jurisprudence needs … a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs."[6] Moral assumptions may refer not only to questions about what should and should not be criminal, but also what level of punishment taxpayers may be asked to finance. People do not expect all punishments for all crimes to be as punitive as possible; instead people have a sense of proportion, and they expect the punishment to fit the crime.[7] Conducting these reviews is a profoundly basic function of government, yet Texas has not had a mechanism for this since 1993.

The 1993 revision of the Texas Penal Code was, in fact, one of the most impressive achievements of public administration in modern Texas history. The Texas Punishment Standards Commission, which was established to review the code, appropriately enhanced many sentences for violent offenders, improved treatment options for nonviolent offenders, removed several obsolete offenses altogether, and reorganized the code.[8] Shortly thereafter, a group of scholars reviewing state penal codes—and the code for the District of Columbia—ranked the Texas Penal Code the best in nation.[9]

This achievement, however, occurred 20 years ago, and it concerned only the penal code, not the other parts of the state code which list hundreds of criminal offenses carrying significant punishments, including incarceration. On average, Texas adds over 40 new criminal laws per legislative session (not including accompanying sentencing enhancements), and they are frequently located outside the penal code. There are now more criminal penalties listed in the Texas Occupations Code, for example, than there were in the Texas Penal Code as originally enacted. These crimes and enhancements have often been of the sort that prompted the American Law Institute to create the Model Penal Code in 1961—"ad hoc statutory

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enactments … triggered by a crime or a crime problem that gained public interest for a time."[10]

Shannon Edmonds, a former prosecutor who is now the Director of Governmental Relations for the Texas District and County Attorneys Association (TDCAA), speaks with bewilderment, for example, about the push for the 83rd Legislature to pass "Caylee's Law," legislation that would require people to report missing children within 24 hours of their disappearance or report dead children within one hour of discovery. Legislation of this sort was filed across the country in the wake of an infamous Florida case in which a mother did not report her daughter's disappearance, and in time, became widely suspected of having killed the child.[11] Edmonds is dubious about the value of the proposed law because, as he points out, numerous existing statutes—tampering with physical evidence,[12] endangering a child,[13] failing to report a corpse,[14] abusing a corpse,[15] failing to report child abuse/neglect,[16] providing a false report to a peace officer,[17] and providing a false report regarding missing child or missing persons[18]—would have been adequate to prosecute the mother in Texas. Nevertheless, the case received overwhelming media attention, and an internet site urging states to pass versions of the law gained over one million supporters in less than one month.[19]

Edmonds makes this observation in his personal capacity, not on behalf of the TDCAA, but it nevertheless belies the widespread idea that prosecutors tacitly approve of cluttered criminal law and a trend towards "overcriminalization."[20]

Overcriminalization

Overcriminalization refers to the increased tendency of governments to use the criminal law to regulate behavior that is not traditionally considered criminal. "Crimes" traditionally carry the moral opprobrium of society, but in modern America, criminal penalties attach to thousands of actions which do not fit the historical conception of a crime. Texas, for example, has eleven different criminal penalties relating to the improper harvesting of oysters.[21] Among the most bizarre "crimes" in Texas, all of which carry the risk of incarceration, are the following:

- Lying in a fishing tournament. This is Class A misdemeanor, punishable by up to one year in jail.[22]
- Causing pecans to fall from a pecan tree by any means, including by thrashing. This is a misdemeanor, punishable by up to three months in jail.[23]
- Driving stock to market without a bill of sale or sworn list. This is a Class B misdemeanor, punishable by up to 180 days in jail.[24]
- Mislabeling a container of citrus fruit. This is a Class B misdemeanor, punishable by up to 180 days in jail.[25]
- Issuing, as a warehouseman (or his officer, agent, or employee), a duplicate or additional negotiable warehouse receipt for goods if the warehouseman knows at the time of issuance that a previously issued negotiable warehouse receipt describing those goods is outstanding and not cancelled. This is a felony, punishable by up to five years in prison.[26]
- Using the name of a credit union without including the words "credit union" or the abbreviation "CU" and an appropriate descriptive word or words, or an acronym made up of initials of the appropriate descriptive word or words and ending in "CU," approved by the commissioner. This is Class A misdemeanor, punishable by up to one year in jail.[27]
- Delivering materials for industrial homework to any person in Texas without an employer's permit. This is a misdemeanor, punishable by at least 30, but not more than 60, days in jail.[28]
- Owning, leasing, operating, or controlling an oil property in Texas and equipping or enclosing the oil property, or any part of the oil property. This is a misdemeanor punishable by up to six months in jail.[29]

- Discriminating, as a theater manager (including a theater owner or lessee, or a representative of an owner or lessee) against "reputable" theaters, operas, shows, or other productions. This is a misdemeanor punishable by up to 10 days in jail.[30]

As one prominent judge has written:

> [C]riminal law should clearly separate conduct that is criminal from conduct that is legal. This is not only because of the dire consequences of a conviction—including disenfranchisement, incarceration and even deportation—but also because criminal law represents the community's sense of the type of behavior that merits the moral condemnation of society.[31]

Professor Erik Luna of the Washington & Lee School of Law, has observed that many states have "abuse[d] the law's supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of dubious value."[32] Texas, unfortunately, is no exception. The principle aim of HB 2804 is to simplify the penal code by removing obscure, non-traditional "crimes" for which there are no individual victims and that do not involve fraud or coercion (including perhaps some of the ones listed above).[33]

Overcriminalization is not only inefficient, it is inherently unjust, and Texans who value justice should be troubled by it. Prosecutors are allowed "multiple bites at the apple" because they are permitted to charge defendants with myriad crimes, all of which are essentially the same offense. If the prosecutor is unable to prove the elements of one charge, he moves on to the next one—which is largely the same as the first. Eventually, the prosecutor hopes, something will surely stick.[34] Centuries ago, Cicero recognized that "Injustice often arises through chicanery, that is, through an over-subtle and even fraudulent construction of the law. This it is that gave rise to the now-familiar saw, 'More law, less justice.'"[35]

The inconsistencies that result from a proliferation of offenses can lead to tragic mistakes. As Professor Paul Robinson, an internationally renowned expert on the reorganization of criminal codes, has observed:

Partisan politics do not appear to influence whether or not a commission exists. "Red states" like Alabama and Utah have commissions, and "blue states" like Maryland and Oregon have commissions. Texas does not have one, but HB 2804 would establish one.

> [T]he trend of having overlapping offenses also undermines the rule of law by shifting authority to set the general level of punishment, as statutorily set by the grading of an offense, away from the legislature and into the hands of prosecutors and police, who can pick and choose among the multiple and overlapping related offenses that may apply. Even judges who try to interpret laws according to legislative prerogative may find their task impossible, as interpretive canons mandate that any overlap in offenses be read so that nothing is rendered superfluous. The task may require the court to distort the meaning of one provision in order to give meaning to the existence of another.[36]

The Composition of the Commission

Twenty-four states currently have sentencing commissions that are charged, at least in part, with performing evaluations of state criminal law to address these concerns.[37] Partisan politics do not appear to influence whether or not a commission exists. "Red states" like Alabama and Utah have commissions, and "blue states" like Maryland and Oregon have commissions. Texas does not have one, but HB 2804 would establish one.

The establishment of a commission is not an idea without risk. Although some commissions have successfully worked to control criminal justice costs (e.g., Alabama, Kansas, South Carolina), other commissions have evolved into mechanisms for needlessly enhancing sentence lengths and thus driving up corrections costs. (The federal sentencing commission is the most notorious example). The composition of the commission would therefore be critically important.

House Bill 2804 proposes that the commission consist of nine members: two appointed by the governor, two by the lieutenant governor, two by the speaker of the House, two by the chief justice of the Supreme Court, and one by the presiding judge of the Court of Criminal Appeals.[38] The bill further states that the officials making appointments must include "representatives of all areas of the criminal justice system, including prosecutors, defense attorneys, judges, legal scholars, and relevant business interests."[39] The commission's goal would be to develop a consensus for omnibus legislation that would streamline criminal laws, recognizing that such laws are so numerous and complex that legislators would have difficulty drafting a comprehensive rewrite of them during the short Texas legislative session.

Conclusion

According to Professor Robinson, "it is common practice to create new, serious offenses scattered throughout chapters outside the criminal code. As a result, criminal codes no longer provide an accessible source from which one can find a clear statement of the conduct that is criminal."[40] Texas criminal law has been subject to precisely this kind of abuse, and HB 2804 proposes to address the problem.

It would be preposterous to argue that Texas criminal law is transparent because anybody can access the code books (of which there are over two dozen, including the penal code, the alcoholic beverage code, the business and commerce code, the occupations code, etc.) and read the 1,700 criminal laws therein.[41] In a famous G.K. Chesterton short story, a character remarks that the best place to hide a leaf is in a forest.[41] Such is the case with Texas criminal law. The power to prosecute a person for a criminal violation is the most extraordinary power wielded by a state government, yet the criminal laws are so voluminous and disorganized that, effectively, they are hidden. ✯

Endnotes

[1] Chapter 76 of the Parks & Wildlife Code governs oysters, and section 76.118 assigns penalties for various oyster offenses. *See* TEX. PARKS CODE ANN. § 76.118 (Vernon 2011). If an offender has been found guilty on two or more occasions in a five-year period of having violated sections 76.101 (Oyster Licenses Required), 76.107 (Sale of Sport Oysters Prohibited), 76.109 (Night Dredging Prohibited), or 76.116 (Oysters from Restricted Areas), then his third offense within that period is a felony. Ibid. Similarly, if an offender has been found guilty on just one prior occasion of having violated section 76.109 and section 76.116, then the offense is a felony. Ibid.

[2] TEX. PENAL CODE ANN. § 42.08 (Vernon 2011).

[3] Legislative Budget Board, *Texas State Government Effectiveness and Efficiency Report: Selected Issues and Recommendations* (Jan. 2013) 271-280.

[4] HB No. 2804, 83rd Session (2013).

[5] Ibid. at §1(b)(2).

[6] Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1139 (1978).

[7] The Enlightenment philosopher Cesare Beccaria, whose theoretical works on criminology influenced the American founders and inspired Thomas Jefferson to draft a penal reform for Virginia, may have put this best: "[T]he obstacles which repel men from committing crimes ought to be made stronger the more those crimes are against the public good and the more inducements there are for committing them. *Hence, there must be a proportion between crimes and punishments.*" Cesare Beccaria, *On Crimes and Punishments* 19 (1995) (ed. Richard Bellamy) (emphasis added).

[8] *2013 Legislative Budget Board Recommendations* 271.

[9] Paul H. Robinson, Michael T. Cahill & Usman Mohammed, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 60 (2000).

[10] Paul Robinson & Markus Dirk Dubber, *An Introduction the Model Penal Code* at 7. Professor Robinson has written that before the creation of the Model Penal Code, "the criminal codes of most states were essentially collections of ad hoc statutory enactments, often triggered by a political need to address a 'crime du jour' from recent deadlines." Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Meagan Schultz & Douglas M. Weck, *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 711 (2010). Professor Herbert Wechsler led the Model Penal Code drafting effort, which was guided by the principle that the structure and content of a criminal code should reflect "contemporary, reasoned judgment." Herbert Wechsler, *The Model Penal Code and the Codification of American Criminal Law*, CRIME, CRIMINOLOGY, AND PUBLIC POLICY 419, 424-25 (R. Hood, ed. 1976). Professor Wechsler and his colleagues recognized that criminal statutes (unlike constitutions) must be regularly updated to ensure criminal law is confined to it traditional role, clarify confusing language, consolidate redundancies, and ensure that the structure of the penal code is not causing waste and inefficiency in the criminal justice system. *See generally*, Friedrich A. Hayek, *The Constitution of Liberty* (New York: Routledge, 1960) 178-79, (discussing the distinction between general principles set forth in constitutions and policy-directed aims set forth in statutes). According to Professor William Stuntz, many years later, Professor Wechsler explicitly advocated for commissions—or "protective organizations"—that would work to impede overcriminalization. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, n. 277 (2011) (citing *Model Penal Code Conference Banquet Remarks and Responses*, 19 RUTGERS L.J. 855, 864-65 (1988)).

[11] Lizette Alvarez, "Casey Anthony Not Guilty in Slaying of Daughter," *The New York Times* (5 July 2011).

[12] TEX. PENAL CODE ANN. § 37.09 (Vernon 2011).

[13] Ibid. § 22.041 (Vernon 2011).

[14] TEX. PENAL CODE ANN. § 37.09(d)(2) (Vernon 2011).

[15] Ibid. § 42.08(a)(5) (Vernon 2011).

[16] TEX. FAM. CODE ANN. § 261.109 (Vernon 2011)

[17] TEX. PENAL CODE ANN. § 37.08 (Vernon 2011).

[18] Ibid. § 37.081 (Vernon 2011).

[19] Brian Stelter & Jenna Wortham, "Watching a Trial on TV, Discussing it on Twitter," *The New York Times* (5 July 2011) ("[T]he viewing public was captivated by Caylee Anthony's death and Casey Anthony's trial to a degree that has not been seen in years, even drawing comparisons in some quarters to the O. J. Simpson trial. Thanks to social networking Web sites like Facebook, members of the public reacted to every moment of the televised testimony in real time, driving even more coverage on national morning news programs and on local newscasts.").

[20] Professor William Stuntz, who was perhaps the foremost proponent of this position before his death in 2011, famously expounded on the argument in a *2001 Michigan Law Review* article. *See Pathological Politics of Criminal Law* at 537-38. *See also* Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors' Scarce Resources*, 106 NW. U. L. REV. COLLOQUY 138, 139 (2011) (citing Stuntz's views).

[21] *See* Texas Board of Pardons and Paroles Current Offense Severity Rankings List (9 Feb. 2012).

[22] TEX. PARKS CODE ANN. § 66.119 (Vernon 2011).

[23] TEXAS GOV'T CODE ANN. § 3101.010 (Vernon 2011). The statute provides that this is not an offense if the tree is located on: (1) land owned by the person causing the pecans to fall; (2) privately owned land, and the person causing the pecans to fall has the written consent of the owner, lessee, or authorized agent of the owner or lessee; (3) land owned by the state or a political subdivision of the state and in the boundaries of a municipality, and the person causing the pecans to fall has written consent from an officer or agent of the agency or political subdivision controlling the land or from the mayor of the municipality; or, (4) land owned by the state or a political subdivision of the state and outside the boundaries of a municipality, and the person causing the pecans to fall has written consent from an officer or agent of the agency or political subdivision controlling the property or from the county judge of the county.

[24] TEX. AGRIC. CODE ANN. § 146.006 (Vernon 2011).

[25] TEXAS AGRIC. CODE ANN. § 93 (Vernon 2011).

[26] TEXAS BUS. & COM. CODE ANN. § 35.31 (Vernon 2011).

[27] TEXAS FIN. CODE ANN. § 122 (Vernon 2011).

[28] TEXAS HEALTH & SAFETY CODE ANN. § 143 (Vernon 2011).

[29] TEXAS NAT. RES. CODE ANN. § 88 (Vernon 2011).

[30] TEXAS OCC. CODE ANN. § 2156.005 (Vernon 2011).

[31] *U.S. v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010).
[32] Erik Luna, *Indigent Representation: A Growing National Crisis Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary*, U.S. House of Representatives (24 June 2009) 3.
[33] For guidelines on reversing overcriminalization, *see* Marc A. Levin and Vikrant P. Reddy, "Twelve Steps for Overcoming Overcriminalization," Texas Public Policy Foundation (2012); Ronald M. Dworkin, *Law's Empire* 143 (1986), ("In one department, criminal law, Anglo-American practice…believe[s] that no one should be found guilty of a crime unless the statute or other piece of legislation establishing that crime is so clear that he must have known his act was criminal, or would have known if he had made any serious attempt to discover whether it was. In the United States, this principle has the status of a constitutional principle, and the Supreme Court has on many occasions overturned criminal convictions because the supposed crime was too vaguely defined to give the necessary notice.") (citations omitted).
[34] Ibid. at 519 ("[C]riminal codes have at least three important consequences. First, they shift lawmaking from courts to law enforcers. Because criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators. Broad criminal law thus means that the law as enforced will differ from the law on the books. And the former will be defined by law enforcers, by prosecutors' decisions to prosecute and police decisions to arrest.").
[35] Marcus Tullius Cicero, *The Treatise of Cicero, De Officiis*; or, *His Essay on Moral Duty* (Bell & Bradfute: 1798), trans. William McCartney.
[36] Robinson, et al, *Modern Irrationalities of American Criminal Codes*, 100 J. CRIM. L. & CRIMINOLOGY at 713.
[37] Although several of the state commissions are highly admired, the commission formed by the federal government is not a particularly good model, and a former U.S. Attorney General has suggested that a different commission, with a broader mandate, is necessary. See Testimony of Dick Thornburgh, Hearing on Overcriminalization and the Need for Legislative Reform Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. (22 July 2009) 8, ("A Commission should be constituted, perhaps in connection with Senator Webb's National Criminal Justice Commission Act, to review the federal criminal code, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated mens rea requirements, and consider overcriminalization issues.").
[38] HB No. 2804, §1(c).
[39] Ibid. §1(d).
[40] Robinson, et al, *Modern Irrationalities of American Criminal Codes*, 100 J. CRIM. L. & CRIMINOLOGY at 712.
[41] I have borrowed this phrasing from an opinion written by the Honorable Richard Posner of the 7th Circuit Court of Appeals: "[S]ometimes, though the law is obscure to the population at large and nonintuitive, the defendant had a reasonable opportunity to learn about it….We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18 [of the United States Code]. *It would be preposterous to suppose* that someone from Wilson's milieu is able to take advantage of such an opportunity. If none of the conditions that make it reasonable to dispense with proof of knowledge of the law is present, then to intone 'ignorance of the law is no defense' is to condone a violation of fundamental principles for the sake of a modest economy in the administration of criminal justice." *United States v. Wilson*, 159 F.3d 280, 295 (7th Cir. 1998) (emphasis added).
[42] G.K. Chesterton, "The Sign of the Broken Sword" *Favorite Father Brown Stories* (Dover: London 1993) 42.

About the Author

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