

Overcriminalization and the Importance of Proportionality in Sentencing

Bill Analysis: HB 544, HB 1069, & HB 2849

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House Bill 544 (HB 544) by Rep. Tim Kleinschmidt,¹ HB 1069 by Rep. Ruth Jones McClendon,² and HB 2849 by Rep. James White³ are different “overcriminalization” bills, but they are philosophically connected. At their core, the bills are about how criminal offenses must be punished with commensurate penalties. The Enlightenment philosopher Cesare Beccaria, whose theoretical works on criminology influenced Thomas Jefferson and several other American founders, put it succinctly:

[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.⁴

HB 544 (Kleinschmidt):

Under current law, theft of aluminum, bronze, copper, and brass is a state jail felony if the amount of metal stolen is valued at less than \$20,000. HB 544 would alter section 31.03(e) of the penal code so that the offense is only a state jail felony if the value of the metal stolen is between \$500 and \$20,000. Theft of metals valued at less than \$500 would, therefore, be punishable only as Class B or Class C misdemeanors. The bill addresses a common sense reality: there is a difference between stealing a few hundred dollars worth of metal and stealing tens of thousands of dollars worth of metal. The place where this line is drawn is necessarily arbitrary, but a line must be drawn, and HB 544 offers a workable proposal.

If HB 544 becomes law, theft of metal valued at less than \$500 will still be a crime, as should be the case. In fact, theft of metal valued from \$51-\$500 would be a Class B misdemeanor punishable by up to 180 days in jail.

Texasans do not expect all punishments for all crimes to be as punitive as possible; instead they have a sense of proportion. HB 544 appreciates that basic truth and brings Texas criminal law a step closer towards being a system in which the punishment truly fits the crime.

HB 1069 (McClendon):

This bill increases the offense thresholds for misdemeanor and state jail property offenses in section 31.01(e) of the penal code. (Felony property offenses are left untouched.) The state must draw a line between what constitutes a Class C and a Class B misdemeanor, and it must draw a line between what constitutes a Class B and a Class A. Again, these lines will necessarily be arbitrary. It is important, however, to periodically revisit these offense thresholds and update them to keep pace with inflation. Under current law, an offender accused of stealing \$51.00 is guilty of a Class B misdemeanor (the crime of theft of \$51-\$500), which is punishable by up to 180 days in county jail. Furthermore, because the offense is punishable with possible incarceration, the offender is entitled to state-appointed counsel, an additional cost burden.⁵ Theft of \$51.00 may have been an offense that policymakers thought justified the possibility of incarceration at the time of the last penal code revision in 1993, but in the intervening years, inflation has grown by about 70 percent, and the offense thresholds have not been commensurately increased. Reasonable people may differ on the sensibility of the 1993 threshold placements, but at the very least, the threshold amounts ought to be adjusted periodically to track inflation.

These are the misdemeanor and state jail felony offense thresholds for theft under current law:

Class C Misdemeanor	Under \$51
Class B Misdemeanor	\$51-\$500
Class A Misdemeanor	\$501-\$1,500
State Jail Felony	\$1,501-\$20,000

These are the offense thresholds generally adjusted to keep pace with inflation:⁶

Class C Misdemeanor	Under \$81
Class B Misdemeanor	\$81-\$1,500
Class A Misdemeanor	\$1,501-\$5,000
State Jail Felony	\$5,001-\$20,000

These are the offense thresholds suggested in HB 1069:

Class C Misdemeanor	Under \$101
Class B Misdemeanor	\$101-\$1,000
Class A Misdemeanor	\$1,001-\$3,000
State Jail Felony	\$3,001-\$30,000

The methodology behind the numbers suggested in HB 1069 is not clear. For Class C misdemeanors, the bill recommends an offense threshold that is higher than the rate of inflation would indicate is necessary. For Class B's, Class A's, and state jail felonies, however, the legislation actually recommends offense thresholds that are lower than the rate of inflation would indicate is necessary.

Nevertheless, the legislation is a step in the right direction. The offense thresholds offered in HB 1069 would better prioritize law enforcement and corrections resources on more important higher-level theft offenses.

HB 2849 (White):

This bill amends sections 28.03 and 23.08 of the penal code (the sections dealing with criminal mischief and graffiti) to increase the offense thresholds.

Under current law, damage or destruction of under \$20,000 to “a place of worship or human burial, a public monument, or a community center” is a state jail felony. HB 2849 would increase the damage threshold to \$30,000 to keep pace with inflation.

Furthermore, under current law, damage or destruction of \$1,500-\$20,000 to “a public or private elementary school, secondary school, or institution of higher education” is a state jail felony. HB 2849 would increase the damage threshold to \$3,000-\$30,000 to keep pace with inflation.

Finally, under current law, criminal mischief resulting in damage or destruction of less than \$100,000 is a third-degree felony. HB 2849 would increase this amount to \$150,000, once again, to keep pace with inflation.

The methodology behind these figures is clear and consistent: the proposed offense thresholds generally match the national increases in inflation.

Conclusion

In 1961, Professor Herbert Wechsler led the American Law Institute's effort to draft a Model Penal Code, one guided by the principle that the structure and content of a criminal code should reflect “contemporary, reasoned judgment.”⁷ Professor Wechsler and his colleagues recognized that criminal statutes (unlike constitutions⁸) must be regularly updated, in part, to ensure that the structure of the penal code is not causing waste and inefficiency in the criminal justice system.⁹ On this score, HB 544, HB 1069, and HB 2849 are all a step in the right direction. ★

¹ H.B. NO. 544, 83rd Session (2013).

² H.B. NO. 1069, 83rd Session (2013).

³ H.B. NO. 2849, 83rd Session (2013).

⁴ Cesare Beccaria, *On Crimes and Punishments* (ed. Richard Bellamy), (Cambridge: Cambridge University Press, 1995), 19 (emphasis added).

⁵ *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972) (“The United States Supreme Court rejects...the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer.”)

⁶ These figures were calculated using the Inflation Calculator provided by the Bureau of Labor Statistics. These figures do not exactly reflect inflation-adjusted thresholds; they have been rounded slightly for clarity.

⁷ Herbert Wechsler, *The Model Penal Code and the Codification of American Criminal Law*, in *CRIME, CRIMINOLOGY, AND PUBLIC POLICY* 419, 424-25 (R. Hood, ed. 1976).

⁸ On the distinction between general principles set forth in constitutions and policy-directed aims set forth in statutes, see generally, Friedrich A. Hayek, *The Constitution of Liberty*, 178-79 (Chicago: University of Chicago Press, 1978).

⁹ 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)).

