



# Policy *Perspective*

## Business Overcriminalization in the 80th Legislative Session

by **Marc Levin, Esq.**  
Director, Center for Effective Justice

**T**exas lawmakers have created over 1,700 criminal offenses. This excludes offenses created by state agencies through rule-making. For example, under Occupations Code, § 165.151, it is a Class A misdemeanor (up to one year in jail) for violating “any rule” of any professional licensing board. Additionally, there are thousands of criminal ordinances created by cities, ranging from a San Antonio ordinance that regulates the shape and packaging of ice to a Dallas ordinance that bans dancing at clubs along Greenville Avenue.

Despite the glut of criminal offenses, Texas legislators are considering dozens of proposals to create still more offenses and enhance existing offenses that concern conduct outside of the Penal Code and not traditionally thought of as criminal. Fortunately, there are also a handful of bills pending that would rein in the ever-expanding scope of state criminal law.

### LEGISLATION THAT WOULD EXACERBATE OVERCRIMINALIZATION

The largest category of bills creating new criminal offenses are those that would expand the number of licensed occupations, thereby attaching to the newly government-regulated jobs criminal penalties for practicing without a license or violating any occupational rule.

These bills include:

- HB 463 creates a licensing and regulatory scheme for air conditioning and refrigeration contractors.
- HB 689 creates a licensing and regulatory scheme for landmen.
- HB 703 creates a licensing and regulatory scheme for lactation consultants.
- HB 1281 creates a licensing and regulatory scheme for certain journeymen and apprentice sheet metal workers, including requiring 8,000 hours of work experience and authorizing a detailed state written exam with questions on federal air quality standards.
- HB 2211 & SB 1120 create a licensing and regulatory scheme for automotive shops, automotive technicians, and automotive service writers, advisors, and estimators.
- HB 2764 creates a licensing and regulatory scheme for swimming pool and spa installers.
- HB 1985 & SB 832 create a licensing and regulatory scheme for interior designers, including up to a \$5,000 fine per day for each day a violation of state rules occurs.

900 Congress Avenue  
Suite 400  
Austin, TX 78701  
(512) 472-2700 Phone  
(512) 472-2728 Fax  
[www.TexasPolicy.com](http://www.TexasPolicy.com)

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

**QuickFact:**

Consumer choice can also be compromised at the altar of standardization, as demonstrated by the cases of African hairbraiders denied cosmetology licenses in many states.

While not all of these bills expressly create a new criminal penalty, the aforementioned default general criminal penalty of a Class A misdemeanor for violating any rule under the Occupations Code would apply. In addition to expanding the scope of criminal penalties, subjecting an occupation to government regulation creates a mechanism to reduce competition among providers, often resulting in higher prices for consumers. Consumer choice can also be compromised at the altar of standardization, as demonstrated by the cases of African hairbraiders denied cosmetology licenses in many states.<sup>2</sup> Moreover, market mechanisms ranging from word-of-mouth to the Better Business Bureau to the website Angieslist.com have proven successful in helping consumers select qualified providers of goods and services. At hearings, it often becomes apparent that these bills result from either an isolated example of a bad actor in the occupation or an effort by members of the occupation and their labor union leaders to stem the flow of new entrants, thereby artificially raising wages. The Sunset Commission Occupational Licensing Model recommended that “Criminal penalties should exist only for agencies overseeing practices that can have dire consequences on the public health and welfare.”<sup>3</sup>

There are also several other bills that threaten to criminalize legitimate business activities. House Bill 617 would require counties to adopt residential building codes for unincorporated areas with a criminal penalty. While commercial home builders and remodelers must already comply with performance standards set by the Texas Residential Construction Commission (TRCC), this bill would require counties to adopt a code for construction and remodeling that

could go beyond the state standards. The bill would also make a violation of orders under such a county code a Class C misdemeanor whereas TRCC rules are enforced through administrative penalties. Also, unlike the state standards, HB 617 would apply to individuals who build, remodel, enlarge, or repair their own residence.

House Bill 553 would create a second degree felony (up to 20 years in prison) for a person working at an electric utility that is found to have engaged in so-called “market power abuses.” This term is so vague as to place this offense on shaky legal ground. The criminal penalty provision in this legislation states:

Sec. 39.159. CRIMINAL PENALTY. (a) A person who knowingly violates Section 39.157 or a rule adopted or order issued by the commission under that section commits an offense. (b) An offense under this section is a felony of the second degree.

This language raises the specter of rank-and-file utility workers being imprisoned for simply implementing the decisions of superiors, since there is no requirement that the person actually have control over determining company policy. Moreover, this offense is of limitless scope because it can apply to any future rule or order adopted by the Public Utility Commission (PUC). These blanket provisions are dangerous because they effectively require all businesses and individuals subject to agency rulemaking to monitor the issuance and modification of such rules on a weekly basis.

House Bill 59 is on the front-burner because it addresses the recent crisis concerning the disclosure of records containing Social Secu-

<sup>2</sup> See <http://www.ij.org/publications/other/national-hairbraiding.html>.

<sup>3</sup> See <http://www.sunset.state.tx.us/licensemodel05.pdf>.

rity numbers by county clerks. While there is merit in the bill's provisions ensuring that a government entity does not release a person's identifying information without their knowledge and without an opportunity to block such a release, the bill also includes some other provisions that would affect businesses and individuals. For example, it would make it a third degree felony (up to 10 years in prison) for various acts and omissions relating to Social Security numbers, including to "require an individual's Social Security number to allow the individual access to the products or services provided by the person, unless required by state or federal law." Similarly, it would be a felony to "require an individual to use a Social Security number to access an Internet website." Many bank websites authenticate their online customers logging in using their Social Security number. The legislation also creates an offense for denying a product or service to someone based on their written request to discontinue using their Social Security number in a manner prohibited by the bill. These prohibitions could have unintended consequences and the market already provides consumers concerned about this with a remedy: choose not to do business with companies that require their Social Security number.

Other problematic legislation (HB 441) would make it a second degree felony for secondhand metal dealers to buy metal without filling out various documents disclosing details about the transaction and the person from whom they bought the metal. Secondhand metal dealers are already regulated under Section 1956 of the Occupations Code. While this proposed legislation is designed to crack down on thieves who steal metal from construction sites and other locations and then sell their booty, the criminal penalty it expands and enhances also applies to

dealers who buy metal, not just those who sell the metal to the dealer. Moreover, the proposed penalty enhancement of up to 20 years in prison contains no requirement that the omission in filling out the proper paperwork or maintaining the records of the metal purchase occur in a transaction that involves stolen goods. Although it appears this will be changed, HB 441, as currently worded, would make it a second degree felony if a secondhand metal dealer violates Section 1956.008, a part of the statute not changed by the bill which requires that metal dealers report all purchases to the state within seven days or the next working day if it is bronze material.

The Senate version of this secondhand metal bill (SB 1154) was revised in committee to reduce the penalty to a Class B misdemeanor for the first offense and a Class A misdemeanor for repeat offenses. Nevertheless, we recommend that civil and administrative penalties be utilized instead of criminal penalties, unless the secondhand metal dealer knowingly traded in stolen goods.

## LEGISLATION THAT WOULD REDUCE OVERCRIMINALIZATION

There are several bills pending that could reduce the overcriminalization of legitimate business activities. First, HB 371 would direct the Office of Court Administration to conduct a study on the conversion of various Class C misdemeanors to civil penalties. While it is unfortunate that the bill does not direct the study to examine which offenses should be abolished altogether, the study's findings could nonetheless serve as an impetus for both conversion and elimination of Class C misdemeanors that unnecessarily burden business activities.

### TalkingPoint:

House Bill 371 would direct the Office of Court Administration to conduct a study on the conversion of various Class C misdemeanors to civil penalties.

**QuickFact:**

The Texas Constitution guarantees all defendants, even in Class C misdemeanor cases, the right to a jury trial, but a person assessed a civil penalty by a regulatory agency does not have this right.

Among the Class C misdemeanors already in statute:

- Transporting tomatoes “in an unauthorized container or subcontainer.” (Ch. 92 Agriculture Code)
- Knowingly “disposes of, discards, or stores a pesticide or pesticide container in a manner that the person knows or should know is likely to cause injury to man, vegetation, crops, livestock, wildlife, or pollinating insects.” A criminal offense for endangering another person is one thing, but pollinating insects? (Ch. 76 Agriculture Code)
- Sale of unpackaged food in violation of state regulations, including one which requires that the seller “post in the immediate display area a conspicuous sign that instructs the customer on the proper procedure for dispensing the food.” (Ch. 438 Health & Safety Code)
- Operating a junkyard or an automotive yard without “a solid barrier fence at least eight feet high” that is “painted a natural earth tone color” and does not “have any sign appear on its surface other than a sign indicating the business name.” (Ch. 397 Transportation Code)

There are hundreds more similarly questionable criminal offenses regulating ordinary business activities that are Class A or B misdemeanors, and even felonies, but as currently worded, the study commissioned by HB 371 would only cover the conversion of Class C misdemeanors.

The conversion of some Class C offenses to civil violations must be done with great care to ensure that individuals penalized have recourse to an independent hearing, such as before an administrative law judge. The Texas Constitution guarantees all defendants, even in Class C misdemeanor cases, the right to a jury trial, but a person or busi-

ness assessed a civil penalty by a regulatory agency does not have this right. However, since a Class C misdemeanor is a fine-only offense capped at \$500, most defendants, even those who are not guilty, are unlikely to request a jury trial due to the time involved and the expense if they were to hire an attorney. Consequently, a more efficient but similarly impartial procedure in the civil context could be advantageous. Also, a civil penalty allows a person to fill out a job application stating that they have not been convicted of a criminal offense. Nonetheless, offenses that are entirely unnecessary or involve excessive government intrusion into the free enterprise system should not simply be changed to civil infractions, but eliminated altogether.

In addition, HB 2391 would amend Section 14.06 of the Code of Criminal Procedure to give peace officers the option of issuing a citation and notice to appear for some Class B misdemeanors. Current law requires that a Class B offender be arrested and taken before the magistrate, which usually means being placed in county jail until bail is posted. Most Class B misdemeanors are regulatory in nature and do not involve an immediate danger to public safety. Those that do, such as driving while intoxicated, are not covered by this legislation, meaning that arrest and appearance before the magistrate would remain mandatory. The several hundred Class B misdemeanors include misrepresenting the effect of a citizen petition, invalid inspection sticker, driving stock to market without a bill of sale, and mislabeling a container of fruit. The Foundation has worked with Chairman Madden on this legislation, which is supported by the Travis County Sheriff’s office because a citation and notice to appear in cases where there is no danger to public safety could save officers an average of three hours of arrest and booking time as well as space in the county jail.

House Bill 461 and HB 637 would repeal legislation passed last session that created a criminal offense for failure to comply with the National Animal Identification System (NAIS). While currently a voluntary program, the U.S. Department of Agriculture (USDA) plans to eventually mandate that all farmers and ranchers—and perhaps even owners of certain pets like birds—register their animals with the government using a radio frequency tag and then report all movements of such animals to the government. In states that fail to set up their own bureaucracies for this purpose, animal owners would be required to report directly to the federal government. However, due to an outpouring of opposition, the USDA has postponed mandatory implementation, although they are paying trade groups to sign up their members and procedures for registrants to remove themselves from the scheme are unclear.

As a result of HB 1361 enacted last session, Chapter 1611 of the Agriculture Code makes it a Class C misdemeanor to violate any animal identification rule promulgated by the Animal Health Commission. This kind of broad language represents an abdication of the Legislature's unique role to specifically delineate criminal offenses, effectively allowing a state bureaucracy to create its own offenses on an ad hoc basis. Furthermore, it is a Class B misdemeanor (up to 180 days in jail) for multiple convictions and each day a violation occurs (such as an animal not being tagged) is a separate offense. Both HB 461 and HB 637 would ensure that all animal identification in Texas is voluntary and repeal this criminal penalty.

House Bill 348/SB 369 would correct current law that makes it a misdemeanor and subjects a driver to arrest if any part of a per-

sonal or commercial auto license plate is obscured, including the “design features” such as the stars in the Texas sky, even though the plate number is fully visible. Earlier this year, a decision by the Court of Criminal Appeals—upholding but criticizing this law—forced many car dealers to wastefully discard thousands of plate holders that obscured these “design features.” Under these proposed bills, so long as the word “Texas” and the license plate number were visible, the plate would be in compliance. These bills have been approved by their respective chamber and Governor Rick Perry has said he will happily sign either. That will put an end to the madness, which has resulted in 200,000 motorists being pulled over for a slightly obscured plate with several hundred receiving tickets.<sup>4</sup>

Finally, another aspect of overcriminalization is the disqualification of Texas' 2 million ex-offenders, including those who committed petty crimes and minor regulatory offenses, from hundreds of occupations. Working with the Foundation, Senate Criminal Justice Chairman John Whitmire filed SB 1750 that would rectify this problem by allowing applicants for occupational licenses who are otherwise qualified, but are denied because of a prior offense, to obtain a provisional license that would be valid for six months. The license would become permanent after that time assuming the person was not revoked from probation or parole and did not violate any occupational rules. The bill excludes applicants who committed a 3(g) offense, which includes murder, rape, and the other most serious violent crimes, and sexually violent offenders. Also excluded are those who committed an offense in the last five years that directly relates to the duties and responsibilities of the occupation.

### TalkingPoint:

Another aspect of overcriminalization is the disqualification of Texas' 2 million ex-offenders, including those who committed petty crimes and minor regulatory offenses, from hundreds of occupations.

<sup>4</sup> See [http://dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-license\\_21tex.ART.State.Edition1.4457bca.html](http://dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-license_21tex.ART.State.Edition1.4457bca.html).

**QuickFact:**

There are some 168 state statutes and regulations that can be used to bar many ex-offenders from numerous occupations from plumber to electrician to manicurist.

There are some 168 state statutes and regulations that can be used to bar many ex-offenders from numerous occupations from plumber to electrician to manicurist. Many of these restrictions are in the Texas Administrative Code, meaning that they resulted from bureaucratic rulemaking rather than the vote of elected officials. For example, many provisions like Chapter 597 of the Administrative Code applying to the Structural Pest Control Board, allow state agencies to revoke a license for any misdemeanor involving moral turpitude. Studies show ex-offenders who are employed are three times less likely to recidivate and that Texas crime victims only collect half of all restitution they are owed, largely because offenders are not earning money.<sup>5</sup> Moreover, the state spends over \$16 million on Project RIO to reintegrate ex-offenders into the workforce, a program that the Texas Workforce Commission has indicated could be more effective if more occupations were open to ex-offenders.

The *Austin American-Statesman* reported earlier this year that the Department of Public Safety's Private Security Bureau in 2006 alone "cited an unacceptable criminal history to summarily deny nearly 10,000 applicants the opportunity to work in one of the 16 professions it regulates," including locksmiths and guard dog trainers.<sup>6</sup> Despite contrary rulings by several administrative law judges, the Bureau refuses to reinstate highly respected lifelong locksmiths whose licenses were revoked for petty crimes decades ago, insisting instead that any criminal offense—no matter how ancient—is an automatic disqualifier. The *Statesman* documented that some of these locksmiths ironically worked for DPS and local police

departments, receiving excellent reviews for their performance.

In addition to SB 1750 which would address this issue across the broad spectrum of licensed occupations, HB 3203 would specifically solve the problem concerning occupations regulated by the Private Security Bureau. Unlike the Texas Department of Licensing and Regulation (TDLR) which has allowed all but 519 of the 21,000 electricians with a criminal record to nonetheless obtain or keep a license after a review and in some instances a hearing, the Bureau does not use any discretion in reviewing past criminal records. House Bill 3203 would limit the Bureau's authority to deny and revoke licenses to Class B misdemeanor offenses or greater that relate to the person's fitness to perform the occupation. This standard recognizes that, while a thief is not suited to be a locksmith, someone convicted of a minor alcohol or drug possession offense years ago, and who has been a law abiding locksmith for decades, should not have their livelihood destroyed by state regulators.

## CONCLUSION

For years, the Legislature, as well as municipal governments, have created a vast labyrinth of criminal laws that relate to ordinary business activities. These statutes often serve as traps for the unwary, trivialize the traditional use of criminal law, and unduly burden a justice system already struggling to enforce the bread and butter crimes that protect public safety.

While business-related offenses likely account for only a small portion of the total number of criminal cases, the state's over-

<sup>5</sup> See <http://www.tucsonweekly.com/gbase/Currents/Content?oid=82342-33k> & <http://www.crimevictimsinstitute.org/doc/Restitution%20Report.pdf>.

<sup>6</sup> See <http://www.statesman.com/news/content/news/stories/local/02/18/18locksmith.html>.

burdened justice system could benefit from any relief. One illustration that the volume of criminal cases is unmanageable came earlier this year in the City of Dallas. The City canceled its warrant round-up of 400,000 residents with outstanding Class C misdemeanor citations at the behest of Dallas County, which informed the City that due to the overflow at the Dallas County Jail, there was no room for more offenders.<sup>7</sup> In fact, the Dallas County Jail released 700 offenders in February, including home burglars, in order to comply with Jail Standards Commission orders concerning crowding. Peace officers are also in short supply. New York City, the safest large city in the nation, has twice the

police strength per capita as Dallas, which is the nation's most unsafe large city.<sup>8</sup>

The 80th Legislature must continue the trend set in the 79th Legislature when the only new non-traditional offense created was the animal identification law, despite many proposals for unnecessary new crimes. Moreover, by reining in the excesses of existing criminal offenses, lawmakers can chart a new course that improves the state's business climate and enhances public safety by targeting limited law enforcement, prosecutorial, and judicial resources at those who pose a true danger to their fellow Texans. ★

#### **QuickFact:**

Dallas County Jail released 700 offenders in February, including home burglars, in order to comply with Jail Standards Commission orders concerning crowding.

<sup>7</sup> See <http://www.encyclopedia.com/doc/1Y1-103351517.html>.

<sup>8</sup> See <http://www.dallascrime.com>.

## About the Author

Marc A. Levin, Esq., is the director of the Center for Effective Justice at the Texas Public Policy Foundation. Levin is an Austin attorney and an accomplished author on legal and public policy issues.

Levin has served as a law clerk to Judge Will Garwood on the U.S. Court of Appeals for the Fifth Circuit and Staff Attorney at the Texas Supreme Court.

In 1999, he graduated with honors from the University of Texas with a B.A. in Plan II Honors and Government. In 2002, Levin received his J.D. with honors from the University of Texas School of Law.

Levin's articles on law and public policy have been featured in publications such as the *Wall Street Journal*, *USA Today*, *Texas Review of Law & Politics*, *National Law Journal*, *New York Daily News*, *Jerusalem Post*, *Toronto Star*, *Atlanta Journal-Constitution*, *Philadelphia Inquirer*, *San Francisco Chronicle*, *Washington Times*, *Los Angeles Daily Journal*, *Charlotte Observer*, *Dallas Morning News*, *Houston Chronicle*, *Austin American-Statesman*, *San Antonio Express-News* and *Reason Magazine*.

## About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute guided by the core principles of individual liberty, personal responsibility, private property rights, free markets, and limited government.

The Foundation's mission is to lead the nation in public policy issues by using Texas as a model for reform. We seek to improve Texas by generating academically sound research and data on state issues, and recommending the findings to policymakers, opinion leaders, the media, and general public.

The work of the Foundation is primarily conducted by staff analysts under the auspices of issue-based policy centers. Their work is supplemented by academics from across Texas and the nation.

Funded by hundreds of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

