

BUSINESS OVERCRIMINALIZATION

THE ISSUE

Criminal law is not just for criminals anymore—at least not criminals as we have traditionally defined them. Texas lawmakers have created over 1,700 criminal offenses. The traditional criminal offenses like murder, rape, and theft are found in the Penal Code, but there are over 1,500 offenses outside of the Penal Code, many of which relate to ordinary business activities in fields such as agriculture, health care, natural resources, and insurance. There are 11 offenses alone relating to oysters.

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, because it is assumed that criminal laws cover only those activities that are inherently wrong, no such balancing occurs in criminal proceedings. 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 has traditionally been distinguished by the requirement that a criminal must have a guilty state of mind, expressed in the Latin term *mens rea*.

THE FACTS

Examples of excessive Texas criminal laws include:

- ★ Under Agriculture Code, Chapter 76, it is a Class A misdemeanor (up to one 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 specifies that it is a second degree felony (up to 20 years in prison) for a person who “fails 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 (up to one year in jail) for violating “any rule” of any professional licensing board.

RECOMMENDATIONS

- ★ *Avoid creating new criminal offenses, especially for non-fraudulent business activities.* If a new law is necessary, civil fines and revocation of state permits and licenses can be used as enforcement mechanisms.

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- ★ *Apply Water Code provision to other regulatory areas that allows state agencies to review local prosecutions.* Section 7.203 provides a safe harbor for business owners who come into compliance by giving the Texas Commission on Environmental Quality the ability to block local prosecutions under the regulations it enforces. This safe harbor provision should be applied elsewhere to ensure that regulated businesses do not satisfy the state agency, rectify the problem, and pay administrative fines, only to face duplicative local prosecutions.
- ★ *Revise catch-all statutes.* Blanket statutes that allow agencies to create rules that have criminal penalties should be rewritten so that offenses are limited to violations of statute and non-compliance with rules is enforced by civil penalties and revocations of permits. In addition to Occupations Code, §165.151, other blanket statutes include:
 - ★ Agriculture Code, Chapter 1611: Class C misdemeanor for violation of any animal identification rule promulgated by the Animal Health Commission. Class B misdemeanor (up to 180 days in jail) for multiple convictions.
 - ★ Health & Safety Code, Chapter 143: A person engaged in industrial homework commits an offense if they “otherwise violate this chapter or any provision of the employer’s permit or violates a rule adopted by the board.”
- ★ *Eliminate possibility of jail time for first-time conviction of a regulatory misdemeanor.* Modify Sections 12.21 and 12.22 of the Penal Code to rule out jail time for first-time convictions of misdemeanors other than those offenses listed in the Penal Code, Controlled Substances Act of the Health & Safety Code, fleeing a police officer under Transportation Code § 545.421, and any others that involve inherent wrongs and/or actual victims. This would relieve counties of the cost of indigent legal representation, which is required by the U.S. Constitution only if jail time is possible.

RESOURCES

- *Not Just for Criminals: Overcriminalization in the Lone Star State* by Marc Levin, Texas Public Policy Foundation (Apr. 2005) <http://www.texaspolicy.com/pdf/2005-04-pp-overcrim.pdf>.
- *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>.
- *Sometimes There Ought Not Be a Law* by Paul Rosenzweig and Steve Muscatello, Heritage Foundation (Apr. 2005) <http://www.heritage.org/Press/Commentary/ed040605a.cfm>.

