

## The Rule of Lenity

### *Bill Analysis: House Bill 2568*

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**H**ouse Bill 2568, by Rep. Paul Workman, would amend chapter 311 of the Texas Government Code by codifying the rule of lenity.<sup>2</sup> The committee substitute will clarify that the legislation does not apply to offenses in the Penal Code and Controlled Substances Act. It will also exempt those offenses relating to the operation of a motor vehicle. Accordingly, the focus of the bill is to ensure that the rule of lenity is applied to those approximately 1,500 non-traditional offenses outside of these codes, most of which relate to ordinary business activities.

The rule of lenity is a technique of statutory interpretation, which instructs a court to resolve ambiguities about whether conduct is criminally prohibited in favor of the defendant.<sup>3</sup> The U.S. Supreme Court has explained the rule using a sports analogy:

Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.<sup>4</sup>

This approach to statutory interpretation is almost universally unquestioned in criminal prosecutions—except when it comes to regulatory offenses. One expert commented:

Not only has the rule of lenity been ignored in the context of regulatory offenses, it has also been turned on its head. When an ordinary criminal statute is ambiguous, the courts give the benefit of the doubt to the accused, but when a regulatory provision is ambiguous, the benefit of the doubt is given to the prosecutor.<sup>5</sup>

The rule of lenity is a canon of construction that dates back to English common law. Canons of construction are among the techniques that are taught to law students and which become part of the norms of the practice of law. Ideally, they need not be codified in a state code. In the case of the rule of lenity, however, where a revered principle is eroding, codification would likely have a salutary effect because it would require that the rule be applied in all prosecutions.

The American Legislative Exchange Council has approved the Rule of Lenity as model legislation. Florida has a particularly strong, codified rule of lenity, providing that “when the language [of a statute] is susceptible of differing constructions, it shall be construed most favorably to the accused.”<sup>6</sup> The rule, however, is not as strongly codified in Texas.<sup>7</sup>

The rule of lenity is consistent with the presumption of innocence and the need for laws to provide warning so that individuals and businesses are put on notice about what conduct is criminal. Perhaps most importantly, enshrining the rule of lenity discourages careless and vague drafting by legislators.

Conservative legal experts and judges are well known for advocating the need to strictly interpret the law when dealing with constitutional provisions and civil statutes, so as to avoid legislating from the bench by expanding the meaning of a provision beyond what was intended and specified. The rule of lenity is compatible with this notion, as the conviction of a person for conduct that is not clearly prohibited may not only undermine the legitimacy of the law by going beyond the plain meaning and intent of the statute, but it also can result in an individual's permanent loss of liberty. If a defendant is acquitted because a statute was unclear as to whether the conduct was prohibited and the legislature did in fact intend to include the conduct, it may revise the statute at its next opportunity. ★

<sup>1</sup> The material in this bill analysis is taken substantially from Marc A. Levin & Vikrant P. Reddy, "Engulfed by Environmental Crimes: Overcriminalization on the Gulf Coast," Texas Public Policy Foundation (Dec. 2012) 5; *see also* Marc A. Levin and Vikrant P. Reddy, "12 Steps for Overcoming Overcriminalization," Texas Public Policy Foundation (May 2012) 1.

<sup>2</sup> HB 2568, 83rd Session (2013).

<sup>3</sup> Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts § 49 (2012); *see also* Dan Levin and Nathaniel Stewart, "Whither the Rule of Lenity?" *Engage: Journal of Federalist Society Practice Groups* 10 no. 3 (2009): 1.

<sup>4</sup> *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (citations omitted).

<sup>5</sup> Timothy Lynch, "Polluting Our Principles" 49 in *Go Directly to Jail: The Criminalization of Almost Everything*, ed. Gene Healy, Cato Institute (Dec. 2004) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) ("[It is] not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.")).

<sup>6</sup> FLA. STAT. § 775.021(1).

<sup>7</sup> *See* Roger J. Marzulla, "Lenity: An Essential Rule for Interpreting Environmental Crimes Statutes" *Engage: Journal of Federalist Society Practice Groups* 13 no. 3 (October 2012) (providing the status of the rule of lenity throughout the United States in the chart "The Rule of Lenity by Jurisdiction").

