Arresting Overcriminalization and Right-Sizing the Criminal Justice System

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Texas Public Policy Foundation (TPPF) • Right on Crime

Introduction to TPPF

- Mission:
  - Individual Responsibility
  - Free Enterprise
  - Limited Government
  - Private Property Rights

- We apply these foundational principles to criminal justice, bringing together stakeholders and working with policymakers and allies across the spectrum.

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The TPPF Portfolio

- Fiscal and tax restraint

- Civil justice reform
  (worked to enact loser pays in 2011)

- Center for Tenth Amendment Action

- Deregulation of (over) regulated industries like insurance and utilities

- Center for Effective Justice launched in March 2005; Right on Crime in December 2010

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Right on Crime Enters the Field

- Jeb Bush, Rick Perry, Newt Gingrich, Bill Bennett, Ed Meese, Ken Cuccinelli, Grover Norquist, Larry Thompson, J.C. Watts, George Kelling, and John Dilulio endorse ROC's "Statement of Principles"

- Statement supports reining in growth of non-traditional criminal laws, cost-effective alternatives for nonviolent offenders, emphasis on restitution and treatment, and performance measures.

Overcriminalization Challenges at the State Level

Regulatory Offenses on the Rise

- These offenses typically involve ordinary business and recreational activities and no individual victim.

- States where criminal laws have been counted reveal about 2,000 each in Texas and Arizona.

- There are 11 felonies in Texas relating to harvesting oysters.

- Nearly 20 states have default *mens rea* provisions, including Ohio, enacted in 2014.

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The Withering Intent Requirement

- Many of these laws dispense with the traditional requirement of a culpable mental state. For example, of the 83 environmental criminal offenses in Florida, 52 are strict criminal liability offenses.

- Under federal law, corporate defendants have been held strictly criminally liable for deaths of migratory birds.

Justice Robert Jackson on *Mens Rea*

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Penalties Can Be Extreme

- In Alabama, "disposing of scrap ties in a manner that is not approved by the Environmental Management Act" is a felony punishable by up to 10 years in prison, even if there is no harm.

- Under the Texas Water Code, "transporting or causing or allowing to be transported for storage, processing, or disposal, any hazardous waste to any location that does not have all of the required permits" is punishable by up to 10 years behind bars, even if it is not actually stored at the location that lacks permits and there is no harm.

The Dangers of Deregulation

- Federal and state laws often confer virtually un-limited authority on agencies, effectively creating new criminal offenses via rulemaking.

- Louisiana RS 30:2421A creates an offense with a one-year prison term for "disposing of white goods (appliances) except in a collection or recycling facility in accordance with the rules and regulations of the department."

Vicarious Liability Offenses Make Doing Business Precarious

- Alaska's corporate criminal liability statute exposes organizations to criminal liability for the actions of their agents, as long as agents intended the organization to benefit from their actions.

- It also specifies that organizations cannot disclaim liability through codes of conduct or corporate policies; their liability extends beyond any merger, consolidation, or dissolution; and that convicted organizations can be subjected to larger fines than the convicted individual.

# Solutions to Rein in Overcriminalization at the State Level

Enact ALEC Model Legislation on Default *Mens Rea* & Rule of Lenity

- Model default *mens rea* provision requires that the defendant has a conscious object to engage in conduct of the nature constituting each element of the offense and with either specific intent to violate the law or with knowledge that the person's conduct is unlawful.

- Rule of lenity provision states that if there are two or more objectively reasonable interpretations of a criminal statute and, under one of them the defendant's conduct is not criminal, the benefit of the doubt goes to the defendant.

ALEC

American Legislative Exchange Council

LIMITED GOVERNMENT • FREE MARKETS • FEDERALISM

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Justice Scalia on the Rule of Lenity

- "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."

- Codified in Ohio, Florida, and Texas as of 9.1.2015 and sometimes applied by courts in other states.

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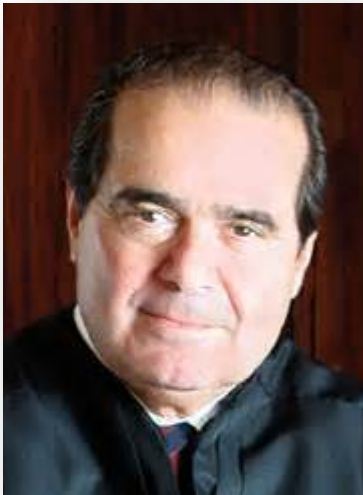
Reduce and Revise Criminal Laws

- Stop creating new criminal offenses as a method of regulating non-fraudulent business activities. Regulation is better handled through non-criminal administrative mechanisms and market forces, not the heavy stigma of criminal sanctions.

- Most new crimes aren't requested by prosecutors, but by rent-seekers who are seeking to stick a free government lawyer on a competitor.

Narrow What's Criminal and Jailable

- Convert many regulatory misdemeanors into civil violations or, at the least, remove jail time as an option for such offenses, provided that the non-jail penalty is satisfied.

- Economic conduct should be criminal only when it results in actual harm or danger, except if there is international fraud such as with Madoff.

Establish Holistic Review Process

- Create interim committee or commission to develop and submit comprehensive, consensus reform packages to lawmakers at the beginning of legislative sessions.

- These bodies would identify criminal laws that are unnecessary, duplicative, overboard, excessively vague, lacking an appropriate culpable mental state, create vicarious liability, or are otherwise deficient, and incorporate their work into one omnibus bill.

# Enact ALEC Transparency & Accountability in Criminal Law Measure

This requires:

- A detailed state and local fiscal note on all bills creating or enhancing an offense

- Reference to new offense or enhancement in caption of bill

- Elimination of provisions that delegate power to agencies to create offenses through rulemaking.

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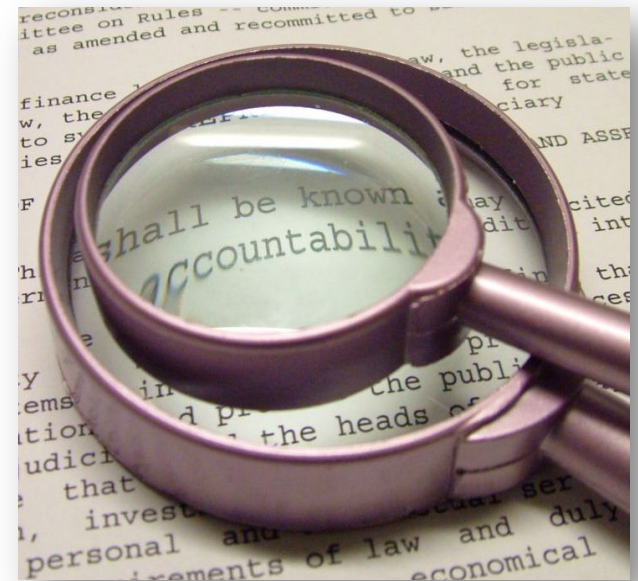
Institute Procedural Safeguards to Slow Growth in New Criminal Laws

- Require approval of new offenses and sentencing enhancements by the legislative committees overseeing the criminal justice system.

- Require sunrise review of new proposals similar to the sunset process, which is done for certain measures such as those involving occupational licensing in states like Arizona and Oregon.

- Sunset criminal laws outside of the Penal Code.

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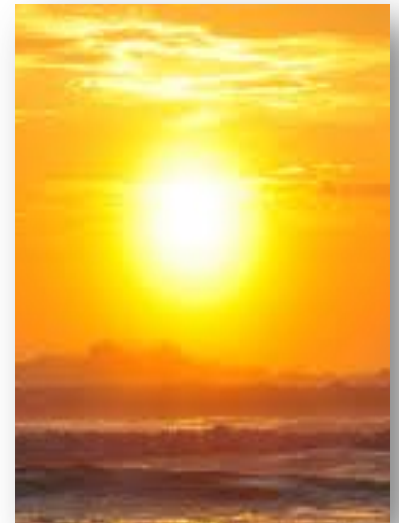
Suppressing Unnecessary Arresting

- Examples include overgrown lawns, overdue library books and business owners for illegal signs.

- Prohibit arrest for regulatory misdemeanors unless the charged individual fails to respond to a summons or there is emergency danger to humans.

- Being arrested can create a permanent record, compromise an individual's ability to defend himself, and be used in cases to gather personal information and effects when a court might not have found a basis for a warrant.

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Responding to Traditional Crimes

- Many states including Georgia, Ohio, Texas, and South Carolina have recently enacted reforms to strengthen alternatives for holding nonviolent offenders accountable.

- Effective approaches: risk/needs assessments, drug and other problem-solving courts, swift and certain sanctions and incentives, earned time for probationers, and ensuring supervision upon release.

Remove Barriers to Reentry

- Immunize employers and land lords from negligent hiring or renting suits. (Minnesota language says if no additional risk from job than simply being in society, then no liability.)

- In the last few years, Indiana, Texas and Minnesota have adopted sealing laws for certain nonviolent offenses.

- Allow most ex-offenders to obtain provisional occupational licenses.

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Texas Trend:
Lower Incarceration and Crime Rates

Year	FBI Index Crime Rate	Incarceration Rate per 100K
2005	4,857.1	681
2013	3,658.0	601
Percent Change	-24.7%	-11.7%

Texas' crime rate has reached its lowest level since 1968.

Other Issues to Weigh

- Civil asset forfeiture reform
- Solitary confinement (stop direct release)
- Pretrial justice, wrongful convictions, indigent representation, (Texas voucher pilot)
- Pushing back on overfederalization (SORNA and driver's licenses)
- Protecting policing advances, e.g. bkwindows
- Sentencing – uniformity vs. discretion to tailor
- Juvenile justice (status offenses/zero tolerance)
- Heroin in the Heartland

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Key Resources

- Heritage Foundation www.overcriminalized.com
- ALEC (including model legislation) www.alec.org
- Pew Public Safety Performance Project www.pewcenteronthestates.org
- Council of the State Governments www.csgjusticecenter.org
- Justice Fellowship www.justicefellowship.org
- TPPF and Right on Crime www.texaspolicy.com www.rightoncrime.com