



Overcriminalization



The Issue

Criminal law is not just for criminals anymore—at least not criminals as traditionally defined. Texas lawmakers have created over 1,700 criminal offenses, including 11 felonies relating to harvesting and handling oysters. Moreover, the 1,700 figure does not include the countless criminal offenses that have been created through agency rulemaking pursuant to catch-all statutory provisions that make any violation of any agency rule a crime, as well as the more than 4,000 federal criminal offenses and myriad local criminal ordinances.

In many spheres of economic activity voluntary transactions have been criminalized. Some antitrust laws, for example, provide for criminal penalties for transactions to which both buyer and seller have voluntarily consented. Criminalization of activities of this sort should be eliminated.

Texans once lived under a criminal code that resembled the Ten Commandments. Now, the traditional criminal acts found in the Penal Code—from murder to many types of theft—account for less than 300 offenses. This leaves over 1,400 byzantine offenses scattered outside of the Penal Code. Many of these are “regulatory offenses”—those relating to ordinary, non-fraudulent business activities in fields such as agriculture, health care, natural resources, and insurance.

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, no such balancing occurs in criminal proceedings, which is appropriate provided criminal law adheres to its traditional focus on conduct for which there is clearly no justification. 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 not filing the correct paperwork with a state agency, does not include anyone actually being harmed as an element of the offense. Finally, civil law and criminal law have traditionally been distinguished by the requirement that a criminal must have a guilty state of mind, expressed in the Latin term *mens rea*. An increasing number of regulatory offenses nevertheless dispense with the *mens rea* requirement or require merely criminal negligence rather than intentional, knowing, or reckless conduct.

The Facts

- Occupations Code Section 165.151 makes it a Class A misdemeanor (punishable by up to one year in jail) to violate a rule of a professional licensing board covered under this chapter.
- Parks and Wildlife Code Section 66.023 makes it a third degree felony (punishable by up to 10 years in prison) to lie in a fishing tournament in which the prize money is valued at over \$10,000.
- Chapter 26.3574(s)(16) of the Water Code makes it a second degree felony (punishable by up to 20 years in prison) not to “remit any fees collected by any person required to hold a permit under this section.”

Recommendations

- Refrain from creating new criminal offenses, especially those regulating non-fraudulent business activities.

- Avoid licensing new occupations, and revise laws to eliminate criminal penalties associated with many occupational licensing violations.
- Do not criminalize voluntary economic transactions using either civil or criminal law.
- Repeal excessive and unnecessary offenses and narrow the scope of overly broad offenses. Eliminate criminal offenses based on voluntary economic transactions involving legal products and services. (Fraudulent transactions, meaning those that involve coercion, would not be included in this category.)
- Ensure that an appropriate culpable mental state is included for all non-traffic offenses and that it applies to each element of the offense.
- Strongly codify the Rule of Lenity, a rule of statutory interpretation instructing a court to resolve in favor of the defendant any ambiguities concerning whether the business-related conduct at issue is criminally prohibited.
- Narrow the scope of catch-all statutes allowing agencies to create rules that carry criminal penalties. Offenses should be limited to statutory violations, and non-compliance with rules should be enforced by civil penalties and the revocation of permits and licenses.
- Eliminate the possibility of jail time for first-time conviction of a regulatory misdemeanor, unless the person does not comply with the fine or probation conditions.
- Require that each bill creating an offense specify in the caption and improve fiscal notes so that they state the full cost of the bill, including prosecutorial and judicial expenditures and the appointment of counsel for indigent defendants.
- Amend the Code of Criminal Procedure to allow for citation without arrest for additional misdemeanors and prohibit arrest for regulatory Class C misdemeanors, unless the defendant does not respond to a court summons.

Resources

Overcriminalization in the States by Vikrant Reddy, Texas Public Policy Foundation (Nov. 2013).

Engulfed by Environmental Crimes: Overcriminalization on the Gulf Coast by Marc Levin and Vikrant Reddy, Texas Public Policy Foundation (Dec. 2012).

12 Steps for Overcoming Overcriminalization by Marc Levin and Vikrant Reddy, Texas Public Policy Foundation (May 2012).

Analyze Before You Criminalize: A Checklist for Legislators by Marc Levin, Texas Public Policy Foundation (Apr. 2011).

