

Texas Public Policy Foundation

Criminal Justice

Legislator's Guide to the Issues 2017-18



Overcriminalization



The Issue

In 1790, there were 23 federal crimes. By 2008, there were over 4,450 federal criminal offenses and over 300,000 regulatory offenses that carried a criminal penalty. These regulatory offenses, promulgated not by Congress, but by unelected bureaucrats, generally criminalize everyday business activity not traditionally left under the guise of the criminal justice system, but rather left for civil and administrative remedies. Many of these “crimes” do not require the actor to know he or she has committed an offense, also known as *mens rea*.

Texas is not immune to the growing tendency of using the criminal justice system to regulate non-fraudulent business activity. Texas has over 1,700 criminal offenses, of which roughly 300 are found within the Penal Code. This does not count the burdensome and often conflicting local ordinances that carry criminal penalties. The rest (without even counting “catch-all” provisions that make violations of certain sections of agency rules a criminal offense) originate outside the Penal Code and regulate traditionally non-criminal activities in areas such as health care, insurance, agriculture, and fishing. For example, it can be a felony to alter the weight or length of a fish in a fishing tournament.

Texas also has criminal and administrative procedural issues that need to be addressed in the 85th Texas Legislature. Defendants prosecuted for frivolous criminal charges have little recourse to terminate them prior to trial, as is afforded in civil proceedings via “motions to dismiss” and “summary judgments.”

Administrative agencies act as quasi-judicial bodies capable of doling out harsh penalties and fines for ordinary business activity with few protections afforded individuals during a criminal or civil proceeding. Texas law generally requires that you exhaust all administrative remedies prior to receiving judicial review. Exhausting all remedies wastes time, money, and resources unnecessarily in certain situations when immediate judicial review is appropriate. Even when you are afforded judicial review, great deference is generally given to the administrative agency decision. Further, there are few provisions preventing criminal prosecution when administrative remedies would suffice.

Grand jury proceedings are ripe for abuse and inconsistent outcomes. Prior to the 84th Legislature, judges were allowed to use judicially appointed commissioners to assist the court in picking the juror pool, a rare process nationwide due to the threat of bias. Now, jurors can only be randomly selected from a “fair cross section of the population of the area served by the court.” Further, the suspect is not (usually) present at the grand jury proceeding, nor does he or she have counsel present in the grand jury room. Additionally during a grand jury proceeding, prosecutors are under no obligation to present exculpatory evidence they have come across during their investigation and can bring multiple grand jury proceedings for the same charges if the grand jury does not indict the defendant.

The Facts

- HB 1396 established a committee to make recommendations on repealing all criminal laws outside the Penal Code that are “unnecessary, unclear, duplicative, overly broad, or otherwise insufficient to serve the intended purpose of the law.” The bill also codified the Rule of Lenity for laws outside the Penal Code. The Rule of Lenity is an age-old canon of law that requires an ambiguous criminal law to be interpreted in favor of the defendant.
- HB 2150 removed the method of court-appointed commissioners to pick grand jurors and expanded the cause for challenging a grand juror.

continued on back

Recommendations

- Enact recommendations from the commission pursuant to HB 1396.
- Require sunset commissions to review criminal penalties for violations of statutes outside the Penal Code within the pertinent agency's purview.
- Preclude the state from bringing a case before the grand jury after a previous grand jury has declined to bring charges, unless there is new material evidence to be presented.
- Expand access for defense counsel in grand jury room to provide balance in the proceedings. For example, allow counsel to be present when a witness/accused is being questioned.
- Require witness testimony to be transcribed and automatically entitle an accused individual a copy of the proceedings following an indictment.
- Require prosecutors to disclose to the grand jury exculpatory information that they come across during their investigation.
- Reform the Code of Criminal Procedure to allow for "as applied" constitutional challenges to a penal statute in a pretrial *habeus corpus* proceeding.
- Allow for a "motion to dismiss" in criminal matters following an indictment.
- Allow a "mistake of law" affirmative defense for criminal statutes outside the Penal Code.
- Allow defense counsel to be subject to suit for legal malpractice arising from their representation of persons in criminal matters.
- Expand and codify exceptions for judicial review of administrative agency suits and alleged violations prior to exhausting all administrative remedies.
- Implement "safe harbor" provisions to all administrative agency codes.
- Require trial *de novo* for every administrative decision in a contested case.
- Establish state preemption of local criminal laws.

Resources

["Solutions 2016: Overcriminalization,"](#) Heritage Foundation (2016).

[Time to Rethink What's a Crime: So-Called Crimes are Here, There, and Everywhere](#) by Marc Levin, Texas Public Policy Foundation (Feb. 2010).

Annotated Criminal Laws of Texas by Diane Beckham, Texas District & County Attorney's Association (2016).

[Exhaustion of Administrative Remedies in Texas: First Principles and Recent Developments](#) by Steven Baron and Susan Kidwell, University of Texas School of Law (Aug. 2013).

