

Texas Public Policy Foundation

Keeping Texas Competitive

A Legislator's Guide to the Issues 2013-2014



Overcriminalization ★ Keeping Texas Competitive Priority

The Issue

Criminal law is not just for criminals anymore—at least not criminals as traditionally defined. Texas lawmakers have created more than 1,700 criminal offenses, including 11 felonies relating to harvesting and handling oysters. Moreover, the 1,700 figure does not include 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.

Additionally, in many spheres of economic activity, voluntary transactions have been “criminalized,” i.e., made illegal under either civil or criminal law. Many antitrust laws, for example, provide for either civil or 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. Today, nearly 10,000 federal, state, and local offenses confound more often than command, diluting the traditional focus of criminal law.

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*. Nevertheless, an increasing number of regulatory offenses dispense with the *mens rea* requirement, or require merely criminal negligence rather than intentional, knowing, or reckless conduct.

The Facts

Examples of excessive Texas criminal laws include:

- Under the Agriculture Code, Chapters 76.201(e) and 76.202(b), it is a Class A misdemeanor (punishable by up to a year in jail) to use, handle, store, or dispose of a pesticide in a manner that injures vegetation, crops, wildlife, or pollinating insects.
- Chapter 26.3574(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.”
- 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.

[continued on back](#)

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 occupations.
- Don't criminalize voluntary economic transactions using either civil or criminal law.
- Enact the Rule of Lenity, a rule of statutory interpretation instructing a court to resolve ambiguities concerning whether the business-related conduct at issue is criminally prohibited against the state.
- 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 a 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 so 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.
- Ensure that an appropriate culpable mental state is included for all non-traffic offenses and that it applies to each element of the offense.
- 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.)
- 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

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

"*Criminal Law v. Free Enterprise: What's the Verdict?*" audio of panel featuring Texas Rep. Bill Callegari, Cato Institute Criminal Justice Director Tim Lynch, and Texas District and County Attorneys Association Legislative Director Shannon Edmonds at the 10th Annual Policy Orientation for the Texas Legislature (Jan. 2012).

Amicus Brief in Shelton v. Sec'y, Dep't of Corrs., No. 11-13515-GG (11th Cir. 2011) by Vikrant P. Reddy, Texas Public Policy Foundation (Nov. 2011).

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

Time to Rethink What's a Crime by Marc A. Levin, Texas Public Policy Foundation (Feb. 2010).

