



# PolicyPerspective

## Time to Rethink What's a Crime: So-Called Crimes Are Here, There, and Everywhere

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### The Problem

Texas lawmakers have created over 1,700 criminal offenses, including 11 felonies alone relating to harvesting and handling oysters.<sup>1</sup> This excludes criminal offenses created through state agency rulemaking and city ordinances. The traditional offenses like murder, rape, and theft are found in the Penal Code, but the proliferation of crimes now extends to nearly every other body of state law. Indeed, just 254 of these offenses are those traditional crimes found in the Penal Code such as homicide, rape, and assault. Most of the other offenses interspersed throughout other codes concern business activities that would be better addressed through incentives created by competitive markets or civil penalties.

Texas can't arrest its way out of a recession, but many policymakers act as if we could. During the 81st legislative session, the Senate passed legislation creating a criminal penalty for establishments that serve food with trans-fats, with only seven Senators deciding they couldn't stomach this legislation.<sup>2</sup> A loophole in the bill exempted "fried yeast," i.e., donuts. Though the measure died in the House, the Legislature still created 40 new offenses and dozens of penalty enhancements.<sup>3</sup> Fortunately, legislators rejected measures that would have extended the breadth of criminal law by subjecting roofers to a government licensing scheme and allowing counties to impose criminal penalties on developers.

At the federal level, there are more than 4,000 statutory offenses counted by the

Congressional Research Service several years ago, which ran out of resources before they could finish a precise count.<sup>4</sup> Moreover, former U.S. Attorney General Dick Thornburgh noted in his testimony at a July 2009 congressional hearing on overcriminalization and overfederalization that there are some 300,000 regulatory offenses\* created by federal agencies that have not been approved by Congress.<sup>5</sup> Similarly, Texas has catch-all agency delegation statutes such as Occupations Code Section 165.151 that makes it a Class A misdemeanor (up to one year in jail) for violating "any rule" of any professional licensing board.

There are countless examples of unnecessarily broad and harsh Texas laws. Under Agriculture Code, Chapter 76, it is a Class A misdemeanor to "use, handle, store, or dispose of a pesticide in a manner that injures vegetation, crops, wildlife, or pollinating insects." Similarly, under Chapter 26 of the Water Code, it is a second degree felony (up to 20 years in prison) when a person "fails to remit any fees collected by any person required to hold a permit under this section."

Excessive criminalization not only leads to injustice and unfairness; it also deters and even reduces productive activity. The Sarbanes-Oxley legislation and the labyrinthine rules it has spawned, which impose criminal penalties for accounting errors, has saddled U.S. businesses with an estimated \$100 million in compliance and opportunity costs, not including any costs associated with the shift in initial public offerings overseas. It

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\* Regulatory offenses are defined as those crimes created in statute or by agency rule that are not found in the common law.

triggered an estimated \$1.4 trillion stock market value decline that was correlated with congressional and executive actions in enacting the bill.<sup>6</sup> Truly fraudulent business activities must be penalized and, most importantly, the shareholders or consumers restored as much as possible, but we must also ask whether some congressional and bureaucratic cures are worse than the disease. Federal prosecutors deployed broad criminal laws to deal a death blow to Arthur Andersen and tens of thousands of innocent employees, all based on the misdeeds of a handful of employees. While the U.S. Supreme Court eventually overturned the verdict, the company was forced out of business by that time.

Although less widely known, Spring, Texas retiree George Norris—who imported orchids—was sentenced to federal prison for 17 months on the basis that some of the plants he had offered for sale were not listed on the permits he filed as required by an international treaty on endangered species and the Endangered Species Act. The treaty is enforced through the Lacey Act, a federal law that criminalizes U.S. citizens' violations of another country's criminal laws or international treaties.<sup>7</sup> Similarly, a hunting guide for retired Houston business executive Dan Duncan was indicted in 2007 under the Lacey Act for importing antlers and horns in alleged violation of Russian law as part of a Siberian moose hunting trip with Mr. Duncan.<sup>8</sup> Russian authorities had no qualms with the trip, leading Mr. Duncan's attorney Rusty Hardin to observe, "What the hell is the U.S.' interest in bringing felony charges here for hunting on Russian soil, where not one single person has complained? Is this really the best use of our prosecutorial resources?"<sup>9</sup>

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Significant differences between criminal and civil law make criminal law an overly blunt instrument for regulating non-fraudulent activities. Whereas administrative rulemaking and civil proceedings may utilize cost-benefit analysis to evaluate the conduct at issue, no such balancing occurs in criminal proceedings. Rather, it is assumed that criminal laws cover only those activities that are inherently wrong. Also, criminal law, because it is enforced entirely by state prosecution, tends to minimize the role of the victim, if there actually is one. In fact, the prototypical "regulatory" offense such as mislabeling fruit under Chapter 93 of the Agriculture Code does not include anyone actually being harmed as an element of the offense. Civil 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*. However, there are increasing numbers of federal, state, and local criminal offenses that dispense with a culpable mental state or require mere negligence instead of intent, knowledge, or recklessness. Federal courts have issued mixed rulings in interpreting such offenses.<sup>10</sup>

Additionally, with so many sweeping and often ambiguous criminal laws, including those that are created every week by regulatory agencies without the approval of elected officials, it is impossible for any person or business to regularly stay abreast of the line between what is legal and what is criminal. Moreover, the deluge of overly broad and vague criminal laws gives police and prosecutors virtually untrammelled authority to arrest and indict anyone. In Texas, a person can be arrested for any crime—even a Class C misdemeanor—other than speeding or an open container of alcohol. A Baytown, Texas woman was arrested for an overdue library book.<sup>11</sup> As there are one million intakes into Texas county jails every year, it may be appropriate for state and local policymakers to review what other Class C misdemeanors for which an arrest, as opposed to a citation and summons to appear, should remain permissible.<sup>12</sup>

Indeed, constitutional attorney Harvey Silverglate, who has taught at Harvard Law School, has estimated every American unwittingly commits three felonies a day.<sup>13</sup> Conservative commentator and former prosecutor Tony

Blankley recently observed at a Cato Institute forum on overcriminalization that criminal law was once a series of clearly demarcated “tall oak trees” whereas now it is a vast meadow in which “blades of grass” are virtually indistinguishable.<sup>14</sup>

Overcriminalization is a cradle to grave phenomenon. Tens of thousands of Texas students as young as 10 years old receive tickets for Class C misdemeanors in school, most commonly disrupting class. They must then appear in municipal or justice of the peace court with their parent where they face a fine of up to \$500. If they do not appear or don't pay, the case is typically referred to juvenile probation and, if not cleared up by the time the youth turns 17, an arrest warrant is issued.

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In 2007, the Texas Public Policy Foundation assisted lawmakers in developing House Bill 278, which eliminated a provision in the Education Code authorizing school districts to create offenses not in state law for violations of school policies.<sup>15</sup> However, the disruption of classes offense that remains in the Education Code is overly broad, including, for example, “emitting noise of an intensity that prevents or hinders classroom instruction.”<sup>16</sup> Tens of thousands of students as young as 10 years-old are ticketed every year in school, most often for simply being disruptive. Students convicted of these “crimes” may have to answer affirmatively to questions on job applications asking whether they have ever been convicted of a non-traffic offense. Such collateral consequences illustrate yet another problem with overcriminalization.

Finally, youth curfew ordinances adopted in Austin and Dallas impose a criminal penalty on business owners if a youngster is on their premises when they are supposed to be in school or at home, effectively transferring the responsibility for keeping kids in line from parents and schools to retailers and other businesses.<sup>17</sup> In such instances, criminal law, which was intended to promote personal responsibility, is being used to impose a duty on a third party that has not committed a wrongful act.

## Solutions

The following reforms should be considered:

- **Avoid creating new crimes, imposing unnecessary penalty enhancements, licensing new occupations, and revise laws to eliminate criminal penalties associated with many occupations.** The Sunset Advisory Commission Occupational Licensing Model recommends: “Criminal penalties should exist only for agencies overseeing practices that can have dire consequences on the public health and welfare.”<sup>18</sup> In 2008, the House Government Reform Committee compiled a document listing all occupational licensing penalties that spanned 142 pages.<sup>19</sup>
- **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.** Also, the fiscal note is often zero for many enhancement bills when in fact there are likely to be costs.
- **Prohibit jail as a sanction for most first-time regulatory misdemeanors, unless the defendant fails to comply with other sanctions.** Modify Sections 12.21 and 12.22 of the Penal Code to eliminate the possibility of jail time for first-time convictions of regulatory misdemeanors that do not involve inherent wrongs and/or actual victims. This constitutes the majority of misdemeanors not listed in the Penal Code. Exceptions that should be provided include fleeing a police officer under Transportation Code Section 545.421.

- **Abolish excessive and unnecessary offenses and narrow offenses that are needed but are overly broad.** Since this task is more intensive than any legislative office could manage, a volunteer commission of legal experts and key stakeholders could be created to make recommendations to lawmakers for the elimination and narrowing of existing offenses that would be incorporated into one piece of legislation. Existing resources should be used to support the Commission's work as needed.
- **Ensure that a culpable mental state is required for conviction of nearly all crimes.** State law should also prevent localities from creating strict liability regulatory offenses.
- **Amend the Code of Criminal Procedure to allow for citation without arrest for additional misdemeanors and prohibit arrest for regulatory Class C misdemeanors.** Ordinary business people should not be arrested for minor infractions, such as not posting a required sign, that may be honest mistakes and pose no danger to the public. Law enforcement resources can be saved by simply issuing citations either requiring a court appearance or offering payment by mail or online. HB 2391 enacted in 2007 with the support of the state's leading law enforcement associations gave police the option to issue a citation instead of making an arrest for seven misdemeanors, including possession of four ounces or less of marijuana.<sup>20</sup> Prior to this legislation, an arrest was required for all Class B misdemeanors or higher. The bill has been fully implemented in Travis County, with 90 percent of cited offenders showing up for trial, and implemented for offenses other than marijuana in Dallas County.<sup>21</sup> State lawmakers could expand this discretionary authority to numerous other misdemeanors, many of which are business regulatory offenses.
- **Repeal statutes that allow agencies to create rules that are criminal offenses or revise them so that offenses are limited to violations of statute and non-compliance with rules is enforced by civil penalties and revocations of permits.** In addition to the Occupations Code provision described above, other

examples of statutes that delegate to an agency the authority to create rules that carry a criminal penalty are:

Health & Safety Code, Chapter 143: A person engaged in industrial homework commits an offense if they "otherwise violate this chapter or any provision of the employer's permit" or "violates a rule adopted by the board."

Agriculture Code, Chapter 1611: Class C misdemeanor for violation of any animal identification rule promulgated by the Animal Health Commission. Class B misdemeanor (up to 180 days in jail) for multiple convictions and each day a violation occurs (such as an animal not being tagged) is a separate offense.

This state law adopted in 2005 authorizes the Animal Health Commission to impose a criminal penalty for failure to register an animal with the government. The bill was designed to implement the proposed National Animal Identification System (NAIS) currently under consideration by the U.S. Department of Agriculture that could require all farmers and ranchers to register and report the movements of each animal to the federal government if the state does not create its own registry.<sup>22</sup> In 2009, Senator Kevin Eltife filed legislation that was left pending, which would have required that any state animal identification program be voluntary until and unless a mandatory program is required by the federal government.<sup>23</sup>

- **Require all proposals to license new occupations to first be reviewed by the Sunset Advisory Commission.** The Commission would provide a cost/benefit analysis and identify alternatives to licensing. At least 14 states have adopted provisions providing for such a "sunrise" review of proposals to license new occupations.<sup>24</sup> Additionally, the Sunset Advisory Commission should be required, in the course of their regular reviews of each agency, to determine whether the occupations they regulate still need to be regulated and whether existing

criminal penalties are necessary. These provisions constituted HB 1543 by Representative Bill Callegari in 2009, though the bill would not have required a sunrise review but authorized it upon request.<sup>25</sup>

- **Restrict the issuance of criminal citations to students for misbehavior that does not violate any traditional criminal law.** Policymakers should review the age at which it is appropriate to ticket students for “crimes” such as disrupting class and narrow the wording of those crimes in the Education Code to reduce arbitrariness in enforcement.

## Conclusion

Ultimately, there are two competing theories of government. James Madison wrote in the Federalist Papers:

It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?<sup>26</sup>

In contrast, Lavrenti Pavlovich Beria, the apparatchik who headed the Soviet secret police under Joseph Stalin, declared proudly: “Show me the man and I’ll find you the crime.”<sup>27</sup>

Policymakers must:

- Refocus criminal law, and its enforcement and prosecution, on activities that harm individual victims and neighborhoods;
- Ensure there are strong but carefully tailored and proportionate laws that penalize truly fraudulent activities and make shareholders or other victims whole; and
- Enable individuals and businesses to better find the increasingly blurry line between legal and criminal activities. ★

## Endnotes

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## About the Author

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