



Codifying the Rule of Lenity

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Key Points

- Texas should formally codify the rule of lenity in the state code.
- The rule of lenity is a partial solution to a larger problem—the overall trend towards overcriminalization in American life.
- Fewer “business crimes” would mean fewer crimes for which the rule of lenity is disregarded.

The rule of lenity is a technique of statutory interpretation that instructs a court to resolve ambiguities about whether conduct is criminally prohibited in favor of the defendant.² In a 2008 opinion authored by Justice Antonin Scalia, the U.S. Supreme Court explained the rule using a sports analogy: “the tie must go to the defendant.” The opinion continued:

The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. 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.³

This approach to statutory interpretation is commonly applied in Texas, and it has been commonly applied as far back as the 19th century.⁴ A quick search of Lexis-Nexis’ legal database reveals only 21 cases in which the rule of has been explicitly referred to by name by appellate courts, but this is likely because the rule—as a canon of construction that is taught to all law students and which is simply a norm of the practice of law—hardly needs to be stated. Justice Sharon Keller explained this in a concurrence to a 2002 Court of Criminal Appeals opinion:

It is a fundamental tenet of criminal jurisprudence that, when courts must choose between two reasonable readings of a statute to determine what conduct the legislature intended to punish, courts apply the policy of lenity and adopt the less harsh meaning. Fortunately, Texas courts rarely need resort to the Rule of Lenity to construe its penal provisions. By and large, the Texas Legislature drafted the Texas Penal Code with clarity, precision, and straightforward, well-defined language. But as early as 1886, recognizing the im-

possibility of achieving absolute linguistic perfection, the Texas Court of Appeals adopted the rule of lenity, stating: “the doctrine is fundamental in English and American law that there can be no constructive offenses; that, before a man can be punished, his case must be plainly and unmistakably within the statute, *and, if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.*”⁵

Conservative legal experts and judges generally advocate for the strict interpretation of laws when dealing with constitutional provisions and civil statutes, so as to avoid “legislating from the bench” by expanding the meaning of a provision beyond what was intended and specified. The rule of lenity is compatible with this notion, as the conviction of a person for conduct that is not clearly prohibited does not only undermine the legitimacy of the law by going beyond the plain meaning and intent of the statute, but it also can result in an individual’s permanent loss of liberty. If a defendant is acquitted because a statute was unclear as to whether the conduct was prohibited and the legislature did in fact intend to include the conduct, it may revise the statute at its next opportunity. The important thing is that burden of precise drafting be placed on the government.

Although this understanding should be perfectly ordinary, the application of the rule of lenity has in fact begun to erode dramatically in recent years. This has happened in concert with a troubling phenomenon: the dramatic growth of criminal law in a variety of non-traditional arenas, generally involving freely agreed-upon exchanges between adults.⁶ These “business crimes” (which include such things as harvesting oysters at the wrong time of day,⁷ improperly thrashing pecan trees,⁸ or even mislabeling citrus fruit⁹) are increasingly exempt from the ordinary application of the rule of lenity in the minds of many judges and prosecutors.¹⁰

Tim Lynch of the Cato Institute has even argued that the ordinary application of the rule of lenity

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“has been turned on its head.” He has observed that “When an ordinary criminal statute is ambiguous, the courts give the benefit of the doubt to the accused, but when a regulatory provision is ambiguous, the benefit of the doubt is given to the prosecutor.”¹¹ What is troubling is that while defendants found guilty of these business crimes are subject to criminal sanctions—including prison—they increasingly do not enjoy the fundamental due process protections that are supposed to be guaranteed by the rule of lenity.

The solution to this problem is the formal codification of the rule of lenity in the Texas code. Ideally, canons of construction (or other legal norms) need not be codified in a state code. In the case of the rule of lenity, though, a revered principle is eroding, and codification would likely have a salutary effect because it would require that the rule be applied in all criminal prosecutions—not just prosecutions for traditional crimes.

For Texas legislators who are looking for a template for the codification, the state of Florida has a particularly strong, codified rule of

lenity, providing that “when the language [of a statute] is susceptible of differing constructions, it shall be construed most favorably to the accused.”¹² The rule is not nearly as strongly codified in Texas.¹³ The American Legislative Exchange Council has also approved rule of lenity model legislation.

In some ways the rule of lenity is a partial solution to a larger problem—the overall trend towards overcriminalization in American life. Texas (and other states) should primarily focus on eliminating most non-traditional crimes altogether.¹⁴ Fewer “business crimes” would mean fewer crimes for which the rule of lenity is disregarded. Until this happens, though, the codification of the rule of lenity will serve as an important safeguard of defendants’ rights. It will provide an important reminder to prosecutors and the judiciary that anything serious enough to be labeled a crime by the government should only be prosecuted with fundamental, centuries-old legal protections firmly in place. ★

¹ The material in this bill analysis is taken substantially from Marc A. Levin & Vikrant P. Reddy, *Engulfed by Environmental Crimes: Overcriminalization on the Gulf Coast*, Texas Public Policy Foundation (Dec. 2012) 5; see also Marc A. Levin and Vikrant P. Reddy, *12 Steps for Overcoming Overcriminalization*, Texas Public Policy Foundation (May 2012) 1.

² Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* § 49 (2012); see also Dan Levin and Nathaniel Stewart, “Whither the Rule of Lenity?” *Engage: Journal of Federalist Society Practice Groups* 10 no. 3 (2009): 1.

³ *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (citations omitted).

⁴ *Cuellar v. State*, 70 S.W.3d 815, 822 (Tex. Crim. App. 2002) (citing *Murray v. State*, 21 Tex. Ct. App. 620, 633 (1886)).

⁵ *Ibid.* (emphasis in original).

⁶ Testimony of Stephen F. Smith, Hearing on Reining In Overcriminalization: Assessing the Problems, Proposing Solutions before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 112th Cong. 1 (28 Sept. 2010).

⁷ Chapter 76 of the Parks & Wildlife Code governs oysters, and section 76.118 assigns penalties for various oyster offenses. See TEX. PARKS CODE ANN. § 76.118 (Vernon 2011). If an offender has been found guilty on two or more occasions in a five-year period of having violated sections 76.101 (Oyster Licenses Required), 76.107 (Sale of Sport Oysters Prohibited), 76.109 (Night Dredging Prohibited), or 76.116 (Oysters from Restricted Areas), then his third offense within that period is a felony. *Ibid.* Similarly, if an offender has been found guilty on just one prior occasion of having violated section 76.109 and section 76.116, then the offense is a felony. *Ibid.*

⁸ TEXAS GOV'T CODE ANN. § 3101.010 (Vernon 2011). The statute provides that this is not an offense if the tree is located on: (1) land owned by the person causing the pecans to fall; (2) privately owned land, and the person causing the pecans to fall has the written consent of the owner, lessee, or authorized agent of the owner or lessee; (3) land owned by the state or a political subdivision of the state and in the boundaries of a municipality, and the person causing the pecans to fall has written consent from an officer or agent of the agency or political subdivision controlling the land or from the mayor of the municipality; or, (4) land owned by the state or a political subdivision of the state and outside the boundaries of a municipality, and the person causing the pecans to fall has written consent from an officer or agent of the agency or political subdivision controlling the property or from the county judge of the county.

⁹ TEXAS AGRIC. CODE ANN. § 93 (Vernon 2011).

¹⁰ Professor Erik Luna has linked this rise in non-traditional crimes to the rise of the administrative state. Erik Luna, *The Overcriminalization Phenomenon*, 54 Am U.L. Rev. 703, 708 (2005) (“The impact of [overcriminalization] has been exacerbated by the rise of the modern administrative state, erecting a vast legal labyrinth buttressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety. Many public welfare offenses, such as submitting an incorrect report or serving in a managerial role when an employee violates agency regulations, expose otherwise law-abiding people to criminal sanctions.”) (citations omitted).

¹¹ Timothy Lynch, “Polluting Our Principles” 49 in *Go Directly to Jail: The Criminalization of Almost Everything*, ed. Gene Healy, Cato Institute (Dec. 2004) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) (“[It is] not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”)).

¹² FLA. STAT. § 775.021(1).

¹³ See Roger J. Marzulla, “Lenity: An Essential Rule for Interpreting Environmental Crimes Statutes,” *Engage: Journal of Federalist Society Practice Groups* 13 no. 3 (Oct. 2012) (providing the status of the rule of lenity throughout the United States in the chart “The Rule of Lenity by Jurisdiction”).

¹⁴ See Vikrant Reddy, *More Laws, Less Justice: The Proliferation of Non-Traditional Crimes in the Texas Legal Code*, Texas Public Policy Foundation (June 2014).

