

2019-20

LEGISLATOR'S GUIDE to the Issues

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 traditionally left for civil and administrative remedies. Many of these “crimes” do not require the actor to even know he or she has committed an offense, also known as *mens rea*—one of the earliest pillars of our common law system.

Texas is not immune. The state has over 1,700 criminal offenses, of which roughly 300 are found within the Penal Code. 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, natural resources, insurance, agriculture, and fishing. For example, in Texas it’s a crime to shake a pecan tree, and the state has some 11 felonies relating to harvesting oysters. Some burdensome and often conflicting local ordinances can also carry criminal penalties.

Texas also has criminal and administrative procedural issues that undermine transparency and fairness. Defendants prosecuted for frivolous criminal charges are denied access to grand jury proceedings and have little recourse to reclaim their reputations 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 of the same protections afforded individuals during a criminal or civil proceeding. Texas law generally requires that you exhaust all administrative remedies prior to receiving judicial review. Some exceptions within jurisprudence allow for immediate judicial review, but they are not consistently applied. 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 (“safe harbor” provisions) when administrative remedies would suffice. Finally, even when a person or business prevails before an administrative law judge, the state agency in question may refuse to implement the decision, forcing the claimant to proceed to district court.

Grand jury proceedings are ripe for abuse and inconsistent outcomes. In general, all felony cases must go before a grand jury, a group of 12 citizens who will hear evidence only from the state to determine whether probable cause exists to charge the defendant. The suspect is not (usually) present at the grand jury proceeding, nor does he or she have counsel present in the grand jury room. Witnesses have no right to counsel, even though they could be

criminally charged based upon their own testimony. 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 doesn’t indict the defendant because jeopardy has not yet attached.

The Facts

- Texans can be arrested for any crime—even traffic offenses such as failure to signal and broken tail light—with the exception of driving with an open container of alcohol and speeding.
- Passed in 2015, HB 1396 established a volunteer panel called the Commission to Study and Review Certain Penal Laws, which was renewed in 2017, 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.

Recommendations

- Adopt recommendations from the Commission to Study and Review Certain Penal Laws.
- Require the Sunset Advisory Commission 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 against a defendant, unless there is new material evidence to be presented.
- Expand access for defense counsel in grand jury proceedings to provide greater balance in the proceedings. For example, allow defense 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 certain exculpatory information to the grand jury 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 habeas corpus proceeding.
- Allow for a “motion to dismiss” for non-constitutional “as applied” challenges to charges.

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- Allow for a “mistake of law” claim as an affirmative defense for statutes outside the Penal Code during a criminal prosecution.
- 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 that give many respondents an opportunity to come into compliance before legal action commences.
- Require trial *de novo* for every administrative decision in a contested case.
- Require state agencies to implement the decision of an administrative law judge favorable to the petitioner, unless the agency obtains an emergency stay from a district court upon finding that implementing the decision pending the agency’s appeal would cause grave and irreparable harm to the public.
- Establish default provision for state preemption of local criminal laws.
- Prohibit arrest for fine-only misdemeanors.
- Eliminate catch-all provisions that improperly delegate the power to regulatory bureaucracies to create criminal laws.
- Enhance Texas’ default mens rea provision by requiring that, for violations of laws not listed in the Penal Code as well as crimes created by regulatory agencies, the conduct must be knowingly or intentionally committed. Recklessness would remain the default standard for those traditional offenses listed in the Penal Code.

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).

