



Texas Conservative Coalition Research Institute

Senate Committee on State Affairs

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Regarding the Committee's Charge: Personal Property Protections: Examine prosecution rates for thefts involving property valued under \$1,000. Make recommendations to ensure law enforcement agencies and prosecutors have the tools necessary to thoroughly protect Texans' personal property from theft.

I. Background

In the last few years, many politicians across the political spectrum have advocated criminal justice reform. Different people use the phrase “criminal justice reform” to mean different things, but to a significant number of advocates, these proposed policy changes consist of emphasizing rehabilitation rather than punishing offenders and deterring prospective offenders. In pursuing this goal of rehabilitation, some advocates of criminal justice reform argue that certain offenders, such as the homeless, mentally ill, or juveniles, should not be subjected to the penalties for which the law provides. Similarly, some advocates argue that certain types of offenses, such as criminal trespass, drug use, and minor theft, should not be prosecuted in at least some circumstances.

A number of district attorneys embracing these controversial views have been elected in large cities across the country in the last few years, including St. Louis, Philadelphia, and Boston. This wave of change has affected Texas as well. In 2018, John Creuzot easily won election to the office of Dallas County District Attorney. Shortly before his election, he stated that “[t]he umbrella issue is ending mass-incarceration.” During his time as a state district court judge, Creuzot helped start the Dallas Initiative for Diversion and Expedited Rehabilitation and Treatment (DIVERT), which focuses on helping lower-level drug offenders obtain treatment in lieu of being sentenced to jail or prison. More recently, Creuzot announced that he would not prosecute cases involving theft of property up to \$750 in value, if the theft were done out of necessity and not for economic gain.¹ Examples of thefts of “necessity” include a low-income person stealing items such as food, diapers, or baby formula.²

Similarly, Bexar County District Attorney Joe Gonzales announced last year a new “cite and release” policy under which police officers will issue tickets to offenders who commit certain misdemeanors such as theft or criminal mischief³ (criminal mischief involves damage to, or destruction of, tangible property of another). Prior to the change, such offenders could face jail time.

Policymakers should certainly be open to considering new ideas on criminal justice. Certain groups, such as veterans, or juveniles may be subject to certain pressures or challenges which make an emphasis on rehabilitation sensible. There is some evidence that drug courts for lower-level offenders slash recidivism

rates.⁴ However, policymakers should be wary about easing penalties for people who commit theft. Drug use and theft are easily distinguishable; while drug use may have diffuse, negative effects on the offender and society, it does not directly harm a person in the way that having his or her property stolen does.

II. Theft Data in Texas

Theft is defined as unlawfully appropriating property with intent to deprive the owner of property.⁵ The offense that a particular theft constitutes depends on the value of the property stolen, as illustrated below.

Table 1: Theft Offenses

<i>Value of Property Stolen</i>	<i>Category of Offense</i>	<i>Maximum Punishment</i>
<i>Less than \$100</i>	Class C misdemeanor	\$500 fine
<i>\$100 or more but less than \$750</i>	Class B misdemeanor	\$2,000 fine and 180-day jail term
<i>\$750 or more but less than \$2,500</i>	Class A misdemeanor	\$4,000 fine and 1-year jail term
<i>\$2,500 or more but less than \$30,000</i>	State jail felony	\$10,000 fine and a 2-year jail term (minimum term of 180 days)
<i>\$30,000 or more but less than \$150,000</i>	Third-degree felony	\$10,000 fine and life term in prison (minimum term of 2 years)
<i>\$150,000 or more but less than \$300,000</i>	Second-degree felony	\$10,000 fine and 20-year term in prison (minimum term of 2 years)
<i>\$300,000 or more</i>	First-degree felony	\$10,000 fine and life term in prison (minimum term of 5 years)

Source: Chapter 31 of the Texas Penal Code.

Penalty enhancements can apply. For example, if an offender has previously been convicted of theft, a second theft of property with a value of less than \$100 is a Class B misdemeanor rather than a Class C misdemeanor. Similarly, a theft of property with a value of less than \$2,500 is a state jail felony if the offender has two previous convictions for theft.

Unfortunately, data on prosecution rates for thefts of property with a value of less than \$1,000 is not publicly available. The extent of theft in general in Texas can be approximated from the Uniform Crime Reporting (UCR) program, under which hundreds of Texas law enforcement jurisdictions submit data from arrest records. This data is published annually.⁶ The category of “larceny-theft” is divided into nine sub-categories: pocket-picking, purse-snatching, shoplifting, theft from motor vehicles, theft of motor vehicle parts, theft of bicycles, theft from buildings, theft from coin-operated machines, and all other thefts. Embezzlement, forgery, bad checks, and thefts of motor vehicles are excluded from larceny-theft. Table 2 below illustrates the number of thefts reported in recent years, the number of thefts per 100,00 people, and the clearance rate. For UCR purposes, an offense is “cleared” when a law enforcement agency has identified the offender, enough evidence exists to press charges, and the subject is taken into custody. Law enforcement agencies can also clear a crime by “exceptional means” when some element beyond law enforcement control precludes the placing of formal charges against the offender (e.g., the offender commits suicide before he or she can be arrested).⁷

Table 2: Data on Theft in Texas, 2009-2018

Year	Number of Thefts Reported	# of Reported Thefts per 100,000 Persons	Clearance Rate*
2009	678,340	2,737.2	17%
2010	654,483	2,602.8	18%
2011	613,528	2,389.6	19%
2012	605,362	2,323.0	19%
2013	604,389	2,285.0	20%
2014	570,385	2,118.3	20%
2015	555,867	2,023.6	19%
2016	548,941	1,973.1	16.7%
2017	518,414	1,831.6	15.0%
2018	491,028	1,710.8	14.4%

Source: All data is drawn from the Texas Uniform Crime Reports for years 2009 through 2018.

**Although not stated in the reports, it appears that the crime reports began reporting clearance rates rounded to the nearest tenth of a percent in 2016.*

As the reports note, it is likely that many minor thefts are not reported and thus are not incorporated into official data.

The data in Table 2 shows an impressive 27.6 percent decline in the number of thefts in Texas from 2009 to 2018. Even more impressively, this drop occurred even as the state's population was growing. The rate of theft per 100,000 persons declined by 37.5 percent over the same time period. Although the clearance rate has declined noticeably since 2014, that does not necessarily reflect any failing on the part of law enforcement. If low-level or unsophisticated offenders are being deterred from theft by the efforts of law enforcement officers, a likely result is that a greater proportion of crime will be committed by sophisticated offenders, who presumably are more difficult to apprehend.

Table 3 lists the average loss incurred per reported theft, as well as the average loss incurred per reported shoplifting incident. Although shoplifting is only a sub-set of theft, it is worth examining in detail both because it is a type of theft which can be committed easily by prospective offenders and because it often involves theft of items with a value below the prosecution threshold announced by so-called progressive prosecutors:

Table 3: Average Loss per Theft and Average Loss per Shoplifting Incident, 2009-2018

Year	Average Loss per Reported Theft	Average Loss per Reported Shoplifting Incident (Rounded)
2009	\$933	\$149
2010	\$1,036	\$168
2011	\$701	\$168
2012	\$1,133	\$198
2013	\$1,136	\$202
2014	\$1,210	\$191
2015	\$1,195	\$211
2016	\$1,283	\$269
2017	\$1,425	\$277
2018	\$1,911	\$338

Source: All data is drawn from the Texas Uniform Crime Reports for years 2009 through 2018.

Again, this data does not incorporate unreported thefts, which very likely involve lower-value items more frequently than the average theft. Even accounting for that likelihood, though, the data indicates that the value of the items being stolen- whether through theft in general or shoplifting in particular- is increasing at a rate well above that of inflation. This rapid increase relative to inflation may be due to offenders being able to target more expensive items over time, such as computer laptops and iPods.

Notably, the loss of value per reported shoplifting incident is still significant enough to pose a serious threat to the viability of the average retailer. If a profit margin of 3 percent for a retailer is assumed, one shoplifting incident of \$338 per day wipes out a retailer's profit on over \$11,000 in sales.

III. Competing Arguments for Prosecutors to Refrain from Prosecuting Low-Level Offenses

Proponents of de-emphasizing sanctions for theft make several arguments in support of their position. First, they claim that offenders who are placed in jail may as a result become more inclined to recidivism. Second, not arresting or prosecuting offenders who commit certain nonviolent offenses (such as theft or drug use) eases court backlogs considerably, contributing to judicial efficiency. Third, refraining from the arrest and/or prosecution of lower-level offenders similarly relieves law enforcement officers of the burden of taking the offender to jail and submitting paperwork related to the arrest, thereby allowing those officers to focus on investigating more serious crimes. Fourth, refraining from the prosecution of lower-level crimes saves taxpayers significant money in light of how expensive it is to jail offenders. These proponents claim that a "tough on crime" approach toward these lower-level offenses results in a revolving-door justice system that is expensive but yields poor long-term results.

While there may be some truth to the above claims, they are ultimately unconvincing. The argument that not jailing lower-level offenders for crimes such as theft must be separated from a similar argument that is made for drug offenders. As noted above, theft and drug use are different crimes, and a policy that reduces recidivism with respect to drug use does not necessarily do the same with respect to theft. In addition, if time in jail is itself increasing recidivism, de-criminalizing lower-level offenses is not the only option. Instead, jail

inmates could receive greater rehabilitation services than they do currently. Rehabilitation is not the sole goal of a criminal justice system; retributive justice, deterrence of potential offenders, and compensation to the victims are also important ends.

The argument for judicial efficiency similarly overlooks the goals of a criminal justice system. The adjudication process of defendants ideally should be as speedy as reasonably possible. However, if a backlog of cases exist, slower justice is preferable to effectively ignoring laws in place that protect people's property. An extreme hypothetical illustrates the point: if courts were backlogged with cases involving murder, kidnapping, and terrorism, no reasonable person would suggest that these crimes should no longer be prosecuted. The contention that theft is an offense undeserving of judicial attention when there is a backlog of such cases assumes that theft is not a serious violation of citizens' fundamental property rights.

The argument that police officers will be free to focus on investigating more serious crimes ignores how offenders can develop. A person who begins offending at a young age and learns that society does not take lower-level offenses seriously can be tempted to progress to more serious crimes. Tellingly, police associations- whose members have "front-line" experience combating crime- consistently voice opposition to policies which effectively de-criminalize lower-level offenses. When District Attorney Creuzot unveiled his plan to not prosecute certain offenses, both the Texas Municipal Police Association and Dallas Police Association voiced opposition to the policy.⁸ Mike Mata of the Dallas Police Association pointed out that smaller retailers in particular would be adversely affected by the new policy. Among other things, small retailers are placed in a very difficult position when apprehending a shoplifter; do they detain the person, knowing that police will not prioritize it and may not arrive for an hour or more? Can they take physical measures to ensure detention of shoplifters?⁹

In Suffolk County, Massachusetts (the county seat of which is Boston), the recently-elected district attorney campaigned on the promise that she would not prosecute 15 specified crimes, including theft of items with a value of less than \$250, receiving stolen property, and wanton or malicious destruction of property. In response, the National Police Association filed a complaint against her, arguing that she exceeded her authority as prosecutor and that her policies would increase crime rates.¹⁰ Police officers have an up-close view of combating crime and their opinion on whether a given policy or practice will make stopping crime more difficult should be given significant weight.

The argument that arresting and prosecuting lower-level offenders costs taxpayers significant money is undoubtedly true, at least on a short-term basis. Ensuring that taxpayers dollars are spent wisely is a worthy goal. However, enforcing the criminal law and protecting the rights of citizens from criminals are among the most fundamental obligations of government. If substantial funding is necessary to provide that protection, then that substantial funding is money well spent. In addition, the argument that not prosecuting theft will save taxpayer dollars also assumes that offenders will not progress to more destructive crimes over time, given the lack of sanctions against them for lower-level offenses.

If there were strong empirical data that refraining from prosecution of theft caused theft rates to go down, then of course it would be sensible for policymakers to examine whether taxpayer dollars directed to law enforcement were being spent in an efficient manner. However, the data that exists on the connection between crime rates and prosecutors foregoing prosecution for arrests below a certain dollar amount is not robust enough to justify changes in policy. A 2017 study by the Pew Charitable Trusts found that, between 2000 and 2012, 30 states increased the threshold dollar amount at which thefts would be treated as felonies

rather than misdemeanors. The study concluded that property and crime rates in the 30 states declined to roughly the same extent as the rates for those crimes declined in the other 20 states.¹¹ However, modifying the line between misdemeanor theft and felony theft is a different matter than not prosecuting thefts of items with a value below a certain dollar amount. Misdemeanor theft can still result in a significant fine and jail time, whereas not being prosecuted at all effectively results in no punishment.

In contrast to the Pew Charitable Trusts study, evidence from California suggests that increasing the threshold dollar amount for a theft to be categorized as a felony has contributed to an increase in shoplifting. In 2014, California voters approved Proposition 47, which among other things raised the dollar threshold for felony theft to \$950, up from \$450. One news report states that, “Sources quote some large California retailers such as Safeway, Target, Rite Aid and CVS as saying that shoplifting has increased at least 15 percent [after the passage of Proposition 47], and in some cases, doubled. LAPD reported that shoplifting reports jumped by 25 percent in the first full year of the new law.”¹² A Sacramento district attorney remarked that “we’ve heard of cases where shoplifters are going into stores with a calculator so they can make sure that what they steal is worth less than \$950.”¹³

One point that policymakers should recognize in the debate on criminal justice reform is that the United States is a much safer country than it was in 1990. Many criminal justice reform advocates bemoan the high incarceration rate of the United States, but refuse to acknowledge the tremendous strides the country has made in combating crime. For example, in 1960, the United States violent crime rate was less than 200 violent crimes per 100,000 persons. Over the next few decades, violent crime rates exploded, reaching more than 700 per 100,000 persons in 1992.¹⁴ From 1999 to 2018, the violent crime rate per 100,000 persons dropped from 523 to 369.¹⁵ The number of thefts per 100,000 persons over that same time period has gradually declined from 2,551 to 1,595.¹⁶ Along with this reduction in violent crime, the rate of persons jailed or imprisoned in the United States in 2016 was lower than that in 2000.¹⁷ Determining the causes of changes in crime patterns can be an inexact and complex analysis that takes into account many variables, including economic factors and demographic patterns. However, the combination of trends- lower crime rates along with lower incarceration rates- suggests that law enforcement nationally is doing an excellent overall job by imprisoning people who contribute to the crime rate. While the U.S. may still have a relatively high incarceration rate, that high incarceration rate itself may be key driver of the decline in the crime rate since the early 1990’s.

People in favor of continuing to prosecute theft of property below a certain dollar amount have their own arguments. First, they argue that not prosecuting crimes only encourages offenders to commit more crime. In the absence of solid data showing that non-prosecution of theft reduces incidences of theft, such an intuitive conclusion should be the default position. As noted above, California’s experience in the wake of Proposition 47 is not encouraging.

Second, a key drawback of treating theft offenders leniently is the demoralizing effect that the policy can have on law enforcement, judges, and the public. The current district attorney of Philadelphia has embraced a policy of treating cases of retail theft in which the value of the stolen item is less than \$500 as summary offenses, which are similar to traffic citations and often result in fines.¹⁸ One judge in Philadelphia, speaking anonymously, rhetorically asked ““What’s the point in reporting a crime if you know the guy will remain on the street?...Why bother?”¹⁹ This resignation is echoed by police: as one officer noted in the wake of Proposition 47 in California, misdemeanors in theory can bring up to a year in county jail, but “it’s not worth

it to issue a citation or arrest a shoplifting suspect who would likely be released immediately because of overcrowding.”²⁰ Members of the public can similarly come to feel jaded about criminal justice when they see people who refuse to play by the rules receive no more than a slap on the wrist. This is particularly true of the victims of theft. The average profit margin in the grocery industry is a meager 1.6 percent.²¹ With such a thin margin, grocery stores and similar retail outlets can quickly become economically unfeasible if shoplifting worsens.

Third, determining which crimes are not going to be prosecuted invites prosecutors to make questionable economic judgements. Although the Dallas district attorney has stated he wants to exempt only those food thefts that are done out of poverty rather than for economic gain, it is fair to ask why he selected \$750 as the cutoff point. Perhaps coincidentally, a value of \$750 is the cutoff point between a Class B and Class A misdemeanor. However, even if one accepts the Dallas district attorney’s premise that low-income people should not be prosecuted for theft of necessary items, a much smaller number would have made more sense. By using the figure of \$750, Dallas invites people to commit theft for economic gain. As Governor Abbott stated on Twitter, “If someone is hungry they can just steal some food. If cold, steal a coat. Where does it end? It’s wealth redistribution by theft.”²² Rather than ignoring theft that is committed by people who fit some vague notion of “being poor,” the proper course of action is to direct these people to the numerous private charities dedicated to helping the poor and to the existing government social safety net.

A final problem with prosecutors declining to prosecute certain crimes is that it is fundamentally undemocratic. Prosecutorial discretion has always been an important part of the American justice system. Prosecutors do not have unlimited time or resources, and accordingly must focus their efforts in ways which produce the greatest results. The practice of plea-bargaining is an obvious example of how prosecutorial discretion can be effectively used; since it is not feasible to take every criminal case to trial, a prosecutor might offer a defendant a sentence less than the maximum in exchange for a guilty plea. But there is a key difference between district attorneys who decline to prosecute a given case because of constraints on resources, and those who decline to prosecute it because they believe that the law that was violated is poor policy. In the latter case, the district attorney is substituting his or her judgement for the judgement of the legislative body of the state, and ultimately, of the people of the state. For example, Audia Jones, a candidate for district attorney of Harris County, has said that, if elected, she will not prosecute 17-year olds as adults (even though they are considered adults under Texas criminal law) except in cases where somebody has suffered serious bodily injury or sexual violence.²³ Reasonable people can debate whether 17-year old offenders should be tried as adults. But that is a separate issue from whether a local elected official should be able to effectively override the will of the Texas Legislature.

IV. Recommendations

As the data from Table 2 above makes clear, Texas has done an outstanding job at combating theft over the last decade. Fortunately, policymakers have not been content with current results and have continued to strengthen the relevant law. In the 86th legislative session, a trio of bills- House Bill 2624, House Bill 2625, and House Bill 2945- were enacted to help protect Texans from credit card-related theft, particularly “skimming.” Skimming is a relatively new type of theft in which offenders utilize devices to steal consumers’ credit card information at self-service terminals (e.g., gas station pumps).

As online commerce has proliferated, the brazen theft of packages delivered to consumers’ porches, sometimes referred to as porch piracy, has been an increasing problem in Texas. For example, a December

2018 news report cited Houston police for the claim that such thefts in Houston have increased by 80 percent since 2015.²⁴ In addition, a growing number of Americans have fallen victim to identity theft. House Bill 37 targets both problems by making the theft of mail (including packages) a separate offense. Prior to the enactment of the bill, the prosecution of mail theft was often hindered due to coordinating prosecution with federal law enforcement.

Texas should consider three additional reforms to ensure that Texans' rights to their personal property are being adequately protected.

Ensure that penalty enhancers apply to repeat offenders whose initial offenses do not result in a technical conviction. Perhaps the most obvious concern with prosecutors declining to prosecute thefts of items below a certain value is that offenders will be emboldened; an offender who "gets away" with a first offense may be inclined to commit a second offense. Current Texas law recognizes this reality by upgrading the classification of a theft offense in some circumstances when the offender has previously been "convicted" of a prior theft. If prosecutors refrain from prosecuting offenders who commit low-level theft, the state should be aware that the offender may learn the wrong lesson from that leniency. If the offender re-offends, he or she should not escape the enhanced penalty for a second offense (that applies in some circumstances). The difficulty in implementing this approach is that a prosecutor may resolve a case against a defendant other than through a conviction. For example, a deferred adjudication is not an actual conviction.²⁵ The Legislature may wish to consider amending the law to provide that any applicable penalty enhancers for second and subsequent theft offenses may apply even if the offender received only deferred adjudication for the first offense.

Amend Section 12.44 of the Penal Code. Section 12.44(a) of the Penal Code authorizes a court to punish a defendant who is convicted of a state jail felony by imposing a jail term the jail term for a Class A misdemeanor. Section 12.44(b) permits a court, at the request of the prosecuting attorney, to prosecute a state jail felony as a Class A misdemeanor. As noted above in Table 1, the jail term for a state jail felony can range from 180 days to two years. In contrast, the jail term for a Class A misdemeanor is a term of up to one year, with no minimum required.

From an offender's perspective, the shorter maximum jail term is not the only benefit of a Class A misdemeanor conviction relative to a state jail felony conviction. Crucially, state jail felony sentences must be served "day for day"; offenders do not accrue credit for good conduct and generally serve their entire sentence. In contrast, offenders punished for Class A misdemeanors can accrue good conduct time and have it applied against their sentence. An accused often accrues time served while awaiting disposition of his or her case. Because this time served can be applied against Class A misdemeanor punishment (but not state jail felony punishment), the accused has a powerful incentive to ask that he or she receive Class A misdemeanor punishment under Section 12.44(a). If that request is granted, the accused can apply the accrued time against the jail term, effectively shortening that term. Essentially, Section 12.44 allows conviction and release, whether immediate or after a very short stint in jail.

The purpose of the state jail felony classification is to reduce recidivism by holding offenders in jails separate from the prison population and providing them with rehabilitate services. Unfortunately, the state jail felony classification is not achieving this purpose. Data indicates that approximately 63 percent of state jail felons who were released during state fiscal years 2013-2015 were re-arrested within three years of being released, whereas the corresponding figure for prison inmates (who have committed more serious offenses) was approximately 21 percent.²⁶

As noted above, Texas law tries to target repeat offenders by providing that a theft of property with a value of less than \$2,500 is a state jail felony if the offender has two previous convictions for theft. While well-intentioned, this penalty enhancement is not productive given the current failure of the state jail felony system and the Section 12.44 loophole. The Legislature should consider providing that people who are charged with theft and have multiple previous convictions for theft are not eligible for the provisions of Section 12.44.

Consider whether the state needs to have concurrent jurisdiction over certain offenses. If the Legislature is concerned that local prosecutors are abdicating their responsibilities to prosecute offenders due to policy disagreements with the Legislature, a possible response would be to amend Texas law to provide the Texas Attorney General (AG) with concurrent jurisdiction over theft offenses, or any other low-level offenses which local prosecutors refuse to prosecute. Texas law provides that the AG has concurrent jurisdiction in many cases, such as in cases of theft involving the state Medicaid program.²⁷ Although the consent of the local prosecutor is required in that particular example for concurrent jurisdiction to apply, the Legislature can provide for concurrent jurisdiction over theft cases even without the consent of local prosecutors. Ideally, concurrent jurisdiction is provided for in situations where local governments might lack the resources necessary to combat a crime, such as the operation of a sophisticated human-trafficking ring. However, the Legislature may have to consider providing concurrent jurisdiction for theft if the policies of a growing number of local prosecutors in Texas jeopardize public safety.

ENDNOTES

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