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April 29, 2003

Texas Legislature
Senate Criminal Justice Committee
Austin, Texas

Re: House Bill 2121

Dear Senators:

I have examined the committee substitute for H.B. 2121 and, specifically, the proposed revision of Penal Code section 31.13. I understand this would create a new offense with three elements:

- (1) possessing or using a communication device or unauthorized access device;
- (2) knowingly; and
- (3) with the intent to defraud a communication service provider.

Given the definitions of "communication device" and, to perhaps a lesser extent, "unauthorized access device," this proposed offense seems unacceptably broad and vague.

I understand from proposed section 31.12(b)(1) that communication device would include even such innocuous items as a telephone or internet-enabled software. Clearly no argument can be made that simple possession of such an item should be criminal.

The requirement that the use or possession be "knowing" adds little of substance. It seems unlikely a person would possess or use a covered item in any meaningful way without being aware of the nature of the item. Possessing a telephone knowing that it is an instrument capable of receiving communication service, then, is activity no serious person could suggest be criminalized.

Clearly, then, the final culpable mental state requirement—the intent to defraud—is the only possible way the proposed crime might be acceptably limited. In my view, this culpable mental state of intent to defraud does not do this.

Intent to defraud is used in some other Texas criminal offenses. Nevertheless, my understanding is that it is not defined in any statutory provision nor is its substance developed in the case law. Consequently, if a prosecution were brought under the proposed version of section 31.13, I do not think the trial judge would instruct the jury with any definition of intent to defraud. The jurors would be left to apply whatever meaning "defraud" has to them or that the lawyers could persuade them it has.

The so-called "specific intent" of "intent to defraud" has traditionally been a part of the crime of embezzlement. Despite this traditional use, it is poorly if at all defined in that context. We know little more than that it means less than the intent to deprive required for traditional larceny. I am convinced that in practical terms it includes even passively deceiving the so-called victim in any way about anything.

If "intent to defraud" were given this meaning in proposed section 31.12(b)(1), the result would be absurd. Suppose, for example, I take advantage of a communication service provider's lack of access to my home to keep that provider from learning that I have acquired a telephone. I could be said to have possessed that telephone with the intent to defraud for purposes of section 31.12(b)(1). If I were charged and tried, I am quite certain the judge would tell the jury nothing that would make clear I did not have the intent to defraud a communication service provider.

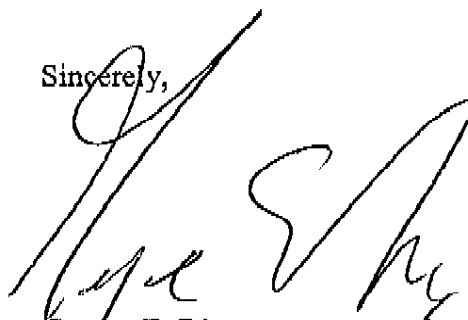
Perhaps this vagueness is acceptable in a crime like embezzlement that also contains other substantive elements that limit its scope. I do note, however, that our current Texas Penal Code provisions prohibiting what was previously embezzlement, Penal Code §§ 31.03 (theft) and 32.45 (misapplication of fiduciary property) do not use intent to defraud.

In any case, the proposed revision of section 31.13 would create a crime with no such other limiting elements. In my view, this would leave the crime with far too uncertain a meaning. This in turn would create an unacceptably high risk of the offense being misused and of convictions being based upon judges' or juries' intuitive and highly subjective notions of what defraud might mean.

Ordinarily, I would guess that despite the practical uncertainty of the term "intent to defraud," courts would defer to our traditional acceptance of the phrase and uphold a crime containing that language against a challenge of unconstitutional vagueness. But courts apply vagueness with more rigor to crimes criminalizing conduct with First Amendment implications. That of course is the case with the crime proposed in the legislation.

I think there is a real risk that the proposed offense would be found unconstitutionally vague. In any case, that offense would be very poor policy. I urge that you reject it.

Sincerely,

A handwritten signature in black ink, appearing to read "George E. Dix", written over a light blue horizontal line.

George E. Dix
Professor of Law