

OVERCRIMINALIZING THE WOLVERINE STATE

A Primer and Possible Reforms for Michigan

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EXECUTIVE SUMMARY*

In recent years, Michigan's criminal law has put into legal jeopardy a woman innocently helping her neighbor's children board a school bus; a man who unknowingly deposited spare tires with a facility lacking proper state permits; and a business owner who expanded his parking lot on land that state regulators later deemed a "wetland."

At present, Michigan's vast, disorganized criminal law inherently places the Wolverine State's residents at risk of unintentionally violating a growing array of regulatory crimes that are difficult, if not impossible, to discover and understand. For example:

- Michigan's penal code contains 918 sections—eight times the number of the Model Penal Code and significantly more than that of neighboring states Ohio, Illinois, and Wisconsin.
- Michigan has at least 3,102 crimes—1,209 felonies and 1,893 misdemeanors—and most of these (48 percent of felonies and more than 76 percent of misdemeanors) lie outside the penal code.
- Michigan has created, on average, 45 crimes annually over the last six years, 44 percent of which were felonies and 73 percent of which fell outside the penal code.
- More than 26 percent of felonies and more than 59 percent of misdemeanors on the Michigan books do not explicitly require the state to make a showing of intent (*mens rea*) on the part of the accused.

*Meghan Herwig and Amanda Swysgood of the Manhattan Institute and Michael Van Beek and Josiah Kollmeyer of the Mackinac Center provided invaluable research assistance. Some language in this report is identical to that published in a previous Manhattan Institute publication: James R. Copland and Isaac Gorodetski, *Overcriminalizing The Old North State: A Primer and Possible Reforms for North Carolina*, Issue Brief 28 (Manh. Inst. For Pol'y Res., May 2014), http://www.manhattan-institute.org/html/ib_28.htm#.VCBSGBYVB8E.

The size as well as the breadth of Michigan's criminal law not only places citizens in legal jeopardy but also creates a serious risk that prosecutions will vary markedly from jurisdiction to jurisdiction. Further, it threatens to divert scarce resources away from the enforcement of serious violent and property crimes. To address this overcriminalization, Michigan policymakers should consider:

1. **Creating a bipartisan legislative task force** to conduct hearings and set guiding principles for lawmakers when creating new criminal offenses, with an emphasis on organizing and clarifying criminal laws for state residents.
2. **Creating a commission**, or charging the Michigan Law Revision Commission, to review the criminal law and consolidate, clarify, and optimize the state's current criminal statutes.
3. **Enacting a default *mens rea* provision**, ensuring that to be convicted of a crime requires a showing of intent, unless the legislature clearly specifies otherwise.

INTRODUCTION

In 2009, Michigan resident Lisa Snyder gained national media attention after the state's Department of Human Services alleged that, in assisting her neighbor's children board the school bus in front of her house each morning, free of charge, she was guilty of a misdemeanor crime for operating an illegal day care in violation of state regulations.¹ Her local legislator, now-lieutenant governor Brian Calley, spearheaded a legislative fix that helped her avoid prosecution,² but many other individuals and small businesses in the Wolverine State have been placed in legal jeopardy by the state's sweeping criminal laws. These include a man who unknowingly ran afoul of state environmental regulations for disposing spare tires³ and pig farmers who suddenly found themselves potential felons after the state's Department of Natural Resources issued a vague interpretive ruling prohibiting the farmers from owning much of their livestock.⁴

Unlike most traditional crimes, regulatory and licensing offenses in Michigan do not generally require an individual to understand that his actions were illegal.⁵ Most individuals, moreover, would have little way of knowing that their actions were illegal: thousands of crimes are on the books in Michigan, the number of crimes has been growing annually, and any violation of the state's voluminous regulatory code—including those dealing with public health, agriculture, and the environment⁶—is a criminal offense, notwithstanding that such regulations are promulgated without legislative action.

At the federal level, the trend toward overcriminalization has drawn the attention of Congress⁷ and judges.⁸ In recent years, scholars at the Manhattan Institute and elsewhere have examined the increase in "regulation by prosecution," in which the criminal law is used as a tool to punish ordinary business practice.⁹ Although there is "wide consensus" among scholars that the explosive growth of criminal law is problematic,¹⁰ most ordinary citizens remain unaware that they are likely guilty of many criminal offenses—or suspect that they will never be prosecuted.¹¹

Most attention placed on overcriminalization to date has focused on federal crimes; however, most criminal prosecutions occur at the state level.¹² Some scholars have argued that—contrary to the federal trend toward expanding the criminal law—states, on balance, may be "moving towards less criminalization rather than more."¹³

To study the extent to which states have followed the federal trend toward overcriminalization, the Manhattan Institute has begun to look at the evolution of some states' criminal laws in detail. In May 2014, coauthors Copland and Gorodetski published a primer on the subject, examining North Carolina.¹⁴ The present issue brief, authored jointly with Michael Reitz of the Mackinac Center, is the second in the series.¹⁵

Michigan's criminal code contains more than eight times the number of sections found in the Model Penal Code,

a document drafted by the American Law Institute (an independent group of lawyers, judges, and academics) to “assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment”¹⁶—and significantly more than neighboring states Ohio, Illinois, and Wisconsin.¹⁷ Moreover, Michigan’s legislature has been expanding the reach of its criminal law, adding more than 45 new criminal offenses to the books annually, on average, from 2008 through 2013.¹⁸ Almost half of these new offenses are felonies, and almost three-fourths are codified outside the state’s penal code.

Even as Michigan’s legislature has been adding new crimes to the books, it has also tackled some criminal-justice reforms intended to lighten the criminal law’s fiscal burden. (In Michigan, one

out of every five state general fund dollars is spent on corrections.)¹⁹ In June 2013, the state launched a Justice Reinvestment Initiative, with a specific focus on its felony sentencing guidelines.²⁰ Nevertheless, there has been little legislative effort, to date, to assess the criminal-law reach of the state’s regulatory code and its impact on the state’s economy and business development.

This issue brief looks at overcriminalization trends in Michigan, quantitatively and qualitatively, and proposes various avenues for reform. **Section I** looks at Michigan’s criminal code quantitatively—including the number and rate of creation of crimes, how Michigan compares with its neighbors, and how the legislature has been reforming the criminal law in the sentencing context. **Section II** looks at Michigan’s criminal law more qualitatively—including outdated criminal provisions, redundant new crimes added to the books, the broad array of crimes “without intent” under Michigan law, and various regulatory mechanisms through which new crimes are enacted. **Section III** assesses the policy implications of overcriminalization and makes recommendations for reform.

I. QUANTITATIVE ASSESSMENT

Number of crimes. The Michigan Penal Code, located in chapter 750,²¹ and the listing of additional crimes and offenses, located in chapter 752,²² run to 266,300 words, taking up 500 pages of ten-point, double-spaced Times New Roman text.²³ Its provisions contain a combined 918 sections,²⁴ though this count does not fully reflect the number of crimes on the books,²⁵ as many crimes—including 48 percent of felonies and more than 76 percent of misdemeanors—are codified

outside the penal code.²⁶

Overall, Michigan has an estimated 3,102 crimes in its statutes, including 1,209 felonies and 1,893 misdemeanors.²⁷ Yet many more exist through regulatory “catchall provisions,”

which make entire sections of the regulatory code criminal, including the state’s regulations dealing with public health, agriculture, and the environment.²⁸

Comparative trends. By comparison, Ohio’s criminal code contains 415 sections,²⁹ Illinois’s 571,³⁰ and Wisconsin’s 384.³¹ The criminal codes of Michigan’s neighbors demonstrates that having a large number of codified crimes—more than the ordinary citizen could hope to know and understand—is a common, modern trend. Each of these states has increased the scope of its criminal laws far beyond the Model Penal Code, developed in 1962, which contains only 114 sections.³² Although cross-state comparisons of criminal laws are complicated by the fact that states organize their laws differently—and, in many cases, as in Michigan, not all criminal provisions are located in criminal codes themselves—Michigan appears to have a criminal-law complexity even more pronounced than comparison states.

Intertemporal trends. Not only does Michigan seem to have more crimes on the books than its neighbors; the state has also been adding crimes consistently in

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recent years. Over the last six years, the state has, on average, added more than 45 crimes annually, 44 percent of which were felonies (see *New Crimes in Michigan* graph). Seventy-three percent of the new crimes created during this period fell outside the penal code—including 25 crimes in the laws governing natural resources and environmental protection (chapter 324) and 25 crimes in the laws governing trade and commerce (chapter 445).³³ These figures indicate that Michigan’s legislature has been even more aggressive in adding new crimes to its books than the legislature of North Carolina, a state that the Manhattan Institute deemed to be overcriminalized, partly based on North Carolina’s adding of 34 new crimes, on average, annually to its laws.³⁴ (North Carolina, as mentioned, was the subject of the Manhattan Institute’s first state-overcriminalization analysis.)

Sentencing. Notwithstanding the broader trend toward increasing the number of criminal offenses, the Michigan legislature has taken recent steps to reassess the state’s sentencing approach—fueled in part by the fact that prisons constitute a greater share of Michigan’s general fund budget than they do in any other state.³⁵ After launching a Justice Reinvestment Initiative in June 2013, Michigan completed an analysis of data across the criminal-justice system in May 2014.³⁶ Al-

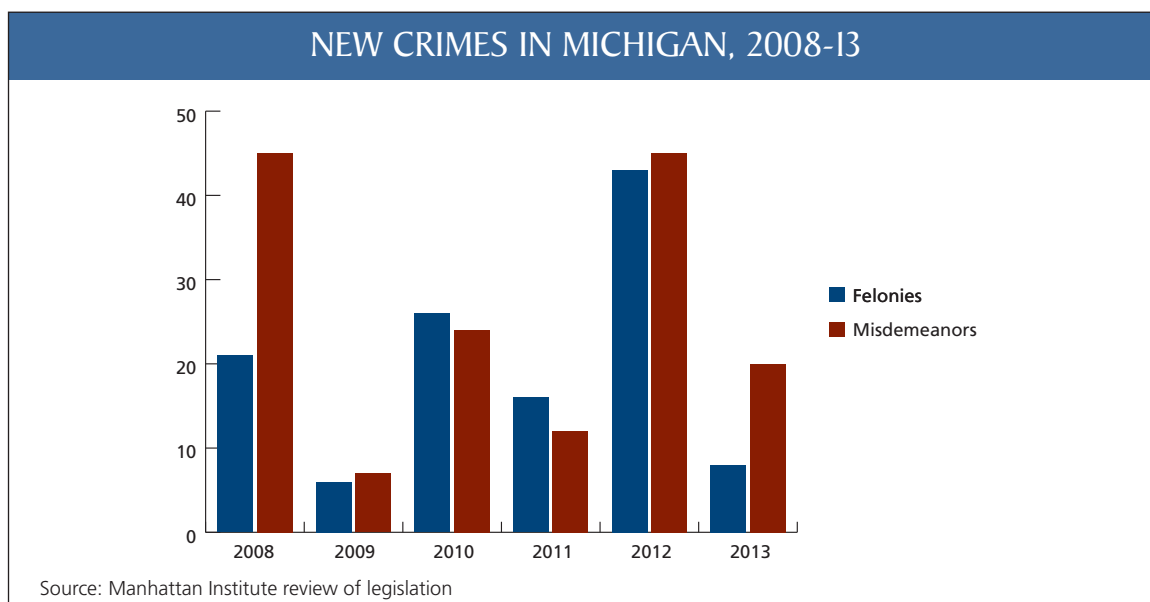
though the policy changes stemming from this effort are as yet undetermined, other states have undertaken sweeping efforts to reallocate prison populations toward violent offenders—most notably, Michigan’s neighbor Indiana in its 2013 legislative session.³⁷

II. QUALITATIVE ASSESSMENT

Old crimes. Even as more crimes have been created in Michigan, there have only been sporadic efforts to rid the state’s laws of archaic existing crimes. Criminal offenses currently on Michigan’s books include:

- Prohibiting endurance contests known as walk-athons³⁸
- Entering a horse into a race under a false name³⁹
- Prohibiting the playing of “The Star-Spangled Banner” in public for dancing or as an exit march⁴⁰
- Prohibiting the shaming of a person for not accepting a challenge to a duel⁴¹

In addition, the state legislature has left on the books various “moral” offenses—some of questionable constitutionality⁴²—such as prohibitions on cohabitation by divorced parties,⁴³ adultery,⁴⁴ teaching or advocating polygamy,⁴⁵ and seduction by a man of an unmarried woman.⁴⁶



New crimes. A close examination of recently promulgated crimes reveals that they are often duplicative or unnecessary. For example, among the new crimes passed by the legislature in 2012 were:

- Displaying any material containing the name of an elected official of Michigan at a polling site⁴⁷
- Improperly displaying an owner's contact information on a barge⁴⁸
- Improperly keeping records of large purchases of plastic bulk-merchandise containers⁴⁹

The prohibition of election material in a polling place rightfully aims to safeguard the integrity of the voting process but duplicates Michigan's host of electioneering prohibitions on the books, including a broad ban on unofficial materials related to an election covering the very same conduct.⁵⁰ Record-keeping and contact-information display requirements are appropriate matters of state regulation, but whether violations in this area should be added to the criminal code is, at the very least, questionable (and especially doubtful in the case of a barge owner's requirement to display contact information in a particular lettering type, color, and size).⁵¹

Criminal intent. Criminal statutes that fail to specify whether the state must establish that the defendant intended to commit an illegal act contribute to overcriminalization. Centuries of legal tradition have recognized that for a conviction to occur, a crime requires both a wrongful act (*actus reus* in Latin) and a culpable state of mind (*mens rea*). Not only does this principle protect the innocent, but it provides additional due-process protections against overaggressive prosecutions.

In the late nineteenth century, legislatures began enacting "public welfare" offenses as a regulatory response to industrialization—laws that imposed liability on the actor regardless of intent. For example, traffic laws, workplace regulations, and the sale of food and beverages imposed strict liability with the intent to promote social welfare and safety.⁵² Because public

welfare offenses omit the requirement that intent be established for a criminal prosecution, individuals can be convicted of crimes of which they were unaware through conduct that would be otherwise unobjectionable, apart from the regulatory prohibition.

Congress and state legislatures regularly enact public welfare offenses. For example, a 2010 joint report by the Heritage Foundation and the National Association of Criminal Defense Lawyers found that 57 percent of criminal laws proposed in the 109th U.S. Congress contained inadequate *mens rea* provisions.⁵³

Michigan displays a similar trend. An extensive 2014 analysis of Michigan criminal statutes conducted by the Mackinac Center for Public Policy found that hundreds of crimes have an inadequate or no *mens rea* provision. Michigan statutes contain at least 3,102 crimes: 1,209 felonies and 1,893 misdemeanors.⁵⁴ Of these, 321 felonies (27 percent of all felonies) and 1,120 misdemeanors (59 percent) contain no *mens rea* provision.⁵⁵

The remaining crimes require a hodgepodge of mental states on the part of the accused, including that the person acted "willfully," "intentionally," "knowingly," "recklessly," "maliciously," "with the intent to," or some combination.⁵⁶ Little indicates that this patchwork of mental states required for various crimes is the product of considered deliberation; rather, it is likely a product of ad hoc decision making by different drafters of these laws. Examples of crimes that fail to define an intent element include:

- Improperly disposing of scrap tires⁵⁷
- Driving motor vehicles in a state wilderness area⁵⁸
- Purchasing a new or used motor vehicle on the weekend⁵⁹
- Transporting Christmas trees without a bill of sale⁶⁰

When the legislature does not explicitly state an intent standard in a criminal offense, Michigan courts have adopted the practice of evaluating whether a *mens rea* requirement should nevertheless be inferred.

While the Michigan Supreme Court has indicated that it does not favor strict-liability crimes, the court maintains that the legislature may decide to penalize certain acts, irrespective of the person's intent.⁶¹ When a statute codifies a common-law crime (such as murder or theft), the courts assume a *mens rea* standard.⁶² For other crimes that are silent on intent, the courts look to the language of the statute and the legislative history to determine whether the legislature meant to create a strict-liability crime.⁶³

Imprecise legislative drafting and judicial efforts to infer legislative intent have resulted in expensive litigation and lengthy appeals to determine what standard of intent should be applied at trial. Worse, unclear intent requirements jeopardize the personal liberty and livelihood of individuals who conduct themselves in a decent fashion, without criminal intent, but who are nevertheless in danger of prosecution.

Regulatory crimes. Although many new crimes on the books enacted by statute are regulatory in nature, a substantial number of crimes are created with no act of the legislature whatsoever. As previously mentioned, various statutes contain catchall provisions that vest in administrative state and local agencies authority to criminalize conduct through their own promulgation of regulations.⁶⁴

An individual who violates any provision of Michigan's public health code is guilty of a misdemeanor and can also be prosecuted for a violation of "a rule promulgated under this code, or a local health department regulation [emphasis added]."⁶⁵ The state's agriculture, occupational, and environmental codes are riddled with catchalls not only criminalizing the violation of any legislative provision within the various parts of acts but also violations of any rules promulgated, orders issued, or operational standards

developed by myriad departments, commissioners, directors, or commissions.⁶⁶

Michigan's environmental and natural resources laws—largely codified in the Natural Resources and Environmental Protection Act (NREPA)⁶⁷—are densely packed with catchalls criminalizing sometimes hyper-technical regulatory requirements concerning the management of state lands, air and water pollution, solid and hazardous waste disposal, wetland protection, and other areas.⁶⁸

Protecting the environment and natural resources in Michigan with strong rules and regulations is an important government responsibility, but the blanket criminalization of certain matters—such as the failure

to surrender a fishing license within a prescribed time span;⁶⁹ ensuring the proper type, size, and color of letters on a barge identification;⁷⁰ or properly displaying a livery boat's maximum carrying capacity⁷¹—needlessly poses a danger to the state's residents and

businesses. Many of these catchall provisions—granting agencies, heads of agencies, and various commissions effective authority to create new criminal offenses—do not contain criminal-intent standards, despite the fact that much of the conduct prohibited under Michigan's regulatory code is unlikely to be intuitively criminal.

Michigan has an estimated 3,102 crimes in its statutes. Many more exist through regulatory 'catchall provisions,' which make entire sections of the regulatory code criminal.

III. DISCUSSION AND POLICY RECOMMENDATIONS

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.

—James Madison, *The Federalist*, No. 62

For the aforementioned reasons, it is certain that many Michiganders unknowingly commit crimes every day.

Underlying the argument against overcriminalization is the fact that modern criminal codes, such as Michigan's, have expanded so exponentially in recent decades that an ordinary person can no longer be assumed to know whether certain conduct is legal—unless advised by the armies of lawyers so common in modern large corporations.⁷²

Even if each new crime were enacted with the best of intentions, careful consideration is rarely given to how a new crime would fit into the current criminal-law framework, how—or whether—it would be prosecuted, and what risks the new offense would pose to innocent individuals. Consequently, unnecessary laws pile up (old crimes are rarely pruned from the books), eroding the integrity and logical cohesion of the criminal-justice system, as laws on the books go unused and unenforced.⁷³

At the heart of the Anglo-American criminal-justice system is the principle that an individual charged with a crime should be provided fair and adequate notice of the conduct deemed criminal.⁷⁴ A corollary principle, that ignorance of the law is not a legitimate excuse,⁷⁵ traces to a time when virtually all criminal laws were tied to the “moral code”⁷⁶—including clear societal violations such as murder, assault, or robbery—for which the risk of being unknowingly ensnared by the criminal law was exceedingly low.

In addition, as a general rule, innocent individuals were historically protected by intent requirements: traditional common law required a crime to involve not only a prohibited act but also the intent to commit that criminal act (*actus rea* and *mens rea*, respectively).⁷⁷ In short, the requirement that a criminal act be knowingly committed, not accidental, prevents the innocent from being unjustly targeted by criminal law.

To be sure, the most dangerous consequences of overcriminalization are mitigated by the discretion that prosecutors exercise when deciding whether, or in what manner, to prosecute a crime. In fact, legislators often rely heavily on the judgment of prosecu-

tors, thereby passing overly broad criminal statutes, confident that no injustice will result.

Yet even if all prosecutors faithfully and judiciously execute their duties, reliance on prosecutors as an exclusive backstop to protect the innocent creates, at minimum, serious risk of wide variance in treatment across jurisdictions. And—to the extent that law-enforcement officials and prosecutors pay attention to the plethora of regulatory crimes in states with criminal codes like Michigan's—the enforcement of such crimes diverts scarce resources from the enforcement of serious violent and property crimes with real victims.

Of course, blithely assuming that prosecutorial discretion is a reliable check on sweeping, inarticulate criminal laws is a perilous proposition—especially when considering the potential deprivation of individual liberty, disruption of life, and marring of reputation that criminal prosecution can entail.⁷⁸ At the federal level, for instance, prosecutorial discretion did not prevent absurd convictions, such as a fisherman convicted of violating a post-Enron, anti-document-shredding statute for destroying three fish;⁷⁹ a Florida seafood importer sentenced to an eight-year prison sentence for transporting lobsters in plastic bags, rather than in cardboard boxes (as required by Honduran regulations);⁸⁰ or an engineer who pleaded guilty for diverting a backed-up sewage system into an outside storm drain to prevent flooding at a retirement home.⁸¹

Michiganders, too, have found themselves lost in their state's labyrinthine criminal-law regime. Consider the case of Kenneth Schumacher. In 2003, Schumacher delivered scrap tires to a facility that he believed to be a legal depository—only to be subsequently prosecuted for unlawfully disposing of them because the facility lacked a license.⁸² In 2007, a Michigan appeals court upheld his conviction for the unlawful disposal of scrap tires, including a sentence of 270 days in jail and a \$10,000 fine, because it determined that Schumacher's subjective judgment that his delivery was legal did not absolve him of the environmental law's strict licensing rule.⁸³

More recently, pig farmers in Michigan suddenly found themselves potential felons after the Michigan Department of Natural Resources issued a vague interpretive ruling to add certain types of pigs to its list of “prohibited species”⁸⁴—with violations potentially resulting in a felony conviction, two years in jail, and \$20,000 in fines.⁸⁵ Without any legislative action, deliberation, or analysis, a regulatory agency was able to disrupt an entire industry with a vague rule requiring pig farmers to bring pictures of their pigs to the Department of Natural Resources to let government workers decide, on a case-by-case basis, whether each pig complied with the new rule.⁸⁶ A circuit court has declared the agency action unconstitutional, leaving Michigan hog owners momentarily relieved as they await the state’s appeal.⁸⁷

Possible Action Steps

The Michigan legislature’s recent efforts through the Justice Reinvestment Initiative suggest a willingness to consider new approaches to criminal justice. Although there is no simple solution to overcriminalization, pursuing the following three steps would constitute progress in the right direction:

1. Create a Bipartisan Legislative Task Force

At the federal level, the U.S. House of Representatives formed a task force last year to focus on overcriminalization, with ten members evenly split between Democrats and Republicans.⁸⁸ In Michigan, as part of an effort to effectuate sentencing reform,⁸⁹ the state formed a Justice Reinvestment Working Group, consisting of representatives from both chambers of the legislature, governor’s office, and various administrative offices to analyze strategy relating to Michigan’s crime, community corrections, and sentencing policies, with a special focus on improving public safety and reducing spending on corrections.⁹⁰

A similar, temporary task force or working group specifically examining overcriminalization in Michigan could be established for a specified period to conduct hearings on issues such as criminal-intent requirements, criminalization of administrative rules, and the scope

and size of criminal law in the state.⁹¹ In addition, the task force could set guiding principles for lawmakers when creating new criminal offenses, with an emphasis on organizing and clarifying criminal laws for state residents. Guidelines for legislative drafters, suggested by a diverse array of policy groups to the congressional task force, include the following questions:⁹²

- Should the conduct in question be a crime, or are there adequate civil, administrative, or other alternatives?
- Is a new criminal law absolutely necessary to discourage this conduct?
- If so, what should the criminal-intent requirement be?
- What is the appropriate punishment?

2. Create a Commission to Review the Criminal Law

Following, or concurrent with, the establishment of the legislative task force, the Michigan legislature could create an independent commission charged with consolidating, clarifying, and optimizing Michigan’s criminal statutes. Alternatively, the existing Michigan Law Revision Commission (MLRC), established in 1965 to “examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms,” could be delegated the charge.⁹³

Such a commission’s first task should be an accurate accounting of all criminal offenses on the books in the state. Within that body of law, the commission should identify and recommend for repeal all unnecessary and overbroad laws⁹⁴—a task that MLRC has undertaken in the past but one that needs further effort—including outdated laws, unutilized laws, and crimes needlessly duplicative of other offenses (such as specific crimes dealing with similar types of electioneering conduct at polling places⁹⁵ or the stealing of shrubs, bushes, and vines⁹⁶ already criminalized by the common-law crime of larceny). Additionally, the commission could evaluate whether penalties are

proportionate to the crimes (e.g., whether the penalty for returning nonreturnable beverage containers⁹⁷ should be as severe as that of assault and battery).⁹⁸ Finally, the commission should evaluate the propriety of catchall provisions criminalizing the violation of large swaths of administrative rules,⁹⁹ as well as review existing *mens rea* provisions in Michigan law—recommending possible changes as necessary.

The creation of such a body is not unprecedented and has, in fact, been utilized by nearby states. In 2004, Illinois created a commission as part of its Criminal Law Edit Alignment and Reform (CLEAR) initiative in a long-term, bipartisan effort to thoroughly review and clean up its 300,000-word criminal code.¹⁰⁰ As a result, Illinois’s criminal code was reorganized, made easier to understand and reference, reduced in size by one-third, rid of redundancies and inconsistencies, and updated with *mens rea* protections where necessary.¹⁰¹ Last year, Minnesota formed a team that helped identify for repeal 1,175 antiquated, unnecessary, and poorly drafted laws, including criminal laws, with a special focus on onerous regulatory provisions.¹⁰² A bit farther away, in Kansas, an “Office of the Repealer” (created in 2011 by the governor)¹⁰³ has already recommended 51 statutes and regulations for repeal.¹⁰⁴

3. Enact a Default Mens Rea Provision

The Model Penal Code¹⁰⁵ contains a default *mens rea* culpability requirement when a criminal statute is silent as to culpability.¹⁰⁶ Although such a provision would not prevent the legislature from exercising its judgment to create crimes even in the absence of intent, lawmakers would have to make that judgment clear in express language. Yet Michigan lacks a default *mens rea* safeguard,¹⁰⁷ even though its

penal code has, as mentioned, eight times as many sections as the Model Penal Code. Today, 14 other states, including Illinois and Ohio, already have a default *mens rea* provision paralleling that of the Model Penal Code.¹⁰⁸

A 2013 study by the Mackinac Center reviewed landmark Michigan legal decisions that addressed the *mens rea* issue; the study concluded that Michigan should adopt a default *mens rea* provision that would apply to crimes where the legislature has been silent on the issue of intent.¹⁰⁹ The legislature would be free

to adopt strict-liability crimes if so desired, but if a statute failed to articulate an intent element, courts would be advised to incorporate the default *mens rea* standard provision.

A recent decision of the Michigan Supreme Court illustrates why such a change is necessary.

Alan Taylor, owner of a medical-device manufacturing company, moved his business to Sparta, Michigan, in 1998.¹¹⁰ In 2006, to accommodate the growth of his company, Taylor decided to expand the employee parking lot. The Department of Environmental Quality later informed Taylor that the parking-lot expansion intruded upon a state-protected “wetland.” Taylor disputed this finding, pointing out that environmental engineers did not note the presence of a wetland, while the DEQ’s own investigator admitted during litigation that the alleged wetland was not readily evident. Taylor was nevertheless charged and convicted for violations of the state’s wetlands protection law and was ordered to pay a fine of \$8,500.

Taylor’s appeal eventually reached the Michigan Supreme Court, but the court declined to review the case. In a concurring opinion, however, Justice Ste-

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phen Markman highlighted the problem of criminal statutes with poorly defined intent standards: “Imposing strict liability on an individual for a violation of [the wetlands protection act] has the potential to subject Michigan property owners to criminal prosecution even when they are unaware that a property at issue comprises a wetland and, as a result, that certain not-obviously-damaging conduct affecting that land is prohibited.”¹¹¹ Markman called on the legislature to clarify intent standards in criminal statutes:

[O]ur Legislature might wish in the future to review this and similar criminal statutes and communicate with clarity and precision its specific intentions concerning which public-welfare offenses ... should be treated by the judiciary of this state as strict-liability offenses[.] It is the responsibility of our Legislature to determine the state of mind required to satisfy the criminal statutes of our state, and the judiciary is ill-equipped when reviewing increasingly broad and complex criminal statutes to discern whether some *mens rea* is intended, for which elements of an offense it is intended, and what exactly that *mens rea* should be.¹¹²

Kenneth Schumacher’s conviction, previously discussed, for the unlawful disposal of scrap tires, in violation of NREPA, further illustrates the risk in relying on courts to infer a *mens rea* provision when legislation is silent.¹¹³ The Michigan Court of Appeals found that the statute¹¹⁴ “contains no language from which it may be inferred that guilty knowledge is a required element for offending its mandate”¹¹⁵—which can, likewise, be said for most of the aforementioned environmental, health, agricultural, and occupational codes criminalized by catchall provisions.¹¹⁶

The lack of a systematic, uniform framework in the promulgation of new laws means that the requisite mental culpability for committing crimes is often unclear and that, absent a default *mens rea* provision, individuals must assume that they are strictly liable for crimes that they unknowingly commit. Fortunately, at least some in the legislature understand this problem:

Representative Mike Shirkey, R–Clark Lake, recently introduced legislation, House Bill 5807, to establish a *mens rea* default for newly enacted crimes.¹¹⁷

CONCLUSION

Reforms suggested in this issue brief should be viewed merely as first steps. The state may also wish to codify the rule of lenity (clarifying to courts that defendants should be given the benefit of the doubt when statutory language is ambiguous), to convert existing crimes to civil infractions, or to eliminate potential jail time for the offenses.

Legislators might also usefully consider procedural changes to prospectively improve enactment of new crimes—such as requiring new offenses and sentencing enhancements to be indicated as such in the caption of the bill and be approved by both the subject-matter committee and the committee with jurisdiction over the criminal-justice system. These ideas, and others, would necessarily be outgrowths of any bipartisan task force or criminal-law review commission. (The precise structure of such reforms are, of course, best left to policymakers closest to the needs of the state.)

Still, the reforms proposed here would set Michigan on the path toward a coherent, effective criminal law—rather than a dubious model of overcriminalization. A bipartisan task force to examine Michigan’s criminal law would help identify the state’s problem areas in more detail, as well as suggest best avenues for reform (and risks to avoid). A commission review of the state’s existing criminal law would improve the clarity of Michigan’s penal code by trimming laws and regulations that have outlived their usefulness. Such a change, along with a default *mens rea* law, would reduce the chance that individuals are prosecuted for crimes that they unknowingly commit, absent a clear decision by legislators that a strict-liability crime is needed. These changes would, not least, focus Michigan’s scarce criminal-enforcement resources on violent and property crimes—a matter of significant import, given crime levels and fiscal constraints in Detroit and other urban areas in the state.¹¹⁸

ENDNOTES

- ¹ John Agar, *Middleville Mom Speaks on 'Today' Show About State Officials Telling Her to Stop Watching Friends' Children Waiting for Bus*, MLIVE.COM, Sept. 29, 2009, http://www.mlive.com/news/grand-rapids/index.ssf/2009/09/middleville_mom_speaks_on_toda.html; Brian Sullivan, *Silly Surveillance*, ABA J., Dec. 2, 2009, available at http://www.abajournal.com/magazine/article/silly_surveillance.
- ² Press release, Michigan State Gov't, Governor Granholm Signs Legislation Clarifying Day-Care Laws (Nov. 24, 2009), <http://www.michigan.gov/minewswire/0,1607,7-136-3452-226840--,00.html>; H.B. 5514, 95th Leg., Regular Sess. (Mich. 2009), available at <http://www.legislature.mi.gov/documents/2009-2010/billengrossed/House/pdf/2009-HEBS-5514.pdf>.
- ³ *People v. Schumacher*, 740 N.W.2d 534 (Mich. App. 2007), available at <http://www.michbar.org/opinions/appeals/2007/062807/36449.pdf>.
- ⁴ Jennifer F. Thompson, *Is It Lawful to Own a Pig in Michigan?*, PACIFIC LEGAL FOUND. LIBERTY BLOG (Apr. 13, 2012), <http://blog.pacificlegal.org/2012/is-it-lawful-to-own-a-pig-in-michigan>.
- ⁵ Michael J. Reitz, *Criminal Minds: Defining Culpability in Michigan Statutes* (Mackinac Ctr. for Pub. Pol'y, Dec. 10, 2013), available at www.mackinac.org/archives/2013/s2013-10.pdf.
- ⁶ See e.g., MCL § 324.11147; MCL § 324.41712; MCL § 324.41905; MCL § 324.9510; MCL § 324.43560; MCL § 324.11549; MCL § 290.668; MCL § 287.966; MCL § 287.149; MCL § 288.684; MCL § 339.1118; MCL § 339.2635.
- ⁷ See, e.g., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the H. Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2010).
- ⁸ See, e.g., Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *IN THE NAME OF JUSTICE* 43–56 (Timothy Lynch ed., 2009).
- ⁹ See, e.g., Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Civ. Justice Rpt. 12 (Manh. Inst. for Pol'y Res., 2009), available at http://www.manhattan-institute.org/html/cjr_12.htm; James R. Copland, *Regulation by Prosecution: The Problem with Treating Corporations as Criminals*, Civ. Justice Rpt. 13 (Manh. Inst. for Pol'y Res., 2010), available at http://www.manhattan-institute.org/html/cjr_13.htm; Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).
- ¹⁰ Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 (2012).
- ¹¹ See Kozinski & Tseytlin, *supra* note 8.
- ¹² Compare Court Statistics Project, National Center for State Courts, *Criminal Caseloads Continue to Decline*, <http://www.courtstatistics.org/Criminal/20121Criminal.aspx> (showing 20 million state criminal cases annually) with U.S. Department of Justice, *United States Attorneys' Annual Statistical Report*, 6, 12 (2012), http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (showing 140,000 federal cases annually).
- ¹³ Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. (forthcoming, fall 2014) (citing Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 239 [2007]).
- ¹⁴ James R. Copland & Isaac Gorodetski, *Overcriminalizing the Old North State: A Primer and Possible Reforms for North Carolina*, Issue Brief 28 (Manh. Inst. for Pol'y Res., May 2014), http://www.manhattan-institute.org/html/ib_28.htm#VCBSGBYVB8E.
- ¹⁵ The Manhattan Institute's Center for Legal Policy endeavors to examine the scope of, and trends in, the criminal law across several states. To compare findings across such states as it builds a portfolio of research, these reports—including those on Michigan and North Carolina—will follow a template format utilizing the same methodology for analysis, section organization, and, in some cases, text. Accordingly, some language in this report is identical to that published in a previous Manhattan Institute publication in this series, *Overcriminalizing The Old North State: A Primer and Possible Reforms for North Carolina*, Issue Brief 28 (Manh. Inst. For Pol'y Res., May 2014), http://www.manhattan-institute.org/html/ib_28.htm#VCBSGBYVB8E. The Mackinac Center has contributed significant original research and analysis, most specifically in, but not limited to, the Criminal Intent section of this brief.
- ¹⁶ See American Law Institute, publications catalog, statement of the purpose of the Model Penal Code, https://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=92 (last visited Sept. 23, 2014).

- ¹⁷ By the count of the Manhattan Institute’s coauthors. Ohio Revised Code, Title 29, Crimes-Procedure, *available at* <http://codes.ohio.gov/orc/29>; Illinois Compiled Statutes, Chap. 720, Criminal Offenses, *available at* <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=53>; Wisconsin Statutes and Annotations, Chap. 939–951, Criminal Code, *available at* <http://docs.legis.wisconsin.gov/statutes/prefaces/toc>. Any error in the section calculations are those of the Manhattan Institute’s co-authors alone and should not be attributed to co-author Michael Reitz or the Mackinac Center.
- ¹⁸ By the count of the Manhattan Institute’s coauthors. Any error in the calculation of new crimes between in 2008–2013 are those of the Manhattan Institute’s coauthors alone and should not be attributed to co-author Michael Reitz or the Mackinac Center.
- ¹⁹ Robin Risko, Corrections Background Briefing (Lansing: House Fiscal Agency, Michigan House of Rep., Dec. 2013), *available at* http://www.house.mi.gov/hfa/PDF/Briefings/Corrections_BudgetBriefing_fy13_14.pdf.
- ²⁰ Office of Justice Programs, BJA Justice Reinvestment Initiatives, Michigan, <https://www.bja.gov/programs/justicereinvestment/michigan.html> (last visited Sept. 22, 2014).
- ²¹ Michigan Compiled Laws, Chap. 750, Michigan Penal Code, *available at* <http://www.legislature.mi.gov/%28S%28lbc02v55hqbugnmjzvpvqw%29%29/mileg.aspx?page=getObject&objectName=mcl-Act-328-of-1931>.
- ²² Michigan Compiled Laws, Chap. 752, Crimes and Offenses, *available at* <http://www.legislature.mi.gov/%28S%28lbc02v55hqbugnmjzvpvqw%29%29/mileg.aspx?page=GetObject&objectname=mcl-chap752>.
- ²³ The estimated calculation was compiled by the Mackinac Center by reviewing criminal statutes, the Michigan Prosecutors’ Association Warrant Manual, and information provided by Michigan House of Representatives staff.
- ²⁴ By the count of the Manhattan Institute’s coauthors. Michigan Compiled Laws, Chap. 750, Michigan Penal Code, *available at* <http://www.legislature.mi.gov/%28S%28lbc02v55hqbugnmjzvpvqw%29%29/mileg.aspx?page=getObject&objectName=mcl-Act-328-of-1931>; Michigan Compiled Laws, Chap. 752, Crimes and Offenses, *available at* <http://www.legislature.mi.gov/%28S%28lbc02v55hqbugnmjzvpvqw%29%29/mileg.aspx?page=GetObject&objectname=mcl-chap752>. Any error in the section calculations are those of the Manhattan Institute’s coauthors alone and should not be attributed to coauthor Michael Reitz or the Mackinac Center.
- ²⁵ The number of sections in the code does not necessarily comport with the number of crimes: there can be multiple crimes in a single section (such that the section count is *underinclusive* of the number of crimes), and there can be crimes created in one section with various other provisions, such as penalties, established in other sections (such that the section count is *overinclusive* of the number of crimes). Some statutes are rarely, or narrowly, applied while others are sweeping and regularly prosecuted. Additionally, many statutes with criminal offenses and penalties are not in Michigan’s penal code. That said, more sections generally mean more crimes: a relatively large number of statutory sections is an important data set when considering the extent of criminalization in the state.
- ²⁶ The estimated calculation was compiled by the Mackinac Center by reviewing criminal statutes, the Michigan Prosecutors’ Association Warrant Manual, and information provided by staff of Michigan’s House of Representatives.
- ²⁷ *Id.*
- ²⁸ See e.g., MCL § 324.11147; MCL § 324.41712; MCL § 324.41905; MCL § 324.9510; MCL § 324.43560; MCL § 324.11549; MCL § 290.668; MCL § 287.966; MCL § 287.149; MCL § 288.684; MCL § 339.1118; MCL § 339.2635.
- ²⁹ By the count of the Manhattan Institute’s coauthors. Ohio Revised Code, Title 29, Crimes-Procedure, <http://codes.ohio.gov/orc/29>. Any error in the section calculations are those of the Manhattan Institute’s coauthors and should not be attributed to coauthor Michael Reitz or the Mackinac Center.
- ³⁰ By the count of the Manhattan Institute’s coauthors. Illinois Compiled Statutes, Chap. 720, Criminal Offenses, *available at* <http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=53>. Note that although Illinois’s criminal code contains fewer sections than Michigan’s, it contains more words—about 300,000—prior to a recent review streamlining its provisions. See CLEAR Initiative, <http://www.clearinitiative.org> (last visited Sept. 22, 2014). Any error in the section calculations are those of the Manhattan Institute’s coauthors alone and should not be attributed to coauthor Michael Reitz or the Mackinac Center.
- ³¹ By the count of the Manhattan Institute’s coauthors. Wisconsin Statutes and Annotations, Chap. 939–951, Criminal Code, <http://docs.legis.wisconsin.gov/statutes/prefaces/toc>. In addition to the states listed, Minnesota has 306 sections

in its criminal code. Minnesota Statutes, Chap. 609–624, Crimes, *available at* <https://www.revisor.mn.gov/statutes/?view=part&start=609&close=624>. Indiana’s contains 1,139 sections—or 1,013 exclusive of sentencing—though the large number of sections is attributable to a different organizational schema, with only one offense included per section. Indiana Code, Title 35, Criminal Law and Procedure, *available at* <https://iga.in.gov/legislative/laws/2014/ic/titles/035>. A different sampling of southeastern states used as a comparison group in an earlier study of North Carolina similarly saw states with fewer criminal-code sections than Michigan: North Carolina has 765 sections in its criminal code; South Carolina, 556; Georgia, 671; Tennessee, 607; and Virginia, 495. Copland & Gorodetski, *supra* note 14. Any error in the section calculations are those of the Manhattan Institute’s coauthors alone and should not be attributed to coauthor Michael Reitz or the Mackinac Center.

³² See Welty, *supra* note 13.

³³ By the count of the Manhattan Institute’s coauthors. In Michigan, sessions in even-numbered years are two months shorter than those in odd-numbered years. Therefore, the chosen study period to evaluate recent growth trends in Michigan’s criminal laws includes a balanced number of short- and long-session years. As depicted in the chart, significantly more criminal laws were passed in even years with long sessions than in odd years with short sessions.

For the six years in the study period, Manhattan Institute research assistants Amanda Swysgood and Meghan Herwig identified every piece of legislation passed with keywords, such as “felony,” “misdemeanor,” “crime,” or “criminal.” They then cross-checked each of those identified laws containing the keywords to determine whether a new criminal offense was created—either *de novo* or by the expansion of a definition or intent requirement. The Manhattan Institute’s coauthors then reviewed each identification with a careful eye for discrepancies to determine the final count of new crimes created for each year in the study period.

MI’s coauthors followed a conservative set of internal guidelines to err on the side of undercounting crimes, with a concerted effort to generate an unbiased result. When a new crime was created by expanding the category of who could be charged—to include, for example, an owner, partners, officer, or director—we conservatively counted the addition as one new offense, even though its application was expanded across several categories. Crimes for second/ subsequent offenses were not counted separately as new crimes (Michigan’s felonies and misdemeanors are not formally classified by degrees or classes). New crimes containing the same substantive elements, but with different corresponding penalties based on the severity of harm caused by the criminal conduct, were not counted as separate new crimes.

Several pieces of legislation required subjective judgment calls on a case-by-case basis. Such cases usually involved legislation to amend existing law that was already criminally enforced by a catchall provision criminalizing a violation of any provision contained in an act, part, or division. Technically, any substantive change or addition could be considered a new crime. In such a case, however, barring special circumstances, only substantively amended provisions with “shall not” language were counted as new crimes—even though prescriptive “shall” requirements could also be criminally enforced, given the catchall provision. Such subjective decisions may, or may not, be warranted; any relaxation of the conservative counting methodology that we employed would advance, rather than undercut, the argument that Michigan is becoming overcriminalized.

Note that the count of new crimes includes any legislation passed by the legislature; almost all were also signed into law by the governor. All the data are organized in a spreadsheet, *available upon request*. Any error in the calculations are those of the Manhattan Institute’s coauthors alone and should not be attributed to coauthor Michael Reitz or the Mackinac Center.

³⁴ Copland & Gorodetski, *supra* note 14; Welty, *supra* note 13.

³⁵ See Henry J. Kaiser Family Foundation, Distribution of State General Fund Expenditures (in millions), <http://kff.org/other/state-indicator/distribution-of-general-fund-spending> (last visited Sept. 22, 2014). The only states spending more on corrections than Michigan are the much larger states of California, Texas, New York, and Florida.

³⁶ See Office of Justice Programs, BJA Justice Reinvestment Initiatives, Michigan, <https://www.bja.gov/programs/justicereinvestment/michigan.html> (last visited Sept. 22, 2014).

³⁷ Marilyn Odendahl, *Criminal Code and Expungement Bills Signed by Governor*, *TheIndianaLawyer.com* (May 6, 2013), <http://www.theindianalawyer.com/criminal-code-and-expungement-bills-signed-by-governor/PARAMS/article/31401>.

³⁸ MCL § 752.161; MCL § 752.162.

³⁹ MCL § 750.332.

⁴⁰ MCL §§ 750.541–750.543.

⁴¹ MCL § 750.173.

⁴² See *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding a due-process right protecting noncommercial sexual activity between consenting adults); see also U.S. Const. amends. I, XIV (establishing right to freedom of speech).

⁴³ MCL § 750.32.

⁴⁴ MCL § 750.30.

⁴⁵ MCL § 750.441.

⁴⁶ MCL § 750.532.

⁴⁷ MCL § 168.744a. This statute is significantly vague, given that it does not criminalize a conduct but rather a condition as a result of some unspecified conduct. It is unclear what conduct would be in violation of the statute—more specifically, how far removed a person could be, in terms of causation in connection to the prohibited condition, to be found criminally liable.

⁴⁸ MCL § 324.80143.

⁴⁹ MCL § 445.2077; MCL § 445.2081.

⁵⁰ MCL § 168.744; MCL § 168.744a.

⁵¹ MCL § 324.80143.

⁵² See Reitz, *supra* note 5.

⁵³ Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Special Rep. 77 (Heritage Found. & Nat’l Assoc. of Crim. Def. Lawyers, May 5, 2010), available at <http://www.heritage.org/research/reports/2010/05/without-intent>.

⁵⁴ The estimated number of crimes in Michigan was compiled by reviewing criminal statutes, the Michigan Prosecutors Association’s Warrant Manual, and information provided by the staff of Michigan’s House of Representatives. This figure may undercount the actual number of criminal offenses without any criminal intent requirements because of catchall provisions criminalizing large swaths of laws and regulations.

⁵⁵ As discussed later, courts in Michigan have developed a practice of inferring intent standards for certain types of crimes and where legislative intent would indicate a desire to establish a standard of intent.

⁵⁶ There are also crimes with other, less frequently used, *mens rea* language, such as “has reason to know,” “carelessly,” “negligently,” etc.

⁵⁷ MCL § 324.16902.

⁵⁸ MCL § 324.35106.

⁵⁹ MCL §§ 435.251–254.

⁶⁰ MCL § 324.52901; MCL § 324.52909. These examples are hardly exhaustive. Other crimes on the books in Michigan lacking any *mens rea* requirement include: removal of forest products from state lands, MCL § 324.2156; causing a pet ferret discomfort or failing to provide adequate bedding, MCL § 287.893; selling dyed or artificially colored baby chicks, rabbits, or ducklings, MCL § 752.91; and trimming a tree or shrub within a highway right-of-way to make a sign more visible, MCL § 252.311.

⁶¹ *People v. Lardie*, 452 Mich. 231, 240 (1996). *Lardie* was subsequently overturned by the Michigan Supreme Court on grounds unrelated to the issues discussed in this paper.

⁶² *Id.* at 241.

⁶³ *People v. Kowalski*, 489 Mich. 488, 498, reh’g denied, 490 Mich. 868 (2011).

⁶⁴ See James R. Copland, *What’s Wrong—and Right—with New York Criminal Law*, in *ONE NATION UNDER ARREST* 173 (Paul Rosenzweig & Brian W. Walsh eds., 2010).

⁶⁵ See MCL § 333.1299.

⁶⁶ See e.g., MCL § 324.11147; MCL § 324.41712; MCL § 324.41905; MCL § 324.9510; MCL § 324.43560; MCL § 324.11549; MCL § 290.668; MCL § 287.966; MCL § 287.149; MCL § 288.684; MCL § 339.1118; MCL § 339.2635.

⁶⁷ MCL §§ 324.101–324.90106 (2014).

⁶⁸ Reitz, *supra* note 5.

- ⁶⁹ MCL § 324.1616.
- ⁷⁰ MCL § 324.80143.
- ⁷¹ MCL § 324.44520.
- ⁷² See e.g., MCL § 324.11147; MCL § 324.41712; MCL § 324.41905; MCL § 324.9510; MCL § 324.43560; MCL § 324.11549; MCL § 290.668; MCL § 287.966; MCL § 287.149; MCL § 288.684; MCL § 339.1118; MCL § 339.2635.
- ⁷³ See John S. Baker, Jr., *Mens Rea and State Crimes 10* (Federalist Soc’y, 2012), available at <http://www.fed-soc.org/publications/detail/mens-rea-and-state-crimes>.
- ⁷⁴ See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005).
- ⁷⁵ See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).
- ⁷⁶ See *id.* (citing Oliver Wendell Holmes, Jr., *The Common Law* 45–46, 125 (Belknap, 2009) (1881) (“[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law”); Wayne R. Lafave, *Criminal Law* § 5.6, § 1.3(f) (5th ed., 2010); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1940) (“[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom’ ”).
- ⁷⁷ See William Blackstone, 4 *Commentaries*, at 432 (9th ed., Callahan, 1913).
- ⁷⁸ See *Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime—A Roadmap to Restore Rights and Status After Arrest or Conviction* (Nat’l Assoc. of Crim. Def. Lawyers, May 29, 2014), available at <http://www.nacdl.org/restoration>.
- ⁷⁹ See *Yates v. United States*, U.S. Sup. Ct., No. 13-7451, decision below 733 F.3d 1059 (11th Cir. 2013).
- ⁸⁰ See Michael Johnson, *Congress Reviewing “Overcriminalization,”* WASH. EXAMINER, Oct. 4, 2010, available at <http://www.examiner.com/article/congress-reviewing-overcriminalization>.
- ⁸¹ See Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J., Dec. 21, 2011, available at <http://online.wsj.com/news/articles/SB10001424052970204903804577082770135339442>.
- ⁸² See *People v. Schumacher*, 740 N.W.2d 534, 538 & n. 2 (Mich. App. 2007).
- ⁸³ See *id.*, at 542–43.
- ⁸⁴ See Thompson, *supra* note 4.
- ⁸⁵ See Elizabeth Meister & Dan Collison, *Battle over Michigan’s New Swine Rules Goes Hog Wild*, NPR BLOG (Aug. 31, 2014, 4:45PM), <http://www.npr.org/blogs/thesalt/2012/08/31/160394513/battle-over-michigans-new-swine-rules-goes-hog-wild>; John Flesher, *Exotic Swine Ban in Michigan Brings Backlash*, HUFFINGTON POST DETROIT, Apr. 27, 2012, available at http://www.huffingtonpost.com/2012/04/27/exotic-swine-ban-michigan-invasive-species_n_1458684.html.
- ⁸⁶ See Thompson, *supra* note 4.
- ⁸⁷ See Pete Kennedy, *Judge Strikes Down Michigan Swine ISO*, Farm-to-Consumer Legal Defense Fund, http://www.farmtoconsumer.org/news_wp/?p=15329; Robert Allen, *Good Pig, Bad Pig: Michigan Files Appeal to Preserve Ban on Invasive Swine*, May 19, 2014, available at <http://www.freep.com/article/20140518/NEWS06/305180164/Michigan-exotic-swine-ban>.
- ⁸⁸ See Press Release, U.S. H. Comm. on the Judiciary, House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014), available at <http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee-reauthorizes-bipartisan-over-criminalization-task-force>; see also H.R. Res., Over-Criminalization Task Force Resolution of 2014, available at http://judiciary.house.gov/_cache/files/337718ed-ed2f-4b33-a926-33a6bc7ccd32/over-crim-task-force-resolution.pdf.
- ⁸⁹ Office of Justice Programs, BJA Justice Reinvestment Initiatives, Michigan, <https://www.bja.gov/programs/justicereinvestment/michigan.html> (last visited Sept. 22, 2014).
- ⁹⁰ Bipartisan Plan to Increase Public Safety and Reduce Spending (Michigan Justice Reinvestment Working Group, May 2009), available at http://csgjusticecenter.org/wp-content/uploads/2012/12/Michigan_Working_Group.pdf.
- ⁹¹ See *generally*, Nat’l Assoc. of Crim. Def. Lawyers, *Criminal Defense Issues*, <https://www.nacdl.org/overcrimtaskforce> (last visited Sept. 22, 2014).
- ⁹² Heritage Found., *Criminal Law Checklist for Federal Legislators*, <http://www.heritage.org/criminallawchecklist%E2%80%8E> (last visited Sept. 22, 2014).

- ⁹³ Michigan Legislative Council, Michigan Law Revision Commission, <http://council.legislature.mi.gov/CouncilAdministrator/mlrc> (last visited Sept. 22, 2014).
- ⁹⁴ See Vikrant Reddy & Marc A. Levin, 12 Steps for Overcoming Overcriminalization, Pol’y Perspective (Texas Public Pol’y Found., May 2012), available at <http://www.rightoncrime.com/wp-content/uploads/2012/05/12-Steps-for-Overcoming-Overcriminalization.pdf>.
- ⁹⁵ MCL § 168.744a; MCL § 168.744.
- ⁹⁶ MCL § 750.367.
- ⁹⁷ MCL § 445.574a.
- ⁹⁸ MCL § 750.81.
- ⁹⁹ See e.g., MCL § 324.11147; MCL § 324.41712; MCL § 324.41905; MCL § 324.9510; MCL § 324.43560; MCL § 324.11549; MCL § 290.668; MCL § 287.966; MCL § 287.149; MCL § 288.684; MCL § 339.1118; MCL § 339.2635.
- ¹⁰⁰ See CLEAR Initiative, <http://www.clearinitiative.org> (last visited Sept. 22, 2014); *Governor Approves Last in Series of Bills Streamlining Illinois Criminal Code*, PR NEWSWIRE, Aug. 27, 2012, <http://www.prnewswire.com/news-releases/governor-approves-last-in-series-of-bills-streamlining-illinois-criminal-code-167609195.html>.
- ¹⁰¹ *Id.*
- ¹⁰² See Briana Bierschbach, *Dayton’s Team Outlines 1,000 ‘Unsession’ Ideas for Updating, Streamlining Government*, MINNPOST, Mar. 4, 2014, available at <http://www.minnpost.com/politics-policy/2014/03/dayton-s-team-outlines-1000-unsession-ideas-updating-streamlining-government>; Bill Salisbury, *Minnesota ‘Unsession’ Dumps 1,175 Obsolete, Silly Laws*, ST. PAUL PIONEER PRESS, May 27, 2014, available at [https://www.google.com/?gws_rd=ssl#safe=off&q=pioneer+pre ss](https://www.google.com/?gws_rd=ssl#safe=off&q=pioneer+press).
- ¹⁰³ Kansas Department of Administration, Office of the Repealer, <https://admin.ks.gov/offices/repealer> (last visited Sept. 22, 2014).
- ¹⁰⁴ Tim Carpenter, *State ‘Repealer’ Lists 51 Objections*, TOPEKA CAPITAL J., Jan. 20, 2012, <http://cjonline.com/news/2012-01-20/state-repealer-lists-51-objections>. Not all of the statutes repealed in Kansas are criminal.
- ¹⁰⁵ MODEL PENAL CODE (1962); see Baker, *supra* note 73, at 16.
- ¹⁰⁶ See Baker, *supra* note 73, at 16.
- ¹⁰⁷ *Id.*, at Appendix 2.
- ¹⁰⁸ *Id.*
- ¹⁰⁹ Reitz, *supra* note 5.
- ¹¹⁰ See Order, People of Michigan v. Taylor, No. 145491 (Jan. 31, 2014) (Markman, J., concurring).
- ¹¹¹ *Id.*
- ¹¹² *Id.*
- ¹¹³ Reitz, *supra* note 5; People v. Schumacher, 740 N.W.2d 534 (Mich. App. 2007).
- ¹¹⁴ MCL § 324.16902.
- ¹¹⁵ Schumacher, 740 N.W.2d 534.
- ¹¹⁶ See e.g., MCL § 324.11147; MCL § 324.41712; MCL § 324.41905; MCL § 324.9510; MCL § 324.43560; MCL § 324.11549; MCL § 290.668; MCL § 287.966; MCL § 287.149; MCL § 288.684; MCL § 339.1118; MCL § 339.2635.
- ¹¹⁷ H.B. 5807 would require “a culpable mental state and that the person act purposely, knowingly or recklessly” for any criminal offense laws enacted after Jan. 1, 2015.
- ¹¹⁸ In recent years, crime has been trending downward in Michigan—reported violent crime is down 15 percent from 2008 to 2012—but violent crime rates in four Michigan cities remain three to five times greater than the national average. See Applying a Justice Reinvestment Approach to Improve Michigan’s Sentencing System, Justice Ctr., May 2014, at <https://www.bja.gov/Publications/CSG-MichiganJRI.pdf>. The City of Detroit is an estimated \$18 billion in debt, has experienced operating deficits for seven consecutive years, and allocates 38 percent of its expenditures to debt service. See In re City of Detroit, Michigan, 504 B.R. 97 (E.D. Mich., Dec. 5, 2013).