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**ISSUE BRIEF**

Legal Reform



# OVERCRIMINALIZING THE SOONER STATE

A Primer and Possible Reforms for Oklahoma

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# FIFTH IN THE OVERCRIMINALIZING AMERICA SERIES

Authored in whole, or in part, by scholars from the Manhattan Institute

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\*James Parsons and James Devereaux provided invaluable research assistance. This paper is the fifth in a series of state-level reports authored in whole, or in part, by scholars at the Manhattan Institute. Some language may be identical, or substantially similar, to that published in previous publications in this series. See 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); James R. Copland et al., *Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan*, Issue Brief 31 (Manh. Inst. for Pol'y Res., October 2014); James R. Copland and Isaac Gorodetski, *Overcriminalizing the Palmetto State: A Primer and Possible Reforms for South Carolina*, Issue Brief 44 (Manh. Inst. for Pol'y Res., January 2016); and James R. Copland and Rafael A. Mangual, *Overcriminalizing the North Star State: A Primer and Possible Reforms for Minnesota*, Issue Brief 48 (Manh. Inst. for Pol'y Res., February 2016).

## Executive Summary\*

In Oklahoma, residents face an array of criminally enforceable rules and regulations covering ordinary business and personal conduct. These rules often place individuals in legal jeopardy for unknowingly engaging in seemingly innocuous, but nonetheless illegal, conduct. Some arrests in the Sooner State border on the absurd, such as the case of local bartender Ian McDermid: he was arrested for violating state liquor regulations by infusing vodka with pickles and bacon to make specialty cocktails.

Overall, Oklahoma's criminal code is larger than that of its neighbors, to the extent that it has more sections than the codes of Arkansas, Colorado, Missouri, Texas, and Kansas. Many of the Sooner State's criminally enforceable rules and regulations fall outside its penal code. In addition, lawmakers continue to add crimes to the books:

- Oklahoma's criminal code contains 1,232 sections—compared with 114 in the Model Penal Code—and more than 272,000 words.
- Oklahoma has created, on average, 26 crimes annually over the last six years; 91% of these fell outside the penal code.
- Over the last six years, lawmakers have added crimes to 21 different statutory titles covering areas ranging from professions and occupations to schools. Many of these statutes also use regulatory catchall provisions to criminalize violations of rules promulgated by unelected regulators.

The breadth and complexity of Oklahoma's criminal law cause citizens to face a number of serious risks: unintentionally violating rules that do not proscribe self-evidently wrong conduct; the risks inherent in the vast jurisdictional variations in prosecutions arising from a voluminous and complex body of criminal laws; and the diversion of scarce resources away from the enforcement of serious violent and property crimes. To address the overcriminalization problem, Oklahoma policymakers should:

1. **Create a bipartisan legislative task force.** 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. **Create a commission to review the criminal law.** Engage in a comprehensive review of the criminal law with the aim of consolidating, clarifying, and optimizing the state's current criminal statutes and regulations.
3. **Enact a default *mens rea* provision.** Ensure that being convicted of a crime requires a showing of intent—unless the legislature clearly specifies otherwise.

## I. Introduction

The phenomenon of “overcriminalization” in the United States has drawn increasing scrutiny by politicians,<sup>1</sup> judges,<sup>2</sup> scholars,<sup>3</sup> and policy analysts.<sup>4</sup> Overcriminalization refers not only to the creation of new criminal laws but also to the erosion of criminal-intent requirements. Unlike most traditional crimes, these proliferating new regulatory and licensing offenses do not typically involve conduct that is self-evidently wrong and do not typically require that an individual know or understand that his actions violated a legal or social norm.<sup>5</sup> When governments, especially acting outside the legislative process, criminalize ordinary conduct, some good-hearted people will inevitably be surprised to find themselves in handcuffs. Every time a well-meaning farmer or small-business owner gets ensnared in the enforcement of shoddily created, overreaching statutes, respect for the rule of law erodes. Such respect is essential for a well-functioning society.

Although most attention placed on overcriminalization to date has focused on federal crimes, most criminal prosecutions occur at the state level.<sup>6</sup> 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.”<sup>7</sup> To study the extent to which states have followed the federal trend toward overcriminalization, the Manhattan Institute is in the process of examining the evolution of states’ criminal laws in some detail—an effort we have dubbed “Overcriminalizing America.”<sup>8</sup> In May 2014, coauthor Copland and the Institute’s Isaac Gorodetski published a primer on the subject for North Carolina;<sup>9</sup> in October 2014, they published a similar primer on Michigan, authored jointly by scholars at the Mackinac Center;<sup>10</sup> in January 2016, they published a primer on South Carolina;<sup>11</sup> and in February 2016, coauthors Copland and Rafael Mangual published an examination of Minnesota’s criminal law.<sup>12</sup> The present paper, examining overcriminalization in Oklahoma, is the fifth in the series.

Oklahoma’s criminal code contains more than 10 times as many sections as 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.”<sup>13</sup> The Sooner State’s criminal code contains more sections than that of any of its neighboring states and more sections than the codes of any of the four states previously studied as part of the *Overcriminalizing America* project. The criminal code, however, hardly captures the totality of Oklahoma’s criminal law. Among the new crimes created by the legislature in the last six years, 91% have been codified *outside* the state’s criminal code. That is a higher percentage than in any state previously studied. This means that Oklahomans are acutely at risk of running afoul of an obscure criminal offense because they did not look beyond the penal code when attempting to conform their behavior to the law.

Nevertheless, the Oklahoma legislature has been adding *new* criminal offenses to the books at a somewhat slower rate than in other states studied: 26 new crimes annually from 2010–15.<sup>14</sup> Moreover, the rate at which the state has been creating new crimes has been slowing down; only 15 new crimes were created annually from 2013 through 2015. Still, many of these new crimes seem unnecessarily duplicative or merely create onerous licensing and professional obligations on private enterprise. Included in this category are 35 new crimes in the section of the Oklahoma statutes governing “professions and occupations.” Among them is a prohibition on advertising for the sale of pets by an unlicensed commercial pet breeder.



Legislators aren't the only ones making criminal law in Oklahoma. Despite the fact that they are politically unaccountable to voters, much of the state's criminal-lawmaking has been delegated to unelected regulators, a phenomenon we've characterized as "criminalization without representation." Indeed, Oklahoma's pet-breeders law is an example of the legislature not only creating new crimes but delegating crime-creation authority to regulators. The law criminalizes the violation of "any rule adopted under the Pet Breeders Act."<sup>15</sup>

Unfortunately, overcriminalization is not a problem that is of interest only to academics and theorists. This trend has affected the lives of many individuals across the country. And, in Oklahoma, individuals have been ensnared for putatively innocent conduct, including Ian McDermid, the bartender arrested for infusing vodka with bacon and pickles, in violation of liquor regulations.<sup>16</sup> Kim Powers, of Ponca City, had to sue the state to avoid criminal prosecution for engaging in her business of selling caskets, which the state prohibits unless one is a licensed funeral-home director.<sup>17</sup> Powers was represented by the Institute for Justice, a nonprofit law firm notable for taking on cases to expand and protect economic liberty.<sup>18</sup>

This paper looks at overcriminalization trends in Oklahoma, quantitatively and qualitatively, and proposes various avenues for reform. **Section II** examines the state's criminal-lawmaking quantitatively. That analysis includes the number and creation rate of crimes and discusses how Oklahoma compares with its neighbors in various respects. **Section III** examines Oklahoma's criminal law more qualitatively by highlighting outdated criminal provisions, redundant new crimes, crimes without intent requirements, and the delegation of criminal-lawmaking authority to regulators. **Section IV** assesses the policy implications of overcriminalization and gives an overview of general recommendations for reform.

## II. Quantitative Assessment

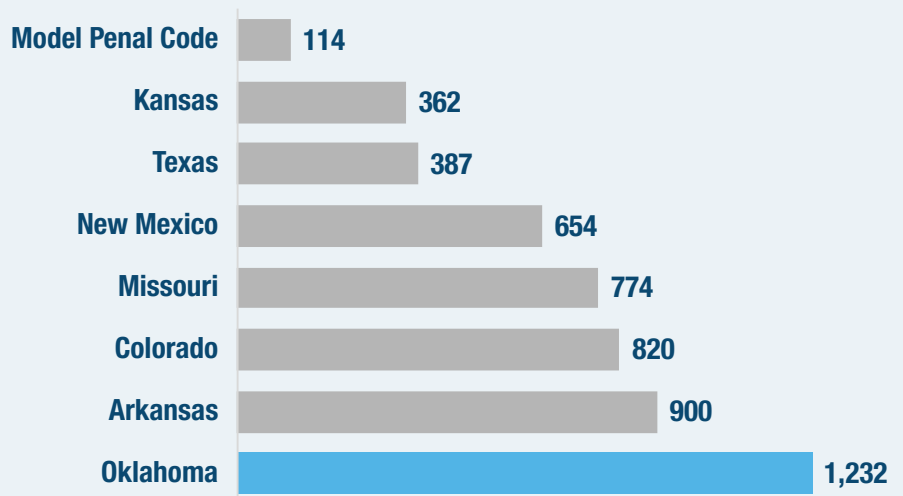
**Number of Crimes.** Oklahoma's criminal code, Title 21 of the Oklahoma statutes, contains 286,196 words over 659 pages (272,978 words in 629 pages, excluding the table of contents). Oklahoma's voluminous criminal code, however, would hardly place the average citizen on notice of every crime on the books in the state. Over just the last six years, the state legislature has created dozens of new crimes outside the criminal code. The new crimes appear in sections of the state's statute books governing agriculture, animals, children, contracts, elections, insurance, intoxicating liquors, liens, motor vehicles, poor people, professions and occupations, public health and safety, schools, state government, and workers' compensation.

**Comparative Trends.** Oklahoma's criminal code has 1,232 sections. In comparison, the Model Penal Code, developed by leading scholars and attorneys as a template for criminal law in 1962, contains only 114 sections.<sup>19</sup> Moreover, Oklahoma's criminal code contains significantly more sections than the codes of any of its neighboring states: Arkansas's criminal code contains 900 sections, Colorado's 820, Missouri's 774, New Mexico's 654, Texas's 387, and Kansas's 362 (**Figure 1**).

Although the difference between Oklahoma's criminal code and those of its neighbors might be partly explained by variations in codification techniques, it is hard to escape the conclusion that Oklahoma's criminal code is unusually large. The Sooner State's penal code has more words than those of any of the states previously studied by the Manhattan Institute as part of its *Overcriminalizing America* project. On the other hand, Oklahoma has been creating *new* criminal offenses at a somewhat slower pace than other states studied. On average, it has created 26 new crimes annually over the prior six years (**Figure 2**).

FIGURE 1.

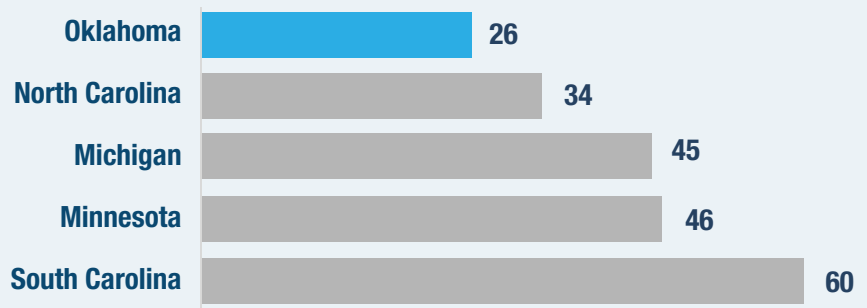
### Number of Sections in Penal Code, Oklahoma and Neighboring States



Source: Manhattan Institute researchers

FIGURE 2.

### New Crimes Created Annually by Statute, Prior Six Years



Source: Crime counts were done by Manhattan Institute researchers and were based on a review of legislation passed in Oklahoma during the years 2010–2015 as reported by LegiScan, a "legislative tracking service designed for both public citizens and government affairs professionals."

**Intertemporal Trends.** The rate at which Oklahoma has been creating new crimes has been below that of other states studied by the Institute; moreover, that rate has slowed in recent years. From 2010 through 2012, the state legislature created almost 37 new crimes annually. The rate of new-crime creation, however, fell to 15 annually from 2013 to 2015 (Figure 3). The rate at which the legislature has created new felonies has also dropped. A total of 36% of all new crimes created in 2010–12 were felonies, compared with only 26% of new crimes created in 2013–15. Overall, one-third of new crimes created over the six-year period were felonies. That is a higher fraction than in Minnesota and South Carolina but a lower fraction than in North Carolina and Michigan, the states previously studied in this series.

Most new crimes created in Oklahoma were codified *outside* the penal code—91% across the entire six-year period studied (Figure 4). That is a higher percentage than in any state previously studied.

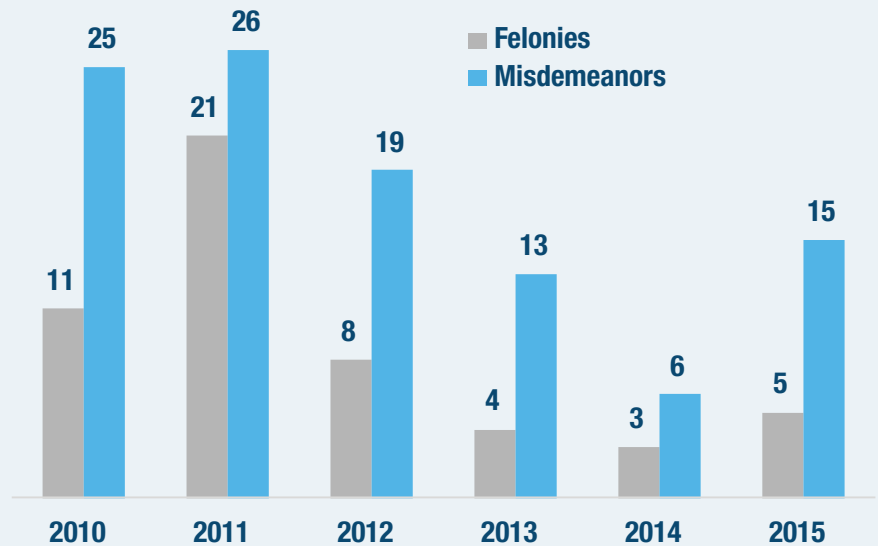
### III. Qualitative Assessment

**Old Crimes.** While they may not be enforced often—or even at all, in some cases—Oklahoma’s statutory code contains numerous archaic, outmoded, and likely unconstitutional criminal offenses. Even as state lawmakers continue to add new crimes to the books, there has been no effort to rid the state’s laws of outdated crimes. This compounding makes it more difficult for citizens to identify, read, and comprehend the offenses for which they can be criminally sanctioned.

Criminal offenses still on Oklahoma’s books include: a 1915 statute

FIGURE 3.

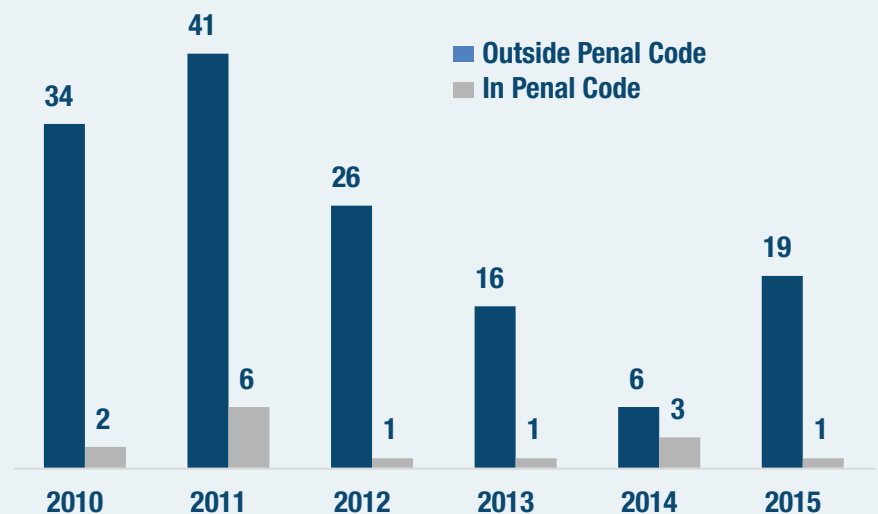
#### New Crimes in Oklahoma, 2010–15



Source: LegiScan

FIGURE 4.

#### New Crimes in Oklahoma, by Codification, 2010–15



Source: LegiScan

prohibiting the practice of fortune-telling;<sup>20</sup> a 1955 law banning membership and participation in the Communist Party;<sup>21</sup> and a 1919 prohibition on the public display of “any red flag or other emblem or banner, indicating disloyalty to the Government of the United States.”<sup>22</sup> In addition to the constitutionally problematic laws against certain political speech, there remain various “moral” offenses in Oklahoma’s statutory code—many of which may very well be constitutionally infirm. These offenses include breaking the Sabbath<sup>23</sup> and “wantonly uttering or publishing words, casting contumelious reproach or profane ridicule upon God.”<sup>24</sup>

Leaving outmoded and/or clearly unconstitutional offenses on the books makes navigation of the criminal law unnecessarily cumbersome for Oklahomans—particularly in light of the rate at which lawmakers have added new laws to the books.

**New Crimes.** In addition to the old crimes discussed above, many of the more than 150 new crimes created in Oklahoma since 2010 are duplicative, unnecessary, confusing, or bordering on the ridiculous. For example, a 2011 statute prohibits anyone from “[w]illfully and knowingly enter[ing] or remain[ing] in any posted, cordoned off, or otherwise restricted area of a building or grounds the use of which is restricted in conjunction with an event designated as a special event of national or state significance.”<sup>25</sup> The statute duplicates rules against trespass. Bordering on the ridiculous is a 2011 statute that criminalizes the “[f]ailure to leave any gates, doors, fences, road blocks and obstacles or signs in the condition in which they were found, while engaged in the recreational use of the land of another.”<sup>26</sup>

Oklahoma’s books are also weighed down by laws that separately criminalize conduct already illegal on the basis of *who* engages in the act or *why*. For example, a 2013 statute creates a separate “breaking and entering” offense if the perpetrator is a bail enforcer seeking to recover a defendant.<sup>27</sup> Similarly, Section 856.3 of Title 21 (passed in 2011) separately criminalizes conduct such as assault and battery if done as a condition of membership in a street gang.<sup>28</sup> This phenomenon is also illustrated in a 2012 law that separately punishes the falsification of child-welfare case documents if the documents are falsified by an agent of the state.<sup>29</sup> While circumstances may make certain criminal conduct more or less egregious, Oklahoma might be wise to consider addressing those circumstantial distinctions between and among violations of general prohibitions in sentencing enhancements that are codified separately from a comprehensive criminal code.

**Criminals at Work.** While many of the more than 150 new crimes created in Oklahoma over the last six years are spread throughout the state’s many statutory codes, 35 crimes were added to Title 59, *Professions and Occupations*. These crimes not only regulate but also criminally sanction acts and omissions undertaken while engaged in certain professions and go beyond mere licensing requirements. Many of these laws criminalize acts without regard to criminal intent.

In 2010, for example, the legislature created five misdemeanors (and authorized the creation of more crimes by regulators) related to the sale of pets. Among other conduct, the new law criminalized (1) advertisement for sale of pets by an unlicensed commercial pet breeder, and (2) interference (even unknowingly) with an inspection or investigation.<sup>30</sup> Eight misdemeanors were created in sections of the occupational code that regulates contractors. The crimes addressed conduct that might be thought of as innocuous by most people, such as the failure to conspicuously post certain information at job sites.<sup>31</sup> And in 2011, lawmakers made it a felony for a bail bondsman to assist (even unknowingly) another bondsman whose license has been revoked.<sup>32</sup>

The above crimes represent a small sample of the business conduct regulated by the state of Oklahoma’s *Professions and Occupations* code, which regulates (in many cases, on pain of criminal penalties) a number of professions, including:

- Pawnshop owners
- Scrap-metal dealers
- Speech pathologists
- Welders
- Dieticians
- Locksmiths
- Plumbers
- Real-estate professionals
- Barbers
- Public auctioneers
- Accountants
- Interior designers
- Athletic trainers

There are certainly instances in which strong public health and safety arguments can be made in support of some of the regulations found in Title 59. Nonetheless, state lawmakers should give serious consideration to whether criminal enforcement (often without regard to criminal intent) of many of those regulations unnecessarily raises the costs of doing business in the Sooner State and unjustly lands workers in jail.



**Criminal Intent.** Many of the offenses that Oklahoma legislators created during the period studied are silent as to criminal intent. That is, they do not facially require that prosecutors establish that the alleged offender knew, or had reason to know, that he was committing a crime. These types of strict-liability offenses contribute to the overcriminalization problem by essentially eliminating the legal distinction between purposeful and accidental conduct. Moreover, the increasing prevalence of strict-liability offenses in the statutory and regulatory codes of states across the country represents a relatively rapid departure from centuries of Western legal tradition. As many lawyers will recall from their first-year criminal-law courses, that tradition required the state to establish both the commission of a wrongful act (in Latin, *actus reus*) and a sufficiently culpable state of mind (*mens rea*) in order to secure a conviction. The tradition, as the eminent eighteenth-century legal scholar William Blackstone put it, was rooted in the idea that “it is better that ten guilty persons escape, than that one innocent suffer.”<sup>33</sup>

The trend away from regarding intent as integral to a criminal case is not new. It dates back to the late nineteenth century and was a response to industrialization. Lawmakers and their bureaucratic appointees began imposing criminal and civil liability on actors without regard to intent. It was a step taken often in the name of public health and safety. Consequently, citizens across the country now face an increased risk of being convicted of crimes of which they are unaware, often for conduct that is not intuitively wrong.

To help illustrate this trend in favor of strict liability at the federal level, the Heritage Foundation and the National Association of Criminal Defense Lawyers published a joint study, which found that 57% of the criminal laws proposed in the 109<sup>th</sup> U.S. Congress contained

inadequate *mens rea* provisions, with more than 20% of those lacking any intent provision whatsoever.<sup>34</sup>

Unfortunately, Oklahoma lawmakers recently passed on an opportunity to buck this trend: a default *mens rea* standard was introduced by Representative Lisa Billy of the State House in February 2016, but it was not adopted. Beyond this, lawmakers heightened the risk of criminal convictions (and their collateral consequences) faced by their constituents for engaging in conduct that may seem to fall within the regular course of everyday life. Such conduct includes possessing certain regulated substances;<sup>35</sup> unlicensed advertising of puppies for sale;<sup>36</sup> and failing to make a boat-rental business in a state park sufficiently visible.<sup>37</sup> In addition, an entity that contracts with the Oklahoma Tax Commission and obtains information from it can incur criminal liability by accidentally disclosing such information.<sup>38</sup>

To give credit where it is due, there were also several instances between 2010 and 2015 in which state lawmakers clearly gave due consideration to *mens rea* and included strong intent provisions in many statutes passed during the period studied.<sup>39</sup> The presence of strong intent requirements in many of the crimes created during the period studied indicates that state lawmakers take criminal intent seriously when they contemplate the issue. To be sure, the chances that intent will be left out of a criminal statute are likely increased by the fact that many of Oklahoma’s legislative and regulatory rules are criminalized by statutory and regulatory catchall provisions, which, respectively, criminalize the violation of large swaths of the state’s statutory codes as well as of regulations promulgated pursuant to legislative grants of rule-making authority to (often unelected and, therefore, unaccountable) regulatory bodies.<sup>40</sup>

**Regulatory Crimes.** While many of the crimes created by the legislature during the period studied are regulatory in nature, a substantial number of crimes are created in Oklahoma without any act of the legislature whatsoever. As mentioned above, various statutory provisions in the state’s codes contain catchall provisions. Such statutory language vests in administrative bodies the effective authority to criminalize conduct through the promulgation of rules in an area that these bodies have been given the power to regulate.

This sort of delegation is in no way unique to Oklahoma but is nonetheless problematic.<sup>41</sup> The basic problem with regulatory catchall provisions is that they reflect a decision on the part of lawmakers to criminalize rules that they haven’t even seen. It should be noted that the delegation of criminal-lawmaking authority described above has led to the promulgation of many crimes not counted in the quantitative analysis in Section II above, during the period studied.

What’s more, absent from many of these regulatory catchalls are even modest *mens rea* requirements, leaving regulators free to create strict-liability crimes outside the normal political process. To stick with the example of a regulatory catchall highlighted in note 40, Oklahoma lawmakers criminalized the violation of “any rule adopted under the Pet Breeders Act.”<sup>42</sup> When we looked for a collection of the rules promulgated pursuant to that act, we found a document that exceeded 20 pages with more than 43 sections of regulations. All the regulations can be criminally enforced, and only two have a traditional intent requirement.<sup>43</sup> As we have seen in jurisdictions around the country, these broad grants of criminal-lawmaking authority can place well-meaning Oklahomans at risk of prison for unknowingly violating rules promulgated by unelected officials. In essence, it is criminalization without representation.<sup>44</sup>

## IV. 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

It is certain that many Oklahomans unknowingly commit crimes every day. Modern criminal codes such as Oklahoma’s have expanded exponentially in recent decades, and the scope of the criminal law has grown in the regulatory arena outside the confines of the criminal codes. The result is 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. Even if each new crime were enacted with the best of intentions, careful consideration is rarely given as to how the new crime would fit—if at all—into the current criminal-law framework. Other considerations overlooked are how, or whether, the new crime would be prosecuted and what risks the new offense would pose to innocent individuals. Consequently, unnecessary laws pile up, while old crimes are rarely pruned from the books. This pattern erodes the integrity and logical cohesion of the criminal-justice system as laws on the books go unused and unenforced.<sup>45</sup>

At the heart of the Anglo-American criminal-justice system is the principle that an individual charged with a

crime should be provided with fair and adequate notice of the conduct deemed criminal.<sup>46</sup> A corollary principle, that ignorance of the law is not a legitimate excuse,<sup>47</sup> traces back to a time when virtually all criminal laws were tied to the “moral code.”<sup>48</sup> Clear societal violations include murder, assault, and robbery—for which the risk of being unknowingly ensnared by the criminal law is exceedingly low. In addition, as a general rule, innocent individuals were historically protected by intent requirements. Traditional common law required a prohibited act as well as the intent to commit the act with knowledge of its criminal nature (*actus reus* and *mens rea*, respectively).<sup>49</sup> In short, the requirement that a criminal act be knowingly committed, not accidental, prevents the innocent from being unjustly targeted by criminal law.

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. Legislators indeed often rely heavily on the judgment of prosecutors, thereby passing overly broad criminal statutes, confident that no injustice will result.

But reliance on prosecutorial discretion as an exclusive backstop to protect the innocent creates, at a minimum, the serious risk of wide variance in treatment across jurisdictions. Even assuming that law-enforcement officials and prosecutors pay attention to the plethora of regulatory crimes in states with criminal codes comparable with Oklahoma’s, the enforcement of such crimes diverts scarce resources from the enforcement of serious violent and property crimes with real victims.

Moreover, assuming that prosecutorial discretion is a reliable check on sweeping, inarticulate criminal laws is a perilous proposition. This is especially so when one considers the potential deprivation of individual liberty, disruption of life, and marring of reputation that criminal prosecution can entail.<sup>50</sup> At the federal level, for instance, prosecutorial discretion has not prevented absurd convictions. Consider the fisherman who threw three fish back into the sea and was convicted of violating a post-Enron, anti-document-shredding statute.<sup>51</sup> Another case involved a Florida seafood importer who was sentenced to eight years in prison (under Honduran regulations enforced by federal officials) for transporting lobsters in plastic bags rather than cardboard boxes.<sup>52</sup> Or think of the engineer who pleaded guilty to an EPA violation after diverting a sewage backup into the wrong storm drain to prevent flooding at a retirement home.<sup>53</sup>

Although there is no simple solution to the problem of overcriminalization, taking the following three steps would constitute progress:

### 1. Create a bipartisan legislative task force.

At the federal level, the U.S. House of Representatives formed a task force in 2014 to focus on overcriminalization, with 10 members evenly split between Democrats and Republicans.<sup>54</sup> A similar temporary task force or working group could be established for a specified period in Oklahoma to look specifically at overcriminalization in the state. The group could conduct hearings on issues such as criminal-intent requirements, criminalization of administrative rules, and the scope and size of criminal law in the state.<sup>55</sup> 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:<sup>56</sup>

1. Should the conduct in question be a crime, or are there adequate civil, administrative, or other alternatives?
2. Is a new criminal law absolutely necessary to discourage this conduct?
3. If so, what should the criminal-intent requirement be?
4. 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 Oklahoma legislature could create an independent commission charged with consolidating, clarifying, and optimizing Oklahoma's criminal statutes. Such a commission's first task should be an accurate accounting of all the criminal offenses on the books in the state. Within that body of law, the commission should identify any additional laws that should be repealed, beyond those identified in 2014; and recommend amendments to laws deemed vague, ambiguous, overbroad, or otherwise unclear.<sup>57</sup> Additionally, the commission could evaluate whether penalties are proportionate to the crimes. Finally, the commission should evaluate the propriety of catchall provisions criminalizing the violation of large swaths of administrative rules,<sup>58</sup> and it should evaluate existing *mens rea* provisions in Oklahoma law—and recommend changes to the law as necessary.

The creation of such a body would not be unprecedented. In 2013, Tennessee created a commission to review statutes and make annual recommendations for repeal.<sup>59</sup> In 2014, Virginia removed 14 offenses, pursuant to the recommendations of its commission.<sup>60</sup> In Kansas, an "Office of the Repealer" (created in 2011 by the governor)<sup>61</sup> has already recommended 51 criminal statutes and regulations for repeal.<sup>62</sup>

### 3. Enact a default *mens rea* provision.

The Model Penal Code<sup>63</sup> contains a default *mens rea* provision to be applied when a criminal statute is silent as to mental culpability.<sup>64</sup> 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.

Oklahoma lacks a default *mens rea* safeguard,<sup>65</sup> even though its penal code alone has more than 10 times as many sections as the Model Penal Code. Today, 15 other states have default *mens rea* provisions like those in the Model Penal Code; Ohio strengthened and clarified its provision in December 2014,<sup>66</sup> and Michigan most recently adopted a default *mens rea* rule in December 2015.<sup>67</sup> Oklahoma's neighbor Kansas also has a version of this sort of provision, though its applicability is limited to offenses found in the criminal code.

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. Oklahoma should adopt a default *mens rea* provision that would apply to crimes where the legislature has been silent on the issue of intent. 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.

## V. Conclusion

Our recommendations for reform should be viewed merely as first steps. Oklahoma may wish also to codify the rule of lenity<sup>68</sup> (clarifying to courts that defendants should be given the benefit of the doubt when statutory language is ambiguous). In addition, the state could consider the conversion of existing crimes to civil infractions. Another reform would be to eliminate potential jail time for certain offenses (a step that Oklahoma lawmakers should be given credit for taking to a larger extent than we have observed in other states).

Legislators might also usefully consider procedural changes that would prospectively improve the enactment of new criminal laws—such as requiring that new offenses and sentencing enhancements 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 is best left to the policymakers closest to the needs of the state.

Still, the reforms that we suggest would set Oklahoma on the path toward a coherent, effective criminal law and help establish the state as a national leader in criminal-justice reform. Establishing a bipartisan task force as recommended in Section IV above would help identify the problem areas specific to Oklahoma in more detail, as well as the best avenues for reform and risks to avoid. A commission review of the state's existing criminal laws would be an important step in avoiding the current state in which we find federal criminal law—a body so large as to be immeasurable. A default *mens rea* law would reduce the chance that Oklahomans could be prosecuted for crimes that they unknowingly commit, absent a clearly indicated decision by legislators that a strict-liability crime is needed.



## Endnotes

Unless otherwise indicated, citations beginning with "Title" are citations to Oklahoma state statutes. Citations beginning with "HB" or "SB" are citations to bills originating in the Oklahoma State House or Senate, respectively, passed and signed into law during the year indicated in the parentheses that follow the bill number.

- <sup>1</sup> 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).
- <sup>2</sup> See, e.g., Alex Kozinski and Misha Tseytlin, *You're (Probably) a Federal Criminal*, In the Name of Justice 43–56 (Timothy Lynch, ed., 2009).
- <sup>3</sup> Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. and Criminology 537, 537 (2012).
- <sup>4</sup> 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); James R. Copland, *Regulation by Prosecution: The Problem with Treating Corporations as Criminals*, Civ. Justice Rpt. 13 (Manh. Inst. for Pol'y Res., 2010); and Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2005).
- <sup>5</sup> Michael J. Reitz, *Criminal Minds: Defining Culpability in Michigan Statutes* (Mackinac Ctr. for Pub. Pol'y, Dec. 10, 2013).
- <sup>6</sup> Cf. National Center for State Courts, *Criminal Caseloads Continue to Decline, Court Statistics Project* (showing 20 million state criminal cases annually) with U.S. Dept. of Justice, *United States Attorneys' Annual Statistical Report*, 6, 12 (2012) (showing 140,000 federal cases annually).
- <sup>7</sup> Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. Rev. 1935, 1937 (2014), citing Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 231 (2007).
- <sup>8</sup> See *Overcriminalizing America* (Manh. Inst. for Policy Res.).
- <sup>9</sup> See 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).
- <sup>10</sup> James R. Copland et al., *Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan*, Issue Brief 31 (Manh. Inst. for Pol'y Res., Oct. 2014).
- <sup>11</sup> James R. Copland and Isaac Gorodetski, *Overcriminalizing the Palmetto State: A Primer and Possible Reforms for South Carolina*, Issue Brief 44 (Manh. Inst. for Pol'y Res., Jan. 2016).
- <sup>12</sup> James R. Copland and Rafael A. Mangual, *Overcriminalizing the North Star State: A Primer and Possible Reforms for Minnesota*, Issue Brief 48 (Manh. Inst. for Pol'y Res., Feb. 2016).
- <sup>13</sup> See American Law Institute, publications catalog, [statement of the purpose of the Model Penal Code](#).
- <sup>14</sup> By the count of the Manhattan Institute's coauthors and researchers.
- <sup>15</sup> SB 1712 (2010).
- <sup>16</sup> See Brian Hardzinski, *Arrest over 'Bacon Vodka' Prompts Questions from Oklahoma's Alcohol Commission*, [KGOU](#) (June 23, 2016).
- <sup>17</sup> See Institute for Justice, *Requiem for a Cartel: Challenging Oklahoma's Casket Monopoly*.
- <sup>18</sup> See Institute for Justice, [Kim Powers](#).
- <sup>19</sup> Model Penal Code (1962).
- <sup>20</sup> Title 21 [§§ 931–32](#).
- <sup>21</sup> Title 21 [§ 1266.4\(4\)](#).
- <sup>22</sup> Title 21 [§ 374](#).
- <sup>23</sup> Title 21 [§ 911](#) (1910).
- <sup>24</sup> Title 21 [§ 901](#) (1910).
- <sup>25</sup> Title 21 [§ 282\(2\)](#).
- <sup>26</sup> Title 21 [§ 1835.6\(5\)](#).
- <sup>27</sup> Title 59 [§ 1350.6\(A\)](#).
- <sup>28</sup> Title 21 [§ 856.3](#).
- <sup>29</sup> Title 10A [§ 1-8-110](#).
- <sup>30</sup> See *supra* note 15, specifically, portion codified as Title 59 § 5026(C), (D) (repealed 2012).
- <sup>31</sup> Title 59 [§ 1151.7\(4\)](#).
- <sup>32</sup> HB 1243 (2011), specifically, portion codified as Title 59 [§ 1311.3\(B\)](#).

- <sup>33</sup> Harvard Law School Library, [Words of Justice: Roof Garden Wall—Right Panel](#) (last visited Feb. 17, 2016).
- <sup>34</sup> Brian W. Walsh and Tiffany M. Joslyn, [Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law](#), Special Rep. 77 (Heritage Found. and Nat'l Assoc. of Crim. Def. Lawyers, May 5, 2010).
- <sup>35</sup> HB 3380 (2010), specifically, portion codified as Title 63 [§ 2-701\(B\)](#).
- <sup>36</sup> *Supra* note 30.
- <sup>37</sup> SB 374 (2013), specifically, portion codified as Title 74 [§ 2217.1\(A\)\(3\)](#).
- <sup>38</sup> HB 2235 (2015), specifically, portion codified as Title 68 [§ 264\(F\)](#).
- <sup>39</sup> See, e.g., HB 3251 (2010), SB 1712(B) (2010), SB 1762 (2010); HB 1888 (2011), SB 285 (2011), and SB 856 (2011).
- <sup>40</sup> For an example of both a statutory and regulatory catchall provision, see SB 1712 (2010), specifically, portion codified at Title 59 [§ 5026\(A\)](#) (criminalizing—without regard to intent—both the violation of any part of the Commercial Pet Breeders Act and of “any rule adopted under the Pet Breeders Act”). It should be noted that, according to [§ 5027](#) of the same title, rules are promulgated by the Board of Commercial Pet Breeders—an eight-member board of unelected appointees.
- <sup>41</sup> See James R. Copland, *What's Wrong—and Right—with New York Criminal Law*, One Nation Under Arrest 173 (Paul Rosenzweig and Brian W. Walsh, eds., 2010).
- <sup>42</sup> *Supra* note 40.
- <sup>43</sup> Oklahoma Department of Agriculture, Food, and Forestry Office of General Counsel, [Commercial Pet Breeders and Animal Shelter Law and Rules](#), revised Sept. 25, 2014. The number of rules with intent provisions was determined from the results of document searches for the words “knowingly,” “purposefully,” “intentionally,” “recklessly,” and “negligently.”
- <sup>44</sup> While imprisonment is not an available penalty for violation of the rules criminalized in the example highlighted in note 40 above, there are other instances in which Oklahoma lawmakers have included in legislation catchall provisions that do allow for imprisonment as punishment for the unknowing violation of regulations promulgated pursuant to a legislative grant of authority. See, e.g., Title 82 [§ 1087.20](#) (allowing for imprisonment and fines for each violation of any provision of “any lawful regulation or order issued pursuant” to the Oklahoma Weather Modification Act).
- <sup>45</sup> See John S. Baker, Jr., [Mens Rea and State Crimes](#) 10 (Federalist Soc'y, 2012).
- <sup>46</sup> See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. 335 (2005).
- <sup>47</sup> See Edwin Meese III and Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. and Criminology 725 (2012).
- <sup>48</sup> 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); and Livingston Hall and 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’ ”).
- <sup>49</sup> See William Blackstone, 4 *Commentaries*, at 432 (9th ed., Callahan, 1913).
- <sup>50</sup> See Nat'l Assoc. of Crim. Def. Lawyers, [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](#) (May 29, 2014).
- <sup>51</sup> See *Yates v. United States*, 135 S. Ct. 1074, 1078 (2015).
- <sup>52</sup> See Michael Johnson, Congress Reviewing “Overcriminalization,” *Wash. Examiner*, Oct. 4, 2010.
- <sup>53</sup> See Gary Fields and John R. Emshwiller, [A Sewage Blunder Earns Engineer a Criminal Record](#), *Wall St. J.*, Dec. 21, 2011.
- <sup>54</sup> See Press Release, U.S. H. Comm. on the Judiciary, [House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force](#) (Feb. 5, 2014); see also [H.R. Res., Over-Criminalization Task Force Resolution of 2014](#).
- <sup>55</sup> See, generally, Nat'l Assoc. of Crim. Def. Lawyers, [Criminal Defense Issues](#) (last visited Sept. 22, 2014).
- <sup>56</sup> Heritage Foundation, [Criminal Law Checklist for Federal Legislators](#) (last visited Sept. 22, 2014).
- <sup>57</sup> See Vikrant Reddy and Marc A. Levin, [12 Steps for Overcoming Overcriminalization](#), *Pol'y Perspective* (Texas Public Pol'y Found., May 2012).
- <sup>58</sup> See, e.g., the catchall provision highlighted in *supra* note 44.
- <sup>59</sup> See Welty, *supra* note 7, at 1964, citing [Welcome to the OLS Repealer, Off. of Legal Services](#) (last visited Dec. 29, 2015).

- <sup>60</sup> See Welty, *supra* note 7, at 1937 n. 6, citing Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 223 n. 1 (2007) (noting the frequent use of the ratchet metaphor).
- <sup>61</sup> Kansas Dept. of Administration, [Office of the Repealer](#) (last visited Sept. 22, 2014).
- <sup>62</sup> Tim Carpenter, [State 'Repealer' Lists 51 Objections](#), Topeka Capital J., Jan. 20, 2012.
- <sup>63</sup> Model Penal Code (1962); see Baker, *supra* note 45, at 16.
- <sup>64</sup> See Baker, *supra* note 45, at Appendix 2.
- <sup>65</sup> *Id.*, at Appendix 2.
- <sup>66</sup> See Ohio [SB 361](#).
- <sup>67</sup> See Michigan HB 4713 (codified as [Public Act 250 of 2015](#)).
- <sup>68</sup> See *United States v. Resnick*, 299 U.S. 207, 209, 57 S. Ct. 126, 127, 81 L. Ed. 127 (1936) (“Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used.”); See also *Ladner v. United States*, 358 U.S. 169, 177, 79 S. Ct. 209, 214, 3 L. Ed. 2d 199 (1958) (stating that when “[n]either the wording of the statute nor its legislative history points clearly to either meaning . . . the Court applies a policy of lenity and adopts the less harsh meaning.”).