

February 2016

MI

ISSUE BRIEF

Legal Reform



OVERCRIMINALIZING THE NORTH STAR STATE

A Primer and Possible Reforms for Minnesota

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*James Parsons provided invaluable research assistance. This paper is the fourth in a series of state-level reports authored in whole, or in part, by scholars from the Manhattan Institute. Some language herein may be identical to that published in previous MI publications in this series. See 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); 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); James R. Copland & 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).

Executive Summary*

In Minnesota, residents face an array of criminal laws covering ordinary business and personal conduct, often placing individuals in legal jeopardy for unknowingly violating seemingly innocuous rules. Some North Star State arrests border on the absurd—including, in 2012, the jailing of a man for not finishing the siding on his own house. In other cases, the state's criminal laws create barriers to entry with real-world economic impacts, such as the City of Lake Elmo's decision to shut down a local couple's business selling pumpkins and Christmas trees without a permit, or the recent prosecution of bartenders for selling a Wisconsin-manufactured beer without the proper license.

Overall, Minnesota's criminal code is smaller than its neighbors', but most of its crimes exist outside the penal law, and the legislature has been adding new crimes at an alarming rate:

- Minnesota's criminal code contains 327 sections—as compared to 114 in the Model Penal Code—and almost 130,000 words.
- Minnesota has created, on average, 46 crimes annually over the last six years; 83 percent of these fell outside the criminal code.
- The state's agriculture, banking, securities, real estate, natural resources, conservation, forestry, game and fish, environmental, education, and health laws all contain crimes, including many catchall provisions that criminalize any violation of rules promulgated by unelected regulatory bodies.

Minnesota does deserve credit, however, for recently engaging in a serious effort to remove unnecessary criminal laws from the books—striking more than 1,000 offenses in a 2014 reform effort.

Nevertheless, Minnesota's criminal law remains voluminous and complex. Apart from placing citizens in legal jeopardy for unintentionally violating rules that do not proscribe self-evidently wrong conduct, Minnesota's vast criminal law 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 problem, Minnesota 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.** Build on the 2014 “un-session” by engaging 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,¹ judges,² scholars,³ and policy analysts.⁴ 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.⁵

Although most attention placed on overcriminalization to date has focused on federal crimes, most criminal prosecutions occur at the state level.⁶ 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.”⁷ To study the extent to which states have followed the federal trend toward overcriminalization, the Manhattan Institute has begun to examine the evolution of states’ criminal laws in some detail—an effort we have dubbed *Overcriminalizing America*. In May 2014, coauthor Copland and the Institute’s Isaac Gorodetski published a primer on the subject for North Carolina;⁸ in October 2014, they published a similar primer on Michigan, authored jointly by scholars at the Mackinac Center;⁹ and in January 2016, they published a primer on South Carolina.¹⁰ This paper, examining overcriminalization in Minnesota, is the fourth in the series.

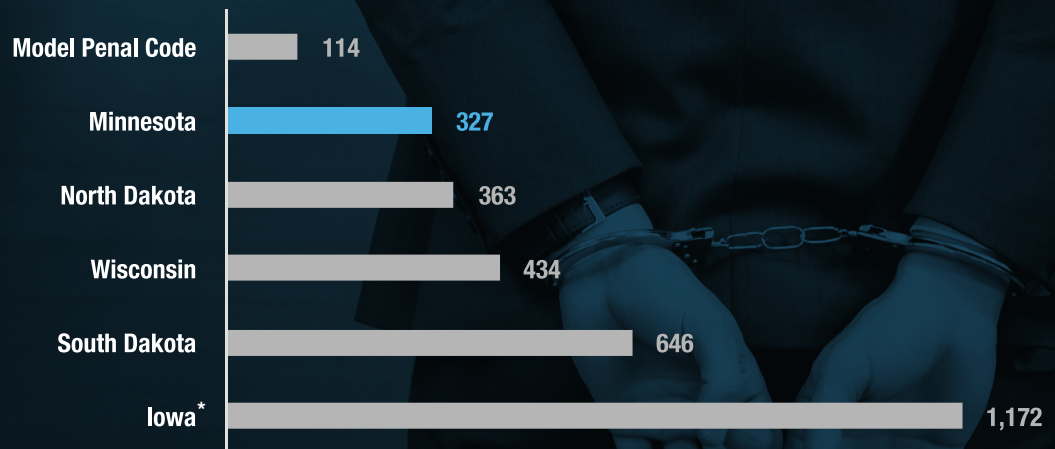
Minnesota’s criminal code contains 186 percent more sections than the Model Penal Code, a document drafted by the American Law Institute (an independent group of lawyers, judges, and academics) to “assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment.”¹¹ Minnesota’s criminal code does contain fewer sections than the respective codes of neighboring states Iowa, Wisconsin, and North and South Dakota. Such comparative data may, however, underestimate overcriminalization in Minnesota: 83 percent of new crimes enacted over the last six years by the Minnesota legislature have not been placed in the criminal code.

In recent years, Minnesota’s legislature has taken an active interest in criminal-justice reform—most notably, in 2014, when the state removed more than 1,000 old offenses from the books.¹² But even as the legislature took old laws off the books, it kept adding new ones: Minnesota’s legislature has been expanding its criminal law even more quickly than North Carolina and Michigan—two of the three other states examined in MI’s *Overcriminalizing America* series—adding more than 46 new criminal offenses to the books annually, on average, during 2009–14.¹³ Among these new crimes are a 2013 law that made it a crime to display a barber pole outside any establishment that isn’t a state-registered barbershop and a 2012 law that makes it a crime for drug and alcohol counselors to “impose” on their clients “any stereotypes of behavior, values, or roles related to human diversity.”¹⁴

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

FIGURE 1.

Number of Sections in Penal Code, Minnesota and Neighboring States



*It should be noted that Iowa's Title 16 combines its penal code and its criminal procedure code, which in part explains why it is an outlier.

Source: Manhattan Institute review of statutes

II. Quantitative Assessment

Number of Crimes. The Minnesota Criminal Code, located in chapter 609 of the state's statutes,¹⁵ contains 327 sections comprising 129,928 words¹⁶. Many criminal penalties, however, lie outside the criminal code—including multiple provisions in the agriculture, banking, securities, real estate, natural resources, conservation, forestry, game and fish, environmental, education, and health laws.

Comparative Trends. Compared with Minnesota's criminal code, the Model Penal Code, developed by leading scholars and attorneys as a template for criminal law in 1962, contains only 114 sections.¹⁷ That said, Minnesota's criminal code is more compact than many of its neighbors'; North Dakota's criminal code contains 363 sections,¹⁸ Wisconsin's 434,¹⁹ South Dakota's 646,²⁰ and Iowa's a whopping 1,172²¹ (**Figure 1**). Although Minnesota has kept its criminal code relatively less expansive than those of its neighbors, cross-state comparisons of criminal laws are complicated by the fact that states organize their laws differently, with not all criminal provisions located in criminal codes themselves.

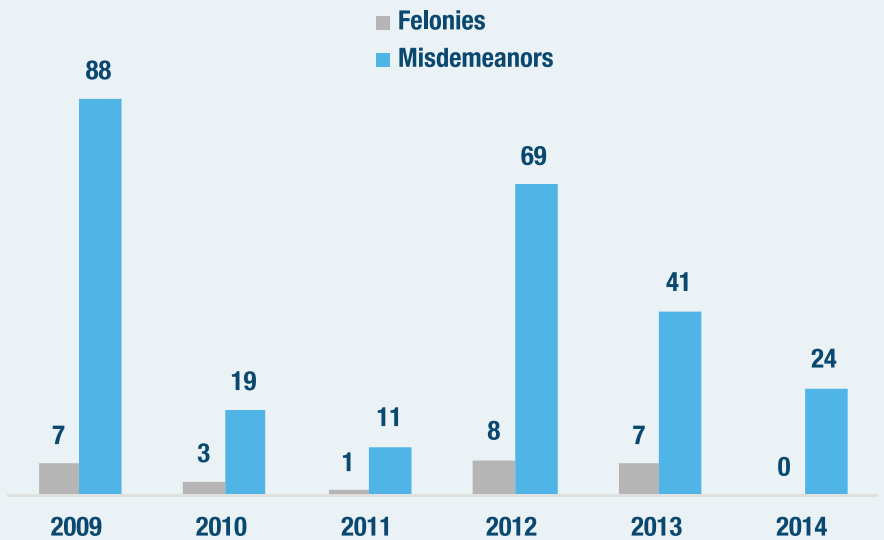
Intertemporal Trends. Over the last six years, Minnesota has, on average, added more than 46 crimes annually. Relative to other states studied in the Manhattan Institute's *Overcriminalizing America* series, Minnesota's rate of increase is higher than that of Michigan and North Carolina, which added new crimes at annual rates of 45 and 34, respectively; but lower than that of South Carolina (60). Like South Carolina's, however, Minnesota's rate of increase is inflated by multiple "class" expansions of crimes—new applications, defined with specificity. Also like South Carolina's, Minnesota's new crimes have

disproportionately been misdemeanors (91 percent) rather than felonies (9 percent) (Figure 2); by comparison, 44 percent of new crimes enacted in Michigan and almost half of those enacted in North Carolina were felonies. Eighty-three percent of the new crimes created in Minnesota during 2009–14 fell outside the penal code (Figure 3), a significantly higher percentage than in Michigan (73 percent) or North Carolina (55), but a slightly lower percentage than in South Carolina (86)—highlighting that the relatively compact size of Minnesota’s criminal code itself should not be viewed as implying the absence of an overcriminalization problem.

Sentencing. Minnesota has not undertaken any significant criminal-justice reforms since the 1980s. The state’s Department of Corrections continually grows, and its budget has gone up more than \$45 million (almost 10 percent) since 2013.²² While the state and local cities regularly receive federal grants for reentry and recidivism programs, Minnesota—unlike several of its neighbors—is not a member state that receives federal funding through the Justice Reinvestment Initiative (JRI) to reduce the cost of state justice.²³ However, the Minnesota Department of Corrections published a report in 2010 that hailed the success of prisoner reentry abatement programs.²⁴

FIGURE 2.

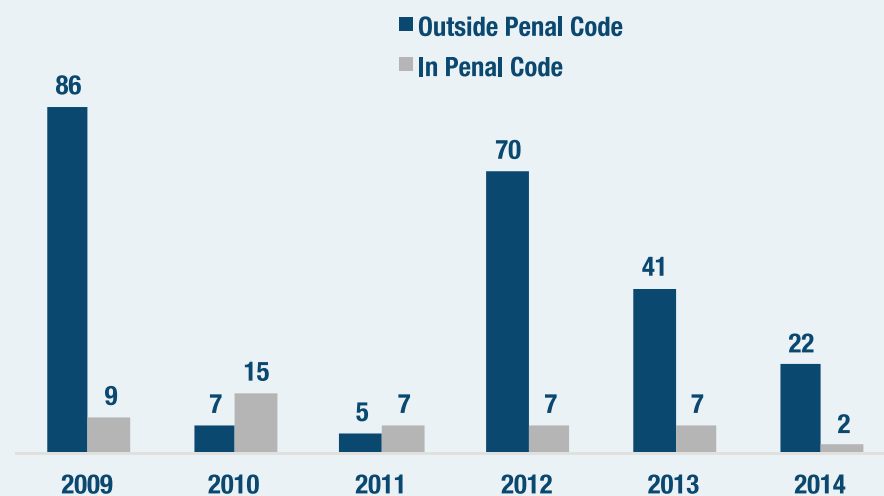
New Crimes in Minnesota, 2009–14



Source: Manhattan Institute review of legislation

FIGURE 3.

New Crimes in Minnesota, by Codification, 2009–14



Source: Manhattan Institute review of legislation

III. Qualitative Assessment

Old Crimes. On this score, credit must be given where it is due. Though the Minnesota legislature has added a large number of new crimes to the books in recent years, unlike any of the states previously reported on for the *Overcriminalizing America* project, Minnesota recently made an admirable effort to rid its books of antiquated, silly, and underutilized criminal statutes. In 2014, Governor Mark Dayton (D) signed off on the repeal of “1,175 obsolete, unnecessary and incomprehensible laws.”²⁵ Among the repealed were the state’s telegraph regulations, as well as silly laws that criminalized carrying fruit in containers of a certain size, and driving a car in neutral.²⁶

To be sure, a few remaining laws still fall into this category, such as a 1971 statute criminalizing contests in which the goal is to catch “a pig, [that is] greased, oiled or otherwise.”²⁷ But relative to other states, Minnesota has taken on the admirable task of pruning away crimes that are unnecessary or have outlived their usefulness.

New Crimes. Many of the more than 250 new crimes created in Minnesota since 2009 are duplicative, unnecessary, confusing, or just plain silly. In 2010, for example, the legislature passed a law that prohibited the use or brandishing of a firearm on school property—a rule that may be understandable in light of recent school shootings but adds little value to a 1985 statute that allows individual school districts to “regulate conduct involving firearms and ammunition occurring on school grounds, in school buildings and buses, and during school programs and activities.”²⁸ On the silly side, in 2013, the Minnesota legislature passed a law that made it a crime to display a barber pole outside any establishment that isn’t a state-registered barbershop.²⁹

In fact, a great many of the new laws passed in Minnesota since 2009 create the risk of criminal liability for engaging in ordinary business practices. The nature of the behavior regulated by these statutes is often innocuous; and the statutes can be so vague as to remove all objectivity from the process of determining whether a crime was even committed. To illustrate this point, consider a 2012 statute prohibiting drug and alcohol counselors from imposing on their clients “any stereotypes of behavior, values, or roles related to human diversity.”³⁰ This law creates a *strict liability* crime—it does not require any showing of intent or knowledge on the part of the actor that his actions were criminal—and what is considered “stereotypical” is not defined.

Occupational Licensing and More. The more typical examples of Minnesota’s criminalization of seemingly innocuous business conduct can be found in the many statutes that regulate nearly every aspect of participation in certain industries. Many of these laws feature various record-keeping³¹ and other administrative requirements and prohibitions that are difficult for even trained lawyers to follow, let alone the average small business owner. For example, barbers in Minnesota are governed by a statutory code chapter with more than 30 sections,³² each of which has many subsections, many of which, if violated, could result in criminal penalties.³³ It’s not just barbers. One would need a state license before engaging in a business as straightforward as braiding hair³⁴ without risking a criminal penalty.³⁵ In addition to barbers and hair braiders, some of the professionals required to have licenses include:

- Cosmetologists
- Estheticians
- Nail Technicians
- Pawnbrokers
- Real Estate and Mortgage Brokers (as well as property assessors, land surveyors, and closing agents)
- Alcohol and Drug Counselors
- Tattoo Artists³⁶
- Home Care Providers

In some cases, the licensing rules border on the farcical: alcohol and drug counselors are required to acquire 2,000 hours of “supervised” practice, but license seekers can acquire only one hour of “supervision” per 40 hours of actual practice.

Organizations like the Institute for Justice and the Cato Institute have sparked a much-needed conversation about the moral and public-policy issues presented by the recent boom in occupational licensing regimes, and the White House has publicly recognized the problem—estimating that more than 25 percent of the nation’s workforce needs governmental permission just

to earn a living.³⁷ Though there are certainly instances in which strong public health and safety arguments can be made in support of some occupational licensing requirements, Minnesota lawmakers ought to (at the very least) consider why these regulations, which can range from the obvious (unlicensed practice) to the ridiculous (imposition of stereotypes on clients) should be *criminally* enforced—often without regard to whether the violator knew he was committing a crime.

Criminal Intent. Many of Minnesota’s new criminal offenses created during the period studied, including those created under the occupational licensing schemes referenced above, do not require prosecutors to establish that the alleged offender knew or had reason to know 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 statutory and regulatory codes around the country represents a departure from centuries of Western legal tradition—which always required the state to prove both a wrongful act (Latin: *actus reus*) and a sufficiently culpable state of mind (*mens rea*) in order to secure a conviction. That 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.”³⁸

The trend away from *mens rea* can be traced back to the late nineteenth century, when, as a response to industrialization, legislatures began imposing criminal and civil liability on actors without regard to intent. The natural consequences of such legislation is the increased risk that individuals face of

being convicted of crimes of which they are unaware, often for conduct that is not intuitively wrong.

To help illustrate the trend in favor of strict liability in federal criminal lawmaking, the Heritage Foundation and the National Association of Criminal Defense Lawyers published a joint study that found that 57 percent of the criminal laws proposed in the 109th U.S. Congress contained inadequate *mens rea* provisions, with more than 20 percent of those lacking any criminal intent provision.³⁹

Unfortunately, Minnesota does not seem to buck this trend, putting citizens of the North Star State at risk of criminal convictions (and all that comes with them) for seemingly innocent business conduct, ranging from placing a barber pole outside certain buildings⁴⁰ to failing to respond to certain customer inquiries within three days⁴¹—and all without regard to whether those people knew that they were violating the law.

That said, Minnesota lawmakers have, in many instances, demonstrated a willingness to consider intent when creating crimes. For example, in 2010, state lawmakers struck the criminal-intent requirement from a statute punishing the creation of “any condition whereby human life is endangered.”⁴² In another case, the legislature added to a misdemeanor weapon possession statute, a requirement that a person have knowledge that certain property belongs to a school.⁴³ Indeed, many of the crimes created in the North Star State between 2009 and 2014 do have strong *mens rea* requirements,⁴⁴ evidencing that legislators take criminal intent seriously when they take care to contemplate the issue. However, when viewed in their totality, Minnesota’s statutory codes feature a hodgepodge of strict liability crimes and crimes with both

weak and strong *mens rea* provisions. What explains the inconsistency? While it is impossible to be sure, the evidence suggests that many of Minnesota’s strict liability offenses are created via statutory and regulatory catchall provisions, which, respectively, criminalize the violation of large swaths of the state’s statutory codes, and violations of regulations promulgated pursuant to statutory grants of rule-making authority to (often unelected and, therefore, unaccountable) regulatory bodies.⁴⁵

Regulatory Crimes. While many of the new crimes enacted by statute in Minnesota are regulatory in nature, a substantial number of crimes are created without any act of the legislature whatsoever. As mentioned above, various statutory provisions in the state’s codes contain catchall provisions that vest in administrative state and local agencies (as well as in individual commissioners, in some cases) the effective authority to criminalize conduct through the promulgation of regulations.⁴⁶ Such catchall provisions span the gamut of the Minnesota code: agriculture, banking, securities, real estate, natural resources, conservation, forestry, game and fish, environmental, education, and health.

What’s more, absent from many of these regulatory catchalls are even modest *mens rea* requirements, leaving commissioners and other regulatory bodies free to create strict liability crimes outside the normal political process.⁴⁷ In a state that enacts new crimes at a rate of 46 per year, these broad grants of criminal lawmaking authority place well-meaning Minnesotans at risk of prison for the unknowing violation of rules promulgated by unelected officials—in essence, criminalization without representation.

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

For the aforementioned reasons, it is certain that many Minnesotans unknowingly commit crimes every day. Underlying the argument against overcriminalization is the fact that modern criminal codes, such as Minnesota’s, have expanded so exponentially in recent decades—and the scope of the criminal law has grown so much in the regulatory arena, outside the criminal codes—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.⁴⁸ 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 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—thereby eroding the integrity and logical cohesion of the criminal-justice system, as laws on the books go unused and unenforced.⁴⁹

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.⁵⁰ A corollary principle, that ignorance of the law is not a legitimate excuse,⁵¹ traces to a time when virtually all criminal laws were tied to the

“moral code”⁵²—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 that a crime involve not only a prohibited act but also the intent to commit that criminal act with knowledge of its criminal nature (*actus rea* and *mens rea*, respectively).⁵³ 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 prosecutors, thereby passing overly broad criminal statutes, confident that no injustice will result. Even if all prosecutors faithfully and judiciously execute their duties, reliance on prosecutors as an exclusive backstop to protect the innocent creates, at a minimum, the 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 comparable with Minnesota’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—especially when considering the potential deprivation of individual liberty, disruption of life, and marring of reputation that criminal prosecution can entail.⁵⁴ 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;⁵⁵ 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);⁵⁶ and an engineer who pleaded guilty for diverting a backed-up sewage system into an outside storm drain to prevent flooding at a retirement home.⁵⁷

In Minnesota, individuals have also been ensnared for putatively innocent conduct, including Kim Barsness, who, for harvesting minnows, was found guilty of a gross misdemeanor under Minn. Stat. § 97A.325 for unlawfully buying or selling “wild animals.” (An appeals court ultimately vacated Barsness’s conviction, ruling that the statute did not apply to the minnow-harvesting business.) Richard and Eileen Bergmann had been selling pumpkins and Christmas trees for years in Lake Elmo, before they were sent a cease-and-desist order owing to a local ordinance that forbids the sale of any goods grown outside the city limits without a permit. They are currently being represented by lawyers from the Institute for Justice.⁵⁸

The Minnesota legislature's recent effort to pare old laws from the books suggests that many legislators are aware of the potential for overcriminalization. Although there is no simple solution to the problem, three additional 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 in 2014 to focus on overcriminalization, with ten members evenly split between Democrats and Republicans.⁵⁹ A similar temporary task force or working group looking specifically at overcriminalization in Minnesota 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.⁶⁰ 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:⁶¹

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—and building on the recent effort to prune statutes from the books—the Minnesota legislature could create an independent commission charged with consolidating, clarifying, and optimizing Minnesota'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.⁶² 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,⁶³ and it should evaluate existing *mens rea* provisions in Minnesota 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.⁶⁴ In 2014, Virginia removed 14 offenses pursuant to the recommendations of its commission.⁶⁵ In Kansas, an "Office of the Repealer" (created in 2011 by the governor)⁶⁶ has already recommended 51 criminal statutes and regulations for repeal.⁶⁷

3. Enact a default *mens rea* provision.

The Model Penal Code⁶⁸ contains a default *mens rea* culpability requirement when a criminal statute is silent as to culpability.⁶⁹ 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. Minnesota lacks a default *mens rea* safeguard,⁷⁰ even though its penal code alone has almost five 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 2014,⁷¹ and Michigan most recently adopted a default *mens rea* rule in December 2015.⁷²

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. Minnesota 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. Minnesota may wish also 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 certain offenses. Legislators might also usefully consider procedural changes that would prospectively improve the enactment of new crimes—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 Minnesota on the path toward a coherent, effective criminal law—building on its 2014 success in eliminating unnecessary laws from the books and establishing the state as a national leader in criminal-justice reform. Establishing a bipartisan task force to examine Minnesota’s criminal law would help identify the problem areas in the state in more detail, the best avenues for reform, and risks to avoid. A commission review of the state’s existing criminal law would build on the 2014 reforms and improve the clarity of Minnesota’s criminal code. A default *mens rea* law would reduce the chance that individuals could be prosecuted for crimes that they unknowingly commit, absent a clear decision by legislators that a strict-liability crime is needed.



Endnotes

- ¹ 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).
- ² 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).
- ³ Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 (2012).
- ⁴ 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), 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), http://www.manhattan-institute.org/html/cjr_13.htm; Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).
- ⁵ Michael J. Reitz, *Criminal Minds: Defining Culpability in Michigan Statutes* (Mackinac Ctr. for Pub. Pol'y, Dec. 10, 2013), www.mackinac.org/archives/2013/s2013-10.pdf.
- ⁶ Cf. National Center for State Courts, *Criminal Caseloads Continue to Decline*, Court Statistics Project, available at <http://www.courtstatistics.org/Criminal/2012Criminal.aspx> (showing 20 million state criminal cases annually) with U.S. Dept. of Justice, *United States Attorneys' Annual Statistical Report*, 6, 12 (2012), available at http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (showing 140,000 federal cases annually).
- ⁷ 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)).
- ⁸ 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.
- ⁹ James R. Copland, Isaac Gorodetski & Michael J. Reitz, *Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan*, Issue Brief 31 (Manh. Inst. for Pol'y Res., Oct. 2014), http://www.manhattan-institute.org/pdf/ib_31.pdf.
- ¹⁰ 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), <http://www.manhattan-institute.org/sites/default/files/ib-JC-0116.pdf>.
- ¹¹ 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 Feb. 16, 2016).
- ¹² See Bill Salisbury, *Minnesota 'unsession' dumps 1,175 obsolete, silly laws*, ST. PAUL PIONEER PRESS (May 26, 2014), available at <http://www.twincities.com/2014/05/26/minnesota-unsession-dumps-1175-obsolete-silly-laws/>.
- ¹³ By the count of the Manhattan Institute's coauthors and researchers.
- ¹⁴ MINN. STAT. § 148F.165, Subd. 3 (criminalized via MINN. STAT. 148F.105, Subd. 3), available at <https://www.revisor.mn.gov/statutes/?id=148F.165>.
- ¹⁵ Minnesota Statutes, Chapter 609 – Criminal Code, available at <https://www.revisor.mn.gov/statutes/?id=609>.
- ¹⁶ By the count of the Manhattan Institute's coauthors and researchers.
- ¹⁷ MODEL PENAL CODE (1962).
- ¹⁸ By the count of the Manhattan Institute's coauthors and researchers. North Dakota Century Code, Title 21.1 – Criminal Code, available at <http://www.legis.nd.gov/cencode/t12-1.html>.
- ¹⁹ By the count of the Manhattan Institute's coauthors and researchers. Wisconsin Statutes, Chapters 939-951 – Criminal Code, available at <http://docs.legis.wisconsin.gov/statutes/prefaces/toc>.
- ²⁰ By the count of the Manhattan Institute's coauthors and researchers. South Dakota Codified Laws, Title 22 – Crimes, available at <http://legis.sd.gov/Statutes/DisplayStatute.aspx?Type=Statute&Statute=22>.
- ²¹ By the count of the Manhattan Institute's coauthors and researchers. Iowa Code, Title 16 – Criminal Law and Procedure, available at <https://www.legis.iowa.gov/law/iowaCode/chapters?title=XVI&year=2016>.
- ²² Cf. Minnesota DOC Budget Fiscal Year 2016-2017, available at <http://www.doc.state.mn.us/pages/index.php/about/budget> (showing a FY2016 total department budget of \$527,012,000) with Notable Statistics: Minnesota Department of Corrections, available at <https://www.doc.state.mn.us/pages/files/6814/1140/1719/notablestatistics.pdf> (showing a FY 2013 department budget of \$481,470,000).
- ²³ See Bureau of Justice Assistance, Justice Reinvestment Initiative, available at <https://www.bja.gov/programs/justicereinvestment/index.html>.
- ²⁴ See Minnesota DOC, *An Evaluation of the Minnesota Comprehensive Offender ReentryPlan (MCORP): Phase 1 Report* (February 2010), available at <http://www.doc.state.mn.us/PAGES/files/large-files/Publications/02->

10MCORPPPhase1EvaluationReport.pdf.

- ²⁵ See Salisbury, *supra* note 12.
- ²⁶ *Id.*
- ²⁷ MINN. STAT. § 343.36 available at <https://www.revisor.mn.gov/statutes/?id=343.36>.
- ²⁸ See House Research Department, *Minnesota Firearms Laws: A Guide for Legislators* (September 1999), available at <http://www.house.leg.state.mn.us/hrd/pubs/firearms.pdf> (citing MINN. STAT. §§ 471.633-635).
- ²⁹ MINN. STAT. § 154.28, available at <https://www.revisor.leg.state.mn.us/statutes/?id=154.28>.
- ³⁰ See MINN. STAT. § 148F.165, Subd. 3 *Supra*, note 14.
- ³¹ Many of these record-keeping regulations require business owners to keep records available for on-demand inspection by police officers without warrants, and therefore might be vulnerable to constitutional challenges in light of the Supreme Court's 2015 holding in *City of Los Angeles v. Patel*, 576 U.S. ____ (2015) (available at <https://www.oyez.org/cases/2014/13-1175>), which struck down a similar record-keeping requirement applicable to hotel operators in that city.
- ³² Minnesota Statutes, Chapter 154 – Barbers, available at <https://www.revisor.mn.gov/statutes/?id=154>.
- ³³ MINN. STAT. § 154.19, available at <https://www.revisor.mn.gov/statutes/?id=154.19>.
- ³⁴ MINN. STAT. § 155A.28, available at <https://www.revisor.mn.gov/statutes/?id=155A.28>.
- ³⁵ MINN. STAT. § 155A.36, available at <https://www.revisor.mn.gov/statutes/?id=155A.36>.
- ³⁶ A recent decision out of the 11th Circuit Court of Appeals could call the constitutionality of these regulations into question. See *Buehrle v. City of Key West*, No. 14-15354 (11th Cir. 2015).
- ³⁷ Dep't of the Treasury, Office of Economic Policy; Council of Economic Advisers; and Dep't of Labor, *Occupational Licensing: A Framework for Policymakers* (Jul. 2015), available at https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.
- ³⁸ The Harvard Law School Library, *Words of Justice: Roof Garden Wall – Right Panel*, <http://library.law.harvard.edu/justicequotes/explore-the-room/south-4> (last visited Feb. 17, 2016).
- ³⁹ 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>.
- ⁴⁰ MINN. STAT. § 154.28, available at <https://www.revisor.leg.state.mn.us/statutes/?id=154.28>.
- ⁴¹ MINN. STAT. § 80G.07 Subd. 1(9), available at <https://www.revisor.mn.gov/statutes/?id=80G.07>.
- ⁴² See 2010 Minnesota Session Laws, H.F.No. 2855 at § 326B.998(b), available at <https://www.revisor.mn.gov/laws/?id=287&year=2010&type=0>.
- ⁴³ MINN. STAT. § 609.66 Subd. 1d(c), available at <https://www.revisor.mn.gov/statutes/?id=609.66>.
- ⁴⁴ See, e.g. MINN. STAT. §§ 609.596 Subd.2a; 609.2231 Subd.8(b); & 211B.15 Subd. 2(a).
- ⁴⁵ For an example of a statutory catchall, see MINN. STAT. § 148F.105 Subd. 3 (criminalizing the violation of more than a dozen statutory sections), available at <https://www.revisor.mn.gov/statutes/?id=148F.105>. For an example of a regulatory catchall, see MINN. STAT. § 84D.13 Subd. 3 (criminalizing the violation of any rule promulgated pursuant to a different statute), available at <https://www.revisor.mn.gov/statutes/?id=84D.13>.
- ⁴⁶ 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); see, e.g. MINN. STAT. §§ 84D.13 Subd. 3; 84.774(a); 34A.04 Subd. 1(c); and 85.20 Subd. 1 (a).
- ⁴⁷ Of the four examples outlined in note 46 above, only one (MINN. STAT. § 85.20 Subd. 1 (a)) includes a *mens rea* requirement.
- ⁴⁸ Consider, for example, the regulatory catchall provisions listed in note 46, *supra*.
- ⁴⁹ 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>.
- ⁵⁰ See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005).
- ⁵¹ See Edwin Meese III and Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).
- ⁵² 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 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’ ”).

- ⁵³ See William Blackstone, 4 COMMENTARIES, at 432 (9th ed., Callahan, 1913).
- ⁵⁴ 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>.
- ⁵⁵ See *Yates v. United States*, 135 S. Ct. 1074, 1078 (2015).
- ⁵⁶ See Michael Johnson, *Congress Reviewing "Overcriminalization,"* WASH. EXAMINER, Oct. 4, 2010, available at <http://www.examiner.com/article/congress-reviewing-overcriminalization>.
- ⁵⁷ See Gary Fields and 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>.
- ⁵⁸ See Anthony Sanders, *Fight for Freedom Focuses on Farms*, INSTITUTE FOR JUSTICE (Aug. 2010), available at <http://ij.org/ll/august-2010-volume-19-number-4/fight-for-freedom-focuses-on-farms/>.
- ⁵⁹ 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-2f-4b33-a926-33a6bc7ccd32/over-crim-task-force-resolution.pdf.
- ⁶⁰ See, generally, Nat'l Assoc. of Crim. Def. Lawyers, *Criminal Defense Issues*, <https://www.nacdl.org/overcrimtaskforce> (last visited Sept. 22, 2014).
- ⁶¹ Heritage Foundation, *Criminal Law Checklist for Federal Legislators*, <http://www.heritage.org/criminallawchecklist%E2%80%8E> (last visited Sept. 22, 2014).
- ⁶² See Vikrant Reddy and 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>.
- ⁶³ See, e.g., the catchall provisions listed in *supra* note 46.
- ⁶⁴ See Welty, *supra* note 7, at 1964 (citing Welcome to the OLS Repealer, Off. of Legal Services), <http://www.capitol.tn.gov/joint/staff/legal/repealer.html> (last visited Dec. 29, 2015).
- ⁶⁵ 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)).
- ⁶⁶ Kansas Dept. of Administration, Office of the Repealer, <https://admin.ks.gov/offices/repealer> (last visited Sept. 22, 2014).
- ⁶⁷ Tim Carpenter, *State 'Repealer' Lists 51 Objections*, TOPEKA CAPITAL J., Jan. 20, 2012, available at <http://cjonline.com/news/2012-01-20/state-repealer-lists-51-objections>.
- ⁶⁸ MODEL PENAL CODE (1962); see Baker, *supra* note 49, at 16.
- ⁶⁹ See Baker, *supra* note 49, at Appendix 2.
- ⁷⁰ *Id.*, at Appendix 2.
- ⁷¹ See Ohio S.B. 361, available at http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_361.
- ⁷² See Michigan H.B. 4713 (Public Act 250 of 2015), available at [http://www.legislature.mi.gov/\(S\(dydy2drwqran1vcefbzekvk1\)\)/mileg.aspx?page=GetObject&objectname=2015-HB-4713](http://www.legislature.mi.gov/(S(dydy2drwqran1vcefbzekvk1))/mileg.aspx?page=GetObject&objectname=2015-HB-4713).

Abstract

In Minnesota, residents face an array of criminal laws covering ordinary business and personal conduct, often placing individuals in legal jeopardy for unknowingly violating seemingly innocuous rules. Minnesota's vast criminal law also creates a serious risk that prosecutions will vary markedly from jurisdiction to jurisdiction, while threatening to divert scarce resources away from the enforcement of serious violent and property crimes.

Key Findings

- Minnesota's criminal code contains **327 sections**—as compared to 114 in the Model Penal Code—and almost **130,000 words**.
- Minnesota has created, on average, **46 crimes** annually over the last six years; **83 percent** of these fell outside the criminal code.
- The state's agriculture, banking, securities, real estate, natural resources, conservation, forestry, game and fish, environmental, education, and health laws all contain crimes, including many catchall provisions that criminalize any violation of rules promulgated by unelected regulatory bodies.