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MICHIGAN OVERCRIMINALIZATION UPDATE 2017

James R. Copland

Director and Senior Fellow, Legal Policy

Rafael A. Mangual

Project Manager, Legal Policy

What Is Overcriminalization?

This term describes the rapid growth in the number of criminally enforceable rules and regulations. Overcriminalization has drawn increasing scrutiny by politicians,¹ judges,² scholars,³ and policy analysts.⁴ Critics have often focused on how modern regulatory crimes govern putatively innocent conduct but can ensnare those who have little reason to know that they are breaking the law. Critics have also looked at how regulations with criminal penalties are often promulgated by unelected, politically unaccountable administrative agencies and other bodies that legislatures have delegated powers to create new crimes.

Introduction

In October 2014, the Manhattan Institute and the Mackinac Center for Public Policy published an issue brief, *Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan*.⁵ It showed that Michigan had at least 3,102 statutory crimes and that most of them (48% of 1,209 felonies and more than 76% of 1,893 misdemeanors) lay outside the state's criminal (penal) code. It also showed that more than 26% of the felonies and more than 59% of the misdemeanors did not explicitly require the state to make a showing of criminal intent (*mens rea*) on the part of the accused.

The report identified a number of old, duplicative, or outmoded criminal statutes, suggesting that they were ripe for repeal. It also suggested that Michigan enact a default criminal-intent standard to protect citizens who unknowingly violate criminally enforceable statutes or regulations governing conduct that is not intuitively wrong. This update looks briefly at the actions of Michigan's 98th Legislature (2015 and 2016 sessions) with respect to crime creation and concurrent developments in the state's criminal law.

Reform Efforts

In May 2015, Michigan governor Rick Snyder released a "special message" on criminal justice that included calls to address overcriminalization.⁶ Over the summer of 2015, the state's House of

Representatives passed a series of bills repealing or modifying various outmoded laws, including doozies like a prohibition on shaming individuals who demurred from challenges to duels.

The governor signed these repeal bills into law on December 15;⁷ and on December 31, he signed a bill establishing a default criminal-intent standard for Michigan.⁸ Under the latter law's terms, the state had to show that a defendant acted with intent, knowledge, or recklessness to convict him of a crime—unless the state legislature clearly specified a lower level of mental culpability in the criminal statute. However, this default criminal-intent standard applied prospectively, not to crimes committed prior to January 1, 2016. Also, the law exempts various crimes from the default criminal-intent requirement.

The 2015 reforms represent an encouraging commitment on the part of Michigan's legislature to address the overcriminalization problem. The default criminal-intent law was imperfect; it did not apply to crimes already in the penal code, nor does it apply to many regulatory sections of the penal code where it would arguably be appropriate, such as the public-health law. Nevertheless, the new law is a significant advance toward the goal of protecting individuals from prosecution for unknowingly committing offenses. This was one of the key recommendations in the 2014 Manhattan-Mackinac report.

Similarly, many of the crimes repealed in legislation at the close of 2015 were among those identified in the 2014 Manhattan-Mackinac report. At least one of the absurd examples pointed to in the report, however, remains in

force: a prohibition on entering a horse into a race under a false name. The 66 crimes that the legislature repealed were a mere 2% of the 3,102 statutory crimes identified in the 2014 report. Still, it was a positive step.

New Crimes Created

The Michigan legislature has continued to create *new* crimes, albeit at a slower pace than in the previous six years (**Figure**). In 2015 and 2016, Michigan’s legislature enacted 60 new criminal offenses, 30 in each year. Sixteen percent were felonies, and 61% fell outside the penal code or the chapter of the state code listing additional crimes and offenses (chapters 750 and 752 of the Michigan statutes). This sort of codification—sprinkling criminal offenses across the state’s voluminous statutory code—makes it harder for citizens to find the provisions of criminal law that apply to them, thereby making legal compliance harder to achieve.

Unfortunately, many of the new crimes enacted in 2015 and 2016 are aimed at owners of small businesses and concern ordinary business activity. They include a private business’s decision to exclude service animals from the premises,⁹ the sale of powdered alcohol, and the use of cash or credit cards in transactions involving used automobiles and car parts.¹⁰

Recommendations

Notwithstanding Michigan’s laudable work in tackling overcriminalization, the state’s criminal code remains larger than those of its neighbors—and most of the state’s crimes remain outside the criminal code itself, making it very difficult for individuals, including owners of small businesses, to determine what conduct may be criminal.

To continue the state’s positive progress, we suggest two reforms, both of which could be facilitated by the kind of bi-partisan legislative commission or task force recommended in the original Manhattan-Mackinac report:

- *Undertake a large-scale repeal effort.* In mid-2014, Minnesota called a special legislative “unsession” to prune its books of outdated, duplicative, and overreaching laws, including criminal offenses. The result was 1,175 laws removed from the state’s books.¹⁴ Michigan lawmakers should consider undertaking a similar effort. They should also decide whether certain existing criminal offenses should be reclassified as civil.
- *Redo the books.* Lawmakers should consider a large-scale effort to revamp and reorganize Michigan’s laws, at least for criminal offenses. Ideally, all mandates and prohibitions with criminal teeth should be found in one chapter, or at least all crimes should be listed in a common location on the Internet. Although Michigan’s new default criminal-intent law will substantially reduce the risk that citizens can be criminally prosecuted for unknowing violations of the law, reorganization would significantly lower the transaction costs of determining what conduct is actually criminal—and thus improve legal compliance.

FIGURE

New Crimes in Michigan



Source: Authors' count

The Michigan legislature in these two years also passed laws that grant to unelected administrative authorities the effective power to create new crimes. In December 2016, for example, the Limousine, Taxicab, and Transportation Network Company Act law criminalized not only any offense under the act—which numbers 53 sections and 6,806 words—but also the violation of any “rule promulgated under” it.¹¹

On the positive side, only one new crime enacted in 2015–16 seems to lack any criminal-intent standard,¹² and several showed serious consideration of the proper level of required intent.¹³

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); James R. Copland, *Regulation by Prosecution: The Problem with Treating Corporations as Criminals*, Civ. Justice Rpt. 13 (Manh. Inst. for Pol'y Res. 2010); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).
- ⁵ James R. Copland, Isaac Gorodetski, and Michael J. Reitz, *Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan*, Issue Brief 31, Oct. 28, 2014.
- ⁶ A Special Message from Governor Rick Snyder: Criminal Justice to Michiganders and the Michigan Legislature, May 18, 2015.
- ⁷ Public Act No. 210 (2015).
- ⁸ Public Act No. 250 (2015).
- ⁹ Public Act 144 (2015).
- ¹⁰ Public Act 112 (2016).
- ¹¹ Public Act 345 (2016).
- ¹² Public Act 79 (2016) (see, specifically, Sec. 7(7), which criminalizes the disclosure of documents obtained by the attorney general's office pursuant to an investigation without regard to whether the disclosure is knowingly, purposefully, or accidentally made).
- ¹³ See e.g., Public Act 146 (2015) (criminalizing, in Sec. 7, the knowing or willing submission of a false or fraudulent affidavit); and Public Act 32 (2016) (criminalizing, in Sec.'s 625Q(3)-(6), the knowing or negligent provision of false information or failures to comply with certain statutory requirements); and Public Act 436 (2016) (criminalizing, in Sec. 21, the knowing or intentional operation of an unmanned aircraft that interferes with the official duties of certain state officers). Each of these statutes specifies an intent requirement (ranging from negligence to willfulness) deemed proper by the legislature for the specific offense, which is a welcome development in light of the high rate at which the legislature failed to specify any intent requirement that we detailed in our 2014 Issue Brief.
- ¹⁴ "Minnesota 'Unsession' Dumps 1,175 Obsolete, Silly Laws," *twincities.com*, May 26, 2014.