

OVERCRIMINALIZING AMERICA

An Overview and Model Legislation for the States

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Prior to joining MI, Copland was a management consultant with McKinsey & Company in New York. Earlier, he was a law clerk for Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. Copland has been a director of two privately held manufacturing companies since 1997 and has served on many public and nonprofit boards. He holds a J.D. and an M.B.A. from Yale, where he was an Olin Fellow in Law and Economics; an M.Sc. in the politics of the world economy from the London School of Economics; and a B.A. in economics from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar.



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Executive Summary

Ordinary citizens and businesses today face criminal liability for a dizzying array of offenses. Most of these bear little resemblance to what we ordinarily think of as “crime”—self-evidently wrong conduct like assaults on person, thefts of property, and knowing frauds.

Further, many of these modern crimes do not require prosecutors to prove that alleged offenders acted maliciously—i.e., that they acted with a culpable mental state—which is a sharp departure from Anglo-American legal traditions. Instead, most crimes today are what lawyers call *malum prohibitum*; the conduct in question is defined as “wrong,” circularly, *because* it is prohibited.

“Overcriminalization” describes both the rapid growth in the number of criminally enforceable rules and regulations—particularly those regarding conduct that is not intuitively thought of as criminal—and the erosion of traditional intent requirements and other due-process protections in criminal cases. This report is the first comprehensive look at overcriminalization at the state level, where most criminal law resides. The report builds on previous in-depth studies of the criminal codes in Michigan, Minnesota, North Carolina, Oklahoma, and South Carolina, as well as additional analysis of surrounding states.

There are five common problems in state criminal law that we have identified in previous research:

1. Too many crimes on the books
2. Outmoded and poorly drafted crimes
3. Confusing codification
4. The absence of criminal-intent requirements
5. The delegation of criminal lawmaking authority to unelected public and private bodies

This report outlines five model policies designed to ameliorate these problems. And it proposes model legislation and executive orders that can be adapted by state elected officials.

OVERCRIMINALIZING AMERICA

An Overview and Model Legislation for the States

Introduction

American law today has a way of making criminals out of ordinary citizens and small business owners:

- In 2016, authorities in Oklahoma prosecuted bartender Colin Grizzle for serving vodkas infused with flavors like bacon and pickles. The practice, though popular with patrons, violated Title 37, Chapter 3, Section 584 of the Oklahoma Code.¹
- In 2012, a Minnesota man, Mitch Faber, was jailed for the crime of not finishing the siding on his own house.²
- In 2011, North Carolina authorities prosecuted Steven Pruner for selling hot dogs from his food cart outside the Duke University Medical Center without a permit. Pruner was sentenced to 45 days of police custody.³

Parents today face criminal sanction if they let children run free—as South Carolina mother Debra Harrell discovered in 2014, when she was arrested and lost custody of her nine-year-old child, whom she had allowed to play alone in a park.⁴ But parents who drop children off in others' care can unwittingly place their friends in criminal jeopardy; in 2009, a Michigan woman, Lisa Snyder, was threatened with arrest after it was discovered that she was taking her neighbors' kids to the school bus stop each morning, which state regulators considered a violation of laws banning unlicensed day care.⁵

In some cases, states have delegated criminal lawmaking authority to unelected regulators and private boards. Such boards have asserted surprisingly sweeping powers. In 2012, the North Carolina Board of Dietetics and Nutrition accused Steve Cooksey of an unlicensed practice of dietetics, a misdemeanor under a catchall provision criminalizing any violation of dietetics or nutrition provisions in the general statutes.⁶

Cooksey's crime? After battling life-threatening diabetes, he had started an Internet blog, in which he shared his experiences, described how a new diet had helped him overcome his serious condition, and answered questions posed by blog readers.⁷ According to the board, the crime extended to ordinary advice exchanged in private e-mails and telephone calls between his friends and readers.⁸ Cooksey ultimately prevailed in a First Amendment challenge to the law brought by the litigation nonprofit Institute for Justice;⁹ but individuals and business owners without such strong free-speech claims are not afforded a similar ability to get out of jail.

Cooksey’s alleged violation was unknowing—but that offered him little recourse. In most jurisdictions, the fact that someone accused of a crime was engaged in seemingly innocent conduct and had no reason to know that he was breaking the law affords no defense.

In 2007, a Michigan appeals court upheld the conviction of Kenneth Schumacher for the unlawful disposal of scrap tires, which included a sentence of 270 days in jail and a \$10,000 fine. Schumacher had not known that the facility where he deposited his tires had seen its permit expire; he believed it to be a legal depository.¹⁰ The court nevertheless determined that Schumacher’s subjective judgment that his delivery was legal did not absolve him of the environmental law’s strict licensing rule.¹¹ (Michigan has since adopted a law that requires a showing of criminal intent for any crime unless the legislature expressly states otherwise; but it remains a minority rule across the states, including in North Carolina.)

These cases exemplify “overcriminalization,” which describes the rapid growth in the number of criminally enforceable rules and regulations. Overcriminalization particularly refers to crimes for conduct that is not intuitively thought of as criminal.

Overcriminalization in the U.S. has drawn increasing scrutiny by politicians,¹² judges,¹³ scholars,¹⁴ and policy analysts.¹⁵ In 2010, coauthor Copland published a book chapter looking at overcriminalization in New York State.¹⁶ Four years later, the Manhattan Institute began to systematically study overcriminalization at the state level, through jurisdiction-specific analyses of quantitative and qualitative trends in state criminal lawmaking. Reports on criminal law in Michigan,¹⁷ Minnesota,¹⁸ North Carolina,¹⁹ Oklahoma,²⁰ and South Carolina,²¹ as well as additional analysis of surrounding states, identified overcriminalization as a serious problem.

Overcriminalization goes beyond the mere presence of too many laws on statute books. Our research has highlighted fundamental deficiencies in how crimes are created and codified. These deficiencies undermine political accountability and erode the structural limits on government action that preserve our freedoms. Overcriminalization is exacerbated by the erosion of traditional intent requirements and other due-process protections in criminal cases.

This paper builds upon the collective findings of our series of state-specific reports and proposes model legislation and executive orders that states can adapt to ameliorate overcriminalization.

Overcriminalizing America

Too Many Crimes

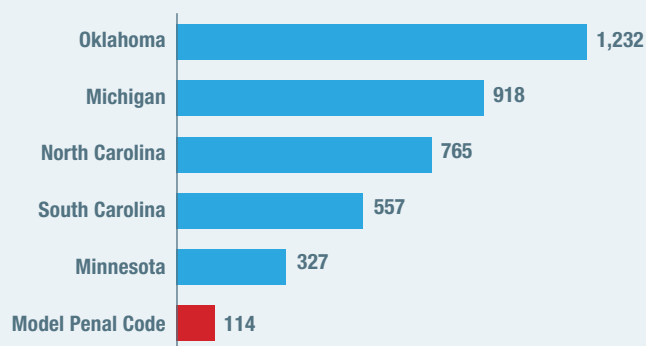
“It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.”

—JAMES MADISON, FEDERALIST NO. 62

In the *Overcriminalizing America* series of reports, Manhattan Institute scholars observed bloated criminal codes—sometimes several times larger than the Model Penal Code (**Figure 1**). (The Model Penal Code

FIGURE 1.

Sections in State Penal Code*



*Counts done by Manhattan Institute researchers at the time of publication of each state report (excluding updates) cited in nn. 17–21. These numbers have likely grown in the years since the reports were published.

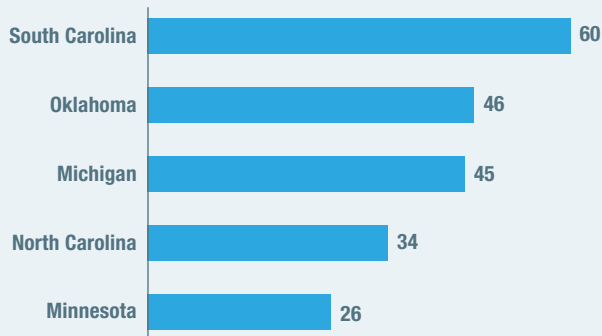
is a document drafted by the American Law Institute—an independent group of lawyers, judges, and academics—to “assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment.”²²

In comparison with the Model Penal Code’s 114 sections, the criminal codes in Michigan and North Carolina, measured in 2014, had 918 and 765 sections, respectively; those in Minnesota, Oklahoma, and South Carolina, measured in 2016, contained 327, 1,232, and 557 sections, respectively. These state criminal codes varied between 129,000 and 293,000 words. Michigan’s criminal code, for example, uses 266,300 words—taking up 500 pages of 10-point, double-spaced Times New Roman text.

As voluminous as these state criminal codes are, they only begin to scratch the surface in cataloging how

FIGURE 2.

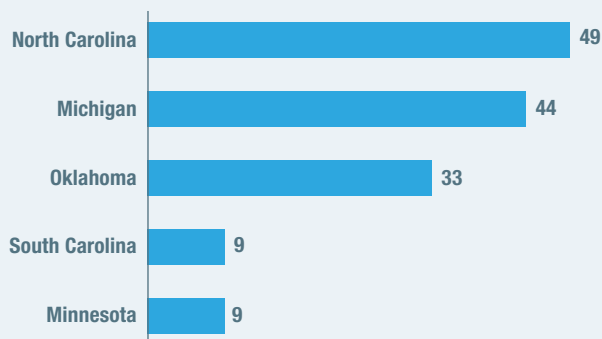
Average Number of Crimes Created Annually*



*Averages based on the six-year periods studied for each state report (excluding updates) cited in nn. 17–21

FIGURE 3.

Percentage of New Crimes Designated as Felonies*



*Percentages based on the six-year periods studied for each state report (excluding updates) cited in nn. 17–21

many crimes are actually on a state’s books. Many state crimes are codified not in penal codes but in other parts of the broader statutory code, in the vast array of agency-created regulation, and even in private licensing-board rules that have de facto criminal effect through “catchall” statutory delegations of criminal lawmaking power. In each of the five states studied in the *Overcriminalizing America* series, a majority of new crimes created by statute in the preceding six years were codified *outside* the criminal code—including 83% of new crimes enacted in Minnesota, 86% of new crimes enacted in South Carolina, and 91% of new crimes enacted in Oklahoma.

During the six-year periods studied, the five states added to their criminal statutes at alarming rates (**Figure 2**), creating 26–60 new crimes annually—an average of 42 per year. Many of the new crimes created in these jurisdictions were felonies (**Figure 3**).

The creation of new crimes has hardly slowed down in the years since we released our reports. During the 2015–16 legislative sessions in Michigan,²³ North Carolina,²⁴ and South Carolina,²⁵ the state legislatures added an average of 37 new crimes to their books.

Outmoded, Silly, and Poorly Written Laws

“We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws.”

—ANTONIN SCALIA, *SYKES V. UNITED STATES*, 564 U.S. 1 (2011)

What do some of the crimes populating state statute books look like? Many are duplicative. For example, in 2012, North Carolina enacted a statute criminalizing the theft or vandalizing of portable toilets—acts presumably covered by the state’s general prohibitions on theft and vandalism.²⁶ The separate codification of acts covered by existing statutes makes the criminal law harder for the average citizen to follow.

Other crimes created during the periods studied border on the ridiculous. Consider a 2011 Oklahoma statute criminalizing 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.”²⁷ Some statutes are so poorly drafted that they remove all objectivity from the process of determining whether a crime was committed. This was the case for a 2012 Minnesota statute prohibiting drug and alcohol abuse counselors from imposing on their clients “any stereotypes of behavior, values, or roles related to human diversity.”²⁸ What constitutes such a stereotype is left undefined in the statute.

When considering the problems created by ill-considered *new* additions to the statute books, often overlooked are the problems that stem from *old* crimes that, while rarely enforced, remain on the books, contributing to the obesity of a state’s body of criminal law. In South Carolina, for example, an old law prohibits, on pain of imprisonment, unlicensed fortune-telling. How one goes about the licensing of fortune-tellers is unclear. A more important question is why such an archaic statute should remain on the books. We have found no example of present-day enforcement of this law.

Other examples include:

- Prohibiting the temporary taking of horses or mules (North Carolina)²⁹
- Breaking the Sabbath (Oklahoma)³⁰
- Prohibiting minors under the age of 18 from playing pinball (South Carolina)³¹

The constant creation of new crimes, coupled with the failure to prune the statute books of old crimes, raises the transaction costs of legal compliance and exacerbates one's risk of becoming entangled in the ever-growing web of state criminal law.

Counterintuitive Codification

“We concluded that the hunt to say, ‘Here is an exact number of federal crimes,’ is likely to prove futile and inaccurate.”

— JAMES STRAZZELLA, AUTHOR OF THE AMERICAN BAR ASSOCIATION REPORT “THE FEDERALIZATION OF CRIMINAL LAW”

Imagine being the proprietor of a small business and wanting to figure out whether something is a criminal offense. Where do you look? Most would answer: “The criminal code.” Yet that would be a risky proposition: newly created crimes are often codified *outside* state criminal codes, in other chapters of the broader statutory code. Indeed, in all five states that we examined, a majority of the crimes created during the six-year periods studied were codified outside their respective criminal codes: 55% for North Carolina, 73% for Michigan, 83% for

Minnesota, 86% for South Carolina, and 91% for Oklahoma (**Figure 4**).

When crimes are codified outside a state's criminal code, people who want to stay out of prison must sift through every chapter of the state's broader statutory code. Parsing through volumes of code with word counts exceeding Tolstoy's *War and Peace* is difficult for a trained legal professional, let alone a layman. After such parsing, one would still need to read the broad array of catchall provisions attaching criminal liability to the rules and regulations promulgated by agency officials, government boards, and private licensing bodies.

Erosion of Mens Rea

“Even a dog knows the difference between being kicked, and being stumbled over.”

— OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1888)

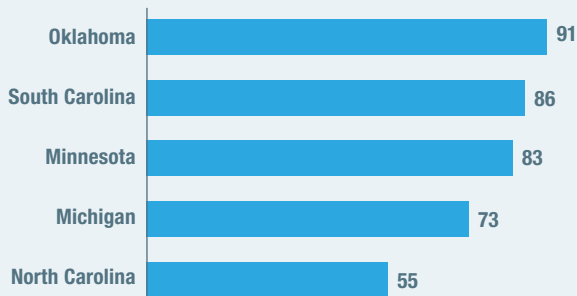
The long-standing tradition in Anglo-American legal systems has been that every crime has two elements: (1) it is a bad act (Latin: *actus reus*); and (2) it is undertaken with a guilty mind (*mens rea*).³² The criminal law has also recognized that there are varying levels of culpability. Generally speaking, offenders can act purposefully, knowingly, recklessly, and negligently. These are terms of art whose definitions are not necessary to set out here; but readers should have a sense of the historical backdrop with which they should view current trends in criminal lawmaking.

State lawmakers have often failed to specify *any* intent requirements in the crimes that have been added to statutory codes in recent years. In Michigan, a study done by the Mackinac Center for Public Policy found that of the 3,102 crimes on state books in 2014, 27% of felonies (321 of 1,209) and 59% of misdemeanors (1,120 of 1,893) contained no *mens rea* provision.³³

Many state courts have interpreted statutory silence on criminal intent as the legislature's intent to create a strict-liability offense (one for which proof of mental culpability is not required). But this is unlikely. Statutory silence on intent in most cases does *not* reflect a considered decision on the part of legislators to create a strict-liability crime; rather, it is a likely by-product of ad hoc decision making by different statutory drafters. Regardless, inverting the Model Penal Code's default rule that *mens rea* is required absent an express statutory command to the contrary leaves citizens at even greater risk: prosecutors would have only to prove that the defendant committed the prohibited act or omission.

FIGURE 4.

Percentage of New Crimes Codified Outside Penal Code*



*Percentages based on the six-year periods studied for each state report (excluding updates) cited in nn. 17–21

Criminalization Without Representation

“Governments are instituted among Men, deriving their just powers from the consent of the governed.”

— DECLARATION OF INDEPENDENCE (1776)

Due to the sweep of the modern regulatory state, legislators regularly delegate details to the executive branch or, in some cases, to private bodies. Statutory catchall provisions make it a crime to violate any of the vast swaths of rules, regulations, and permitting requirements developed outside legislative input or review. We have dubbed this phenomenon “criminalization without representation.”³⁴

In North Carolina, for example, statutory catchall provisions make it a crime to violate any rule adopted by various boards, agency commissioners, and secretaries in the areas of public health, agriculture, and environment,³⁵ as well as private licensing boards in medicine, dentistry, and nutrition.³⁶ Further, most local ordinance violations in North Carolina are state criminal misdemeanors.³⁷ None of these catchall provisions contains any criminal-intent standard, despite the fact that much of the prohibited conduct is unlikely to be intuitively criminal.

North Carolina is not unique. Similar statutory catchall provisions delegating state criminal lawmaking power to unelected or local boards, or to single executive branch officials, exist in the other states studied.³⁸ Such catchall provisions attach criminal penalties to each rule promulgated by a non-legislative individual or board *before* any rule is actually created. When criminal rules are then promulgated, *after* the statute in question becomes law, the elected legislature is not required to review or approve the new crimes.

For an example of how criminalization without representation works, consider a 2010 Oklahoma law, the “Pet Breeders Act,” which, in addition to creating criminal penalties for violating the act, criminalized the violation of “any rule [later] adopted under the [Act].”³⁹ How voluminous were the subsequently promulgated rules? They exceeded 20 pages with more than 43 sections, highlighting just how much the use of regulatory catchalls can inflate a state’s body of criminal laws.⁴⁰

Fixing the Overcriminalization of America

This report paints an unflattering picture of state criminal law. But there is some light shining through the clouds. Some state legislatures have adopted measures to stem the tide of overcriminalization. The five reforms proposed below—and the accompanying model legislation and executive orders—would build upon these recent legislative successes.

Restore Criminal Intent

One way to protect well-meaning citizens against prosecution for crimes that they unknowingly commit is to ensure that prosecutors meet the same burden of proof for *both* of the traditional elements of a crime. That is, the government should have to prove criminal intent in prosecuting alleged regulatory offenses—which are not intuitively criminal in nature—just as it is required to do in cases involving more serious offenses.

Fifteen states have adopted default criminal-intent statutes that establish a baseline level of intent that prosecutors must establish to secure a conviction.⁴¹ These default provisions are typically triggered when the criminal statute or regulation in question is silent as to criminal intent.

Unfortunately, even states that have adopted these *mens rea* rules have sometimes omitted crimes that ordinary citizens are likely to find the least intuitively criminal. For example, Kansas’s default criminal-intent statute applies only to offenses in the state’s criminal code, despite the fact that the criminal code is likely to contain only a minority of the state’s statutory crimes. Kansas and other states should therefore expand their default criminal-intent statutes to apply to offenses listed throughout their entire statutory code.

While including an intent requirement in all criminal statutes may be good policy, legislators may wish to retain the power to create strict-liability offenses in certain cases. Default *mens rea* laws, such as our proposed model legislation, would not prohibit lawmakers from doing so. Instead, a default criminal-intent statute simply prohibits courts from interpreting statutory silence on criminal intent as the legislature’s desire to create a strict-liability offense. Once such a

default is adopted, lawmakers who wish to create a strict-liability offense would have to do so explicitly in the statutory language.

AN ACT TO REESTABLISH MENTAL CULPABILITY AS AN ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE

SEC. 1

1. Except as otherwise provided in this section, a person is not guilty of a criminal offense for which incarceration is statutorily a potential punishment, committed on or after the date of the passage of this Act by both legislative chambers, unless both of the following apply:
 - A. The person's criminal liability is based on conduct that includes either a voluntary act or an omission to perform an act or duty that the person is capable of performing.
 - B. The person has the requisite degree of culpability for each element of the offense as to which a culpable mental state is specified by the language defining the offense.
2. If the statutory language setting out the elements of a criminal offense explicitly imposes strict criminal liability for the conduct described in the statute, then mental culpability is not required for a person to be guilty of the offense.
3. If a subsection of a statute plainly imposes strict criminal liability for an offense defined in that subsection but does not plainly impose strict criminal liability for an offense defined in another subsection, the offense defined in the subsection without a plain imposition of strict criminal liability should not be inferred to be a strict-liability crime.
4. Statutory silence as to mental culpability (*mens rea*) with respect to an offense or element of an offense shall not be construed as the legislature's intent to impose strict criminal liability for any offenses set out therein.
5. If statutory language defining an element of a criminal offense that is related to knowledge or intent or as to which *mens rea* could reasonably be applied neither specifies mental culpability nor plainly imposes strict liability, the element of the offense is established only if a person acts with intent, or knowledge.
 - A. "Intent" means a desire or will to act with respect to a material element of an offense if both of the following circumstances exist:
 - i. The element involves the nature of a person's conduct or a result of that conduct, and it is the person's conscious object to engage in conduct of that nature or to cause that result.
 - ii. The element involves the attendant circumstances, and the person is aware of the existence of those circumstances or believes or hopes that they exist.
 - B. "Knowledge" means awareness or understanding with respect to a material element of an offense if both of the

following circumstances exist:

- i. The element involves the nature or the attendant circumstances of the person's conduct, and the person is aware that his or her conduct is of that nature or that those circumstances exist.
- ii. The element involves a result of the person's conduct, and the person is aware that it is practically certain that his or her conduct will cause that result.

SEC. 2

1. Nothing in this Act shall be construed to alter the state of the law with respect to the legal effect or lack thereof on criminal liability of the voluntary consumption of a substance or compound one knows or reasonably should know may lead to intoxication or impairment.

Expand the Mistake-of-Law Defense

The "mistake-of-law" defense is a legal mechanism through which a defendant who committed a prohibited act can argue that he nevertheless acted in good faith. If successfully invoked, a mistake-of-law defense can rebut the presumption that a defendant knew and understood the law.

Mistake of law is an affirmative defense, i.e., a criminal defendant must advance it to negate legal liability. The defense requires a defendant to establish that he:

- (1) erroneously conclude[d] in good faith that his particular conduct [was] not subject to the operation of the criminal law; (2) ma[de] a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded or [sic] under our legal system, to ascertain and abide by the law; [and] (3) act[ed] in good faith reliance upon the results of such effort.⁴²

The defendant must also show that "the conduct constituting the offense is neither immoral nor anti-social."⁴³

Traditionally, a mistake-of-law defense has been viable only in limited circumstances: when the law in question had not yet been published; when the defendant relied on an official interpretation of the law by a prosecutor or other applicable official; or when the defendant relied on a subsequently overruled judicial opinion. The proposed model legislation would expand the applicability of the defense. If a defendant "erroneously concludes in good faith" that his conduct is not illegal, the model legislation would allow him to present a mistake-of-law defense to a jury—even if the law in question was already published or he was not relying on a judicial opinion or an official interpretation from a government official.

This sort of expansion would offer well-meaning citizens an important layer of protection against criminal liability for acts committed despite having made a good-faith effort to comply with the law—so long as they could convince a jury of their good faith. The model mistake-of-law defense would not apply to cases involving violence, property destruction, or the possession or distribution of narcotics, thereby minimizing the possibility that the policy would harm public safety.

AN ACT TO ESTABLISH THE CONTOURS AND APPLICABILITY OF THE AFFIRMATIVE DEFENSE OF “MISTAKE OF LAW” IN CRIMINAL CASES

SEC. 1 | “MISTAKE OF LAW” DEFINED

“Mistake of Law” is an affirmative defense⁴⁴ that, if proven by a preponderance of the evidence, negates the criminal-intent element of a specific-intent crime.

SEC. 2 | ELEMENTS OF THE DEFENSE

The mistake-of-law defense is a cognizable defense when all of the following elements are established:

1. charges are brought in criminal court;
2. the statutory or regulatory offense(s) in question are not strict-liability offenses, and the state is required to establish criminal intent beyond that to merely perform the act or omission constituting the offense;
3. the defendant erroneously concludes in good faith that his particular conduct is not subject to the operation of criminal law;
4. the defendant makes a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law; and
 - A. In cases in which the conduct constituting the offense(s) is not characterized by the manufacture, sale, possession, or distribution of narcotics or any controlled substance, and is neither violent nor destructive of property, appropriate means are not limited to reliance on official interpretations or judicial decisions, consultation with a licensed attorney, and, where the offense alleged was committed in a business setting, seeking the advice of internal compliance professionals;
 - B. In cases in which the conduct constituting the offense(s) is not characterized by the manufacture, sale, possession, or distribution of narcotics or any controlled substance, and is neither violent nor destructive of property, enactment and publication of a law or regulation shall not be deemed to negate a mistake of law defense as a matter of law;
5. the defendant acts in good-faith reliance upon the results of such effort.

Recodify the Criminal Law

In North Carolina, lawmakers introduced a bill to establish a “recodification task force.” When the proposed legislation stalled, stakeholders from public-policy organizations and the North Carolina government formed an informal working group that took on the tasks outlined in the proposed legislation. The group has since been formally recognized by the state’s legislature, which passed a bill to deliver to the group requested data and other information.⁴⁵

A recodification task force would reorganize a state’s criminal law into a single, comprehensive code of all criminal offenses. Providing a single source in which all criminal offenses are set out would lower the risk that ordinary citizens acting in good faith unknowingly commit a criminal offense, as well as (likely) improve compliance with the criminal law.

The task force would be free to make recommendations to exclude or include various provisions in the comprehensive code being proposed—consistent with the goal of lowering the transaction costs associated with legal compliance. The comprehensive code proposed by the task force could be amended by, and adopted in whole or in part by, the legislature.

AN ACT TO ESTABLISH THE [STATE NAME] CRIMINAL CODE RECODIFICATION COMMISSION

SEC. 1 | COMMISSION ESTABLISHED

There is established the Criminal Code Recodification Commission (hereinafter “[the] Commission”) within the [state name] Judicial Department’s Office of Court Administration {or equivalent}.

SEC. 2 | COMPOSITION

The Commission shall be composed of twenty-one members to be appointed as follows {note: composition may vary based on state constitutional structure, statutory schemes, or political realities}:

1. Four members of the Senate appointed by the President Pro Tempore of the Senate. At least one Senate member must be a member of the minority party at the time of the Commission’s creation.
 - A. Senate members may designate a member of their staff to represent them at meetings of the Commission, but the ability to vote on any matters before the Commission shall be reserved to appointed members.
2. Four members of the House of Representatives appointed by the Speaker of the House of Representatives. At least one House member must be a member of the minority party at the time of the Commission’s creation.

- A. House members may designate a member of their staff to represent them at meetings of the Commission, but the ability to vote on any matters before the Commission shall be reserved to appointed members.
3. Two members appointed by the Governor.
4. The Lieutenant Governor, or the Lieutenant Governor's designee, and one additional member appointed by the Lieutenant Governor.
5. Two sitting sheriffs or police department chiefs, of which one shall be appointed by the President Pro Tempore of the Senate, and the other appointed by the Speaker of the House.
6. Seven members appointed by the Chief Justice of the [state name] Supreme Court as follows:
 - A. A sitting superior court judge
 - B. A sitting intermediate appellate court judge
 - C. Two state penitentiary wardens
 - D. A sitting district attorney
 - E. A sitting public defender
 - F. A member of the private criminal defense bar
7. The Chair of the Commission will be selected by the Governor from among the appointed members.

SEC. 3 | DELIVERABLES OF THE COMMISSION

The Commission shall produce the following:

1. Within eighteen months from the effective date of this Act, a fully drafted, new, streamlined, comprehensive, orderly, and principled criminal code.
2. Official commentary appended to the new code explaining how it will operate. Said commentary shall identify, explain, and provide justification for changes in current law.
3. An offense grading table appended to the new code grouping all offenses covered by the new code by offense grade. Offenses shall be graded within existing sentencing classes.

SEC. 4 | MANDATE OF THE COMMISSION

In producing deliverables outlined in Sec.'s 3(1)–(3), the Commission shall:

1. Incorporate into the new code all major criminal offenses contained in existing law that the Commission has not chosen to exclude.
2. Include necessary provisions not contained in the current code, such as default mental state requirements as an essential element of criminal liability, a listing of affirmative defenses and their elements, and definitions of offenses and key terminology with corresponding citations to governing precedent when applicable or deemed helpful by the Commission.
3. Exclude from the new code unnecessary, duplicative,

inconsistent, or unlawful provisions of current law. Note in commentary whether criminally enforceable provisions of current law that have been excluded from the code should remain available for civil enforcement through the levying of fines, or repealed altogether.

4. Use language and syntactical structure to make the law easier to understand and apply.
5. Ensure that criminal offenses are cohesive, rational, and consistent with one another.
6. Make recommendations regarding whether, and if so, what, limitations should be placed on the ability of administrative boards, agencies, local governments, appointed commissioners, or of other persons or entities to enact rules that will, pursuant to the enabling statute, be eligible for criminal enforcement.
7. Address any other matter deemed necessary by the Commission to carry out its legislative mandate.

Repeal Outmoded, Unnecessary, and Unconstitutional Criminal Laws

Some states have undertaken legislative efforts to clean up their statute books by repealing unnecessary, outmoded, and duplicative criminal offenses. In Kansas, for example, the state established an “Office of the Repealer” in 2011. The primary aim of the office was to review the body of criminal law and continuously flag provisions ripe for repeal, which the legislature could then choose to act upon.⁴⁶ In Michigan, Governor Rick Snyder signed, in 2015, a bill repealing a number of outmoded crimes⁴⁷—the legislature’s response to the governor’s call for such reforms earlier that year.⁴⁸

While these efforts are laudable, they do not go far enough, considering the rate at which lawmakers are adding new criminal offenses to the books. One state studied by the Manhattan Institute, however, does offer a fine example of how to undertake a large-scale repeal effort. In 2014, Minnesota’s legislators repealed more than 1,175 crimes in what was dubbed the legislative “unsession.”⁴⁹ The unsession was the outgrowth of a push by Governor Mark Dayton to prune unnecessary and outmoded laws piling up on state books.⁵⁰

Dayton persuaded lawmakers to take up a long list of crowd-sourced reform proposals during its short even-year legislative session.⁵¹ States wishing to address overcriminalization should consider using Minnesota’s approach. In addition, states should

consider appointing a task force to offer recommendations, which could focus and refine crowd-sourced proposals, as well as facilitate bipartisanship.

The proposed model legislation would not create or mandate a legislative “unsession”—traditional notions of the separation of powers argue against having the executive branch of a state government set the agenda for the legislative branch. Instead, we suggest two mechanisms, legislative resolution and executive order, through which states could create an overcriminalization task force. Such a task force would be charged with reviewing the criminal law with an eye toward identifying provisions ripe for repeal. The legislature could then consider the suggestions of the task force, ideally during a special legislative “unsession.”

A JOINT RESOLUTION TO CREATE THE [STATE NAME] OVERCRIMINALIZATION TASK FORCE, TO PROVIDE FOR THE COMPOSITION OF THE TASK FORCE, AND TO PROVIDE THAT THE TASK FORCE SHALL REPORT ITS FINDINGS TO THE GENERAL ASSEMBLY

Whereas, overcriminalization, defined as the growth of criminal statutes within a state’s code of laws, exists as a phenomenon within the state of _____; and

Whereas, it is in the public interest for the State to establish a _____ Overcriminalization Task Force to study the presence of the criminal law and how the entirety of the criminal law and state policies affect this population.

Now, therefore,

Be it enacted by the General Assembly of the State of _____:

OVERCRIMINALIZATION TASK FORCE, COMPOSITION, REPORT

SEC. 1

1. There is hereby established the [State Name] Overcriminalization Task Force (hereinafter “task force”) to study and review the scope and application of the criminal law and to examine how the criminal law affects the population of this state.
2. The task force shall consist of thirteen members, composed as follows:
 - A. the Director of the [State Name] Department of Corrections, or his designee, shall serve *ex officio* and shall be the chairman of the task force;
 - B. twelve members who shall be appointed as follows:

- i. Six members shall be appointed by the President Pro Tempore of the Senate. Two shall be members of the Senate, at least one of whom shall be a member of the majority political party represented in the General Assembly and at least one of whom shall be a member of the largest minority political party represented in the General Assembly. One shall be a member of the public at large; and
 - ii. Six members shall be appointed by the Speaker of the General Assembly. Two shall be members of the House of Representatives, at least one of whom shall be a member of the majority political party represented in the General Assembly and at least one of whom shall be a member of the largest minority political party represented in the General Assembly. One shall be a member of the public at large; and
3. the task force shall organize as soon as practicable following the appointment of its members and shall select a vice chairperson from among its members.
4. The members of the task force shall be appointed no later than thirty days after the effective date of this act.
5. Vacancies in the membership of the task force shall be filled in the same manner provided by the original appointments.
6. The members shall serve without compensation and may not receive mileage or per diem. The task force may meet and hold hearings at the places it designates during the sessions or recesses of the legislature; and, wherever practicable, the General Assembly shall make meeting space available to the task force upon request.
7. The findings and recommendations of the task force shall be reported to the Governor and the General Assembly no later than twelve months after the initial meeting of the task force. The report shall principally identify the laws the task force recommends to the General Assembly for repeal.
8. The task force shall dissolve immediately after submitting its report to the Governor and the General Assembly.

DRAFT OF EXECUTIVE ORDER ESTABLISHING GOVERNOR’S OVERCRIMINALIZATION TASK FORCE

State of _____

Executive Department

Office of the Governor

Executive Order No. 20XX-XX

Whereas, overcriminalization, defined as the growth of criminal statutes within a state’s code of laws, exists as a phenomena within the state of _____; and

Whereas, it is in the public interest for the State to es-

tablish a _____ Overcriminalization Task Force to study the presence of the criminal law and how the entirety of the criminal law and state policies affect this population.

Now, therefore, pursuant to the authority vested in me by the Constitution and Statutes of the State of _____, I hereby establish the Governor's Overcriminalization Task Force ("Task Force") to be composed of _____ members to include _____, appointees from the majority and minority leaders of the Senate and House of Representatives, and representatives from different business sectors and the conservation community, of which I shall designate the chairperson. I hereby direct the Task Force as follows:

SEC. 1 | TASK FORCE DIRECTIVES

1. **Task Force Mission:** To study and review the body of criminally enforceable rules and regulations and submit a report to the General Assembly identifying those criminal laws and regulations it recommends for repeal.
2. **Duties and responsibilities:**
 - A. The Task Force shall evaluate the reports submitted by agencies, pursuant to Section II, that identify current and proposed statutes, rules, regulations, and policies that add new crimes or criminally-enforceable provisions to _____ laws, rules, and regulations.
 - B. The Task Force shall cooperate and coordinate with the appropriate state agencies, as practicable, to identify current and proposed crimes or criminally-enforceable provisions in state laws, rules, and regulations.
 - C. The Task Force shall conduct public hearings and solicit input from businesses, employers, conservation groups, professional associations, state agencies, and other interested persons and groups to develop its final report. As practicable, the Task Force shall conduct public hearings in local communities around the State.
 - D. Staff will be designated to assist the Task Force in developing its report.
 - E. The Task Force shall submit its final report on or before _____ XX, 20XX, to the Governor and the members of the General Assembly.

FURTHER, I hereby direct all Cabinet agencies and encourage all other executive agencies as follows:

SEC. 2 | AGENCY DIRECTIVES

1. Each agency shall identify its current and proposed statutes, rules, regulations, and policies that expand the existing quantity of criminal laws in _____ using the following guidelines:
 - A. Each agency shall comprehensively review all current and proposed statutes, rules, regulations, and policies in order to assess their effects on the criminal law of _____ to determine whether they are exceedingly vague, duplicious, antiquated, enforced, proportional to their punishments, and contain reasonable culpability requirements.

- B. In evaluating statutes, rules, regulations, and policies, each agency should consider factors to include, but not limited to, their necessity, complexity, efficiency, effectiveness, redundancy, public complaints or comments, short- and long-term effects, impact on all affected persons, both intended and unintended, and unintended negative consequences.

2. Each agency shall submit a written report to the Task Force on or before _____ XX, 20XX, providing detailed recommendations to repeal or amend any provisions that unduly burden businesses and citizens of this State.
3. Each agency is authorized to call upon any department, office, division, or agency of this State to supply it with data and other information, personnel, or assistance it deems necessary to discharge its duties under this Order. Each department, officer, division, or agency of the State is hereby required, to the extent not inconsistent with law, to cooperate with another agency and to furnish it with such information, personnel, and assistance as is necessary to accomplish the purpose of this Order.
4. Each agency shall take care to solicit both written and oral comments from the public, including businesses, employees, professional associations, conservation organizations, and other affected persons or entities as the agency deems appropriate and to consider the views expressed by those parties in any report.

This Order is effective immediately.

GIVEN UNDER MY HAND AND THE GREAT SEAL OF THE STATE OF [STATE NAME], THIS xx DAY OF _____ 20XX.

Eliminate Criminalization without Representation

In every state studied in the Manhattan Institute's *Overcriminalizing America* series, lawmakers have delegated effective criminal lawmaking authority to, among others, executive-branch officials, commissions, and private licensing boards. Such delegation makes legal compliance even more complicated for ordinary citizens.

Moreover, each state that we have examined has a large number of crimes that were never voted on, or even reviewed, by anyone who must answer to voters. Criminalization without representation concentrates power in the hands of unelected officials, undermining political accountability. It also threatens to accelerate the rate of new crime creation.

The proposed model legislation aims to constrain regulators' power to create crimes without express approval by the legislative branch. The model policy would restrict regulations to the realm of civil enforcement unless and until those regulations survive votes in both chambers of a state's legislature and are approved by the state's governor—i.e., unless and until those regulations survive the strictures of bicameralism and presentment.

AN ACT TO END “CRIMINALIZATION WITHOUT REPRESENTATION”

SEC. 1 | DEFINITIONS

1. *Regulatory “catchall” provision*—A provision in legislation that prescribes penalties (specifically criminal penalties, for the purposes of this legislation) for the violation of a rule, or rules, a regulatory body is authorized to promulgate, prior to the promulgation of such rules.
2. *Regulatory body*—Any governmental agency, quasi-private body, commissioner, or other official, vested with the authority to promulgate regulations of any sort enforceable by the state of _____.
3. *Rule or regulation*—Any prohibition or requirement articulated by a regulatory body and enforceable either civilly or criminally by the state of _____.
4. *Criminal enforcement*—Any enforcement action brought by the state for which the target of the enforcement action, if found guilty, can be imprisoned, labeled as a felon or misdemeanor under state law, fined more than \$10,000, or prohibited from exercising state or federal constitutional rights, including the rights to vote, keep and bear arms, and deny a law enforcement officer's request to conduct a search pursuant to the Fourth Amendment to the Constitution of the United States.

5. *Rules eligible for criminal enforcement*—Any rule promulgated pursuant to a grant of legislative authority that contains a “regulatory catchall” provision by which the rule is covered.

SEC. 2 | BICAMERALISM AND PRESENTMENT REQUIRED

1. As of the effective date of this legislation, no rule or regulation covered by a “regulatory catchall” provision, except those that satisfy the requirements set out in (2, below) may be criminally enforced.
2. A rule or regulation may be criminally enforced if and only if it has been approved—in the form of a joint resolution subject to an up and down vote—by a simple majority of both houses of the _____ state legislature, and that resolution has been signed by the Governor.
3. Promulgated rules eligible for criminal enforcement that have not satisfied the requirements set out in (2, above) will be restricted to civil enforcement unless and until said requirements are satisfied.
4. If no civil enforcement penalties are set out in the legislation authorizing a promulgated rule eligible for criminal enforcement, the penalties for the violation of said rule are as follows—
 - A. Upon a finding of guilt by a preponderance of the evidence, a fine not exceeding \$150 per violation may be levied.
 - B. Failure to pay any fines levied pursuant to (A, above) can result in additional fines, a finding of contempt of court, or the suspension of a state license related to the offense charged held by the accused.



Conclusion

Building on the Manhattan Institute's previous findings, this paper lays out the contours of the state-level overcriminalization problem. State statutory and regulatory codes are overflowing with criminal offenses. Most of these offenses involve conduct that is not intuitively wrong. Most could not be easily discoverable by individuals or small businesses that lack teams of specialized lawyers. Many have weak or absent criminal-intent requirements, leaving unsuspecting and well-meaning citizens vulnerable to prosecution even when acting in good faith. Many are never reviewed by legislators accountable to the voting public. And the volume of state crimes is expanding and growing less manageable with each passing year.

The proposed model legislation and executive order offer a framework for state lawmakers to address the overcriminalization problem. These policies:

1. Protect well-meaning individuals by requiring a showing of criminal intent absent a clear legislative command to the contrary, and affording defendants the ability to assert a good-faith mistake-of-law defense in cases not involving public order and safety
2. Make the body of criminal law clearer and easier to navigate, by recodifying criminal laws and paring outdated, duplicative, and unnecessary crimes from the books
3. Reconnect criminal lawmaking with the legislative process, restoring political accountability for the growth of criminal law and potentially slowing the rate at which criminally enforceable regulatory offenses are created

Across the states we have studied, the criminal law tends not to reflect due consideration of whether particular disfavored conduct should be criminalized, rather than dealt with through civil or administrative means; whether it is bad enough to dispense with the long-standing principle that a criminal act requires acting with a guilty mind; and whether the punishment for a given crime fits with parallel offenses, criminal and civil. Such questions can be difficult to answer, especially for the many part-time legislators across the states, constrained by time and resources, and often lacking legal training.

The reforms suggested in this paper implicitly recognize such difficulty—offering protections to criminal defendants acting in good faith, delegating recodification and repeal to focused task forces—while also restoring to the legislature the proper ultimate authority over a government's awesome power to take away a citizen's liberty.

Each state is different. Some states have more work to do than others. But we are confident that each state needs reform. It is up to elected state leaders to meet that need with action.

Endnotes

- ¹ Brian Hardzinski, *Arrest over "Bacon Vodka" Prompts Questions from Oklahoma's Alcohol Commission*, KGOU.org (June 23, 2016).
- ² Madeleine Morgenstern, *Minnesota Man Thrown in Jail for ... Failing to Put Up Siding on His Home*, TheBlaze (Mar. 21, 2012).
- ³ See *State v. Pruner*, 735 SE.2d 451 (N.C. Ct. App. 2012). See also N.C. Gen. Stat. § 130A-248(b) (2011).
- ⁴ Conor Friedersdorf, *Working Mom Arrested for Letting Her 9-Year-Old Play Alone at Park*, THE ATLANTIC (July 15, 2014).
- ⁵ Associated Press, *Michigan: Mom Can't Watch Neighbors' Kids*, CBS.com (Sept. 30, 2009).
- ⁶ N.C. Gen. Stat. § 90-366.
- ⁷ Adam Liptak, *Blogger Giving Advice Resists State's: Get a License*, N.Y. TIMES (Aug. 6, 2012).
- ⁸ Institute for Justice, *Caveman Blogger Fights for Free Speech and Internet Freedom: Challenging the Government's Authority to Censor Ordinary Advice* (2012).
- ⁹ *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013).
- ¹⁰ See *People v. Schumacher*, 740 N.W.2d 534, 538 & n. 2 (Mich. App. 2007).
- ¹¹ See *id.*, at 542-543.
- ¹² 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).
- ¹³ See, e.g., Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal, in In the Name of Justice* 43-56 (Timothy Lynch, ed., 2009).
- ¹⁴ Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 (2012).
- ¹⁵ 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); Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Civ. Justice Rpt. 14 (Manh. Inst. for Pol'y Res., 2012); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM.U. L. REV. 703 (2005).
- ¹⁶ See Paul Rosenzweig & Brian Walsh (eds.), *ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY* (Heritage Found., 2010).
- ¹⁷ See 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., October 2014); see also Copland & Rafael A. Mangual, *Michigan Overcriminalization: Update 2017*, Legal Policy Issue Brief (Manh. Inst. for Pol'y Res., March 2017).
- ¹⁸ Copland & Mangual, *Overcriminalizing the North Star State: A Primer and Possible Reforms for Minnesota*, Issue Brief 48 (Manh. Inst. for Pol'y Res., February 2016).
- ¹⁹ See Copland & 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); see also Copland & Mangual, *North Carolina Overcriminalization: Update 2017*, Legal Policy Issue Brief (Manh. Inst. for Pol'y Res., August 2017).
- ²⁰ See Copland & Mangual, *Overcriminalizing the Sooner State: A Primer and Possible Reforms for Oklahoma*, Issue Brief 56 (Manh. Inst. for Pol'y Res., November 2016).
- ²¹ See Copland & Gorodetski, *Overcriminalizing the Palmetto State: A Primer and Possible Reforms for South Carolina*, Issue Brief 44 (Manh. Inst. for Pol'y Res., January 2016); see also Copland and Mangual, *South Carolina Overcriminalization: Update 2017*, Legal Policy Issue Brief (Manh. Inst. for Pol'y Res., January 2018).
- ²² See American Law Institute, Publications Catalog, Statement of the Purpose of the Model Penal Code; Model Penal Code (1962).
- ²³ See *supra* note 17.
- ²⁴ See *supra* note 19.
- ²⁵ See *supra* note 21.
- ²⁶ See Copland & Gorodetski, *supra* note 19, at p. 6.
- ²⁷ See *supra* note 20, at p. 8.
- ²⁸ See *supra* note 18, at p. 7.
- ²⁹ N.C. Gen. Stat. § 14-82.
- ³⁰ Okla. 21 § 911.
- ³¹ S.C. Code § 63-19-2430.
- ³² See William Blackstone, 4 COMMENTARIES, at 432 (Callahan, ed., 9th ed., 1913).

- ³³ See Copland, Gorodetski & Reitz, *supra* note 17, at p. 5. Mackinac's finding for Michigan is in line with the findings of a 2010 study of federal lawmaking trends by the Heritage Foundation and the National Association of Criminal Defense Lawyers, which found that 57% of criminal laws proposed in the 109th U.S. Congress contained inadequate *mens rea* provisions. See Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, Special Rpt. 77 (Heritage Found. & Nat'l Assoc. of Crim. Def. Lawyers, May 5, 2010).
- ³⁴ See Copland & Mangual, *Let's End Criminalization Without Representation*, NAT'L REV. ONLINE (Jan. 14, 2017).
- ³⁵ See, e.g., N.C. Gen. Stat. § 130A-25, § 106-50.41, § 106-65.48, § 113A-42, § 113-187.
- ³⁶ See, e.g., N.C. Gen. Stat. § 90.41(c); § 90-40; § 90-356(5), § 90-366.
- ³⁷ See N.C. Gen. Stat. § 14-4(a).
- ³⁸ In Michigan, see, e.g., MCL § 333.1299.66; MCL § 324.11147; MCL § 324.41712; MCL § 324.41905; MCL § 324.9510; MCL § 324.43560; MCL § 324.11549; MCL § 290.668; MCL § 287.966; MCL § 287.149; MCL § 288.684; MCL § 339.1118; MCL § 339.2635.67; MCL §§ 324.101–324.90106. In Minnesota, see, e.g., Minn. Stat. §§ 84D.13 Subd. 3; 84.774(a); 34A.04 Subd. 1(c); 85.20 Subd. 1(a). In South Carolina, see, e.g., S.C. Code §§ 5-7-30; 41-15-320(e), (h); 44-1-150; 44-1-150(A); 46-13-180; 46-15-100; 48-1-320; 50-11-10(A).
- ³⁹ See *supra* note 20, at p. 9.
- ⁴⁰ *Id.* At the federal level, of the more than 300,000 criminally enforceable federal rules and regulations, 98% are in the form of regulations promulgated by administrative agencies and executive branch officials. See Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, HARVARD J.L. & PUB. POL'Y (vol. 37), at p. 58 (citing Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441–42 (1995) (estimating that as of the mid-1990s, there were 300,000 criminally enforceable regulations on the books)).
- ⁴¹ See John S. Baker, Jr., *Mens Rea and State Crimes*, at p. 6, Federalist Soc. for Law and Pub. Pol'y (July 2012) (listing, in nn. 26–27, the states that have adopted some sort of default *mens rea* provision: Alaska, Arkansas, Delaware, Hawaii, Illinois, Kansas, Missouri, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Utah). Since the publication of Professor Baker's 2012 paper, the Ohio legislature has strengthened and expanded the application of its default *mens rea* statute (see Ohio SB 361); and Michigan adopted a default of its own in 2015 (see Michigan HB 4713 [codified as Public Act 250 of 2015]).
- ⁴² *Kipp v. State*, 704 A.2d 839, 842 (Del. 1998) (internal quotations and citations omitted).
- ⁴³ *Id.*
- ⁴⁴ An affirmative defense is one that must be pleaded by a criminal defendant prior to the start of trial, lest it be forfeited.
- ⁴⁵ See North Carolina SB 114 (2017), at Part X (proposing the creation of a "criminal code recodification commission"). See also Jon Guze, *Legislative Victory Gets N.C. Closer to an Effective, Efficient, and Fair Criminal Code*, John Locke Foundation (June 28, 2018) (reporting on the formation of "an informal recodification working group"); North Carolina HB 379 (2018) (providing assistance to the working group).
- ⁴⁶ See, e.g., Tim Carpenter, *State 'Repealer' Lists 51 Objections*, TOPEKA CAPITAL-JOURNAL (Jan. 20, 2012).
- ⁴⁷ Michigan Public Act No. 210 (2015).
- ⁴⁸ A Special Message from Governor Rick Snyder: Criminal Justice to Michiganders and the Michigan Legislature, May 18, 2015.
- ⁴⁹ See Bill Salisbury, *Minnesota 'Unsession' Dumps 1,175 Obsolete, Silly Laws*, ST. PAUL PIONEER PRESS (May 26, 2014).
- ⁵⁰ Chris Kardish, *Inside Minnesota's 'Unsession' of Spring Cleaning*, GOVERNING (June 2014).
- ⁵¹ Minnesota Gov. Mark Dayton's 2014 State of the State Speech (May 1, 2014).



Abstract

Building on previous MI studies, this paper lays out the contours of America's state-level overcriminalization problem. Today, state statutory and regulatory codes overflow with criminal offenses. Most of these offenses involve conduct that is not intuitively wrong. Most could not be easily discoverable by individuals or small businesses that lack teams of specialized lawyers. Many have weak or absent criminal-intent requirements, leaving unsuspecting and well-meaning citizens vulnerable to prosecution even when acting in good faith. Many are never reviewed by legislators accountable to the voting public. And the volume of state crimes is expanding and growing less manageable with each passing year.

The proposed model legislation and executive order in this paper offer a framework for state lawmakers to address the overcriminalization problem. These policies:

1. Protect well-meaning individuals by requiring a showing of criminal intent absent a clear legislative command to the contrary, and affording defendants the ability to assert a good-faith mistake-of-law defense in cases not involving public order and safety.
2. Make the body of criminal law clearer and easier to navigate, by recodifying criminal laws and paring outdated, duplicative, and unnecessary crimes from the books.
3. Reconnect criminal lawmaking with the legislative process, restoring political accountability for the growth of criminal law and potentially slowing the rate at which criminally enforceable regulatory offenses are created.