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ISSUE BRIEF

Legal Reform

OVERCRIMINALIZING THE PALMETTO STATE

A Primer and Possible Reforms for South Carolina

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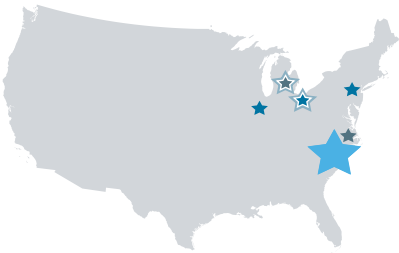
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THIRD IN A SERIES OF STATE-LEVEL REPORTS

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*Rafael Mangual, Joseph Calderera, and James Parsons provided invaluable research assistance. This paper is the third 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 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); and 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).

Executive Summary*

In South Carolina, residents face an array of criminal laws covering ordinary business practices and personal conduct, often placing individuals in legal jeopardy for unknowingly violating seemingly innocuous rules. Some Palmetto State arrests border on the absurd, from a child threatening to “kill” his neighbor’s dinosaur to a mother cursing in a public parking lot. In other cases, the state’s criminal laws create barriers to entry with real-world economic impacts: when the car service Uber attempted to enter the state, it needed the legislature to override strict regulatory rules that could have ensnared drivers lacking special operating permits.

Overall, South Carolina’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:

- ◆ South Carolina’s penal code contains 557 sections—almost five times the number of the Model Penal Code.
- ◆ South Carolina has created, on average, 60 crimes annually over the last six years; 86 percent of these fell outside the penal code.
- ◆ 41 percent of these newly created crimes fall into the fish and wildlife code. Only five of 243 criminal statutes in South Carolina’s fish and game laws contain any requirement of criminal intent.

Apart from placing citizens in legal jeopardy for unintentionally violating rules that do not proscribe self-evidently wrong conduct, South Carolina’s criminal law, due to its size and complexity, 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, South Carolina policymakers should:

- **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.
- **Create a commission to review the criminal law.** Consolidate, clarify, and optimize the state’s current criminal statutes.
- **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. In May 2014, coauthors Copland and Gorodetski published a primer on the subject for North Carolina;⁸ and in October 2014, they published a similar primer on Michigan, authored jointly by scholars at the Mackinac Center.⁹ This paper, examining overcriminalization in South Carolina, is the third in the series.

South Carolina’s criminal code contains more than four times the number of sections as the Model Penal Code, a document drafted by the American Law Institute (an independent group of lawyers, judges, and academics) to “assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment.”¹⁰ South Carolina’s penal

code has fewer provisions than neighboring states North Carolina, Georgia, and Tennessee; and South Carolina’s penal code has 24 percent fewer words than North Carolina’s. Such comparative data may, however, underestimate overcriminalization in South Carolina: 86 percent of new crimes enacted over the last six years by the South Carolina legislature have not been placed in the criminal code.

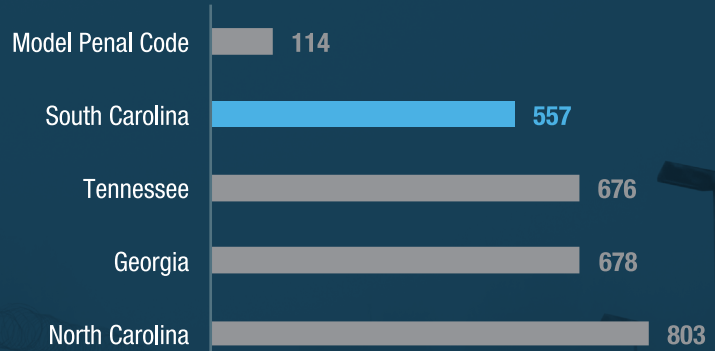
In recent years, South Carolina’s General Assembly has taken an active interest in criminal-justice reform—most notably, in 2010’s Act 237, the Omnibus Crime Reduction and Sentencing Reform Act.¹¹ But even as the legislature has tackled sentencing reforms designed to ensure adequate prison space, lower recidivism rates, and conserve scarce resources, the state has not tackled the broader problem of overcriminalization through regulatory, business, and licensing offenses. Indeed, South Carolina’s legislature has been expanding its criminal law much more quickly than North Carolina and Michigan—the states examined in MI’s two previous papers on the topic—adding more than 60 new criminal offenses to the books annually, on average, during 2009–14.¹²

This paper looks at overcriminalization trends in South Carolina, quantitatively and qualitatively, and proposes various avenues for reform. **Section II** examines South Carolina’s criminal code quantitatively—including the number and creation rate of crimes and how South Carolina compares with its neighbors. **Section III** examines South Carolina’s criminal law more qualitatively—including outdated criminal provisions, redundant new crimes added to the books, the broad array of crimes “without intent” under South Carolina 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, South Carolina and Neighboring States



Source: Manhattan Institute review of statutes

II. Quantitative Assessment

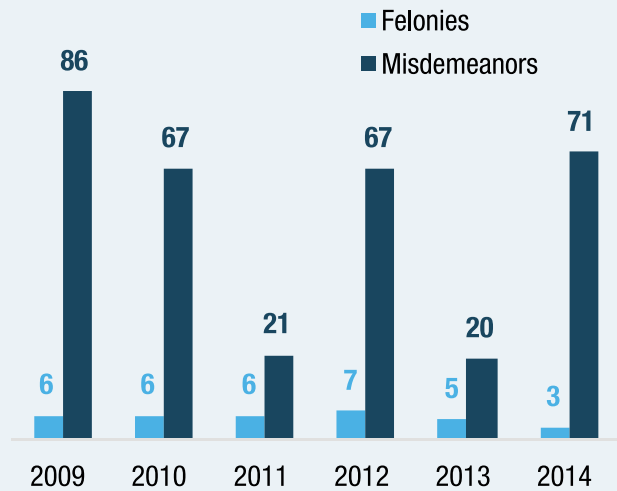
Number of Crimes. The South Carolina Penal Code¹³ contains 557 sections comprising 145,567 words. The scope of criminal law in the Palmetto State, however, is far greater than that contained in the penal code itself: of the 62 titles in the South Carolina code *other than* the penal code, 53 contain criminal offenses. Many more crimes exist outside the codified laws through regulatory “catchall provisions,” which make entire sections of the regulatory code criminal, including state regulations dealing with public health,¹⁴ agriculture,¹⁵ and the environment,¹⁶ as well as local ordinances.¹⁷

Comparative Trends. Compared with South Carolina’s voluminous penal code, the Model Penal Code, developed by leading scholars and attorneys as a template for criminal law in 1962, contains only 114 sections.¹⁸ South Carolina’s code is no outlier, however; indeed, the Palmetto State’s penal code is appreciably more compact than that of its neighbors: North Carolina’s criminal code contains 803 sections,¹⁹ Georgia’s 678,²⁰ and Tennessee’s 676²¹ (**Figure 1**). South Carolina’s penal code also contains 24 percent fewer words than North Carolina’s.

The large size of the criminal codes of South Carolina and neighboring states demonstrates that having a large number of crimes—more than the common citizen could hope to know and understand—is a common modern trend. Although South Carolina’s penal code is less voluminous than neighboring states’, 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.

FIGURE 2.

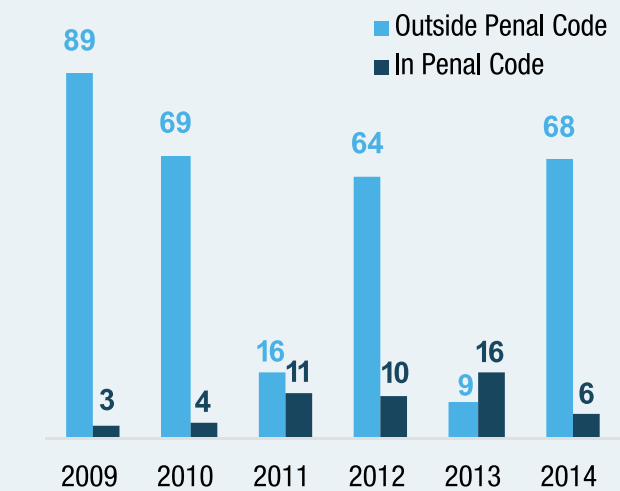
New Crimes in South Carolina, 2009–14



Source: Manhattan Institute review of legislation

FIGURE 3.

New Crimes in South Carolina, by Codification, 2009–14



Source: Manhattan Institute review of legislation

Intertemporal Trends. Over the last six years, South Carolina has, on average, added more than 60 crimes annually—a significantly higher rate of increase than Michigan and North Carolina, which added new crimes at annual rates of 45 and 34, respectively. South Carolina’s new crimes, however, 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-six percent of the new crimes created in South Carolina during 2009–14 fell outside the penal code (Figure 3), a significantly higher fraction than in Michigan (73 percent) or North Carolina (55 percent). Forty-one

percent of all new crimes created in South Carolina in the last six years were enacted in Title 50, which governs fish, game, and wildlife.

Sentencing. Notwithstanding the broader trend toward increasing the number of criminal offenses, the South Carolina legislature has taken recent steps to reassess the state’s sentencing approach—notably, the Omnibus Crime Reduction and Sentencing Reform Act of 2010.²² The South Carolina legislature found that inmate levels in the state had risen from 9,137 in 1983 to more than 25,000 in 2009, prompting a 500 percent increase in costs, from \$63.71 million to \$314.15 million, over the same period.²³ Most of the crimes committed by inmates were for nonvi-

olent drug or property crimes. The new legislation sought to reduce incarceration offenses while also ensuring sufficient prison space for high-risk, violent offenders; requiring adequate supervision for offenders leaving prison; providing incentives for released offenders to stay crime- and drug-free; reducing recidivism; providing fair and effective sentencing options; employing evidence-based practices; and improving public safety.²⁴

By the end of the 2011 fiscal year, the number of inmates had decreased to 23,200, and parole and probation compliance revocations had fallen 36 percent, with total accumulated annual savings of more than \$4 million.²⁵

III. Qualitative Assessment

Old Crimes. Even as more crimes have been created in South Carolina, there has been no real effort to rid the state’s laws of already existing crimes that are archaic or unused. Criminal offenses currently on the books in South Carolina include prohibiting minors under the age of 18 from playing pinball;²⁶ forbidding fortune-tellers from operating without a license;²⁷ prohibiting working on Sundays;²⁸ and holding railroads liable for frightening horses and forbidding railroad companies from “removing” themselves from towns of 500 or more people.²⁹

In addition to the Sunday work prohibition, the state legislature has left on the books various “moral” offenses—some of questionable constitutionality³⁰—such as criminal laws against fornication;³¹ “seduction” (entering into relations with a woman with an unfulfilled promise of marriage);³² and the anonymous sending of “indecent,” “suggestive,” or “immoral” mails, e-mails, or texts.³³

New Crimes. A close examination of recently promulgated crimes reveals that they are often duplicative or unnecessary. For example, new crimes passed by the legislature in recent years include a 2014 law prohibiting trespass in a library;³⁴ a 2014 law outlawing damaging emergency vehicles;³⁵ a 2013 law prohibiting the giving of false information in applying for a special license plate;³⁶ and a 2011 law prohibiting the display of captured whales or dolphins.³⁷ Trespass, property damage, and fraud are already crimes. If special classes of those crimes require sentencing enhancements, the separate codification of such offenses makes the criminal law harder for the average citizen to follow.

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

In the late nineteenth century, legislatures began enacting, as a response to industrialization, laws that imposed liability on the actor regardless of intent. For example, traffic laws, workplace regulations, and the sale of food and beverages imposed strict liability with the intent to promote social welfare and safety.³⁸ But when offenses omit the requirement that intent be established for a criminal prosecution, individuals can be convicted of crimes of which they were unaware, through conduct that would otherwise be unobjectionable apart from regulatory prohibition.

Congress and state legislatures now regularly enact offenses that lack *mens rea* requirements. For example, a 2010 joint report by the Heritage Foundation and the National Association of Criminal Defense Lawyers found that 57 percent of criminal laws proposed in the 109th U.S. Congress contained inadequate *mens rea* provisions.³⁹

A similar trend is found in South Carolina. Crimes on the books in the state, including those enacted in recent years, require a hodgepodge of mental states on the part of the accused—including that the person acted “willfully,” “knowingly,” “with recklessness,” “with gross

negligence,” “negligently,” “after notice” of violation, or some combination. Other crimes, including those newly created, require no culpable mental state at all. There is little indication that this patchwork of mental states required for various crimes is the product of considered deliberation; rather, it is likely a product of ad hoc decision making by different drafters of these laws.

Examples of crimes enacted in 2013 or 2014 that fail to define an intent element include failing to maintain adequate records in a child-care facility;⁴⁰ maintaining inadequate recycling records;⁴¹ offering to pay construction workers’ insurance deductibles;⁴² and violating hunting regulations or fishing catch limits.⁴³

In other instances, newly enacted crimes *did* contain *mens rea* provisions. For instance, a 2013 law governing nonprofit organizations’ raffles specifies clear civil administrative penalties that may be imposed absent a showing of intent but limits criminal liability to “knowing and willful violat[ions] [of the law] . . . with the intent to deceive or defraud.”⁴⁴ (The law also sunsets in 2020, and every ten years thereafter, absent further legislative action.)⁴⁵ A 2014 law modifying regulation of precious-metal dealers actually amended preexisting law so that dealers were guilty only for willful violations, unless previously convicted of a violation of the chapter.⁴⁶ Thus, there is little indication that South Carolina’s legislature has made a conscious choice to forgo traditional *mens rea* requirements as a matter of course—and, indeed, there is significant evidence that legislators take criminal intent seriously when they contemplate the issue.

When the legislature does not explicitly state an intent standard in a criminal offense, South Carolina courts have adopted the practice of evaluating whether a *mens rea* requirement should nevertheless be inferred. The South Carolina Supreme Court looks to common law and the development of the statute to determine whether the legislature intended to require *mens rea*⁴⁷—which tends to support an inference of intent for traditional common-law crimes⁴⁸ but places individuals and businesses in jeopardy for violating regulatory crimes, given the absence in South Carolina law of the Model Penal Code’s default *mens rea* standard.

Regulatory Crimes. Although many of the new crimes on the books enacted by statute are regulatory in nature, a substantial number of crimes are created with no act of the legislature whatsoever. As mentioned, various statutory provisions contain catchall pro-

visions that vest in administrative state and local agencies the effective authority to criminalize conduct through their own promulgation of regulations.⁴⁹ South Carolina’s agriculture, environmental, fish and wildlife, occupational, and public-health codes are riddled with provisions not only criminalizing the violation of any legislative provision within the various parts of acts but also violations of any rules promulgated, orders issued, or operational standards developed by various departments, commissioners, directors, or commissions.⁵⁰

Criminal-intent provisions in regulatory catchall provisions often vary within the same chapter of the South Carolina code. For example, in the state’s agriculture code, violations of agriculture-marketing rules or regulations promulgated by the Agricultural Marketing Advisory Council are criminal without any required showing

of knowledge or intent;⁵¹ but criminal violations of pesticide regulations promulgated by the Pesticide Advisory Committee require a showing of willfulness.⁵² In contrast, provisions of the South Carolina code differ as to the requisite intent standard applied to make criminal violations of regulations promulgated by the Department of Health and Environmental Control: under Title 44, which governs public health, this department’s regulations become misdemeanors only if violated after notice;⁵³ but under Title 48, which governs environmental protection and conservation, violating the department’s regulations is criminal only if done willfully, recklessly, or with gross negligence.⁵⁴ Finally, South Carolina’s legislature has effectively delegated to municipalities the power to make criminal ordinances, without any showing of criminal intent.⁵⁵



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 South Carolinians unknowingly commit crimes every day. Underlying the argument against overcriminalization is the fact that modern criminal codes, such as South Carolina's, have expanded so exponentially in recent decades that an ordinary person can no longer be assumed to know whether certain conduct is legal—unless advised by the armies of lawyers so common in modern large corporations.⁵⁶ 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.⁵⁷

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.⁵⁸ A corollary principle, that ignorance of the law is not a legitimate excuse,⁵⁹ traces to a time when virtually all criminal laws were tied to the

“moral code”⁶⁰—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).⁶¹ 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 South Carolina'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.⁶² 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 throwing away three fish;⁶³ 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);⁶⁴ 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.⁶⁵

In South Carolina, individuals have also been ensnared for putatively innocent conduct, including a boy who was arrested when he wrote a story at school about killing a neighbor's dinosaur,⁶⁶ a mother who was arrested for cursing in a public parking lot,⁶⁷ and another mother who was arrested for felony child neglect for not supervising her nine-year-old child playing in a nearby park while she worked at McDonald's.⁶⁸ The broad reach of the regulatory criminal code also affects many small businesses in South Carolina, from hair braiders to car services.⁶⁹

The South Carolina legislature's recent efforts at sentencing reform suggest a willingness to consider new approaches to criminal justice. Although there is no simple solution to overcriminalization, 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.⁷⁰ A similar temporary task force or working group looking specifically at overcriminalization in South Carolina 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.⁷¹ 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:⁷²

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

2. Create a commission to review the criminal law.

Following or concurrent with the establishment of the legislative task force, the South Carolina legislature could create an independent commission charged with consolidating, clarifying, and optimizing South Carolina'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 and recommend for repeal all unnecessary and overbroad laws⁷³—including outmoded laws, unutilized laws, and crimes needlessly duplicative of other offenses. 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,⁷⁴ and it should evaluate existing *mens rea* provisions in South Carolina 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.⁷⁵ In 2014, Virginia removed 14 offenses pursuant to the recommendations of its commission.⁷⁶ In Kansas, an "Office of the Repealer" (created in 2011 by the governor)⁷⁷ has already recommended 51 criminal statutes and regulations for repeal.⁷⁸

3. Enact a default *mens rea* provision.

The Model Penal Code⁷⁹ contains a default *mens rea* culpability requirement when a criminal statute is silent as to culpability.⁸⁰ Although such a provision would not prevent the legislature from exercising its judgment to create strict liability, lawmakers would have to make that judgment clear in express language. South Carolina lacks a default *mens rea* safeguard,⁸¹ 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 2014,⁸² and, most recently, Michigan did so in December 2015.⁸³

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. South Carolina 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.

Conclusion

Our recommendations for reform should be viewed merely as first steps. South Carolina 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 are best left to the policymakers closest to the needs of the state.

Still, the reforms that we suggest would set South Carolina on the path toward a coherent, effective criminal law—rather than an exemplar of overcriminalization. Establishing a bipartisan task force to examine South Carolina’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 improve the clarity of South Carolina’s penal code by trimming laws and regulations that have outlived their usefulness. Such a change, along with a default *mens rea* law, would reduce the chance that individuals could be prosecuted for crimes that they unknowingly commit, absent a clear decision by legislators that a strict-liability crime is needed. Finally, these changes would focus South Carolina’s scarce criminal-enforcement resources on violent and property crimes, consistent with the state’s recent efforts at sentencing reform.⁸⁴

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 & 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 Compare National Center for State Courts, *Criminal Caseloads Continue to Decline*, Court Statistics Project, available at <http://www.courtstatistics.org/Criminal/20121Criminal.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 & 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 et al., *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 See American Law Institute, publications catalog, statement of the purpose of the Model Penal Code, https://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=92 (last visited Sept. 23, 2014).
- ¹¹ See Omnibus Crime Reduction and Sentencing Reform Act of 2010 (S.1154), available at http://www.scstatehouse.gov/sess118_2009-2010/bills/1154.htm.
- ¹² By the count of the Manhattan Institute's coauthors and researchers.
- ¹³ By the count of the Manhattan Institute's coauthors and researchers. South Carolina Code of Laws, Title 16 – Crimes and Offenses, available at <http://www.scstatehouse.gov/code/title16.php>.
- ¹⁴ See, e.g., S.C. Code § 44-1-150.
- ¹⁵ See, e.g., S.C. Code §§ 46-13-180; 46-15-100.
- ¹⁶ See, e.g., S.C. Code § 48-1-320.
- ¹⁷ See, e.g., S.C. Code § 5-7-30.
- ¹⁸ See Welty, *supra* note 7.
- ¹⁹ By the count of the Manhattan Institute's coauthors and researchers. N.C. Gen. Stat., Chapter 14 – Criminal Law, available at http://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByChapter/Chapter_14.pdf.
- ²⁰ By the count of the Manhattan Institute's coauthors and researchers. Official Code of Georgia, available at <https://www.lexisnexis.com/hottopics/gacode>.
- ²¹ By the count of the Manhattan Institute's coauthors and researchers. Tennessee Code Unannotated, available at <https://www.lexisnexis.com/hottopics/tncode/>.
- ²² See Omnibus Crime Reduction and Sentencing Reform Act, *supra* note 11.
- ²³ The South Carolina Sentencing Reform Oversight Committee, *State Expenditure Savings Report*, Dec. 1, 2013, <http://www.scstatehouse.gov/citizensinterestpage/SentencingReformOversightCommittee/Reports/2013SCSROCSaveExpendituresSavingsReport.pdf> (last visited June 2, 2015).
- ²⁴ J. Gentry, *Justice Reinvestment in South Carolina*, <http://www.ncsl.org/documents/nalfo/JusticeReinvestmentinGentry.pdf> (last visited June 2, 2015).
- ²⁵ The South Carolina Sentencing Reform Oversight Committee, *State Expenditure Savings Report*, Dec. 1, 2011, <http://www.ncsl.org/Documents/cj/SCSROCreport.pdf> (last visited June 2, 2015).
- ²⁶ S.C. Code § 63-19-2430.
- ²⁷ S.C. Code § 40-41-310.

- ²⁸ S.C. Code § 53-1-40.
- ²⁹ S.C. Code §§ 58-17-160; 58-17-3400.
- ³⁰ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (recognizing a due-process right of consenting adults to engage in noncommercial sexual activity); see also U.S. Const. amends. I, XIV (protecting freedom of speech from state and federal interference).
- ³¹ S.C. Code § 16-15-60.
- ³² S.C. Code § 16-5-50.
- ³³ S.C. Code § 16-15-250.
- ³⁴ S.C. Code § 16-11-625.
- ³⁵ S.C. Code §§ 4-23-1055 & 1070.
- ³⁶ S.C. Code § 56-3-13210.
- ³⁷ S.C. Code § 50-5-2310.
- ³⁸ See Reitz, *supra* note 5.
- 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 S.C. Code § 63-13-185.
- ⁴¹ S.C. Code § 16-17-680(l) & (D)(4).
- ⁴² S.C. Code § 40-59-25.
- ⁴³ S.C. Code § 50-11-355.
- ⁴⁴ S.C. Code § 33-57-170(B).
- ⁴⁵ S.C. Code § 33-57-200.
- ⁴⁶ S.C. Code § 40-54-80.
- ⁴⁷ *State v. Ferguson*, 302 S.C. 269, 272 (1990).
- ⁴⁸ See *State v. Jefferies*, 316 S.C. 13, 18 (1994).
- ⁴⁹ 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).
- ⁵⁰ See, e.g., S.C. Code § 41-15-320 (e), (h) (labor and employment); 44-1-150(A) (health); 46-15-100 (agriculture); 48-1-320 (environment); 50-11-10(A) (fish and wildlife).
- ⁵¹ S.C. Code § 46-15-100.
- ⁵² S.C. Code § 46-13-180.
- ⁵³ S.C. Code § 44-1-150.
- ⁵⁴ S.C. Code § 48-1-320.
- ⁵⁵ S.C. Code § 5-7-30.
- ⁵⁶ Consider, for example, the regulatory catchall provisions listed in note 50, *supra*.
- ⁵⁷ 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>.
- ⁵⁸ See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. 335 (2005).
- ⁵⁹ See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).
- ⁶⁰ 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’”).
- ⁶¹ See William Blackstone, 4 *COMMENTARIES*, at 432 (9th ed., Callahan, 1913).
- ⁶² 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>.
- ⁶³ See *Yates v. United States*, 135 S. Ct. 1074, 1078 (2015).

- ⁶⁴ See Michael Johnson, *Congress Reviewing 'Overcriminalization'*, WASH. EXAMINER, Oct. 4, 2010, available at <http://www.examiner.com/article/congress-reviewing-overcriminalization>.
- ⁶⁵ See Gary Fields & John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, WALL ST. J., Dec. 21, 2011, available at <http://online.wsj.com/news/articles/SB10001424052970204903804577082770135339442>.
- ⁶⁶ Jordan Richardson, *Police Arrest Student for Shooting a Fictional Dinosaur*, DAILY SIGNAL (Aug. 22, 2014), <http://dailysignal.com/2014/08/22/police-arrest-student-killing-shooting-fictional-dinosaur/>.
- ⁶⁷ Jordan Richardson, *Mom Arrested for Cursing in a Grocery Store*, DAILY SIGNAL (Aug. 20, 2014), <http://dailysignal.com/2014/08/20/mom-arrested-cursing-grocery-store/>.
- ⁶⁸ CBS/Associated Press, *S.C. Mom's Arrest Over Daughter Alone in Park Sparks Debate*, CBSNEWS.COM (Jul. 28, 2014), <http://www.cbsnews.com/news/south-carolina-moms-arrest-over-daughter-alone-in-park-sparks-debate/>.
- ⁶⁹ Eric Connor, *Uber Cleared to Operate in South Carolina*, USATODAY.COM (Jan. 29, 2015), <http://www.usatoday.com/story/tech/2015/01/29/uber-cleared-to-operate-in-south-carolina/22565037/>.
- ⁷⁰ See Press Release, U.S. H. Comm. on the Judiciary, *House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force* (Feb. 5, 2014), available at <http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee-reauthorizes-bipartisan-over-criminalization-task-force>; see also H.R. Res., *Over-Criminalization Task Force Resolution of 2014*, available at http://judiciary.house.gov/_cache/files/337718ed-ed2f-4b33-a926-33a6bc7ccd32/over-crim-task-force-resolution.pdf.
- ⁷¹ See generally Nat'l Assoc. of Crim. Def. Lawyers, *Criminal Defense Issues*, <https://www.nacdl.org/overcrimtaskforce> (last visited Sept. 22, 2014).
- ⁷² Heritage Foundation, *Criminal Law Checklist for Federal Legislators*, <http://www.heritage.org/criminallawchecklist%E2%80%8E> (last visited Sept. 22, 2014).
- ⁷³ See Vikrant Reddy & Marc A. Levin, *12 Steps for Overcoming Overcriminalization*, POL'Y PERSPECTIVE (Texas Public Pol'y Found., May 2012), available at <http://www.rightoncrime.com/wp-content/uploads/2012/05/12-Steps-for-Overcoming-Overcriminalization.pdf>.
- ⁷⁴ See e.g., the catchall provisions listed *supra* note 50.
- ⁷⁵ 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)).
- ⁷⁶ 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).
- ⁷⁷ Kansas Dept. of Administration, Office of the Repealer, <https://admin.ks.gov/offices/repealer> (last visited Sept. 22, 2014).
- ⁷⁸ 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>.
- ⁷⁹ MODEL PENAL CODE (1962); see Baker, *supra* note 57, at 16.
- ⁸⁰ See Baker, *SUPRA* note 57, at 16.
- ⁸¹ *Id.*, at Appendix 2.
- ⁸² See Ohio S.B. 361, available at http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_361.
- ⁸³ See Michigan H.B. 4713 (Public Act 250 of 2015), available at [http://www.legislature.mi.gov/\(S\(dyyd2drwqran1vcefbzkek1\)\)/mleg.aspx?page=GetObject&objectname=2015-HB-4713](http://www.legislature.mi.gov/(S(dyyd2drwqran1vcefbzkek1))/mleg.aspx?page=GetObject&objectname=2015-HB-4713).
- ⁸⁴ See Gentry, *supra* note 24.