

# Arresting the Runaway Growth in State Criminal Law



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# Introduction to the Texas Public Policy Foundation

- **TPPF Mission: Individual Responsibility, Free Enterprise, Limited Government, Private Property Rights.**
- **We apply these foundational principles to criminal justice, bringing together stakeholders and working with policymakers and allies across the spectrum.**



# The TPPF Portfolio

- Fiscal and tax restraint
- Civil justice reform (worked to enact loser pays in 2011)
- Center for Tenth Amendment Studies
- Deregulation of (over)regulated industries like insurance and utilities
- Center for Effective Justice launched in March 2005, Right on Crime in Dec. 2010

# Right on Crime Enters the Field

- Former Governor Jeb Bush, Speaker Newt Gingrich, Former Drug Czar Bill Bennett, Former A.G. Ed Meese, Grover Norquist, and Other Conservative Leaders Endorse Right on Crime Statement of Principles.
- Statement Supports Reining in Growth of Non-Traditional Criminal Laws, Cost-Effective Alternatives for Nonviolent Offenders, Emphasis on Restitution and Treatment, and Performance Measures.





**Conservatives  
Latch on to Prison  
Reform**

January 28, 2011



**Right on Crime Noted  
in “Budget Crunch  
Forces New Approach  
to Prisons”**

February 15, 2011



***National Review*  
Praises Right on  
Crime**

February 21, 2011

# Overcriminalization Challenges at the State Level





# Regulatory Offenses on the Rise

- ▣ These offenses typically involve ordinary business and recreational activities and no individual victim.
- ▣ No inventory of all Michigan criminal laws is available, which itself adds uncertainty to the business climate.
- ▣ States where criminal laws have been counted reveal about 2,000 each in Texas and Arizona.
- ▣ Michigan is not one of 14 states with a default *mens rea* provision.
- ▣ Texas has 11 felonies relating to harvesting oysters.

# The Withering Intent Requirement

- ▣ Many of these laws dispense with the traditional requirement of a culpable mental state. For example, of the 83 environmental criminal offenses in Florida, 52 are strict criminal liability offenses.





# Notable Jailable Michigan Offenses That Are Silent on *Mens Rea*

- ▣ Causing “discomfort” to a ferret.
- ▣ Transporting various plants include Christmas trees without a bill of sale.
- ▣ Playing the national anthem as a medley or dancing to it.
- ▣ Removal of abandoned property from the bottomlands of the Great Lakes.
- ▣ Disposing of scrap tires without complying with various regulations.
- ▣ Driving on to a state wilderness area.



# It's a Roll of the Dice Whether Michigan Courts Will Apply *Mens Rea* Requirement to Silent Statutes

- ▣ In the *Schumacher* case, the Michigan Court of Appeals declined to apply a culpable mental state requirement to the silent National Resources and Environmental Protection Act, ruling against Kenneth Schumacher who was convicted of the unlawful disposal of scrap tires and sentenced to 270 days in jail and a \$10,000 fine.

# Penalties Are Often Extreme

- ▣ In Alabama, “disposing of scrap tires in a way not approved by the Environmental Management Act” is a felony punishable by up to ten years in prison, even if no harm.
- ▣ Under the TX. Water Code, “transporting or causing or allowing to be transported for storage, processing, or disposal, any hazardous waste to any location that does not have all required permits” is punishable by up to ten years behind bars, even if the waste is not actually stored at the location that lacks permits and there is no harm.

# The Dangers of Delegation

- ▣ State offenses often confer virtually unlimited authority on agencies to effectively create new criminal offenses through their rulemaking.
- ▣ For example, in Louisiana, RS 30:2421A creates an offense with a one year prison term for “disposing of white goods (appliances) except in a collection or recycling facility in accordance with the rules and regulations of the department.”

# Vicarious Liability Offenses Make Doing Business Precarious

- Alaska's corporate criminal liability statute exposes organizations to criminal liability for the actions of their agents, as long as agents intended the organization to benefit from their actions.
- It also specifies that organizations cannot disclaim liability through codes of conduct or corporate policies; their liability extends beyond any merger, consolidation, or dissolution; and that convicted organizations can be subjected to larger fines than the convicted individual.

# Solutions to Rein in Overcriminalization at the State Level





# Enact ALEC Model Intent Rule

- Applies default rule that the following culpable mental state applies to all elements of the offense if one is not provided in the statute:
  - (a) with the conscious object to engage in conduct of the nature constituting the element;
  - (b) with the conscious object to cause such a result required by the element;
  - (c) with an awareness of the existence of any attendant circumstances required by the element or with the belief or hope that such circumstances exist; and
  - (d) with either specific intent to violate the law or with knowledge that the person's conduct is unlawful.

# Reduce and Revise Criminal Laws

- ▣ Stop creating new criminal offenses as a method of regulating non-fraudulent business activities. Regulation is better handled through non-criminal administrative mechanisms and market forces, not the heavy stigma of criminal sanctions.
- ▣ Revise criminal laws to remove ambiguities and consolidate redundant laws to help prevent prosecutorial abuse.

# Narrow What's Criminal and Jailable

- ▣ Convert many regulatory misdemeanors into civil violations or, at the least, remove jail time as an option for such offenses, provided that the non-jail penalty is satisfied.
- ▣ Economic conduct should be criminal only when it results in actual harm or danger, except if there is intentional fraud such as Madoff.

# Establish Holistic Review Process

- Create interim committee or commission to develop and submit comprehensive, consensus reform packages to lawmakers at the beginning of legislative sessions.
- These bodies would identify criminal laws that are unnecessary, duplicative, overbroad, excessively vague, lacking an appropriate culpable mental state, create vicarious liability, or are otherwise deficient, and incorporate their work into one omnibus bill.

# Enact ALEC Transparency & Accountability in Criminal Law Measure

- This requires:
  - A detailed state and local fiscal note on all bills creating or enhancing an offense.
  - Reference to new offense or enhancement in caption of bill.
  - Elimination of provisions that delegate power to agencies to create offenses through rulemaking.



# Institute Procedural Safeguards to Slow Growth in New Criminal Laws

- Require approval of new offenses and sentencing enhancements by the legislative committees overseeing criminal justice system.
- Require sunrise review of new proposals similar to the sunset process, which is done for certain measures such as those involving occupational licensing in states like Arizona and Oregon.
- Sunset criminal laws outside of the Penal Code.



# Create Safe Harbor Statutes

- These statutes, such as Section 7.03 of the Texas Water Code, can prevent local prosecutors and the Attorney General from bringing a prosecution when the same conduct is the subject of pending or resolved administrative proceeding before a state agency.

# Avoid Incentivizing Pursuit of Cases That May Generate Funds, But Not Relate to Public Safety

- ▣ Remove any fiscal incentives to bring certain criminal cases.
- ▣ Arrangements in some states that allow a division within the office of the Attorney General or prosecutor to keep the “winnings” from settlements or fines in cases should be repealed.



# Strengthen Informal Processes

- ▣ Expand the availability of informal processes for expeditious case resolution such as mediation and create a presumption for the use of such processes in appropriate cases.
- ▣ Mediation is confidential, not an admission of wrongdoing, and resolution must be restorative not punitive. Options are restitution and/or community service.



# Suppressing Unnecessary Arresting

- ▣ Prohibit arrest for regulatory misdemeanors unless the charged individual fails to respond to a summons or emergency danger to humans.
- ▣ Being arrested can create a permanent record, compromise an individual's ability to defend themselves, and be used in cases to gather personal information and effects when a court might not have found sufficient basis for a search warrant.

# Taking the Next Steps to Turn Ideas into Action



# Michigan is Ready for Reform

- Broad support for creating default mental state provision from Heritage Foundation and ALEC to the ACLU and National Association of Criminal Defense Lawyers.
- Resources include our “Analyze Before You Criminalize” checklist and “12 Steps for Overcoming Overcriminalization.”
- U.S. House has a special subcommittee that is working on how to address overcriminalization and overfederalization.