

Criminal Minds: Defining Culpability in Michigan Criminal Law

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Executive Summary*

A concept rooted in centuries of American and English legal tradition is that the commission of a crime requires both a wrongful act and a culpable mental state. The wrongful act (*actus reus* in Latin) is the physical act committed by a person. The mental state (*mens rea*) is the person's guilty state of mind when committing the act. A crime requires a marriage of both factors. As one U.S. Supreme Court justice wrote, "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand[.]" The purpose of this approach was to penalize only those who, when faced with the choice of obeying the law or committing a crime, voluntarily chose to commit a crime.

In 1952, the U.S. Supreme Court issued a landmark decision in the case of *Morrisette v. United States*, in which the court examined the concept of *mens rea*. While hunting in northern Michigan, the defendant discovered a pile of rusted bomb casings on state property that had been leased to the federal government. Presuming the casings were abandoned, the defendant collected a load to sell as scrap metal. He was subsequently indicted and convicted of stealing federal property. The trial court refused to allow the defendant to argue his innocent intention, and held

that the fact the defendant took the casings created a presumption that he meant to steal government property, regardless of his actual intent. On appeal, the U.S. Supreme Court reversed the conviction. The high court held that where a federal statute codifies a common-law crime, courts should construe the statute to include a *mens rea* element, even when Congress failed to specify a threshold for harmful intent.

With the growth of industrialization and urbanization in the late 19th century, a new form of crime emerged, commonly known as "public welfare" offenses. Legislatures enacted these new crimes under their police power to promote social order. Examples of public welfare regulations included the improper sale of alcohol, sale of adulterated food and drugs or misbranded articles, public nuisances, and violations of traffic, motor vehicle and other laws concerning public safety and public health.

Significantly, public welfare offenses omit the requirement to establish blameworthiness for a criminal conviction; liability can be imposed irrespective of the actor's intent. The use of public welfare laws to regulate behavior has increased over time, with state legislatures and Congress frequently enacting laws that are silent on the *mens rea* element of crimes, leaving it to the courts to determine what standard of intent should be applied.

The expansion of public welfare offenses (and the attendant erosion of *mens rea*) has been widely criticized and raises a number of concerns. Inadequate *mens rea* provisions result in a vague criminal code,

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granting prosecutors and the courts a great deal of discretion and creating the potential for inconsistent application. The purpose of the *mens rea* doctrine was to punish criminally culpable behavior, and by omitting intent provisions, public welfare offenses often regulate and criminalize behavior that would be otherwise unobjectionable, but for the regulatory prohibition. The proliferation of public welfare offenses can place well-intentioned citizens in jeopardy of unwittingly engaging in criminal behavior.

Given the erosion of the *mens rea* requirement, a number of states have adopted a default *mens rea* provision in their criminal code. In other words, the state prescribes a default culpability standard where the criminal statute is silent on the intent required to establish a criminal offense. Legislatures in those states are still capable of adopting public welfare regulations, but must do so explicitly.

Michigan's criminal code does not contain a default *mens rea* provision. Thus, if Michigan statute does not explicitly state the culpability necessary to establish an offense, courts are left to evaluate whether a *mens rea* requirement should be inferred or if the defendant should be held strictly liable for the criminal act.

Scores of Michigan misdemeanors and felonies are silent on the *mens rea* element. These public welfare offenses cover a wide variety of behavior: lobbying by former state lawmakers; the care of pet ferrets; transportation of Christmas trees and Michigan holly; removal of forest products from state lands; disposal of litter produced at health facilities; disposal of used motor oil; disposal of scrap tires; removal of certain abandoned property on the bottomlands of the Great Lakes; and the transportation of loaded firearms. Significant fines and imprisonment can be incurred for violations of these laws.

The Michigan Legislature should expressly affirm the fundamental importance of *mens rea* and should adopt a default *mens rea* provision to apply to statutes that fail to clearly define the intent required for a criminal conviction. If a criminal statute is silent on the requisite state of mind to establish a crime, the default *mens rea* provision would be incorporated. Standardizing the application of *mens rea* requirements would provide for a more efficient criminal justice system.

Introduction

Joseph Edward Morissette, a 27-year-old Army veteran, lived with his wife and son in Oscoda, Mich.¹ Morissette supported his family by working in fruit markets, hauling scrap iron and driving truck.

In the fall of 1948, Morissette went deer hunting with his brother-in-law in an area popular with deer hunters. The property was owned by the Conservation Department and the Department of Agriculture of the State of Michigan, but had been leased to the Air Force, which used it as a practice bombing range. While hunting, Morissette came upon a pile of bomb casings in the woods. These casings had been piled for approximately four years and showed signs of rust and decomposition.

Morissette assumed that the casings had been abandoned and were of little use to anyone. He collected some of the casings, flattened them, and sold them as scrap metal for \$84 (about \$800 today). While Morissette was hauling some of the bomb casings, a police officer stopped him and asked about the casings. Morissette told the officer where he obtained the casings. The matter was reported to the Federal Bureau of Investigation, and Morissette was indicted and convicted in federal court for “unlawfully, wilfully and knowingly steal[ing] and convert[ing]” property owned by the United States government.²

Morissette told investigating officers and testified at his trial that he believed the casings to be abandoned, and had not intended to steal government property. The court refused Morissette’s argument of his “innocent intention” and instructed the jury that Morissette’s admission to taking the property called for a guilty verdict. Morissette was convicted and faced two months in prison or a fine of \$200 (about \$1,900 today).

Joseph Morissette could little foresee that his 1948 hunting trip would result in a seminal decision from the U.S. Supreme Court. The case hinged on whether Morissette, when he took the abandoned casings, possessed the requisite intent to be convicted of the federal law prohibiting theft of U.S. property.

This report explores this area of the law — culpability and criminal intent — and makes recommendations for how Michigan policymakers could improve standards for establishing criminal intent for the conviction of crimes.

Element of Intent in Criminal Offenses

Mens Rea — An Overview

A fundamental principle from English common law is that a crime generally requires both a wrongful act (*actus reus*) and a guilty mental state (*mens rea*). The *actus reus* is the physical act committed by a person, while *mens rea* refers to that person’s intent when committing the act. Under common law, a crime required a marriage of both factors. In other words, a person could only be convicted of a crime if he committed an unlawful act and if he knew that the act was illegal or if the conduct was of such a nature that a person should recognize it as wrongful.* The result of this approach was to penalize only those who voluntarily choose to commit an unlawful act.³

The *mens rea* requirement can be traced back through centuries of legal tradition. William Blackstone, an 18th century English jurist, wrote: “[A]n unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.”⁴

This principle was carried over the Atlantic and incorporated into the American legal system. As Oliver Wendell Holmes Jr. observed, “Even a dog distinguishes between being stumbled over and being kicked.”⁵ U.S. Supreme Court Justice Robert Jackson described how American courts relied on various devices to infuse blameworthiness into criminal codes:

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as ‘felonious intent,’ ‘criminal intent,’ ‘malice aforethought,’ ‘guilty knowledge,’

* This could include conduct commonly recognized as wrong, such as gross indifference to the safety of others.

‘fraudulent intent,’ ‘wilfulness,’ ‘scienter,’ to denote guilty knowledge, or ‘mens rea,’ to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.⁶

The issue of *mens rea* was central to the resolution of Joseph Morissette’s case. His conviction was upheld by a federal appeals court, but the case eventually came before the U.S. Supreme Court. Justice Jackson (referenced above), who wrote the opinion of the court, acknowledged that the matter would have been a “profoundly insignificant case” had it not raised “fundamental and far-reaching” questions.⁷

Justice Jackson observed that the concept of criminal intent “is no provincial or transient notion,” but is rather “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”⁸ Recognizing the relation between one’s mental state, a criminal act, and the concomitant punishment, Jackson wrote, was essential in replacing the vengeance-based, Old World criminal justice system with an enlightened one based on “deterrence and reformation.”⁹

Justice Jackson noted the profound consequences of holding Joseph Morissette liable for theft of the government’s abandoned bomb casings:

The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of

the immunities of the individual should not be extended to common-law crimes on judicial initiative.¹⁰

The Supreme Court signaled its approval of requiring intent as an inherent element of crimes where a federal statute codifies a common-law crime, even when Congress does not specify a threshold for harmful intent.⁹ Thus, as noted in the *Morissette* case, the “mere omission ... of any mention of intent will not be construed as eliminating that element from the crimes denounced.”¹¹ Subsequently, the Supreme Court held that Morissette could not be held liable unless the jury was afforded an opportunity to evaluate his intent, and the court accordingly reversed his conviction.

Strict Liability and Public Welfare Offenses

Intent crimes are often categorized as either general or specific. General intent crimes require the state to prove that the defendant “purposefully or voluntarily performed the wrongful act” when seeking a conviction.¹² A specific intent crime requires a “particular criminal intent beyond the act done” — in other words, committing an act for a particular criminal purpose.¹³ For example, burglary traditionally requires breaking and entering *with the intent* to steal.

A third category of crime is called strict-liability crimes. Strict-liability crimes require no *mens rea* — a criminal penalty can be imposed regardless of the intent of the actor. Statutory rape, for example, is penalized regardless of a defendant’s knowledge of the victim’s age.¹⁴ As the Michigan Supreme Court has explained:

* The Supreme Court acknowledged that certain exceptions to the rule of culpability have been recognized over time, such as sex offenses and offenses of negligence where a crime occurs because of an omission of duty. *Morissette v. United States*, U.S. 342 at 251 n.8.

For a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know. On this basis, the distinction between a strict-liability crime and a general-intent crime is that, for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act, whereas, for a strict-liability crime, the people merely need to prove that the defendant performed the wrongful act, irrespective of whether he intended to perform it.¹⁵

The regulatory response to growth of industrialization and urbanization in the late 19th century introduced a new form of strict-liability crimes, commonly known as “public welfare” offenses, which legislatures began enacting under their police power to promote social order.⁶ New industrial advances, the congestion of cities and wide distribution of goods all posed new potential dangers to the public. Public welfare regulations were intended to “heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.”¹⁶ These laws were regulatory in nature, intended to prevent public harms that could occur from neglecting a duty of care.

Over time, legislatures used the criminal code, with its power of prosecution and sanctions, for regulatory purposes. In a seminal article written in 1933, Harvard law professor Francis Sayre categorized typical public welfare offenses: the improper sale of alcohol, sale of adulterated food and drugs or misbranded articles, criminal (or “public”) nuisances, and violations of traffic, motor vehicle and other laws concerning public safety and public health.¹⁷ Early public welfare cases in

Michigan penalized the sale of mustard adulterated with turmeric and opening a saloon on a Sunday.¹⁸

Significantly, public welfare offenses omit the requirement to establish blameworthiness for a criminal conviction; liability can be imposed irrespective of the actor’s intent. Legal commentators have theorized that public welfare offenses were favored by lawmakers because of the ease of conviction, as requiring proof of *mens rea* places a greater burden on the prosecution.¹⁹ Public welfare laws often regulated behavior that would, but for the prohibition, be considered innocent conduct; a stop sign at a deserted intersection does not represent a moral imperative.

Today, it is quite common for legislatures and Congress to be silent on intent, creating the inference that strict liability is to be imposed. A 2010 joint report by The Heritage Foundation and the National Association of Criminal Defense Lawyers examined legislation that would create new nonviolent criminal offenses proposed by the 109th U.S. Congress in 2005 and 2006. The authors determined that 57 percent of the proposed offenses contained inadequate *mens rea* requirements, and 64 percent of the proposals enacted into law were lacking *mens rea* provisions.²⁰

Mens Rea in Michigan Jurisprudence

Determining Whether *Mens Rea* is a Required Element

Given the erosion of the concept of *mens rea*, a number of states have adopted a default *mens rea* provision in their criminal code. In other words, the state prescribes a default culpability standard in cases where the criminal statute is silent on the intent required to establish a criminal offense.

The Michigan Penal Code does not contain a default *mens rea* provision. Thus, if the Legislature does not explicitly state the culpability necessary to establish an offense, courts are left to evaluate whether a *mens rea*

* For more on the origins of public welfare offenses, see: Catherine L. Carpenter, “On Statutory Rape, Strict Liability, and the Public Welfare Offense Model,” *American University Law Review* 53, no. 2 (2003): 313–391, accessed Nov. 20, 2013, <http://goo.gl/Tq0oaA>; Richard G. Singer, “The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability,” *Boston College Law Review* 30, no. 2 (Mar. 1, 1989): 337–408, accessed Nov. 20, 2013, <http://goo.gl/C3lJKW>.

requirement should be inferred or if strict liability should be imposed.

The Michigan Supreme Court has stated that although strict-liability crimes are disfavored, the Legislature may, nevertheless, “decide under its police power that certain acts or omissions are to be punished irrespective of the actor’s intent.”²¹ Statutes using strict liability are not constitutionally prohibited.²² Michigan Chief Justice Thomas Cooley articulated the rationale for strict-liability, public welfare offenses: “Many statutes which are in the nature of police regulations ... impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible.”²³

Criminal intent is typically an element of statutorily created crimes in Michigan.²⁴ Where a statute codifies the common law, and that common-law crime required a *mens rea*, courts will interpret the statute as also requiring intent to be shown.²⁵ For crimes with no common-law equivalent, courts first look to the language of the statute to assess the intent of the Legislature.²⁶ Even if a statute fails to expressly state that intent is a predicate for determining guilt, courts operate with the presumption that intent is still necessary. As the Michigan Supreme Court recently held in *People v. Kowalski*, “When interpreting a criminal statute that does not have an explicit *mens rea* element, we do not construe the Legislature’s silence as an intention to eliminate the *mens rea* requirement.”²⁷ If the text of the statute is unclear, courts will also examine the legislative history of a statute to determine intent.²⁸

Numerous decisions from Michigan courts have addressed the issue of culpability and intent. A discussion of the major cases that have recognized a *mens rea* element and those that have imposed strict liability is found in Appendix A.

Concerns with Inadequate *Mens Rea* Provisions

As discussed above, it is quite common for Congress and legislatures to be silent on the issue of intent when enacting new criminal statutes. Many concerns accompany the erosion of criminal intent provisions.

The purpose of the *mens rea* doctrine was to punish criminally culpable behavior.* The proliferation of public welfare offenses, however, increases the possibility that well-intentioned citizens unwittingly break the law. Additionally, as will be shown below, public welfare offenses often regulate and criminalize behavior that would be otherwise unobjectionable, but for the regulatory prohibition. Individuals can incur great damage financially and upon their reputations due to the sanctions associated with a criminal conviction.²⁹

Inadequate *mens rea* provisions also result in a vague criminal code, granting prosecutors and the courts a great deal of discretion and creating the potential of inconsistent application. As detailed in Appendix A, numerous cases have required litigation to the state’s highest court because the Legislature failed to state its intent explicitly as it related to *mens rea* in criminal statutes. The time and expense required of the state and of criminal defendants to clarify legislative intent is not insignificant.

Criminal law retains a potency when it regulates truly objectionable behavior. Society risks a breakdown in the rule of law and the respect for it when routine and otherwise moral behavior is penalized with criminal sanctions. As Dr. John C. Coffee Jr, a Columbia University Law School professor, has written:

* Dr. John S. Baker characterizes the common law crimes of murder, rape, robbery, burglary, larceny/theft as the “meat and potatoes” of criminal prosecutions. John S. Baker, “Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law,” July 19, 2013, accessed Nov. 20, 2013, <http://goo.gl/RtffW6>.

The factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far more than tort law, the criminal law is a system for public communication of values.³⁰

Scores of Michigan statutes are silent on the *mens rea* element for misdemeanors and felonies. A brief review illustrates the variety and scope of public welfare offenses.

A person who breeds ferrets as a hobby must comply with detailed regulations.³¹ Ferrets must be housed indoors, in ventilated areas with minimal drafts and odors, and the temperature must be set to prevent any ferret “discomfort.” Lighting in the cage area must be “ample.” Each ferret must be given a minimum of two square feet of cage space and bedding must be “appropriate for the season.” Food provided a ferret must be “wholesome and of sufficient quantity and nutritive value to maintain all ferrets in good health.” A person who violates the rules of ferret care is guilty of a misdemeanor, punishable by imprisonment for up to 90 days, a fine of up to \$1,000 plus prosecution costs, up to 120 hours of community service and permanent relinquishment of all animal ownership.³²

Christmas revelers would be wise to keep their receipts from the local tree farm. A person may be guilty of a misdemeanor for transporting Christmas trees, evergreen boughs, Michigan holly and other plants without carrying a bill of sale. The law provides an exemption for the sale and transportation of two Christmas trees per person between November 30 and December 31 of the same year.³³

Any person who purchases poultry for the purpose of reselling the domesticated birds must maintain detailed documentation of the transaction, including

the date of each purchase, the name and residence of the seller, the type of poultry purchased with a description and tally. If the seller delivers said poultry by means of a licensed vehicle, the license number must also be noted. Failure to maintain the necessary paperwork is a misdemeanor, punishable by a \$100 fine and up to 90 days in the county jail.³⁴

Purchasing a vehicle on the weekend can be convenient, but buyers should exercise caution. It is unlawful for any person or corporation to engage in the buying, selling or exchange of new or used motor vehicles on Sunday. Similarly, car dealerships are not permitted to be open on Sunday. Violations are a misdemeanor, and dealers can face the suspension or revocation of their license upon conviction.³⁵

An area of dense regulation is Michigan’s environmental and natural resources laws. The primary statute is the Natural Resources and Environmental Protection Act (NREPA), and it governs the management of state lands, air and water pollution, solid and hazardous waste disposal, wetland protection and other topics. Fines and imprisonment can be incurred for numerous violations: unpermitted removal of forest products from state lands;³⁶ improper disposal of litter produced at a health facility;³⁷ improper disposal of used motor oil;³⁸ improper disposal of scrap tires;³⁹ driving motor vehicles in a state wilderness area;⁴⁰ and removal of certain abandoned property on the bottomlands of the Great Lakes.⁴¹

A variety of other offenses can result in fines and imprisonment: Members of the Michigan Legislature who resign from office are prohibited from lobbying for the remainder of their term of office. A violation is punishable by a \$1,000 fine and 90 days in prison.⁴² Unlicensed dogs are to be located by the sheriff and destroyed, with the dog owner held accountable.⁴³ The national anthem may not be played as part of a medley, and dancing to “The Star Spangled Banner” is strictly prohibited.⁴⁴

The conduct described above is but a sample of Michigan law that criminalizes behavior that could result in the application of strict liability. These are examples of statutes where the Legislature should indicate the level of intent necessary for culpability, but each of these statutes is silent on *mens rea*.

Recommendations

Michigan's criminal justice system would benefit from a standardization of the application of *mens rea* requirements. The lack of a clear *mens rea* provision in criminal statutes provides inadequate guidance to prosecutors and judges and can result in inconsistent interpretation by the courts. The criminal justice system is taxed with the time and expense of litigating questions of legislative intent when a statute is unclear or poorly drafted.

The proliferation of strict-liability crimes has been addressed, in part, by the Model Penal Code. The MPC was developed in 1962 by the American Law Institute, a nonprofit that assists legislatures in evaluating, modernizing and standardizing their criminal codes. As it relates to the element of intent in criminal cases, one of the MPC's important contributions was to standardize the levels of culpability into four states of mind: "purposely," "knowingly," "recklessly" and "negligently."

These states of culpability are defined in the MPC as follows:⁴⁵

- Purposely: "A person acts purposely ... when ... it is his conscious object" to engage in specific conduct or to cause a specific result.
- Knowingly: "A person acts knowingly ... when ... he is aware that it is practically certain that his conduct will cause" a specific result.

- Recklessly: "A person acts recklessly ... when he consciously disregards a substantial and unjustifiable risk" that his conduct will produce a specific result. "The risk ... involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."
- Negligently: "A person acts negligently ... when he should be aware of a substantial and unjustifiable risk ... will result from his conduct. The risk must be ... a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

In addition to defining culpable states of mind, the MPC prescribes a default culpability as when "a person acts purposely, knowingly or recklessly with respect [to the offense]."⁴⁶ If a statute is silent on the intent required to establish a criminal offense, MPC recommends using the default culpability provision. Legislatures are still capable of adopting statutes that impose strict liability for certain crimes, but would need to do so explicitly. Fourteen states have adopted a default *mens rea* provision modeled on or similar to MPC's.⁴⁷ In addition to the MPC's standards of culpability, the American Legislative Exchange Council has published model legislation that codifies default rules of application for criminal intent (see Appendix B).

The Michigan Legislature should expressly affirm the fundamental importance of *mens rea* and should adopt a default *mens rea* provision to apply to statutes that fail to clearly define the intent required for a criminal conviction. If a statute is silent on the requisite state of mind to establish a crime, the default *mens rea* provision would be incorporated. The Legislature would be free to adopt new public welfare offenses, but would need to explicitly state its intent to do so.

Conclusion

The Michigan Legislature has regulated all manner of conduct to promote public safety and welfare.

Individuals can be charged, convicted and imprisoned for committing misdemeanors and felonies while harboring no criminal intent. Penalties associated with these crimes are often severe, and the resulting damage to one's reputation and livelihood can be significant.

Given the number of statutes that do not specify an intent standard and the proliferation of strict-liability, public welfare offenses, which often criminalize otherwise innocuous behavior, the Legislature ought to clarify standards of intent in criminal statutes. A default *mens rea* provision would have a moderating influence on unwarranted prosecutions and would concentrate the potency of criminal sanctions on truly culpable behavior.

Appendix A

Michigan courts have addressed the issue of culpability in numerous cases. A review of these cases illuminates the analytical process the courts have adopted.

Court Decisions Recognizing a *Mens Rea* Element

In *People v. Trotter*, the Court of Appeals examined the validity of Michigan’s “dangerous animals” statute.⁴⁸ The defendant was convicted of involuntary manslaughter after her two bullterriers attacked and killed her 2-year-old nephew. The defendant argued that the statute violated due process by creating a strict-liability crime. The court disagreed with the defendant’s characterization of the statute, holding instead that the Legislature intended to codify an aspect of the common-law offense of manslaughter (death that results from gross negligence), and therefore, read *mens rea* into the statute.⁴⁹ Noting that one of the bullterriers had previously bitten a visitor, the court upheld the conviction.

In *People v. Lardie*, the Michigan Supreme Court reversed a Court of Appeals decision that had held that driving while intoxicated and causing death of another was a strict-liability, public welfare offense with no requirement for the prosecution to prove *mens rea*.⁵⁰ The Supreme Court stated that the “operating while intoxicated” crime at issue was not a public welfare offense as those offenses “are designed to protect the public welfare by placing the burden of protecting society on a person otherwise innocent but standing in responsible relation to public danger.”⁵¹ Additionally, the court noted that penalties for public welfare crimes are typically small and do not inflict substantial harm to a person’s reputation.

The Supreme Court held in *Lardie* that the Legislature intended that general intent must be proven for a conviction for driving while intoxicated, which could be shown, for example, by proving that the defendant

knowingly consumed alcohol or a controlled substance and acted voluntarily in deciding to drive.

In *People v. Jensen*, the Court of Appeals upheld the conviction of an HIV-positive woman who failed to inform a sexual partner of her condition, in violation of Michigan law.⁵² The defendant argued that the law was unconstitutional, because it contained no *mens rea* requirement. She also argued that the law should require a showing of specific intent to harm the victim. Relying on *Lardie*, the court reasoned that the Legislature intended to require some type of intent as a predicate to a conviction, and that by engaging in unprotected sexual contact, “the requisite intent is inherent in the HIV-infected person’s socially and morally irresponsible actions.”⁵³ The court expressly noted that the statute does not impose strict liability as an infected person is free to have sexual contact provided his or her partner is informed.⁵⁴

The Court of Appeals held that using a counterfeit cigarette tax stamp was not a public welfare offense in *People v. Nasir*.⁵⁵ The defendant, a party store manager, had been convicted and sentenced to 18 to 120 months’ imprisonment after the trial court ruled that the Michigan statute imposes strict liability. The appeals court reasoned that the tax stamp law is a revenue law, and the harm to the public at large from the loss of revenue is not severe enough to hold violators strictly liable. Further, the severity of the punishment could inflict substantial damage to a defendant’s reputation.⁵⁶ Finally, the court reasoned that imposing strict liability in such cases as these could criminalize “a broad range of apparently innocent conduct.”⁵⁷ For example, an innocent retail customer could buy a pack of cigarettes bearing a counterfeit stamp and be held liability under a strict reading of the law.⁵⁸

In *People v. Tombs*, the Michigan Supreme Court examined whether a statute prohibiting the distribution or promotion of child sexually abusive material required that the act be performed with

criminal intent.⁵⁹ Upon leaving the company, a former Comcast employee returned his work computer. Child pornography material was subsequently discovered on that computer and the former employee admitted to obtaining the files. The individual was charged and convicted of distributing or promoting child sexually abusive material and possessing the material.⁶⁰

The court held that since the statute forbidding the distribution and promotion of child sexually abusive material did not include an explicit *mens rea* requirement, a longstanding principle applied: that absent an indication from the Legislature that it wanted to dispense with a criminal intent element, criminal statutes are presumed to include such a requirement.⁶¹ Noting the statute’s use of active terms — “distribute,” “promote,” and “receives for the purpose of distributing or promoting” — the Supreme Court concluded that the Legislature contemplated intentional conduct by the accused.⁶² Omitting a *mens rea* requirement, wrote the court, could result in a conviction of a person who lacked the criminal intent to distribute child sexually abusive material. For example, the Comcast employees who discovered the material on the defendant’s computer who transferred the files among themselves and then to the police could be charged and convicted under a strict liability statute, though their only desire was to turn the matter over to law enforcement. The court concluded that the Legislature “intended that criminal intent to distribute be an element” of a conviction under the statute.⁶³

Reviewing the facts of the case, the Supreme Court concluded that there was insufficient evidence to support a conviction for distribution or promotion of child sexually abusive material. The evidence indicated that the defendant did not expect his former employer to discover the material, but that it would be destroyed during a routine reformatting of the computer’s hard drive.⁶⁴ Nevertheless, the defendant’s conviction for the lesser offense of possessing the illicit images was upheld.

Court Decisions Recognizing Strict Liability

In *Berry v. Michigan Racing Com’r*, a licensed trainer of harness racehorses entered two horses in separate races in 1981.⁶⁵ A urinalysis of the horses found evidence of a prohibited substance in each horse. The trainer’s license was suspended for two years pursuant to the “insurer rule,” which imposed absolute responsibility for the condition of the horses upon the trainer.^{*} The Court of Appeals pointed out the public interest in protecting the wagering public from fraud or corruption, along with the state’s economic interest in preserving the business. Those interests, combined with the language of the statute indicating that trainers are ultimately responsible for guaranteeing the conditions of their horses, led the court to conclude that the statute imposed strict liability for violations.

In *People v. Quinn*, the Michigan Supreme Court held that knowing whether a firearm was loaded or not was not required to convict someone for transporting a loaded weapon in a vehicle.⁶⁶ The defendant argued that the law should require a showing of knowledge that a firearm was loaded in order to exclude application of the law to innocent violations. While the court acknowledged that the law required knowledge of the *presence* of a firearm, it held that the duty imposed by the statute is to protect the public from accidental discharge, irrespective of whether the individual knew the firearm was loaded. Thus, proof that a defendant knew the transported firearm was loaded was not required.

In *People v. Likine*, the Michigan Supreme Court held that the failure to pay court-ordered child support is a strict-liability offense.⁶⁷ The court looked to the history of the statute in reaching this determination; a previous version of the statute stated that a father or husband would be guilty of a felony if he refused or neglected to pay court-ordered support. The law was amended in 1999 and the relevant portion of the

* This statute was subsequently repealed by P.A. 1995, No. 279, § 35.

statute stated: “[I]f the court orders an individual to pay support ... for a child of the individual, and the individual does not pay the support ... the individual is guilty of a felony”⁶⁸ Given the Legislature’s removal of language concerning refusal or neglect, the court determined that the Legislature intended to impose strict liability.

Earlier cases offered guidance on what offenses would be considered public welfare offenses. A bar keeper was convicted when alcohol was sold in his bar on Sunday without his knowledge.⁶⁹ In *People v. Hatinger*, the Supreme Court held that a statute’s purpose would be defeated if the state were required to prove guilty knowledge for the sale of intoxicating liquor or impure foods.⁷⁰

The variety of statutes enacted by the Legislature occasionally results in inconsistent application of the analysis of strict-liability offenses. For example, in *People v. Schumacher*, Kenneth Schumacher was convicted of the unlawful disposal of scrap tires, and was sentenced to 270 days in jail and a \$10,000 fine.⁷¹ The disposal of scrap tires is regulated by the Natural Resources and Environmental Protection Act, a comprehensive statutory scheme designed to protect the state’s environment and natural resources.⁷² On appeal, the defendant argued that the statute did not impose strict liability.

The Court of Appeals determined that the statute pertinent to this case “contains no language from which it may be inferred that guilty knowledge is a required element for offending [the statute’s] mandate[.]”⁷³ Based on statute’s silence regarding intent, the court held that the statute created a public welfare offense.

The *Schumacher* ruling seemingly reversed the presumption of *mens rea* and held that legislative silence is a strong indication that strict liability should

be imposed.* While no cases have cited *Schumacher* for this proposition, a trend in this direction could seriously erode Michigan’s *mens rea* jurisprudence.

* The Michigan Supreme Court declined to review the Court of Appeals decision. *People v. Schumacher*, 480 Mich. 1043 (2008).

Appendix B

The Criminal Intent Protection Act is model legislation promulgated by the American Legislative Exchange Council. It establishes default culpability requirements if the language of a statute does not specify the criminal intent required to establish an element of a crime.

Criminal Intent Protection Act

Summary

To protect persons from unjust punishment under vague or ambiguous criminal offenses by codifying default rules of application for criminal intent (mens rea) requirements within criminal law.

Model Legislation

{Title, enacting clause, etc.}

Section 1. {Title.} This Act may be cited as the “The Criminal Intent Protection Act.”

Section 2. {Legislative Purpose and Findings.}

The purpose of this Act is to enact default rules of application to ensure that criminal intent (mens rea) requirements are adequate to protect persons against unjust charges and convictions where the law has heretofore failed to clearly and expressly set forth the criminal intent (mens rea) requirements in the text defining the offense or penalty.

Section 3. {Culpability Requirements.}

(A) Culpability Requirements.

(1) The provisions of this section shall apply to any criminal offense or penalty.

(2) Criminal Intent Required Unless Otherwise Provided – When the language defining a criminal offense or penalty does not specify the criminal intent required to establish an element of the offense or

penalty, then such element shall be established only if a person acts:

(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.

(3) Prescribed Criminal Intent Requirement Applies To All Elements – When the language defining a criminal offense or penalty specifies the criminal intent required to establish commission of an offense or imposition of a penalty without specifying the particular elements to which the criminal intent requirement applies, such criminal intent requirement shall apply to all elements of the offense or penalty, including jurisdictional elements.

(4) For the purposes of this section, the following definitions apply:

(a) The term “criminal offense” shall include any portion of a statute, rule, or guidance that defines one or more elements of a violation of law that may be punished by a criminal penalty.

(b) The term “penalty” shall include any criminal fine, criminal restitution, criminal forfeiture, term of imprisonment or confinement, probation, debarment, or sentence of death imposed upon a defendant by the authority of the law and the judgment and sentence of a court.

(c) The terms “person,” “he,” and “actor” shall include any natural person, corporation, or unincorporated association.

Section 6. {Effective date.}

(d) The term “rule” shall have the definition set forth in section

_____ of this title and shall include any interpretive rule, guidance, or other agency publication that may have the effect of altering the scope of state criminal liability of any person or entity, but shall not include any order issued as part of an adjudication under section _____ of this title.

(e) The term “guidance” shall include any guidance, interpretative statement, or binding enforcement policy issued by any agency.

(f) The term “agency” shall have the definition set forth in Title 5, United States Code, Section 551(1) [or cite to state equivalent if applicable].

(g) The term “element” shall mean (i) such conduct, (ii) such attendant circumstances, or (iii) such a result of conduct as:

(i) is included in the description of the forbidden conduct in the definition of the offense; or

(ii) establishes the required kind of culpability; or

(iii) negates an excuse or justification for such conduct; or

(iv) negates a defense under the statute of limitations; or

(v) establishes jurisdiction or venue.

Section 4. {Severability clause.}

If any provision of this [Act] or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this [Act] and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 5. {Repealer clause.}

Endnotes

- 1 Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter Books, 2011); *Morrisette v. U.S.*, 342 U.S. 246 (1952); *Morrisette v. U.S.*, 187 F.2d 427 (6th Cir. 1951).
- 2 *Morrisette v. United States*, 342 U.S. at 248.
- 3 John S. Baker and William J. Haun, “The ‘Mens Rea’ Component Within the Issue of the Over-Federalization of Crime,” *Engage* 14, no. 2 (Jul. 2013): 24-29, accessed Nov. 15, 2013, <http://goo.gl/Gzi8Tc>.
- 4 William Blackstone, “Commentaries on the Laws of England,” 1758, accessed Nov. 19, 2013, <http://goo.gl/uc3a2X>.
- 5 Quoted in *Morrisette v. United States*, 342 U.S. at 252 n.9.
- 6 *Ibid.*, 251-52.
- 7 *Ibid.*, 247.
- 8 *Ibid.*, 250.
- 9 *Ibid.*, 250-51.
- 10 *Ibid.*, 263.
- 11 *Ibid.*, 263.
- 12 *People v. Lardie*, 452 Mich. 231, 241 (1996). *Lardie* was subsequently overturned by the Michigan Supreme Court on grounds unrelated to the issues discussed in this paper.
- 13 *Ibid.*, 240.
- 14 *People v. Cash*, 419 Mich. 230 (1984).
- 15 *People v. Lardie*, 452 Mich. at 240-41 (internal citations omitted).
- 16 *Morrisette*, 342 U.S. at 254.
- 17 Francis B. Sayre, *Public Welfare Offenses*, 33 *Col.L.Rev.* 55, 73, 84 (1933), cited by *Morrisette*, 342 U.S. at 262 n.20.
- 18 *People v. Snowberger*, 113 Mich. 86 (1897) and *People v. Waldvogel*, 49 Mich. 337 (1882).
- 19 Catherine L. Carpenter, “On Statutory Rape, Strict Liability, and the Public Welfare Offense Model,” *American University Law Review* 53, no. 2 (2003): 324, accessed Nov. 20, 2013, <http://goo.gl/Tq0oaA>.
- 20 Brian W. Walsh and Tiffany M. Joslyn, “Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law” (The Heritage Foundation and the National Association of Criminal Defense Lawyers, May 5, 2010), accessed Nov. 20, 2013, <http://goo.gl/M5Tglr>.
- 21 *Lardie*, 452 Mich. at 240.
- 22 *People v. Quinn*, 440 Mich. 178, 198 (1992).
- 23 *People v. Roby*, 52 Mich. 577, 579 (1884).
- 24 *Lardie*, 452 Mich. at 239.
- 25 *Ibid.*, 241.
- 26 *People v. Kowalski*, 489 Mich. 488, 498, reh’g denied, 490 Mich. 868 (2011).
- 27 *Ibid.*, 499.
- 28 *Lardie*, 452 Mich. at 250. In *People v. Quinn*, the Michigan Supreme Court summarized several factors courts have relied upon to determine whether a legislature dispensed with the mens rea requirement: “(1) the statute’s legislative history or its title, (2) guidance to interpretation provided by other statutes, (3) the severity of the punishment provided, (4) the severity of potential harm to the public, (5) the opportunity to ascertain the true facts, and (6) the difficulty encountered by prosecuting officials in proving a mental state.”
- 29 Andrew M. Grossman, “The Unlikely Orchid Smuggler : A Case Study in Overcriminalization” (The Heritage Foundation, Jul. 27, 2009), accessed Nov. 20, 2013, <http://goo.gl/3q9UVG>.

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- 30 John C. Coffee, “Does Unlawful Mean Criminal: Reflections on the Disappearing Tort/Crime Distinction in American Law,” *Boston University Law Review* 71 (1991): 201–252, accessed Nov. 20, 2013, <http://goo.gl/0VcW5h>.
- 31 MCL § 287.893.
- 32 MCL § 287.899(2).
- 33 MCL § 324.52901; MCL § 324.52909.
- 34 MCL § 445.301; MCL § 445.305.
- 35 MCL §§ 435.251-254. The law allows for certain exceptions and does not apply to counties with a population under 130,000.
- 36 MCL § 324.2156.
- 37 MCL § 324.8905.
- 38 MCL § 324.16704.
- 39 MCL § 324.16902.
- 40 MCL § 324.35106.
- 41 MCL § 324.76107.
- 42 MCL § 4.416a.
- 43 MCL § 287.277.
- 44 MCL § 750.542.
- 45 Model Penal Code § 2.02(2)(a)-(d).
- 46 *Ibid.*, § 2.02(3).
- 47 John S. Baker, “Mens Rea and State Crimes” (The Federal Society, Jul. 2012), 12, accessed Nov. 20, 2013, <http://goo.gl/VJQ1GU>.
- 48 *People v. Trotter*, 209 Mich. App. 244 (1995).
- 49 *Ibid.*, 248.
- 50 *Lardie*, 452 Mich. at 237.
- 51 *Ibid.*, 254 (citations and internal quotation marks omitted).
- 52 *People v. Jensen*, 231 Mich. App. 439 (1998).
- 53 *Ibid.*, 453.
- 54 *Ibid.*, 455.
- 55 *People v. Nasir*, 255 Mich. App. 38 (2003).
- 56 MCL § 205.428(6) prohibits the manufacture, possession or use of a counterfeit tax stamp, and is punishable for up to 10 years imprisonment and a fine of up to \$50,000.
- 57 *Nasir*, 255 Mich. App. at 44.
- 58 *Ibid.*
- 59 *People v. Tombs*, 472 Mich. 446 (2005).
- 60 MCL § 750.145c(3)-(4).
- 61 *Ibid.*, 456-57, 466.
- 62 *Ibid.*, 457.
- 63 *Ibid.*, 459.
- 64 *Ibid.*, 461.
- 65 *Berry v. Michigan Racing Com’r*, 116 Mich. App. 164 (1982).
- 66 *People v. Quinn*, 440 Mich. 178 (1992).
- 67 *People v. Likine*, 492 Mich. 367 (2012).
- 68 MCL § 750.165(1).
- 69 *People v. Roby*, 52 Mich. 577, 579 (1884).
- 70 *People v. Hatinger*, 174 Mich. 333 (1913).
- 71 *People v. Schumacher*, 276 Mich. App. 165 (2007).
- 72 MCL §§ 324.101 et seq.
- 73 *Schumacher*, 276 Mich. App. at 173.

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