

Prepared Testimony Regarding House Bill 4713, House Oversight and Ethics
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Mr. Chair and Members of the Committee, thank you for the opportunity to appear before you to comment on HB 4713.

The Mackinac Center has published a number of studies and commentaries on the problem of overcriminalization in Michigan. That is, the ever-increasing number of criminal laws and the trend of using severe criminal sanctions for regulatory purposes.

HB 4713 addresses an aspect of overcriminalization: criminal statutes that fail to specify a culpable mental state for the conviction of the crime. Traditionally, for a person to be convicted of a crime, it must be shown that the accused committed an unlawful act and did so with a guilty state of mind. The culpable state of mind is often indicated in statute as “intentionally,” “knowingly,” or “recklessly.”

This combination of the guilty act and the guilty mind helps differentiate a person’s culpability. As Oliver Wendell Holmes Jr. observed, “Even a dog distinguishes between being stumbled over and being kicked.” U.S. Supreme Court Justice Robert Jackson described blameworthiness in this manner: “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.” *Morissette v. U.S.*, 342 U.S. 246 (1952).

Legal scholars have noted a disturbing trend, however, of crimes that are silent on the defendant’s state of mind. This has resulted in a proliferation of strict liability crimes, where a person could be convicted of a crime even if he were unaware that the conduct is illegal. Strict liability crimes are frequently used to regulate behavior that falls outside of the common understanding of what constitutes criminal behavior.

HB 4713 is a needed reform in Michigan. The state has more than 3,100 criminal offenses in statute, with an average of 45 new crimes enacted every year. Our analysis indicates that 26 percent of felonies and 59 percent of misdemeanors lack an explicit description of the mental state necessary for a conviction.

The Michigan Supreme Court has wrestled with the problem of interpreting vague criminal statutes. In a 2014 opinion, Justice Stephen Markman recommended that the Legislature adopt the reforms that HB 4713 contemplates. Justice Markman wrote:

It is the responsibility of our Legislature to determine the state of mind required to satisfy the criminal statutes of our state, and the judiciary is ill-equipped when reviewing increasingly broad and complex criminal statutes to discern whether some mens rea is intended, for which elements of an offense it is intended, and what exactly that mens rea should be.

Order, *People of Michigan v. Taylor*, No. 145491 (Jan. 31, 2014) (Markman, J., concurring).

I respectfully suggest the following improvements to HB 4713:

- (1) Sec. 3 indicates that when a criminal offense neither specifies culpability nor imposes strict liability, the offense is established “only if a person acts with intent, knowledge, or recklessness.” Sec. 3 should specify a default culpable mental state – either “intent,” “knowledge,” or “recklessness” – in order to avoid asking the courts to determine the appropriate standard in a criminal offense that is silent on intent. The default *mens rea* standard should be fixed at a level higher than mere negligence.
- (2) Sec. 2 ensures that the Legislature may create strict liability crimes, so long as the Legislature plainly expresses its intent to do so. This is appropriate; we would suggest the language be strengthened by amending Sec. 2, lines 2-3 to read: “...not specify any degree of culpability and plainly indicates a purpose to impose strict criminal liability...”
- (3) Sec. 2 could also be improved by adding: “The mere absence of a specified state of mind for an element of a covered offense shall not be construed to mean that the legislature affirmatively intended not to require the prosecution to prove any state of mind with respect to that element.”
- (4) HB 4713 addresses criminal offenses that have already been enacted into law. It should also address the appropriate *mens rea* provisions prospectively in the enactment of new criminal offenses. As the bill is currently written, the Legislature could conclude that it is unnecessary to specify the appropriate criminal intent standard in new crimes, especially if those crimes are codified in the chapters that are exempted by Sec. 7. The Ohio Legislature recently adopted the reforms contemplated in HB 4713. Relevant language stated:

(A) Every act enacted on or after the effective date of this section that creates a new criminal offense shall specify the degree of mental culpability required for commission of the offense. A criminal offense for which no degree of mental culpability is specified that is enacted in an act in violation of this division is void.

(B) Division (A) of this section does not apply to the amendment of a criminal offense that existed on the effective date of this section, but it does apply to a new criminal offense added to a statute that existed on the effective date of this section.

ORC Sec. 2901.20.

- (5) In order to avoid confusion that could lead to litigation, HB 4713 should state explicitly that the Legislature intends that the bill apply to criminal statutes that were enacted before the effective date of the act (with the exception of chapters listed in Sec. 7).

Thank you for the opportunity to submit these remarks.