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Michigan's Regulatory Crimes: Bureaucrats' Hidden Criminal Law

By Michael Van Beek

Introduction

It is widely recognized that the United States has a problem with overcriminalization.* Scholars and policymakers have pointed out that there are too many laws with criminal penalties, ensnaring too many people in the criminal justice system, which costs taxpayers too much money. This problem has been the target of research and a cause for concern for decades.† But a closely related issue is often overlooked: the growth of regulatory crimes, or administrative rules that are enforced with criminal sanctions.

The difference between statutory laws and administrative rules might not seem important, for what the typical citizen needs to know about both is the same: do not violate them or risk facing consequences. There are, however, many important differences between the two. The most basic one is that legislatures — populated by publicly elected representatives — create laws, while government agencies — run by unelected political appointees and bureaucrats — write rules.

Every state and the federal government create their own set of administrative rules.‡ Examples include the Federal Code of Regulations and the Michigan Administrative Code.

The original purpose of rules was to enable governments to operate effectively as they enforce laws. Rules create standards and practices for carrying out tasks legislatures empower administrative agencies — part of the executive branch of government — to do. Many administrative rules define the specifics of broad legislative mandates: how to count the number of pupils in a school district for the purpose of state funding; how the government should process and manage certain data and records; which specific training qualifies someone for a state license.

Other administrative rules, however, go further and restrict the behavior of private individuals, especially business and property owners. These are the main focus of this report. Because these rules carry the same force of law and effectively allow unelected government bureaucrats to determine what behavior is legal and what behavior is not. And in many cases, these rules ultimately define what constitutes criminal behavior.

This report will explain why the prevalence of regulatory crimes is troubling and should worry anyone concerned about the rule of law and the potential for abuses in the criminal justice system. It will describe why this growing trend is problematic, using examples

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* For instance, see: Adam Liptak, "Right and Left Join Forces on Criminal Justice," *The New York Times*, Nov. 23, 2009; "Too Many Laws, Too Many Prisoners," *The Economist*, July 22, 2010, https://perma.cc/AJ5Q-Z5W4. The term "overcriminalization" is thought to have been coined in 1962. Erik Luna, "Prosecutorial Decriminalization," *The Journal of Criminal Law and Criminology* 102, no. 3 (2012): 785–819, http://www.jstor.org/stable/23416060.

† One scholar proclaimed overcriminalization a crisis way back in 1967. Sanford H. Kadish, "The Crisis of Overcriminalization," *The Annals of the American Academy of Political and Social Science* 374, no. 1 (1967): 157–170, https://perma.cc/P82R-45KA.

‡ The Law Librarians' Society of Washington, D.C. provides links to the administrative rules of each state here: https://www.llsdc.org/state-legislation.

from Michigan's administrative rules. It concludes with some basic principles that should guide efforts to reform Michigan's regulatory code.

What are Regulatory Crimes?

Regulatory law is distinct from statutory law and can also be referred to as administrative law or administrative rules. It is created by government agencies or departments, such as the Michigan Department of Agriculture, the Michigan Department of Health and Human Services or the Michigan Department of Licensing and Regulatory Affairs. Regulatory rules are typically created when the Legislature authorizes a state agency to develop them as it executes and enforces legislative mandates. Statutes passed by the Legislature are not often well-defined or specific enough to carry out their intent. Administrative rules are meant to fill this gap, and the Legislature regularly delegates authority to state departments to "promulgate rules" to define the details of how the law will function.*

An example may be helpful. In 1978, the Michigan Legislature passed a bill about outhouses. The law said that a person is not allowed to have an outhouse unless it "is kept in a sanitary condition, and constructed and maintained in a manner which will not injure or endanger the public health."[1] But the bill did not define either "sanitary condition" or "endanger[ing] the public." Instead, the Legislature delegated the duty of defining these terms to an administrative agency, telling it to write rules "governing the construction and maintenance of outhouses to safeguard the public health and to prevent the spread of disease and the existence of sources of contamination."[2]

This state department then wrote a set of rules to define a legal outhouse. Outhouses, it determined, need to be "convenient and accessible to use," made of material that does not rapidly deteriorate, vented, "located as to prevent the pollution of public and private water supplies, lakes or streams" and "fly-tight" — presumably meaning that insects cannot gain entrance.[3] The department also provided specific rules for different types of outhouses — earth-pits, septic toilets and chemical closets — and defined the "minimum standards of maintenance" to keep outhouses in a legally allowed condition.[4]

Administrative rules have the same force as law. Violating them is an illegal act, just as violating a state statute is an illegal one. But administrative agencies cannot assign a criminal penalty to a rule violation. Michigan law is clear on this point: "[A] rule must not designate an act or omission as a crime or prescribe a criminal penalty for violation of a rule."[5] However, the Legislature can decide to make it a crime to violate a rule created by an administrative body.

This, as it turns out, is the case for outhouses. The statute says that violating any of the rules it authorized to be written is a misdemeanor.[6] Prescribing a criminal penalty for violating rules promulgated under a statute is sometimes referred to as a "catch-all," because it applies a specific penalty to a broad range of rules. This practice is what enables government agencies to effectively define what constitutes criminal behavior.

The Problem with Regulatory Crimes

Vast and Varied

According to research conducted by Thomas Shull in 2016 on behalf of the Mackinac Center, there are more than 750 sets of administrative rules in Michigan, containing more than 17,000 individual rules and overseen by more than 150 state agencies.† Not all of these rules are covered by a legislative catch-all that makes their violation a crime, but many are. Determining exactly how many rules carry criminal penalties would be an enormous task as the way that

* The phrase "promulgate rules," a common one used to authorize an administrative agency to create rules, appears 766 times in Michigan statute. "Search Results," Michigan Compiled Laws, https://perma.cc/S3DX-YQZC.

† Shull based this research on publicly available databases of Michigan rules and interviews with state officials.

rules and statutes interact can be extremely complicated and idiosyncratic.

For example, some laws have different penalties for violating the statute than for violating the rules promulgated under it. Breaking the statute may be a misdemeanor, for instance, but breaking a rule might only be a civil infraction. Other laws make a distinction based on the intent of the person who violates a rule. Those who have intentionally broken a rule have committed a crime, but if anyone who commits the same act by accident or while unaware of the rule is subject to a civil infraction or fine. Still other laws ratchet up the penalty based on how many times someone has violated a rule. A first offense might result in a fine; a second offense could lead to a license suspension; a third offense could be a misdemeanor, for example.

It can be hard to understand how a law and its rules interact just by reading the law or the relevant rules. For example, state law requires a building permit to construct a campground and a separate license to operate one, which must be renewed every three years.* The statute authorizes a state department to promulgate rules "regarding the sanitation and safety standards for campgrounds and public health."[7] These rules cover issues like where campgrounds may be located, how vehicles can get access to the campground, what must be done to supply water and dispose of sewage, and much more.[8] Finally, the law says that anyone violating the statute or rules is guilty of a misdemeanor.[9]

That seems fairly straightforward, but one section of the statute requires the department to notify anyone it believes is violating the law or rules.[10] The department must specify the violation and determine how long the person has to comply.[11] But this raises a question: When is a misdemeanor committed? Is it when the department finds out that someone is out of compliance and then issues a notice? Or does it happen only if that person fails to comply with the notice and the department revokes the person's license? Or does the misdemeanor only apply to someone who builds or operates a campground without the proper permit and license? In short, it's hard to tell whether and when someone who violates the campground law or its rules is criminally liable; it is not evident from a plain reading of either. There are most certainly other state statutes and rules that are equally confusing.

Legislative statues and administrative rules interact in complicated, varied, and, at times, confusing ways. For the typical citizen obliged to comply with these laws and rules, understanding their dynamics may seem to be an impossible challenge.

Overcriminalization

One of the largest problems with creating crimes through administrative agencies is that it leads to an increase in criminally liable behavior — in other words, the overcriminalization of society. Overcriminalization is the idea that there are so many laws carrying criminal sanctions that a reasonably well-informed, well-intentioned person could not presume to know whether their actions were legal or not.

Defining and criminalizing all unwanted behavior may seem like a good way to protect public safety and encourage citizens to abide by and respect the law. But in many ways just the opposite is true. With a well-functioning and just legal code, ordinary citizens can reasonably know which behavior is illegal and blameworthy and which is not. Citizens subject to such laws should be able to understand why they are criminally enforced: It is in their best interest if everyone abides by these laws. Those who break the law can then be justly penalized for committing an act they should know is illegal and for what reason. This is a centuries old legal principle, an integral part of

* MCL §§ 333.12505-06a. The building permit costs $600 and the operating licenses cost between $75 and $500, depending on the size of the campground.

British common law that greatly influenced the development of American law.

Creating thousands — even perhaps tens of thousands — of different ways for people to commit criminal acts reduces respect for the law. With so many crimes and no systematic rationale for determining which behavior is legal and which is illegal, it is impossible for an individual to know whether their actions are criminally enforced or not. To the average citizen, the law can appear arbitrary — one never quite knows for sure if certain actions carry criminal penalties or not.

Having so many administrative rules also makes it impossible for law enforcement and administrative agencies to enforce all of them. The state has limited resources and limited knowledge and must ultimately choose which rules it will devote resources to enforcing and which ones it will not. From the viewpoint of the average citizen, then, enforcement appears arbitrary.

This lowers citizens' respect for the law and weakens the rule of law. One consequence is that the Legislature's ability to guide citizens' behavior through the use of the law diminishes. Moreover, arbitrarily enforced rules may lead citizens to believe that those charged with crimes are targeted by the government for some reason unrelated to its duty to uphold the law and protect public safety. This contributes to distrust in government, in particular to its ability to impartially enforce the law.

Incomprehensible Administrative Rules

Even if someone were able to devote the time needed to learn all the administrative rules in Michigan, it still might be impossible for that person to know which behavior is criminal and what the penalty for such behavior is. This is because the publicly available records of Michigan's rules are often outdated and difficult to understand, especially for the nonexpert. The section below provides a few examples.

Honey

Michigan administrative rules say that commercial sellers of honey must clearly label their product as either "white," "amber" or "dark," and each package must contain the honey's net weight. These rules indicate they were written in 1979 and refer to Public Act 91 of 1915 and Michigan Compiled Laws section 287.181 as the source of their authority.[12] Unfortunately, based on readily available public documents, it is impossible to tell if these rules still apply to honey producers and what the penalty might be for violating them.

The first problem is that the source of their authority appears to be incorrect. Public Act 91 of 1915, titled "Marketing Conditions," empowers a state department to write rules about grading farm products and specifies that a violation of these rules is a misdemeanor. However, the law applies to "farm product," defined as "fresh fruit and vegetables," and does not mention honey anywhere.[13] Further complicating matters, PA 91 of 1915 created sections 285.31-39 of the compiled laws, not the one cited in the rules. The statutes cited in the rules were created by PA 91 of 1917, titled "Commercial Feed," and these were repealed in 1960.[14]

It is therefore not certain under what authority a state department may regulate the sale of honey and what the penalty might be for improperly selling it. Adding to the confusion is that other laws seem to apply to honey sellers. For instance, Michigan's Food Law — Public Act 92 of 2000 — requires producers and sellers of honey who sell less than $15,001 per year to use the same labeling required for "cottage food," i.e., food produced in someone's home kitchen and made available for sale.[15] These make no reference to requiring the honey to be labeled "white," "amber" or "dark." Anyone who sells more than $15,001 worth of honey presumably needs to obtain a "food establishment" license from the state, which has other labeling requirements.[16] All told, based on the easily

obtainable information from the state, it is very difficult to determine the rules for producing and selling honey in Michigan and what the penalty might be for their violation.*

Importing dogs

Michigan's rules about bringing in a dog from another state require that "any dog imported into Michigan" have a certificate from a veterinarian from where the dog originated that testifies that it does not have rabies or other communicable diseases. This certificate must then be sent immediately to the state veterinarian of Michigan. In addition, dogs that originate within a 50-mile radius of where a case of rabies was discovered in the previous six months must have been vaccinated within that period.[17]

The rules cite section 45 of Public Act 466 of 1988 as the source of their authority. That is the "Animal Industry Act," and its stated goal, in part, is "to prevent the importation of certain nonindigenous animals under certain circumstances."[18] Anyone who violates a rule promulgated under it is guilty of a misdemeanor, punishable with a fine of $300 or imprisonment of not less than 30 days.[19]

The problem is that the act doesn't seem to have anything to do with dogs — in fact, the only time the word "dogs" appear in the act is where it specifically states that dogs are not included in the definition of "livestock," to which the vast majority of the act does apply.[20] It does not seem likely that dogs are "nonindigenous animals," whose importation is meant to be prevented. Finally, the rules were written in 1979, nine years before the law that supposedly authorizes them was passed.[21]

Citing the Animal Industry Act is additionally odd, because there's another law on the books that appears to be a more sensible source for rules about importing dogs: the Dog Law of 1919.[22] But this law does not appear to authorize any administrative body to promulgate rules about importing dogs, and it mainly pertains to dog licensing requirements, dog kennels and dealing with dogs that cause property damage or endanger humans.†

After investigating all of these different rules and laws, probably more than what the typical Michigan resident is willing to do, it is still not clear exactly what the laws are for importing a dog into Michigan.‡ Since there are criminal sanctions associated with some of these rules, it seems important that residents can reasonably understand what is required of them to avoid prosecution, fines and a criminal record.

Racehorses

The last example concerns rules about horse racing and breeding racehorses. The Michigan Horse Racing Law was passed in 1995, and it empowers a racing commissioner, within the Michigan Department of Agriculture and Rural Development, to promulgate rules to execute this law.[23] Violating these rules is not a crime, but the racing commissioner may issue sanctions of up to $25,000 for violations, and failing to appear before the commissioner, if summoned, is a misdemeanor.[24] The law also empowers the director of MDARD to write rules specifically about the use of the Michigan Agriculture and Equine Industry Development Fund and payments from it to racehorse breeders.[25]

There are five different sets of rules for different breeds of racehorses: thoroughbred, quarter horse,

* This is especially surprising because Michigan, according to the Department of Agriculture and Rural Development, is the eighth largest producer of honey in the country. "Michigan Agriculture Facts & Figures" (Michigan Department of Agriculture & Rural Development, 2019), https://perma.cc/9GNR-FUEV.

† MCL § 287.261 et seq. The Dog Law of 1919 may have once had a section about rabies vaccination and importing dogs: a compiler's note on the repealed section 287.266a says that it "pertained to proof of vaccination for rabies." "Dog Law of 1919," Michigan Public Act 339 of 1919, https://perma.cc/VT64-67C2.

‡ The MDARD website does not clarify the matter. It says dogs must have a certificate from a government-approved veterinarian from their place of origin, but makes no mention of the need to forward this immediately to the state veterinarian. It states that all imported dogs older than 12 weeks need a rabies vaccine. In addition, the webpage says, "No entry permit is required for interstate importation into Michigan." What this "entry permit" refers to is not explained. "Bringing Animals into Michigan: Dogs" (Michigan Department of Agriculture & Rural Development, 2019), https://perma.cc/ZTU3-K6XY.

Appaloosa, Arabian and paint horse.[26] The titles of these rules are nearly identical, only differing based on the breed to which they apply, and they contain large sections of identical language. Yet, the cited legislative authority and state department responsible for the administration of these similar rules is varied and confusing.*

Two sets of rules say they are administered by the Michigan Department of Agriculture's Fairs, Exhibitions and Racing Division; two cite the MDA's Finance and Technology Division; and the other refers to MDARD's Financial Programs Regulation Section. It is not clear why these very similar rules would be administered by different divisions of the same department. Even more confusing, none of these divisions appear to exist any longer, raising the question of which office of the state actually administers these rules.[27]

These five sets of rules also differ in which state law they cite that authorizes their promulgation. They all cite the director of MDARD as being responsible for their rules, but two sets refer to Public Act 327 of 1980 as their source of authority and two refer to Public Act 279 of 1995.[28] One refers to Public Act 327 of 1995, which is probably an error.[29]

PA 279 of 1995 is probably the correct citation, as it empowers the racing commissioner and MDARD director to promulgate rules.[30] But the two rule sets that cite that public act refer to different sections of the statute: one points to the section empowering the racing commissioner and one to the section empowering the director of MDARD.[31] From all of this, it is nearly impossible to determine which cited authority is the correct one.

There is also a lot of duplication in these rules and the relevant law. For instance, each set of rules for the different breeds of racehorses regulate how "breeders' awards" should be handled. These are payments to breeders of the horses that win or place in certain races. These rules, which have nearly identical language, stipulate the size of these awards and that they are not inheritable and only payable if the horse was registered with the state prior to the race. But there's an entirely different rule set, titled "Payment of Breeder's Awards," which stipulates exactly the same rules, and it appears to apply to all the different breeds of racehorses.[32] Additionally, some of these same stipulations also appear in statute.[33]

The need for this duplication is not evident, and it is not clear which rules or statutes apply to which horse breeders or races. The cause of this duplication and inconsistency may simply be that neither the Legislature nor the administrative agencies they empower dedicate resources to identifying such rules and correcting them. This may especially be true for rules and laws that do not affect large groups of people. This is the case with horse racing, as the state now has only one operational horse racing track.[34]

In addition, hundreds of new bills are passed each year and perhaps just as many new rules are written or old ones modified. Based on this example, it may be that the Legislature and administrative agencies simply added new regulations to the books without considering how they might duplicate or even conflict with existing laws and rules. While lawmakers, legal experts and the courts might know which rules and laws are current and actively enforced and which can be safely ignored, the average citizen probably does not.

Ill-Defined Rules

It may seem that writing rules guiding people's behavior is straightforward: Define the actions that are prohibited. Common rules that citizens run up against often appear this way, including speed limits, parking restrictions, licensing rules and registration

* This presents a challenge to anyone attempting to locate these rules. The state website that provides access to Michigan's administrative rules only allows users to search for them by state department and division or bureau. "MI Administrative Code" (Michigan Department of Licensing and Regulatory Affairs, 2019), https://perma.cc/X4LS-LEKA.

requirements. Unfortunately, many administrative rules are not this way at all — they are, instead, vague, ill-defined and subject to numerous interpretations. This can result in the government making a criminal of even well-intentioned citizens who know the rules and are trying to abide by them.

The regulatory requirements governing home-based child care provide several examples of such rules. Home-based child care is a service typically run by people who offer day care services out of their own home. According to the Michigan Department of Licensing and Regulatory Affairs, more than 4,000 such providers have a state license.* State law authorizes the Michigan Department of Health and Human Services and LARA to promulgate rules about who may offer these services, who they may employ and where and how this care may be provided.[35] Anyone who violates these rules is guilty of a misdemeanor, punishable by a fine of up to $1,000.[36]

These regulations are extremely detailed, covering 23 pages of text and including at least 250 different specific orders — measured by the number of times the word "shall" appears in the rules.[37] Nevertheless, several requirements made of in-home day care providers are subjective and vague. This leaves providers in a precarious situation, as what they perceive to be as abiding by the rules may, in fact, be a violation in the eyes of administrative agencies. In addition, interpretations of subjective rules may vary among individual administrative agents, so that according to one official the rule is being followed and according to another, it is not.

For instance, day care providers may only display television, movies, video games and other content if it is "suitable to the age of the child in terms of content and length of use."[38] Determining what is age-appropriate, as most parents know, is highly subjective and varies from family to family and from child to child. Some parents will expose their younger children to content that other parents would not feel is appropriate even for their older children. This makes it very difficult for day care providers to know if they are complying with these rules.

In-home day care providers also "shall provide an adequate and varied supply of outdoor play equipment, materials, and furniture" that is "appropriate to the developmental needs and interests of children" and is "safe and in good repair."[39] Again, what is adequate, varied, safe and in good condition is in the eye of the beholder. One person might find three different pieces of equipment adequate and varied while another believes no fewer than five options are. The definition of "safe" and "in good condition" also has a subjective element. And while the rules do provide additional stipulations for certain types of equipment, it does not define these key terms.[40]

Another example from these rules: the electrical cords used by in-home day care providers "shall be arranged so they are not hazards to children."[41] This rule is so vague that it provides almost no indication of how a provider would know that it is satisfied. The lack of specification could lead to one person's neat and tidy design being deemed a hazard by state authorities.

The state's regulation of dog kennels also contains ill-defined rules. These rules are promulgated by MDARD, per a 1969 law.† A person who violates this act or a rule created under it is guilty of a misdemeanor.[42] Several of the subsequent rules are very broad, unspecific and open to interpretation.

* Active licenses are available to view here: https://childcaresearch.apps.lara.state.mi.us/

† Actually, there appears to be some duplication in the rules and law. One section of the Dog Law of 1919 also covers dog kennels, and it authorizes the director of MDARD to create rules for dog kennels. PA 287 of 1969 specifically applies to "large-scale dog breeding kennels," which means facilities with 15 or more female dogs used for breeding. However, the Dog Law of 1919 says that it applies to any "establishment wherein or whereon 3 or more dogs are confined and kept for sale, boarding, breeding or training purposes, for remuneration." It appears that the Dog Law of 1919 and its rules apply to kennels housing between three and 15 dogs and that both PA 287 of 1969 and the Dog Law apply to kennels with more than 15 dogs. MCL § 287.261(d); MCL § 287.270; MCL § 287.331(o); MCL § 287.332.

For instance, indoor housing for dogs must be "adequately ventilated to provide for the health and comfort of the animals at all times."[43] Ventilation can come via windows, doors, vents or air conditioning systems and must "minimize drafts, odors and moisture condensations."[44] How much ventilation is "adequate" is not specified, nor is how much draft or odor is too much. Similar nonspecific requirements are made regulating indoor lighting: It must be "ample," of "good quality" and "provide uniformly distributed illumination of sufficient intensity."[45] How this will be measured or determined is never stated.

Finally, dog kennels are required to maintain "a sufficient number of employees" to "maintain the prescribed level of husbandry practices set forth in these rules."[46] But, again, no specifications are provided, making it impossible for owners of dog kennels to know if they are complying with the law.

It can be easy to quantify some behaviors and then develop regulations, as is the case with setting speed limits on roads. But as these examples suggest, many activities are not so easily defined, quantified and regulated. This demonstrates an important fact: There is a limit to what the state can efficiently and effectively control. Dictating the appropriate lighting in a dog kennel or the arrangement of electrical cords in a home appear beyond this limit. And so are many administrative rules, which leaves citizens unsure if they are in compliance or not. This is especially troubling for rules that carry criminal sanctions. Because they are ill-defined, it is up to the opinion of an administrative agency or an individual state agent to determine what is criminal behavior and what is not.

Overly Precise and Meticulous Rules

While ill-defined rules create certain problems, the opposite type of rules creates other problems. These are overly precise and specific ones, so fastidious that they are difficult or even impossible to abide by. They can turn well-intentioned, perfectly law-abiding citizens into criminals for failing to meet a fine detail of an administrative rule.

Because these rules are so particular, they cannot be consistently enforced, resulting in administrative agencies having to determine which rules they will strictly enforce and which ones they will let slide. Just as with ill-defined rules, this results in administrative agents independently determining who is criminally liable and who is not, weakening the rule of law. A few examples are provided below.

The Mobile Home Commission Act of 1987 authorizes LARA to promulgate rules covering mobile home parks, including the business practices of mobile home manufacturers, dealers, installers and repairers.[47] In short, LARA is authorized to write rules concerning just about every aspect of mobile homes. Not surprisingly, the rules span 83 pages and contain 591 "shall" orders.[48] Anyone who violates these rules is guilty of a misdemeanor, punishable by a daily fine of up to $500 and up to a year in jail.[49]

Aspiring mobile home park owners must get all their t's crossed and i's dotted when seeking official permission to build a mobile home park. They must submit plans that include a cover sheet with all of the following information: "the name and location of the community, a comprehensive sheet index, list of abbreviations, schedule of symbols" and "a location map of the project depicting its relationship to the surrounding area."[50] The cover sheet must by 24 inches by 36 inches.[51] Each page of the plan also must be dated, and each page must be numbered and contain the total number of sheets in the plan.[52] Obviously, formatting standards make it easier for regulators to process these plans, but should leaving out one of these details result in a misdemeanor?

There are many decrees in this rule set that are equally specific, and they make it difficult for even a meticulous mobile park owner to comply. For instance, all roads, driveways and sidewalks must be

"reasonably free" of holes, upheavals, buckling, depressions and rutting or channeling.[53] Mobile home retailers may not use the phrases "close out," "final clearance," "going out of business," "at cost," "below cost," "below wholesale," "below invoice," "above cost," "above wholesale," "above invoice," "no retailer has lower prices," "the retailer is never undersold," or "statements of similar meaning, unless the statements are true."[54] Of course, only the retailer is going to know if these phrases are true, so enforcing the rule seems an impossible task.

Advertising by retailers of alcohol is also stringently regulated. The Michigan Liquor Control Commission is authorized to promulgate rules about retail sales of alcohol and violators are guilty of a misdemeanor.[55] An alcohol retailer selling liquor, such as a grocery or convenience store, must only use signs that are unilluminated and have a total surface area of less than 3,500 square inches.[56] That means, if a sign is a square, it cannot be more than 59.16 inches on each side. In addition, the total area of any sign that is attached to this sign or "a necessary part of" it counts towards the 3,500 squared-inches limit.[57]

The intent of these rules is clear, but they are so specific that they may do more harm than good. It is not clear that the more detailed a rule, the better it serves its purpose. A rule must not be as ill-defined at the ones discussed in the previous section of this report. But certainly it is possible to create rules that are easy to understand and make it possible to know when a person is in compliance.

Impossible Rules

Some rules are so specific and precise that they appear impossible to comply with, at least on a consistent basis. Sometimes these rules are overly ambitious, making the perfect an enemy of the good. Other times, they attempt to direct behavior that is beyond an administrative agency's ability to control. There are other incidences where the rules conflict so significantly from social norms that it seems unlikely that many people would comply with the rule even if they were aware of its precision. Several examples are outlined below.

Michigan's environmental state department is authorized to create rules about public swimming pools, and any violation of those rules is a misdemeanor.[58] Public swimming pools include "related equipment, structures, areas, and enclosures intended for the use of individuals using or operating the swimming pool such as equipment, dressing, locker, shower, and toilet rooms."[59] The department's rules apply to pools used at hotels, motels, campground, apartments, subdivisions, water parks and elsewhere.[60]

According to these rules, pool owners must exclude from their facility anyone who has "an infectious or communicable disease" or a "possibly infectious condition, such as a cold, skin eruption, or open blister."[61] Without subjecting each pool user to a medical examination, it is hard to imagine how a pool owner could fully comply with this requirement. Equally difficult, each owner must "ensure that the bathing apparel worn in the swimming pool is clean."[62] Swimmers, for their part, could commit a misdemeanor just as easily. The rules prohibit any person from spitting in a swimming pool or "related facilities."[63]

Anyone offering carnival rides to Michiganders has a tall task of complying with all the rules promulgated under the Carnival-Amusement Safety Act of 1966.[64] It is a misdemeanor to violate this act.[65] The rules state that "the area surrounding the ride shall be clear and shall be kept free from trash and tripping hazards."[66] The size of the area "surrounding the ride" is unclear, but keeping it free of trash at all times would be just about impossible.

A final example of overly detailed regulations comes from the rules directing the behavior of people who care for foster children. Public Act 116 of 1973

authorizes these rules, and violators are guilty of a misdemeanor.[67] Foster parents must ensure that the head of an infant less than one year old will "remain uncovered during sleep."[68] Keeping these infants warm at night must be challenging, because the rules further state, "Soft objects, bumper pads, stuffed toys, blankets, quilts or comforters, and other objects that could smother a child shall not be placed with or under a resting or sleeping infant."[69]

The sleeping arrangements for infants under two are equally difficult to comply with. There is a long list of unapproved "sleeping equipment," and it includes infant car seats, swings, bassinets, pack'n play cribs, adult beds, soft mattresses and "other soft surfaces."[70] Any child under two who falls asleep in such an unapproved place must be moved to "approved sleeping equipment appropriate for their size and age."[71] Expecting foster families to move a peacefully sleeping infant who happens to be on the wrong surface is a tall order.

In short, some rules are not only impossible to consistently comply with, they are also impossible to enforce. As with other inappropriate administrative rules, they weaken the rule of law. Citizens must learn the rules that really matter — which ones they must comply with because they will be enforced — and know which ones they do not have to worry about because they cannot and will not be enforced. This is not how the law is meant to function, and administrative rules of this kind water down the force of the law.

Empowering the Bureaucracy

When the state Legislature authorizes a state department to promulgate rules to implement and execute a law, it empowers a group of people who are not accountable to voters to determine what behavior is acceptable and which is not. The fact that these rules can carry criminal sanctions only increases the concern with this practice. This section describes some of the specific ways that legislating via administrative rule empowers state departments and unelected bureaucrats.

Administrative rules are supposed to help in executing the law and protecting the health and safety of Michiganders. If everyone follows these rules, we should all be better off. But the way some rules work is more complicated and suggests that the rules are not actually meant to be universally applied as written. Instead, in some cases, administrative agencies get to decide which rules need to be followed, who has to follow them, when a violation occurs and what penalties will be levied against violators.

Variances

Many of Michigan's rule sets contain "variances," a method for allowing an exception to a specific rule. Sometimes the same statute that authorizes a department to write rules also requires the rules to allow for variances. Other times, statute even allows administrative agencies to create variances for statutory requirements. Administrative agencies also appear able to determine if they will allow any variances to exist. No matter who determines if variances are allowed, it is up to the administrative agency alone to determine if an individual is granted a variance from the rules.

The variances used in the rules about public swimming pools are illustrative. The department's rules contain about 50 different sets of requirements for constructing and operating a public pool. They address topics such as the location of the pool; water slides; chemical usage; the number of toilets; placement and size of ladders; stairways and ramps; and the dimensions of the pool itself.[72] But the rule set also says that the department can grant a variance if it "will not affect the safe and healthful operation of the swimming pool" and if "strict compliance will cause unusual practical difficulties and hardships or will conflict with a special purpose intended for the pool."[73] The end result seems to be that these rules are only required so long as the agency decides they are.

Variances to rules covering campgrounds is similar and provides broad discretionary power to the administrative agency. The agency may issue a variance to any of the rules when it "determines that strict compliance with these rules would cause unusual practical difficulties and hardships."[74] The variance cannot harm "the safe and healthful operation of the campground" or violate "the spirit and intent of the rules," but the department will still determine if these imprecise stipulations are met.[75]

The use of the term "strict compliance" in these regulations is surprising, as it suggests the department assumes that there are gradations to how one might comply with a rule. In other words, if there is "strict compliance," there must be "less strict compliance" too, which makes determining when a rule is complied with even more difficult. Since these rules have the force of law and can result in criminal sanctions, one might think there should be clear lines for when violations have occurred.

A final example: Public Act 116 of 1973 created licensing requirements and regulations about child care facilities. The statute contains more than 60 sections, and the rules require 54 pages and contain more than 500 "shall" statements or commands.[76] The department says in these rules that it will provide a variance to any of the administrative rules contained in those 50-plus pages, on the condition that "the health, welfare, and safety of children is protected."[77] The department is responsible for making that determination.[78]

In short, the use of variances, expands the power of administrative agencies. Not only do they have the power to define criminally punishable behavior, but with variances, they get to determine who must comply with the rules and who need not. This power attracts the same kind of corruption that plagues the integrity of the work done by elected officials, whose capacity to be influenced by lobbyists and special interest groups is well-documented. Giving administrative agencies the power to waive compliance for certain rules makes them a target for this type of undue influence. Indeed, whenever it is less costly to persuade an administrative agency to grant a variance from a rule than it is to comply with it, this type of behavior should be expected.

Rule by reference

As the rules discussed above demonstrate, it is extraordinarily difficult for an administrative agency to write and enforce rules that direct the behavior in the complicated dealings of millions of people. The task becomes more difficult as the law requires more detailed rules. Rules can be so complicated, in fact, that the state and its administrative agencies have trouble just keeping all of them organized, properly cited, up-to-date and comprehensible.

To make the job of regulators easier and to reduce the duplication of work that happens when agencies with overlapping jurisdiction create rules, the state authorizes agencies to essentially crowdsource the writing of their rules. It even does the same for rules enforcement. It is common for Michigan's administrative agencies to refer to codes, standards or regulations written by other states or entities and simply adopt these as their own. In fact, Michigan law explicitly authorizes this: "An agency may adopt by reference in its rules and without publishing the adopted matter in full all or any part of a code, standard, or regulation that has been adopted by an agency of the United States or by a nationally recognized organization or association."[79]

This means that a department can require Michiganders to comply with regulations or standards created by other government entities or even private organizations. Since the department is not required to publish these rules, citizens must find and learn these requirements if they want to comply with them. In cases where state law assigns a catch-all criminal sanction to a rule violation, this means that criminal behavior can ultimately be determined by a body or organization far removed from Michigan voters.

Sometimes this delegation is done in statute. For instance, the state law that authorizes the agriculture department to maintain rules for smoked fish processors says that processors do not have to comply with state rules if they comply with federal regulations created by the U.S. Food and Drug Administration.[80] State law then effectively outsources the rules regulating Michigan smoked fish processors to bureaucrats in the federal government.

A good example of the state outsourcing administrative rule to a private organization comes from ski resorts. Michigan's Ski Area Safety Act of 1962 authorizes the Ski Area Safety Board — a seven-member group of people appointed by the governor — to write rules "to provide for the safety of skiers, spectators, and the public using ski areas."[81] Violating these rules results in a misdemeanor.[82] Specifically, these rules must ensure the "safe construction, installation, repair, use, operation, maintenance, and inspection of all ski areas and ski lifts."[83] To accomplish this, the rules simply reference and adopt standards created by the American National Standards Institute, a private, nonprofit organization headquartered in Washington, D.C.[84] These standards are not printed, and the rules lead readers to the ANSI website where they can be purchased for $175.[85]

Michigan rules concerning dry cleaners also rely on references to standards created in Washington, D.C. In this case it is the Code of Federal Regulations, created by a national government agency. Dry cleaners in Michigan are required to comply with the National Perchloroethylene Air Emission Standards for Dry Cleaning Facilities.[86] These rules are quite broad, contain seven sections and include defined standards, testing procedures, reporting requirements and even an enforcement mechanism.[87] Dry cleaners are required to comply with all of these rules in addition to state rules, and they may be subject to enforcement by both state and federal officials. Violating these rules in Michigan results in a misdemeanor.[88]

Sometimes the state lets local government create and enforce rules. For example, the Michigan Public Health Code contains a section of law about tattoo parlors, or "body art facilities," as they are known in statute.[89] The law empowers the Michigan Department of Health and Human Services to establish licensing requirements and allows the department to authorize local public health departments to enforce this law.* A violation of this section of law or of any rule promulgated under it is a misdemeanor, punishable by up to 93 days in jail or up to a $2,500 fine, and a civil liability for damages up to $1,000, plus court costs.[90]

These local health departments, staffed by unelected officials, are also authorized to grant variances from this state law and any rules they create for tattoo parlors.† The law does require that these variances "not create or increase the potential for a health hazard or nuisance," but this is to be determined by the local health department.[91] In the end, then, state law, via these variances, empowers local public health officials to determine which laws need to be followed and by whom.

Expansive powers

The Michigan Constitution divides the state government into three branches — legislative, executive and judicial. But administrative agencies have powers that blur these distinctions. They are technically part of the executive branch, and their fundamental purpose, therefore, is to enforce the law.[92] But their powers go beyond that.

* MCL § 333.13104; MCL § 333.13108. At the time of this writing, the rules for body art facilities could not be found. MDHHS publishes a document called "Requirements for Body Art Facilities," but it is unclear if these are the actual rules. Further, there is a section in the administrative code for body art facilities, but it has no published rules. The document simply says: "New Rules to be Added." "Requirements for Body Art Facilities" (Michigan Department of Health and Human Services, June 29, 2018), https://perma.cc/GW6K-W48F; "Body Art Facilities" (Michigan Department of Health and Human Services), https://perma.cc/U5YE-Y2KA.

† MCL § 333.13111(2). Local health departments are also explicitly empowered to create more stringent rules and regulations of tattoo parlors, if they choose. MCL § 333.13111(1).

As has been demonstrated throughout this report, administrative agencies serve a legislative function, or at least a quasi-legislative one, by promulgating rules. This function is quasi-legislative because these agencies do not have all the same powers as the Legislature. For instance, the Legislature reserves for itself the right to define the criminal penalties for violations of rules, and the Legislature can also restrict the scope of the rules agencies can create.*

Sometimes, an agency has a wide range of legislative powers; at other times, it has less discretion. It all depends on the statute in question. Sometimes statutes clearly and specifically limit what rules an agency can promulgate. These might include limiting the rules to only defining the requirements someone must meet to obtain a state license or permit. In other instances, however, statutes provide departments with very broad legislative powers.

For example, the state law concerning the sale, ownership and use of off-road recreational vehicles seems to empower the state environmental department with expansive powers. There appears to be no limit on what kinds of rules it can write where ORVs are concerned. The statute states: "If the department finds that rules are necessary to implement the regulatory provisions of this part or to clarify the intent of this part, the department shall promulgate rules."[93] Violation of any of these rules can lead to a misdemeanor, up to 90 days in jail and a fine between $50 and $1,000.[94]

While ORVs represent a narrow subject area, an agency can have expansive legislative powers over a broad amount of activity. The Food Law, for instance, regulates the "processing, manufacturing, production, packing, preparing, repacking, canning, preserving, freezing, fabricating, storing, selling, serving, or offering for sale food or drink for human consumption." It devotes an entire chapter to specifying the powers and duties of the agriculture department to execute the law.[95] One specified duty appears very broad: MDARD may write rules "fixing and establishing for any food or class of food a reasonable definition, standard of identity, and reasonable standard of quality and fill of container" whenever it "determines such action will promote honesty and fair dealing in the interest of consumers."[96] A violation of these rules is a misdemeanor, punishable by a fine of $250 to $2,500 and 90 days in jail.[97]

Even though agencies cannot assign criminal penalties to rule violations, in some instance, agencies have the discretion to determine which penalty will apply when a state statute or administrative rule is violated. For instance, the Mobile Home Commission Act of 1987 allows a commission within a state agency to impose any one or combination of the following penalties: censure; probation; the limitation, suspension, revocation or denial of a license; a civil fine of up to $50,000; or restitution.[98] In addition, anyone who violates a rule promulgated under the act commits a misdemeanor.[99]

Some administrative agencies also have judicial powers, empowered to adjudicate their own rules. In other words, they can determine if someone is complying with a rule or not. Agency hearings can proceed like hearing in a standard courtroom, with judges, oral arguments, witnesses, cross-examinations, etc. After one of these hearings, an agency can force someone to comply with a rule and impose a penalty on them. Research by Thomas Shull on behalf the Mackinac Center estimated that more than 50% of agencies have statutory power to adjudicate their own rules in this or a similar manner.

* In fact, the Administrative Procedures Act of 1969 states this explicitly: "The violation of a rule is a crime if provided by statute. Unless provided by statute, a rule must not designate an act or omission as a crime or prescribe a criminal penalty for violation of a rule." MCL § 24.232(3).

Reform Ideas and Conclusion

The main purpose of this study is to outline the theoretical and practical problems with regulatory crimes and criminalizing behavior through administrative rules. The discussion shows how laws and rules interact and are carried out in complex ways. Due to this complexity, crafting a solution is extremely challenging and beyond the scope of this report.

Further lines of research would help clarify the problems addressed in this report. For instance, how many regulations in Michigan are no longer properly authorized in statute and thus no longer enforceable? Related, what portion of rule sets cite the incorrect legislative authority? Also, how many rules are duplicative of other rules or statutes?

That said, reformers should keep two broad principles in mind. The first is that the power to define criminal behavior and apportion criminal penalties should be reserved for the Legislature. Defining certain behavior as criminal — and by extension, immoral — and condemning and punishing those who partake in it is a serious power. In fact, it is the government's most severe power, for it allows the government to deprive people of their basic rights.

It is also a core function of government, separating it from any other type of organization in society. Considering this, and the weighty consequences that it enables, defining criminal behavior should be reserved for the source of the government's power: the people, or their direct representatives, members of the Legislature.

How to get there from here? There is a long-standing practice of allowing administrative agencies to define criminal behavior through rules that are criminally sanctioned, and moving away from that is, admittedly, difficult. One idea is to pass a law or even a constitutional amendment that says the Legislature must approve each and every rule promulgated under an act that uses a catch-all approach to criminal liability. This would require a lengthy process to carry out retroactively — to have the Legislature vote on each rule that exists for which someone could be held criminally liable.

There may be a more effective approach, which would certainly be more efficient. It is this: Downgrade the criminal punishments of all administrative rules to civil infractions, and then charge agencies with recommending which ones should be criminally punishable. The more limited set of rules that would result could then be voted on by the Legislature, rule by rule, and approved for criminal sanctions or not.

The second broad principle is that the gravest punishment for violating a rule should be directly related to the activity in question. For example, anyone who grossly violates the administrative rules about breeding dogs, racing horses or operating carnival rides should be prohibited from partaking in that activity. And, of course, this would not prevent the use of lighter penalties to encourage compliance, such as fines or temporary suspensions. In fact, this approach to enforcement already exists throughout state law. It should be the default, and criminal punishments should be reserved only for acts that the Legislature determines are a threat to public safety and which it specifically defines.

Overcriminalization at the federal level and through state statue has garnered a lot of attention in recent years, but hiding nearby is the problem of regulatory crimes, or criminally enforceable administrative rules. The growth and abundance of these rules is problematic for many of the same reasons that have caused policymakers to act against statutory overcriminalization. And indeed, regulatory crimes weaken the rule of law and might harm more people than the overabundance of statutory crimes. For these reasons, the state should make a concerted effort to continue to review this problem and evaluate the proper role of administrative agencies and better protect the rights of Michiganders.

Endnotes

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