

## Overcriminalization—A North Carolina Issue

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### The Problem

North Carolina's lack of a streamlined, comprehensive, orderly, and principled criminal code creates costly inefficiencies in the criminal justice system, opportunities for unfairness, and undermines the effectiveness of the criminal law.

Although many of the state's crimes are codified in Chapter 14 of the General Statutes (entitled "Criminal Law"), criminal offenses are peppered throughout the General Statutes. Felony offenses are found in *fifty-three* separate Chapters of the General Statutes.<sup>1</sup> Misdemeanors are spread throughout *one hundred and forty-two* Chapters.<sup>2</sup> Additionally, the law delegates to administrative bodies and boards the authority to proscribe crimes. For example, provisions in the General Statutes make it a misdemeanor to violate any rule or regulation promulgated by the Board of Agriculture concerning the marketing and branding of farm products or any regulation promulgated by the Board of Dental Examiners.<sup>3</sup> Thus, "a dentist who runs an advertisement but neglects to include a statement regarding whether he or she is a general dentist or a specialist is a criminal, as is one who permits a dental hygienist to engage in the '[i]ntraoral use of a high speed handpiece.'"<sup>4</sup> Counties, cities, towns, and metropolitan sewerage districts also have the authority to create crimes through local ordinances.<sup>5</sup> Thus, because a local ordinance of Ahoskie, NC makes it unlawful for a person to allow "chickens and other domestic fowl . . . to be at large in the town,"<sup>6</sup> such conduct constitutes a misdemeanor in that jurisdiction. Given that no central statewide database exists collecting all crimes created by administrative bodies, boards, and local government units, it is impossible to state how many crimes exist at any given time in North Carolina. This diffuse and scattershot approach to proscribing crimes makes it difficult for law enforcement officers, prosecutors, defenders, and judges to know and understand the law. It also undermines a critical purpose of a criminal code: providing notice to citizens of what conduct is prohibited. A comprehensive code would logically organize all of the state's major offenses within one Chapter of the General Statutes and limit the authority to create new crimes to the state's lawmaking body.

In addition to failing to include all of the state's major criminal offenses in a single Chapter of the General Statutes—or even within the General Statutes at all—many core principles of criminal law and liability are not addressed in the statutes. For example, North Carolina continues to recognize a number of common law offenses that, except with respect to sentencing, have never been codified.<sup>7</sup>

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<sup>1</sup> See North Carolina Sentencing and Policy Advisory Commission, *Felony Classification under the Structured Sentencing Act*, <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/Felony-list-2016.pdf>.

<sup>2</sup> See North Carolina Sentencing and Policy Advisory Commission, *Misdemeanor Classification under the Structured Sentencing Act*, <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/Misdemeanor-list-2016.pdf>.

<sup>3</sup> See Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1940 n.16 (2014) (citing statutory provisions).

<sup>4</sup> *Id.* (citing 21 N.C. ADMIN. CODE 16P .0102 (2014) and 21 N.C. ADMIN. CODE 16G .0103(14) (2014)).

<sup>5</sup> G.S. 14-4(a) provides that, as a general rule, violation of such an ordinance constitutes a Class 3 misdemeanor.

<sup>6</sup> AHOSKIE, NC, CODE OF ORDINANCES, Sec. 10-9 (prohibiting such activity); Sec. 1-8(a) (providing that "Unless otherwise specifically provided, violation of any provision of this Code or any other town ordinance shall be a misdemeanor, as provided by G.S. 14-4.").

<sup>7</sup> Some of the state's common law offenses include: common law uttering of forged paper, see JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 437 (7th ed. 2012 & 2015 Supplement) [hereinafter NC

Additionally, North Carolina recognizes common law principles of criminal liability,<sup>8</sup> general crimes,<sup>9</sup> and criminal defenses<sup>10</sup> that are not defined by the statutes. For some crimes no mental state is specified, yet is unclear whether the legislature intended to create a strict liability crime;<sup>11</sup> meanwhile the code fails to define the various mental states that are used,<sup>12</sup> as well as many other key statutory terms.<sup>13</sup> In other instances, two separate statutes may use the same term but it is defined in only one of the statutes, creating uncertainty as to the applicability of the definition to the other.<sup>14</sup> In addition to creating ambiguity and uncertainty that fuels litigation and increased costs to the court system, the failure to define critical terms and concepts in the code may lead to liability where none is deserved or allow guilty offenders to escape conviction. That failure also effectively delegates authority to decide these issues from the legislature to judges, to be determined on a case-by-case basis. When issues are decided inconsistently, the rule of law is undermined. A comprehensive criminal code would avoid these undesirable results by defining all core concepts and terms in simple, easily understood language.

Adding to the current code's complexity is the fact that same conduct is proscribed by multiple provisions when one would suffice. For example, although North Carolina law recognizes a general crime of larceny,<sup>15</sup> there are separate statutory provisions for, among other things, theft of dairy milk cases or crates,<sup>16</sup> larceny of motor fuel,<sup>17</sup> larceny of goods from a construction site,<sup>18</sup> larceny of secret technical processes,<sup>19</sup> larceny of public records,<sup>20</sup> larceny of wills,<sup>21</sup> larceny of ungathered crops,<sup>22</sup> larceny of

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CRIMES]; common law forgery, *id.* at 435; common law robbery, *id.* at 379; burglary, *id.* at 391; unlawful assembly, *id.* at 522; obstruction of justice, *id.* at 557; arson, *id.* at 471; going armed to the terror of the people, *id.* at Supp. p. 134; affray, *id.* at 520; voluntary manslaughter, *id.* at 96; involuntary manslaughter, *id.* at 99; and false imprisonment. *Id.* at 314.

<sup>8</sup> Such concepts include, for example, acting in concert and aiding and abetting. *See* NC CRIMES, *supra* note 7, at 29-31.

<sup>9</sup> General crimes include solicitation, conspiracy, compounding a felony, and attempt. *Id.* at Chapter 5 (defining these common law general crimes).

<sup>10</sup> *See id.* 11-24 (discussing defenses to prosecution such as necessity, duress, unconsciousness, and voluntary intoxication).

<sup>11</sup> *Compare* G.S. 14-27.24 (proscribing what is clearly a strict liability crime: first-degree statutory rape; for this crime it is not defense that the defendant did not know the child was less than 13 years old, N.C. CRIMES, *supra* note 7, at Supp. p. 50), *with* G.S. 90-95(a)(3) (proscribing possession of a controlled substance, without including a mental state; for this crime, however, case law requires that the defendant knowingly possesses the controlled substance, *see* State v. Galaviz-Torres, 368 N.C. 44 (2015)).

<sup>12</sup> *See* N.C. CRIMES, *supra* note 7, at 3-10 (discussing mental states, such as intentionally, willfully, and wantonly).

<sup>13</sup> For example, no statutory definitions are provided for the following terms used in the state's assault statutes: "serious injury," *see* G.S. 14-33(c)(1); "physical injury," *see* G.S. 14-32.4(b); and "deadly weapon." *See, e.g.,* G.S. 14-33(c)(1).

<sup>14</sup> For example, G.S. 14-32.4 criminalizes assault inflicting "serious bodily injury" and expressly defines that term. Meanwhile, G.S. 14-34.6 criminalizes assault on a firefighter or medical personnel inflicting "serious bodily injury" but does not define that term or cross-reference G.S. 14-32.4.

<sup>15</sup> *See* NC CRIMES, *supra* note 7, at 323-330 (describing this offense).

<sup>16</sup> G.S. 14-72.4.

<sup>17</sup> G.S. 14-72.5.

<sup>18</sup> G.S. 14-72.6.

<sup>19</sup> G.S. 14-75.1.

<sup>20</sup> G.S. 14-76.

<sup>21</sup> G.S. 14-77.

<sup>22</sup> G.S. 14-78.

ginseng,<sup>23</sup> larceny of pine needles and straw,<sup>24</sup> larceny of portable toilets,<sup>25</sup> and stealing political signs.<sup>26</sup> A streamlined code would collapse these offenses into a single crime, with separate punishment levels if necessary to preserve the legislature's reasonable policy judgments as to offense grading, thereby reducing complexity and associated costs.

The proliferation of new offenses that have been engrafted in an ad hoc manner onto the existing code causes other problems. For example, as the number of sexual offenses proliferated in past decades and were engrafted onto existing statutes, confusion and reversals resulted. In 2015 this caused the North Carolina Court of Appeals to include language in a sexual assault case urging the General Assembly to clean up the statutes.<sup>27</sup> The General Assembly complied<sup>28</sup> but these types of difficulties remain in other code provisions that have been amended in a similar piecemeal fashion for years.<sup>29</sup>

As new offenses have proliferated, so has overlap among them. In some cases a single act can result in multiple overlapping charges (and convictions), all with different elements and required proof, creating unnecessary complexity and associated costs. For example, passing a worthless check of \$500 can result in charges under both G.S. 14-107, worthless checks (Class 3 misdemeanor for checks of \$2,000 or less), and under G.S. 14-100, obtaining property by false pretenses (a Class H felony for amounts under \$100,000).<sup>30</sup> Similarly, possessing 2,000 pounds of marijuana can result in three separate charges: trafficking in marijuana by possession (Class F felony with special punishment provisions), possession of marijuana with intent to manufacture, sell and deliver (Class I felony), and felony possession of marijuana (Class I felony).<sup>31</sup> If the most serious offenses were properly graded, there would be no need for this type of overlap and the complexity it creates. In still other situations, overlapping offenses seem to apply but the law remains unclear as to whether multiple punishment is permitted.<sup>32</sup> Additionally, because the prosecutor has discretion with respect to charging, overlapping offenses create potential for widely disparate results that may be perceived as arbitrary and unfair. The latter concern also arises with respect to crimes for which the prosecution is allowed to choose whether multiple related offenses will be grouped together and charged as one offense or charged as separate offenses with the possibility

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<sup>23</sup> G.S. 14-79.

<sup>24</sup> G.S. 14-79.1

<sup>25</sup> G.S. 14-86.2.

<sup>26</sup> G.S. 136-32(e).

<sup>27</sup> The court stated:

[W]e strongly urge the General Assembly to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another. Currently, there is no uniformity in how the various offenses are referenced, and efforts to distinguish the offenses only lead to more confusion. . . . We do not foresee an end to this confusion until the General Assembly amends the statutory scheme for sexual offenses.

State v. Hicks, \_\_ N.C. App. \_\_, 768 S.E.2d 373, 381 (2015) (internal citations omitted).

<sup>28</sup> Jessica Smith, *Changes to North Carolina's Sexual Assault Crimes*, NORTH CAROLINA CRIMINAL LAW BLOG (Oct. 14, 2015) (discussing *Hicks* and the legislative response), <http://nccriminallaw.sog.unc.edu/changes-to-north-carolinas-sexual-assault-crimes/>.

<sup>29</sup> Consider for example the statutes pertaining to failure to register as a sex offender and related offenses. See G.S. 14-208.7 through 14-208.19A. For just one example of a case that had to be litigated all the way to the North Carolina Supreme Court to parse out the applicability of these rules, see *State v. Crockett*, 368 N.C. 717 (2016).

<sup>30</sup> See NC CRIMES, *supra* note 7, at 418, 420 (noting that the presentation of a worthless check can constitute making a false representation for purposes of obtaining property by false pretenses).

<sup>31</sup> See *id.* at 706, 729.

<sup>32</sup> This is the case as with shoplifting and larceny. See *id.* at 327 (stating: "[i]f it is unclear whether a person may be convicted and punished for both larceny and shoplifting . . . based on the same incident").

of consecutive punishment for each. For example, with embezzlement (a Class H felony for amounts less than \$100,000), the State has the choice of charging one embezzlement or multiple embezzlements when a person is involved in a continuous course of conduct involving multiple takings of property.<sup>33</sup> Depending upon how the crime is charged, a prior record level VI offender could receive a single presumptive range sentence of 16-29 months in prison or *multiple* such terms running consecutively. When the system allows for such wildly unpredictable results as a matter of discretion, the moral authority of the law may be undermined. An orderly and principled code would reduce overlap among crimes and provide clear rules for when multiple punishment is prohibited or permissible.

In still other instances the law is irrational. For example, G.S. 14-100(a) provides that no person tried for obtaining property by false pretenses may be later prosecuted for larceny or embezzlement based on the same facts. But the reverse is not true; the statute does not bar the State from charging a defendant with obtaining property by false pretenses after a trial for larceny or embezzlement.<sup>34</sup>

The code also includes provisions that are clearly unconstitutional and invite error, wasted resources, and the violation of rights. For example, G.S. 14-27.28 provides that a defendant convicted of statutory sex offense by an adult may be sentenced to an active term above that normally provided for a Class B1 felony if the judge finds egregious aggravation. However, this procedure runs afoul of the United States Supreme Court decision in *Blakely v. Washington*,<sup>35</sup> as the North Carolina courts recognized in a case where the trial judge unwittingly followed the unconstitutional statutory mandate.<sup>36</sup> Similarly, North Carolina's crime against nature statute<sup>37</sup> continues to allow for prosecution of private consensual sexual activity between consenting adults when done not for money even though such a prosecution would be unconstitutional under the United States Supreme Court decision in *Lawrence v. Texas*.<sup>38</sup> Other examples exist.<sup>39</sup>

Other criminal statutes are outdated and not in accord with what citizens would expect to be criminal. For example, G.S. 14-184, entitled fornication and adultery, makes it a crime for a man and a woman who are not married to each other to live together as if they are husband and wife, engaging in habitual sexual intercourse.<sup>40</sup> Meanwhile, some new crimes that have been created are never charged, raising a question as to their value.<sup>41</sup> In some cases the new crimes criminalize acts that already were criminal, perhaps explaining why the new offense is unused. For example, in 2009, G.S. 14-86.2 was enacted,<sup>42</sup>

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<sup>33</sup> See *id.* at 368.

<sup>34</sup> See *id.* at 420.

<sup>35</sup> 542 U.S. 296 (2004) (holding that any factor, other than a prior conviction, that increases punishment beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt).

<sup>36</sup> *State v. Singletary*, \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 712, 724 (2016).

<sup>37</sup> G.S. 14-177.

<sup>38</sup> 539 U.S. 558 (2003) (holding that a state statute prohibiting people of the same sex from engaging in various sex acts violated the defendants' liberty interests protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution).

<sup>39</sup> For example, G.S. 14-196(a)(1), which forbids using "indecent" language on the telephone, remains on the books even though it has been held invalid because it may include speech that is protected by the First Amendment to the federal Constitution. N.C. CRIMES, *supra* note 7, at 171 (so noting and citing relevant case law).

<sup>40</sup> N.C. CRIMES, *supra* note 7, at 288 (defining this crime).

<sup>41</sup> Welty, *supra* note 3, at 1951-52 (noting that 64% of crimes created in 2009-2010 were not charged even once in 2012; among the uncharged new crimes were: releasing non-native venomous reptiles into the wild; stealing or vandalizing a portable toilet; and failing to keep certain records regarding the disposal of sewage from boats).

<sup>42</sup> S.L. 2009-37.

providing that stealing, destroying, defacing or vandalizing a portable toilet is a Class 1 misdemeanor. But stealing such an item already was covered under larceny (Class 1 misdemeanor) and damage to such an item already was covered as injury to personal property (Class 2 misdemeanor if the damage is not more than \$200; Class 1 misdemeanor if the damage is more than \$200). In still other instances, the code criminalizes conduct that may be more efficiently and effectively dealt with as a non-criminal infraction.<sup>43</sup>

An orderly and principled code would be internally consistent, comply with the constitution, and promote the efficient use of judicial system resources by eliminating unnecessary duplication and complexity and reducing ambiguity in the law. The current code creates unnecessary complexity for law enforcement officers, magistrates, and prosecutors, who must determine, among other things, which crimes to charge and how to adhere to a myriad of technical rules for charging language.<sup>44</sup> It also leads to complexity for judges who preside over trials, prosecutors who litigate the State's case, defense lawyers who defend their clients, courtroom staff who prepare court records, and court administrators who create, manage, and adapt forms and computer systems to accommodate all of these offenses. Unnecessary complexity also is created for citizens who serve as jurors and must apply the law in determining guilt or innocence. Additionally, ambiguities, loopholes and inconsistencies in the law drive up the cost of criminal prosecutions by creating opportunities for litigation. Such characteristics also create opportunities for both wrongful convictions and for guilty persons to escape criminal liability. Gaps in the statutes effectively delegate legislative authority to judges, to be administered in a piecemeal and potentially inconsistent fashion. Delegation of authority to create criminal offenses to administrative bodies and local governments greatly expands the scope of the criminal law. This development, combined with a proliferation of offenses within and outside of the criminal code, makes it impossible for ordinary people—and perhaps even experts—to know what has been made criminal and to behave accordingly. The creation of multiple overlapping offenses creates confusion and can lead to injustice. Combined, these characteristics of North Carolina's existing law create inefficiency and costs. And more fundamentally they may undermine the integrity of the law and trust and confidence in the state's criminal justice system, the moral authority of the law, and the law's ability to serve as deterrent to criminal conduct.

### One Solution: Recodification

Rewriting the state's criminal laws to produce a streamlined, comprehensive, orderly, and principled code can address these issues. This comprehensive rewriting of the code is referred to here as "recodification." A streamlined, comprehensive, orderly, and principled code would create efficiencies and cost savings and promote fairness in and respect of the state's criminal justice system.

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<sup>43</sup> See, e.g., IMPROVING INDIGENT DEFENSE IN NORTH CAROLINA, REPORT OF THE CRIMINAL INVESTIGATION AND ADJUDICATION COMMITTEE, N.C. COMMISSION ON THE ADMINISTRATION OF LAW & JUSTICE 47-48 (Oct. 2016) (recommending reclassification of minor crimes). As noted in that report, a 2011 study found that 55.2% of the 1.498 million cases disposed of by the state's court system in 2009 were those in which the highest charge was either a Class 2 or 3 misdemeanor. *Id.* at 48. It also found, among other things, that for a number of these offenses, active time was imposed in less than 1% of cases. *Id.* The study concluded that by classifying certain minor misdemeanor offenses as fine-only infractions the state could save significant money while avoiding negative impacts on public safety. *Id.*

<sup>44</sup> See Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMIN. OF JUST. BULL. No. 2008/03 (July 2008) (explaining technical pleading rules), <https://www.sog.unc.edu/publications/bulletins/criminal-indictment-fatal-defect-fatal-variance-and-amendment>.

### Primary Goals of Recodification

The primary goals of recodification are to rewrite the criminal code to:

- include necessary provisions not contained in the current code, such as mental states, defenses, and definitions of offenses and key terminology;
- eliminate unnecessary, inconsistent or unlawful provisions in the current code;
- revise existing language and structure to make the law easier to understand and apply; and
- ensure that criminal offenses and legal rules are cohesive and relate to one another in a consistent and rational manner.

At the same time, recodification should seek to preserve the General Assembly's substantive policy judgments as reflected in the existing code as well as legal principles established in the case law.

### Specific Products to Be Produced

The recodification project should produce at least four products:

1. A fully drafted new streamlined, comprehensive, orderly, and principled criminal code.
2. Official commentary to the new code that explains how each section operates. Where the proposed code suggests a change in current law, special commentary will note this and identify the suggested change and the reasoning for it. Special commentary also will include impact analysis provided by the North Carolina Sentencing Policy & Advisory Commission (Sentencing Commission).
3. Two conversion tables. One table will list each proposed code provision and identify the current law provision(s) that it replaces. The second will list each current law provision and identify the proposed code provision that addresses its content. These tables will facilitate the comparison between current law and the draft code.
4. An offense grading table. This table will group all offenses covered by the new code by offense grade. Offenses will be graded within the existing sentencing classes and with the recommendations of the Sentencing Commission. In some instances, the recodification Study Commission may recommend that certain existing offenses be reclassified as fine-only infractions.

### Getting it Done

There are a number of ways to accomplish recodification. One is through a Commission or Working Group including key stakeholders, from the legislature, judiciary, prosecutor and public defender offices, the criminal defense bar, the law enforcement community, the Sentencing Commission, and victim's rights advocacy groups. The group should have a Project Director who is an expert in substantive North Carolina criminal law and be supported by administrative staff and resources for legal research assistance. A deadline should be set for the group's work, which likely will take at least 24 months.

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