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CRIMINAL LAW REFORM IN NORTH CAROLINA

THE CASE FOR A NEW, COMPLETE CODE
BASED IN FIRST PRINCIPLES



APRIL 2020

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Executive Summary

North Carolina has thousands of crimes scattered across untold pages of statutes, regulations, and ordinances. Many of these crimes are duplicative, unconstitutional, or outright silly. This labyrinth of crimes creates treacherous conditions for entrepreneurs, property owners, and North Carolinians generally.

To encourage economic growth and innovation, and to expand individual liberty, the North Carolina General Assembly should clarify and consolidate existing crimes and eliminate unconstitutional crimes. Further, the General Assembly should adopt structural reforms that will guard against unnecessary growth of the criminal code in the future.

A new criminal code with appropriate structural reforms would be a major victory for North Carolina, protecting the rule of law and boosting public trust and confidence in our criminal justice system. If done properly, these reform measures could provide the rest of the country with a workable, principled model for criminal law reform at federal and state levels.

Introduction

When most people think of criminal law, they think of crimes like murder, rape, or robbery. These crimes are called “*malum in se*” crimes – acts that are prohibited because they are inherently wrong or evil. Most of these crimes arose as part of the common law, the legal system we inherited from the British before Americans declared independence in the late 18th century.

Since then, however, American criminal codes have grown bloated with “*malum prohibitum*” crimes – acts that are wrong only because they are prohibited. These provisions criminalize behaviors that most of us would not associate with the criminal law, from feeding feral cats to failing to return library books.

One can find endless examples of these kinds of crimes in every state in America. North Carolina is no exception. Depending on which North Carolina town you live in, it might be a crime to not mow your lawn, not

clean your gutters, wear a skimpy bathing suit, or own more than two dogs.

This might not be much of a problem if the laws were accessible to the average person. But they're not. Crimes are scattered across thousands of pages of statutes, rules, ordinances, and court opinions. Tracking down a specific crime often feels like a Choose Your Own Adventure book, minus the fun. And in the end, it is difficult, if not impossible, to know exactly where the boundaries of the criminal law lie.



1

THE PROBLEM: OVERCRIMINALIZATION

The state of affairs described above is known as “overcriminalization,” and it is an acute problem in North Carolina. Overcriminalization is a broad term that may describe a number of issues within a criminal justice system.¹ Simply put, there are too many crimes in too many sources of criminal law, leading to too many people being arrested, charged, convicted, and incarcerated. Often, the number of crimes or the number of criminals is evidence of deeper issues within the legislative process, revealing “fundamental deficiencies in how crimes are created and codified.”²

These deficiencies are an ancient problem. Sir William Blackstone, one of the most influential legal scholars in history, complained about how crimes were created and codified in 18th century England. In his *Commentaries on the Laws of England*, Blackstone declared that the criminal law “should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind.”³

Instead, Blackstone lamented, inattention and carelessness made “the criminal law . . . in every country of Europe more rude and imperfect than the civil.”⁴ He noted that if Parliament had taken the same care with criminal legislation as it had with private bills,

it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or cut down a cherry tree in an orchard. Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians.⁵

Two and a half centuries later, North Carolina finds itself grappling with many of the same issues. Inattention to framing and passing new laws, along with a failure to review and cull unnecessary and obsolete laws, has left us with a criminal code that is unnecessarily large and difficult to digest.

Inertia probably deserves much of the blame. Instead of systematically updating and redefining various common law crimes and defenses that date back to colonial times, the General Assembly has left many ancient definitions intact.⁶ As holes have emerged in these definitions, the General Assembly has patched them one by one, leading to a rapid increase of unnecessarily specific offenses. For example, common law arson is the burning of a “dwelling” but not the burning of other buildings.⁷ One statute could expand the definition of arson to include all buildings. Instead, we have simply added statutory patches to include new kinds of buildings as the need arises. Over time, we have accumulated laws banning the burning of mobile homes,⁸ the burning of government buildings,⁹ the burning of schools,¹⁰ the burning of churches,¹¹ the burning of ginhouses and tobacco houses,¹² and so on.

This legislative inertia has borne itself out in other ways. Unconstitutional

and obsolete laws remain a part of our criminal code. For instance, North Carolina has a law banning the use of “profane, indecent or threatening language to any person over the telephone.”¹³ But courts have declared this statute unconstitutional.¹⁴

The Result

This inattention has resulted in a massive, sprawling criminal code. Chapter 14 of the North Carolina General Statutes, titled “Criminal Law,” contains more than 800 crimes.¹⁵ This collection dwarfs the 114 sections of the American Law Institute’s Model Penal Code,¹⁶ which is the basis for most modern American criminal codes.¹⁷

But it gets worse. Those 800 crimes represent only about a third of our statutory crimes. More than 1,600 other crimes are scattered across more than 140 chapters of our General Statutes,¹⁸ banning everything from trespassing on airport property¹⁹ to cutting your friend’s hair.²⁰

And this is the work of only one body with the power to create crimes. Over time, the General Assembly has delegated crime-making authority to a number of agencies, boards, and commissions. And most of the ordinances created by over 650 counties, cities, towns, and metropolitan sewerage districts are automatically criminalized by statute.²¹ In total, roughly 700 different bodies have the authority to create crimes. And all of them have used it, often to criminalize trivial behaviors such as:

- ▶ using Silly String within town limits;²²
- ▶ not cutting your lawn;²³ and
- ▶ wearing a thong bathing suit.²⁴

With so many crimes — and so many bodies creating new crimes each year — it is nearly impossible for anyone to know the full extent of our criminal code. A person would have to read through thousands of pages of statutes, rules, and ordinances to begin to grasp the law’s requirements. And even then, ambiguities, undefined terms, and poor

organization may leave the reader with more questions than answers.²⁵ In short, the laws have become “so voluminous that they cannot be read, [and] so incoherent that they cannot be understood.”²⁶

This is more than a problem. This is a large crack in the foundation of our criminal system, which requires fair notice of crimes to justify steep penalties for violators. A crime is more than simple wrongdoing. “It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”²⁷ That “formal and solemn pronouncement” means labeling someone a “criminal.” And that label can carry significant collateral consequences long after a sentence is served or a fine is paid. These consequences include decreased employment or professional licensure opportunities,²⁸ decreased access to housing and public benefits, and loss of voting and firearm rights.²⁹ The erosion of employment and housing prospects is particularly concerning where the underlying conviction stems from behaviors associated with homelessness, such as begging or sleeping in a public place;³⁰ more so when one considers that these are some of the most commonly charged ordinance violations.³¹

The moral authority for these steep penalties rests on the assumption that everyone knows the rules.³² By breaking the criminal rules, one has done more than upset his neighbor. He has harmed society and disturbed public order. But this assumption fails in an overcriminalized system like North Carolina’s. When the laws are too numerous to read and too confusing to understand, the law loses the moral force that justifies criminal punishment. As legal scholars Paul Robinson, Michael Cahill, and Usman Mohammad observe, “How can we condemn and punish violations of the rules of lawful conduct if the general public does not, and cannot reasonably be expected to know, these rules?”³³

Confusion and Mistakes

This abstract failing has practical implications. On the one hand, the criminal law tends to churn out a number of “false positives,” ensnaring

blameless people with the gall to run a business, start a blog, or provide a charitable service. On the other hand, the failure of the legislature to adequately define offenses has led to a number of “false negatives,” allowing people who have engaged in wrongdoing to escape punishment.

Consider three false positives:

In February 2019, the Guilford County Health Department warned Joymongers, a popular Greensboro taproom, that allowing dogs inside their building was a misdemeanor violation of the state’s health code. The taproom briefly found itself in legal jeopardy before a public outcry forced the Health Department to back off³⁴

Steve Cooksey is a man who turned his life around after nearly experiencing a diabetic coma. By ignoring conventional dietary advice and doing his own research, he was able to control his diabetes without insulin or other drugs. In 2010, he started a blog offering dietary and exercise advice to fellow diabetics, including an advice column and a life coaching service. The following year, the North Carolina Board of Dietetics/Nutrition accused Cooksey of practicing dietetics without a license — a class 1 misdemeanor³⁵

Tammie Hedges opened a shelter in 2018 to help pets displaced by Hurricane Florence. As the storm pummeled the North Carolina coast, Hedges sheltered and provided first aid for 27 animals, many of whom were sick or injured. For her laudable efforts, she was arrested on a dozen misdemeanor counts and accused of practicing veterinary medicine without a license³⁶ As with the Joymongers case, prosecutors dropped the charges only in response to a public outcry³⁷

Not one of these cases involves conduct that would be considered wrong or evil on its own terms. Not one of these crimes can be found in Chapter 14 of the General Statutes. In these cases, rather than serving fair notice about prohibited conduct, the law functioned like a bear trap, lying in wait for an unsuspecting person to set it off.

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But other times, the criminal law fails to punish wrongdoers because of ambiguities in the law. These false negatives often arise because of procedural technicalities or confusion about which crime to charge or how to charge it. For instance:

A jury convicted a Greensboro woman of felony littering for pouring heating oil, a hazardous substance, onto the ground and contaminating the stormwater system.³⁸ Four and a half years of litigation later, the North Carolina Supreme Court vacated her felony littering conviction because her indictment failed to contain an “element” of the offense — an element that had no bearing on her case and which was not apparent from the statutory language.³⁹

In one Onslow County case, a defendant gave a woman \$20 to buy drugs for him. She never bought them and never returned his money. So, the defendant went with two of his friends to her house, broke in, and viciously beat her in an attempt to get his money back. The North Carolina Court of Appeals overturned his convictions for Conspiracy to Commit Robbery with a Dangerous Weapon and Felonious Breaking or Entering because the defendant was trying to get his own money back, and therefore did not have felonious intent. The courts had split on this issue over the previous 50 years, and

the General Assembly had not (and still has not) clarified the issue.⁴⁰

These examples reveal fundamental flaws in our criminal code. A code that outrages the community when it is enforced plainly does not represent the moral convictions of that community. A code that punishes blameless people while failing to punish culpable people – as ours occasionally does – is not a just code.

If we enforced the letter of the law consistently, one wonders how many more of these examples might arise. Perhaps fortunately, “the most dangerous consequences of overcriminalization are mitigated by the discretion that prosecutors exercise when deciding whether, or in what manner, to prosecute a crime.”⁴¹ But this, too, comes with a steep cost. Reliance on discretion is a treacherous path which “effectively destroys the rule of law.”⁴² As the General Assembly expands the reach of the criminal law (with help from administrative and local bodies), the result is what Paul Robinson and Michael Cahill call “a shift of practical authority away from the legislature to prosecutors and police, who now have broad discretion over who gets punished and the level of punishment.”⁴³ As sheriffs, police chiefs, district attorneys, and other local authorities shift priorities, the criminal law will be enforced differently from city to city and county to county.

In sum, overcriminalization is a deep problem rooted in a lack of attention to — or lack of understanding of — the proper use of the criminal system. The rapid growth of the criminal code has led to the criminalization of trivial behaviors and the maintenance of obsolete and unconstitutional crimes. As the code has grown, it has ensnared blameless people while allowing wrongdoers to slip through the cracks. By alleviating overcriminalization, the General Assembly can build public trust and confidence in the criminal justice system while preventing the waste of taxpayer money on frivolous litigation.



2

THE SOLUTION: CRIMINAL LAW REFORM

If overcriminalization describes a massive criminal code caused by a disorganized system for creating and codifying new crimes, then the solution to overcriminalization requires two distinct fixes. First, lawmakers need to address the problem: they must clean up and consolidate or “recodify” the current criminal laws. Second, lawmakers must address the underlying cause by organizing and strengthening the process of creating new crimes to secure the new code’s integrity. Together, we will refer to these fixes as “criminal law reform.”

Criminal law reform is distinct from other criminal justice reform measures, such as bail reform, sentencing reform, or prison reform. Each of these latter reforms addresses what happens to a person once they are charged with, or convicted of, a crime. In contrast, criminal law reform addresses more fundamental questions: What is a crime? Who should be subjected to the criminal justice system in the first place? By answering these and similar questions, the General Assembly can design and adopt a principled criminal code that inspires, rather than undermines, public trust and confidence.

Step One

The first major task is to recodify the criminal laws. This step, described in more detail below, will require significant time and effort. Inattention and misuse by hundreds of bodies with the power to create crimes have left the criminal code a big mess. And cleaning it up is no easy task.

But the magnitude of the problem should not be a reason to ignore it. In addition to increased institutional trust, there are substantial rewards to be reaped from recodifying the criminal laws:

Fewer people would end up in the criminal justice system. This means fewer people saddled with the collateral consequences of a conviction or a criminal charge, which creates a criminal record even if the charges are later dismissed. Fewer people affixed with that proverbial scarlet letter means fewer people with trouble finding work or housing.

Law enforcement officers would be able to carry out their duties more effectively. An expansive, ill-defined code like the one currently in effect places a tremendous burden on law enforcement and prosecutors, who must decide whether a crime has been committed, what crime or crimes ought to be charged, and how to draw up the indictment. All of these jobs would be easier with a simplified code.

There could be fewer opportunities for litigation.⁴⁴ As the previously discussed littering and robbery cases above show, ambiguous statutory language occasionally allows wrongdoers to escape or delay punishment. And it drives up the cost of administering the criminal justice system — tying up limited prosecutorial, public defense, and judicial resources — as cases drag out for years. Substantially reducing the number of ambiguities

in the code would allow the criminal justice system to operate more efficiently and provide more predictable outcomes.

Finally, a properly constrained criminal code would expand entrepreneurial freedom and set the stage for increased social mobility and economic growth.

For the entrepreneur, regulations lurk around every corner, and many of them carry criminal penalties for their violation. “By treating entrepreneurs as latent criminals, the regulatory state crushes the creative spirit — and wastes the energy and talents of the job producers and the prosperity producers.”⁴⁵ By decreasing the threat of strict criminal liability for certain regulatory violations, lawmakers can encourage entrepreneurship and economic growth.

Step Two

But a new code addresses only the effects of overcriminalization, not the cause. Once a new code is developed, lawmakers must also implement certain structural reforms to ensure that future generations do not lose the benefits of having a clear criminal code. This step is critically important. Without structural reform, criminal law reform becomes nothing more than a temporary fix. But with the right safeguards, criminal law reform can produce lasting benefits for our state.

North Carolina’s criminal law reform efforts have already received national attention.⁴⁶ Overcriminalization is a ubiquitous problem, and criminal law reform would place North Carolina in the national spotlight, providing a workable model for reform in other states and at the federal level. The task is onerous, but it is achievable.



3

REDISCOVERING FIRST PRINCIPLES

In 1850, French economist and journalist Frédéric Bastiat concluded, “The law is the organization of the natural right of lawful defense . . . to secure persons, liberties, and properties, and to maintain each in its right, so as to cause justice to reign over all.”⁴⁷ Ensuring public safety is one of the primary aims of the criminal law. When used properly, the criminal law is a powerful weapon to protect life, liberty, and property, and to deter would-be wrongdoers.

But when the criminal law is misused, it loses much of its efficacy. A code that is too large, too dispersed, and too imprecise is an ineffective deterrent. If people do not know what is criminal, how can the steep sanctions influence their behavior? Under those circumstances, the law functions more as a trap than a deterrent. The imprecision in the code further undermines public safety by allowing wrongdoers to walk free. After all, “it is prosecutors, not defense counsel, who lose when legal complexities and peculiarities produce jury confusion and hesitation.”⁴⁸

As lawmakers attempt to correct these deficiencies through criminal

law reform, reforms must be tethered to first principles. Three core principles should guide the reform process: fair notice, culpability, and legislative intentionality.

Fair Notice

It is an oft-repeated maxim that “ignorance of the law is no excuse” (*“ignorantia juris non excusat”*). If a person breaks the law, he cannot successfully defend himself by saying he did not know what he did was illegal.

This principle is deeply embedded within our legal and cultural traditions.⁴⁹ But is it realistic? With thousands of statutes, rules, and ordinances criminalizing behavior (and thousands more federal statutes and rules criminalizing even more behavior⁵⁰) it is safe to assume that no one actually knows and understands the criminal law. In other words, people lack notice of what the law requires. But they are treated by the criminal justice system as if they knew all along.

To pass muster under the U.S. Constitution, a law must “define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.”⁵¹ These requirements, typically referred to as the “void-for-vagueness doctrine,” speak to the way a crime must be defined. But they say nothing of how the criminal law should be published. Well-defined crimes are far less helpful when they are buried among thousands of pages of other laws.

In keeping with the principle that ignorance of the law is no excuse, lawmakers must recognize a corollary duty to ensure that citizens have fair notice of prohibited conduct. This goes beyond the minimal requirements of the void-for-vagueness doctrine. In their current state, the criminal laws have become, in the words of James Madison in *Federalist* No. 62 (1788), “so voluminous that they cannot be read [and] so incoherent that they cannot be understood.”⁵² The General Assembly must correct this problem and adopt other reforms to prevent it from arising again. Ambiguous terms need to be clarified. Common law crimes need

to be redefined by statute to fit our 21st century conception of what these crimes should prohibit. Whenever possible, overlapping crimes need to be consolidated into a single offense. And criminal laws need to be published in a single, accessible volume.

Culpability

Culpability is an indispensable component of our criminal justice system. On the first day of most criminal law courses, law students learn that there are two parts to any crime: the guilty act (or “actus reus”) and the culpable mindset (or “mens rea”).

The mens rea element is critical in distinguishing innocent behavior from blameworthy behavior. If Alice sets her bag down, containing her wallet and phone, and Barbara picks it up by mistake, most people would argue that Barbara should be held blameless. But if Barbara picks up Alice’s bag intending to keep the bag or any of the valuables inside, then Barbara has committed larceny.

Unfortunately, many of our criminal provisions have dispensed with mens rea altogether. Consider the following ordinance:

Every person using or operating a surfboard within the waters of the Atlantic Ocean within the jurisdiction of the town shall be required to physically maintain control of the surfboard by attachment of a leash at all times to the ankle or wrist of the surfer in order to avoid injury to other swimmers.⁵³

Under the plain language of this ordinance, there is no mens rea required to prove that a misdemeanor has occurred. The law does not say it is criminal to “intentionally” or “recklessly” fail to leash one’s surfboard to her ankle or wrist. The law does not say that it is unlawful to fail to leash one’s surfboard “with the intent to harm other swimmers.” Simply, if you do not leash your surfboard, you are a criminal.

These kinds of crimes, which impose strict liability for engaging in prohibited behavior, are all over our criminal code. Of the nearly 1,600 statutory misdemeanors identified in a recent report from the Administrative Office of the Courts, more than two-thirds failed to include a culpability requirement in the statute.⁵⁴ And that number is likely much higher among ordinances.

The lack of culpability requirements turns our criminal code into a veritable minefield, as the smallest details of our lives are regulated and criminalized without requiring any harmful intent. For example, a number of local ordinances make it a class 3 misdemeanor to have a *potential* breeding ground for mosquitoes on one's property.⁵⁵ But these ordinances fail to specify what level of mens rea, if any, is required. If a potential breeding ground for mosquitos exists on your property, you have committed a class 3 misdemeanor.

It might be acceptable to some to criminalize the "intentional maintenance of standing water on one's property *for the purpose of* providing a breeding ground for mosquitoes." In fact, a community might vehemently support rather harsh punishments for such behavior. But as written, these ordinances make it a crime to have a birdbath, dirty gutters, or even an empty bottle cap on one's property.⁵⁶

In drafting and maintaining a new criminal code, lawmakers must ensure that only the truly blameworthy end up with the "criminal" label. This can be accomplished by making culpability a central consideration in each defined crime within our code. A new criminal code should include a default mens rea provision, which would "fill in the gaps" for any element of a crime that lacks a mens rea requirement. A default mens rea provision would also require lawmakers to designate strict liability crimes when they are desired explicitly.

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Legislative Intentionality

William Blackstone contended, “In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it.”⁵⁷ An effective criminal code requires lawmakers to strike a delicate balance. The law must adequately protect individuals from their neighbors by punishing the blameworthy and deterring others from engaging in wrongdoing. But taken too far, the criminal law begins to encroach on the rights of the blameless. To strike this balance, lawmakers must act with great care and deliberation when expanding or amending the criminal code.

That is not how the criminal law has been treated in North Carolina (or any other jurisdiction in the United States). Crimes are scattered across more than 140 chapters in the General Statutes. Unconstitutional and obsolete crimes remain in force. Minor details of business or property ownership are criminalized without considering whether administrative or civil remedies would be more appropriate.

And perhaps most unsettling is the fact that most local ordinances are criminal *by default*. Local lawmakers may opt out. But that requires awareness of this long-standing arrangement. And awareness does not appear to be universal among local authorities.⁵⁸ The troubling conclusion is that criminal laws may be enacted *by accident* in some instances.

These procedural deficiencies illustrate that rewriting the criminal code, without more, is only a temporary fix. Structural reforms must be put in place to restrain the future growth of the code, to cull outdated and unnecessary laws from the code, and to tether our criminal laws to clearly discernible principles.

In addition to rewriting the substantive criminal laws, the General Assembly should reconsider how it grants the authority to create crimes to other bodies — or if it should grant that authority at all. Any delegation of authority should require affirmative steps to create a new crime, such as requiring an explicit statement of intent to criminalize the behavior

in the new rule or ordinance. Additionally, internal processes should be adopted to require a review of proposed criminal legislation to determine whether it is duplicative, unnecessary, or disproportionately graded compared to similar crimes. And lawmakers should order a periodic review of the entire criminal code to unearth crimes that may be culled, so that obsolete crimes do not remain in force decades after losing their usefulness.



4

THE PATH FORWARD

Criminal law reform is a significant undertaking. The criminal law needs to be compiled, sorted, and analyzed. Criteria for keeping, modifying, or discarding certain crimes need to be developed. A new, complete, self-contained criminal code needs to be written and implemented. And lawmakers, consulting with stakeholders, must decide which structural changes to adopt to make the criminal justice system run more smoothly.

The first step is to take a complete inventory of crimes that currently exist. The sheer number of different legislative and administrative bodies with the power to create or define crimes makes this a daunting task. But the General Assembly has already taken significant steps toward compiling this information. In 2018, the General Assembly adopted Session Law 2018-69: An Act to Assist the Criminal Recodification Working Group. Among other things, this law directed administrative bodies and local governments to submit a list of crimes they had created to the General Assembly.⁵⁹ Additionally, the Administrative Office of the Courts

(AOC) was directed to produce a report on common law and statutory crimes.⁶⁰ A year later, the General Assembly passed Session Law 2019-198: Criminal Law Reform.⁶¹ This law created new incentives for local governments to submit their lists of crimes and required legislative review of any new administrative rule criminalizing new behavior.

Of those required to respond, 95 percent of counties and 86 percent of cities and towns submitted the required reports by the deadline,⁶² along with 40 agencies, boards, and commissions, and the AOC. This information must be categorized to make it easier to identify patterns and eliminate duplications, such as ordinances that criminalize conduct already punishable under statute.

With a master crimes database that has been properly categorized and pared of duplications, a stakeholder working group can begin sorting crimes into those that clearly belong in the new code, those that clearly do not, and those that require more careful consideration. Before this process begins, however, the working group should agree on a set of criteria to help sort these existing crimes. Some possible considerations:

- ▶ Whether there is an overwhelming public consensus that the prohibited behavior is not only wrong, it is contemptible.
- ▶ Whether the prohibited behavior has an identifiable victim.
- ▶ If there is no immediately identifiable victim, whether significant harm is likely to result from the prohibited behavior (i.e., harm to a bystander is more than a mere possibility).
- ▶ The likely severity of the harm that might occur as a result of the prohibited behavior.
- ▶ Whether the law prohibits the behavior *only if* it is committed with the intent to bring about the potential harm (or whether it could be modified to do so).
- ▶ Whether the prohibited behavior could be appropriately handled through civil or administrative means.

This last suggestion comes with an important caveat. One common justification for some misdemeanors, particularly local ordinances, is that the law would be difficult to enforce without criminal penalties. Whatever criteria the working group chooses to help sort existing crimes, this line of reasoning must be rejected. If a certain prohibited behavior could be handled adequately through civil or administrative means, it likely should not be criminalized. But the inadequacy of civil and administrative channels in handling certain behaviors *does not*, on its own, positively justify the use of the criminal law. The criminal label, with all of its collateral consequences, is a steep punishment that should be used sparingly. It must not be used as a failsafe to ensure that the government can enforce every regulation that it enacts.

Once the working group has decided on criteria, sorted crimes accordingly, and made final decisions on whether to keep, discard, or modify marginal crimes, it can set about the task of drafting the new criminal code. Properly drafted, the new code would consolidate overlapping offenses and reflect a 21st century understanding of criminal behavior. Arson would include the malicious burning of all buildings, not merely dwellings. Larceny would include theft of all property, not merely personal property. The new code would define “key terminology” and common law provisions “such as mental states [and] defenses.”⁶³ In addition to the code itself, the working group should include “[o]fficial commentary . . . that explains how each section operates” and conversion tables to “facilitate the comparison between current law and the draft code.”⁶⁴

A Lasting Solution

Once completed, the new criminal code would represent a significant step forward for our criminal justice system. But this accomplishment would be short-lived if lawmakers fail to address the root causes of over-criminalization: delegation and disorganization.

Throughout the process of categorizing and analyzing local and regulatory crimes, certain patterns may begin to emerge. Perhaps the working

group will uncover ordinances and rules that fill significant gaps in the law that the General Assembly has failed to address. Or perhaps the vast majority of local and regulatory crimes will be thrown out as superfluous or improper uses of the criminal law.

As these patterns emerge, the working group should reconsider the scope of the General Assembly's delegations to local and administrative bodies. At the very least, these delegations should require an expression of the promulgating body's intent to criminalize the behavior. The present practice of criminalizing rules and ordinances by default is plainly at odds with the principle of legislative intentionality.

Further, if the working group decides to perpetuate the practice of delegating this authority, it must also consider adopting oversight mechanisms that will help preserve the new code. For example, a mandatory reporting procedure for new criminal ordinances might accompany a delegation to local bodies. These ordinances would then be reviewed periodically to confirm that they are necessary and appropriate uses of the criminalization power. These ordinances should also be published regularly to ensure fair notice to all.

Additionally, the working group should consider structural reforms that bind future lawmakers' hands to protect the integrity of the new code. "Procedures must be developed to ensure that when a legislator adds a new provision, the provision is written in language consistent with, and with an understanding of, the existing criminal code."⁶⁵ The creation of an independent body to review and offer analysis on proposed additions or amendments to the code might also help constrain its unnecessary growth.⁶⁶ Another possibility is to give legal force to the commentary produced by the working group.⁶⁷ By doing so, "individual legislators could

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show concern for, and could be seen as doing something to address, the criminal problem of the day by passing legislation that amends the *official commentary* rather than making an unnecessary code change that could harm rather than help the code's operation."⁶⁸

Structural reforms such as these are a critical piece of criminal law reform. Recodification is an arduous process. To stave off the necessity of future recodification, the new code needs to be protected. By doing so, lawmakers could preserve this victory for many years and make North Carolina a model for the rest of the country to replicate.

Conclusion

Overcriminalization is a problem that is difficult to quantify. But the problems associated with overcriminalization strike at the heart of the criminal justice system. Our voluminous criminal code is ineffective at identifying and punishing wrongdoers, yet it occasionally ambushes the blameless. These inefficiencies waste taxpayer dollars and inhibit economic growth by discouraging innovation and entrepreneurship.

North Carolina is ready to move forward with criminal law reform. As the information gathered from agencies, boards, commissions, and local governments is processed and sorted, the General Assembly should establish a formal stakeholder working group composed of stakeholders and legislators. This working group should develop criteria for keeping or discarding existing crimes, pare down and rewrite the criminal code, and propose structural reforms to protect the new code in the future. Criminal law reform is a daunting task, but it will produce significant benefits in North Carolina and provide the rest of the country with a model for principled change.

Endnotes

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The John Locke Foundation was created in 1990 as an independent, nonprofit think tank that would work “for truth, for freedom, for the future of North Carolina.” The Foundation is named for John Locke (1632-1704), an English philosopher whose writings inspired Thomas Jefferson and the other Founders. The John Locke Foundation is a 501(c)(3) research institute and is funded by thousands of individuals, foundations and corporations. The Foundation does not accept government funds or contributions to influence its work or the outcomes of its research.

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The John Locke Foundation envisions a North Carolina of responsible citizens, strong families, and successful communities committed to individual liberty and limited, constitutional government.

Our Mission

The John Locke Foundation employs research, journalism, and outreach programs to transform government through competition, innovation, personal freedom, and personal responsibility. JLF seeks a better balance between the public sector and private institutions of family, faith, community, and enterprise.

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