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OVERCRIMINALIZING THE OLD NORTH STATE

A Primer and Possible Reforms for North Carolina

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EXECUTIVE SUMMARY

In recent years, North Carolinians selling hot dogs without a license, operating teeth-whitening kiosks in malls, and dispensing dietary advice on the internet have all run afoul of the state's criminal law. In fact, North Carolina's criminal laws today deal with many such ordinary business practices and are sweeping in scope:

- North Carolina's 765-section criminal code is 55 percent larger than Virginia's and 38 percent larger than South Carolina's.
- A large number of crimes—including drug and motor-vehicle offenses, regulatory crimes, and local ordinances—lie outside the state's criminal code.

Year after year, North Carolina has added new crimes, most of which remain "unutilized":

- Over the last six years, the state has created, on average, 34 crimes annually, over half of which are felonies.
- Among new crimes created in 2009 and 2010, 68 percent were never charged in 2012, and only 23 percent were charged more than once.

Many of these new crimes have not required criminal intent, meaning individuals could be held criminally responsible for violating rules unknowingly. And, even assuming most prosecutors effectively exercise sufficient discretion, the vast reach of North Carolina's criminal law

creates a serious risk of wide variance in treatment across jurisdictions, as well as a diversion of scarce resources away from the enforcement of serious violent and property crimes.

To address overcriminalization, North Carolina policymakers should consider:

1. **Creating a bipartisan legislative task force** to conduct hearings and establish guidelines governing the creation of new criminal offenses
2. **Creating a commission to review the criminal law**, one charged with consolidating, clarifying, and optimizing North Carolina's criminal statutes
3. **Enacting a default *mens rea* provision**, ensuring that to be convicted of a crime requires a showing of intent, unless the legislature clearly specifies otherwise

INTRODUCTION

In July 2011, Steven Pruner was found guilty of a criminal offense. His crime: selling hot dogs from a food cart near Duke University Medical Center. His punishment: 45 days in the custody of Durham County's sheriff.[1] Pruner's story is not unique, for North Carolina's criminal laws and licensing requirements increasingly place small businesses and individuals in legal jeopardy—from the diabetic who ran afoul of the law after offering "free dietary advice without a license" on his own website,[2] to the teeth-whitening kiosks in a shopping mall accused of the "practice of dentistry without a license."[3]

Unlike most traditional crimes, these regulatory and licensing offenses in North Carolina do not typically require an individual to know, or understand, that his actions were wrong. Most individuals, moreover, would have little way of knowing that their actions were illegal, given that entire sections of North Carolina's voluminous regulatory code—including those dealing with public health, agriculture, and the environment[4]—make the violation of any of their provisions criminal. Although state-to-state comparisons of the reach of criminal law are difficult, North Carolina's criminal code contains more sections than do neighboring states such as Virginia, South Carolina, Georgia, and Tennessee.[5] Indeed, UNC–Chapel Hill professor Jeff Welty, in a comprehensive analysis of overcriminalization in the state (forthcoming in the *North Carolina Law Review*), concludes that "the available data are compatible with the idea that North Carolina has more criminal laws" than its neighbors and other states studied.[6]

Although North Carolina may stand out from its neighbors, the trend toward overcriminalization is a national one, at least at the federal level, drawing the attention of Congress[7] and judges.[8] In recent years, scholars at the Manhattan Institute and elsewhere have examined the increase in "regulation by prosecution," in which criminal law is used as a tool to punish ordinary business practice.[9] There is, in fact, a "wide consensus" among scholars that the explosive growth of criminal law is problematic:[10] in addition to placing civilians in jeopardy of prosecution for unknowing violation of obscure laws, overreaching criminal codes stretch scarce law-enforcement resources, reduce consistency in enforcement, and erode confidence in the rule of law, as numerous crimes are rarely, if ever, sanctioned. Most ordinary citizens, however, remain unaware that they are likely guilty of many criminal offenses (or, if they are aware, generally suspect that they will never be prosecuted).[11]

The significant attention placed on overcriminalization to date has largely focused on federal crimes,[12] notwithstanding the fact that most criminal prosecutions occur at the state level.[13] Some scholars have argued that, contrary to the federal trend toward expanding criminal law, states on balance may be "moving towards less criminalization rather than more."[14] Last year, for instance, Tennessee created a commission to make annual recommendations for eliminating crimes in the code; Virginia, meanwhile, eliminated 14 crimes from its code in 2013, pursuant to the recommendation of its own commission.[15]

In contrast, North Carolina has been expanding its criminal code dramatically.[16] From 2008 through 2013, North Carolina added more than 34 new criminal offenses to the books annually, on average.[17] In its 2013 appropriations bill, it is true, the state's legislature downgraded 21 low-level misdemeanors; but on balance, significantly more crimes were upgraded, rather than downgraded, over the last five years.[18]

This issue brief looks at overcriminalization trends in North Carolina, quantitatively and qualitatively, and proposes various avenues for reform. **Section 1** examines North Carolina's criminal code in comparative context; recently enacted crimes; offense reclassifications; and prosecution trends. **Section 2** looks at little-utilized criminal provisions (both old and new); the broad array of crimes "without intent" under North Carolina law; and various regulatory mechanisms through which new crimes are enacted. **Section 3** assesses the policy implications of overcriminalization and makes new policy recommendations.

1. QUANTITATIVE ASSESSMENT OF OVERCRIMINALIZATION IN NORTH CAROLINA

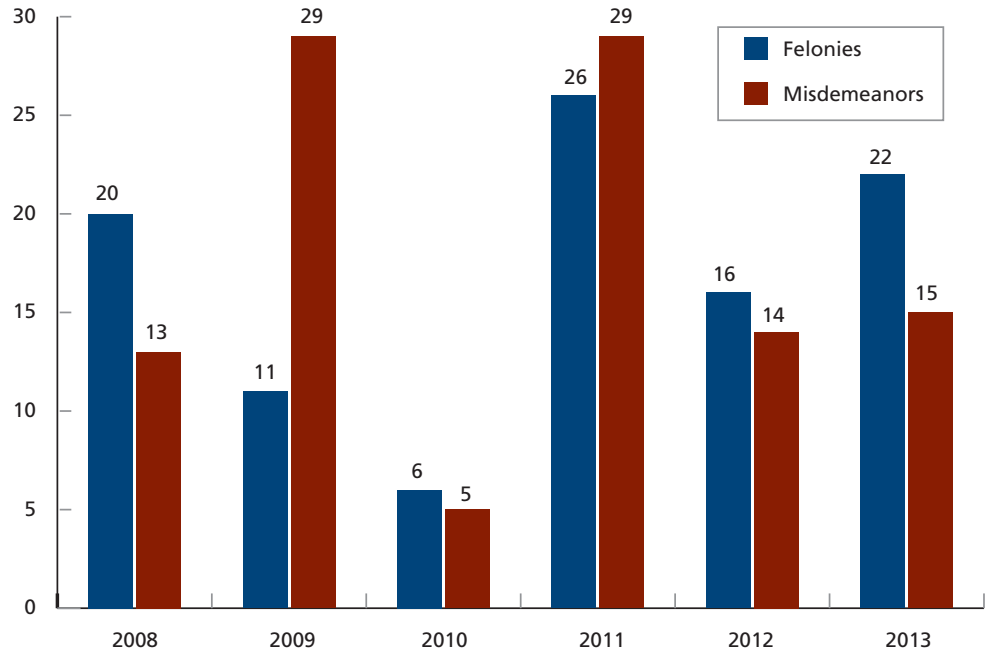
Number of crimes. The criminal-law provisions of the North Carolina General Statutes (located in chapter 14) contained 765 sections, as of year-end 2011.[19] Chapter 14 does not, by any stretch, include all North Carolina crimes: the state's drug laws are coded separately, in chapter 90; motor vehicle laws in chapter 20 contain numerous additional crimes; and "catchall provisions" make entire sections of the regulatory code criminal (including regulations dealing with public health, agriculture, and the environment).[20] State licensing boards have the authority to make their rules criminal,[21] as do municipalities enacting local ordinances.[22] More than 1,150 different criminal offenses are tracked by North Carolina's Administrative Office of the Courts,[23] but this figure also undercounts the number of crimes on state books, as it includes only crimes actually charged. Yet, as we shall see, a significant number of criminal laws on North Carolina's books never result in criminal prosecutions.

Comparative trends. By comparison, South Carolina's criminal code contains 556 sections, Virginia's 495, Georgia's 671, and Tennessee's 607.[24] The large size of the criminal codes of North Carolina's neighbors demonstrates that having a large number of crimes—more than the average citizen could hope to know and understand—is a common modern trend. Indeed, each of these states has increased the scope of its criminal laws far beyond the Model Penal Code (developed in 1962), which contains only 114 sections.[25] Although cross-state comparisons of criminal laws are complicated by the fact that states organize their laws differently—and, in many cases, as in North Carolina, not all criminal provisions are located in criminal codes themselves—North Carolina would seem to have a complexity of criminal law even more pronounced than comparison states.

Intertemporal trends. Not only does North Carolina appear to have more crimes on the books than its neighbors; the state has also been adding crimes consistently in recent years. Over the 25 years preceding 2011, the number of sections in chapter 14 increased 25 percent, while the number of words (over approximately the same time span) grew 76 percent.[26] These increases nonetheless understate the growth of the state's criminal law. Over the last six years, the state has added, on average, 34 crimes annually, 55 percent of which fall outside chapter 14.[27] Almost half of these new crimes are felonies (Figure 1).

Sentencing. Notwithstanding the broader trend toward increasing the number of criminal offenses, North Carolina's General Assembly has—over the last two legislative sessions—made significant efforts to scale back some of the state's criminal-law excesses. In enacting the 2011 Justice Reinvestment Act, North Carolina became one of 17 states to change parole processes and eligibility, limit authority to revoke probation, and enact other measures aimed at reducing its prison population.[28] These changes, intended to cut the costs of incarceration

FIGURE 1. NEW CRIMES IN NORTH CAROLINA, 2008-13



Source: Jeff Welty

with an emphasis on curbing recidivism,[29] were the most significant reform to the state's sentencing laws since the Structured Sentencing Act of 1994.[30]

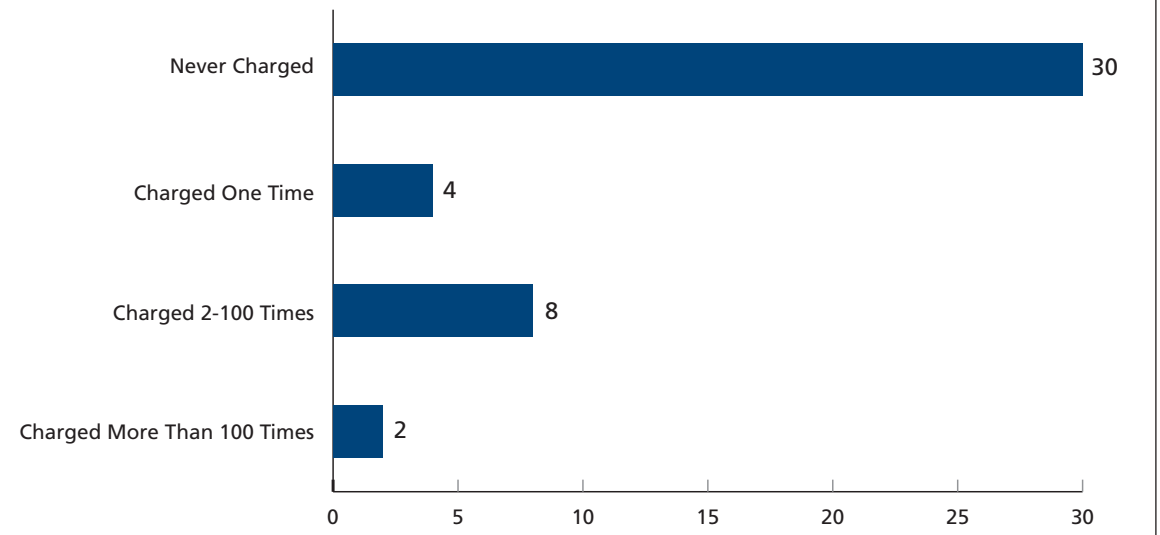
Upgrades and downgrades. In addition, in 2013, the state's appropriations bill reclassified numerous misdemeanors—including common offenses, such as writing/using a bad check, driving without a license or without insurance, and fishing without a license[31]—to Class 3, the lowest classification of misdemeanor offenses,[32] and precluded incarceration for the violation of Class 3 misdemeanors (for offenders with fewer than four previous convictions).[33] While significantly less sweeping than the General Assembly's 1985 decriminalization of many motor-vehicle offenses—which affected an estimated 100,000 cases annually[34]—the 2013 declassification nevertheless constituted a notable countertrend. In all, the General Assembly downgraded 21 crimes in 2013. Still, even after accounting for these downgrades, 69 percent more crimes were upgraded, rather than downgraded, in severity over the last six years.[35]

Charging patterns. Although the North Carolina General Assembly has been creating new crimes at a steady rate in recent years, the vast majority of new crimes created have not resulted in new prosecutions. Of the new crimes created in 2009 and 2010, for example, only 10 of the 44 crimes—that applied statewide and were tracked independently of other offenses—were subsequently charged more than once in 2012.[36] In fact, more than two-thirds of new crimes created in those years resulted in zero related criminal charges two to three years later (Figure 2).[37]

2. QUALITATIVE ASSESSMENT OF OVERCRIMINALIZATION IN NORTH CAROLINA

Old crimes. Even as the state legislature continues to create new crimes in North Carolina at a fairly rapid pace, it has made little effort to prune from the books existing crimes that seem antiquated, unutilized, or needlessly duplicative of broader crimes already in the

FIGURE 2. 2012 CHARGING RATE—NEW CRIMES CREATED, 2009-10



Source: Jeff Welty

criminal code. Criminal offenses still in the North Carolina statutes include:

- Prohibiting railroad executives from failing to provide accurate accounting, or financial records, to those elected or appointed to succeed them
- Prohibiting the temporary taking of horses or mules
- Prohibiting the larceny of ginseng[38]

In addition, the state legislature has left on the books various "morals" offenses declared unconstitutional by the U.S. Supreme Court, including prohibitions on cohabitation or public-accommodation room sharing by opposite-sex, unmarried adults.[39]

New crimes. Many of the new crimes added to the books in recent years are similarly duplicative or unnecessary—a casual review of new crimes created in 2009 and 2010 makes obvious why so many of these were not subsequently prosecuted. Among the uncharged *new* crimes in 2012 were:

- Stealing or vandalizing a portable toilet
- Improperly maintaining records regarding the disposal of sewage from boats
- Performing sleep studies without a proper license[40]

The "Port-a-Potty protection" law, while undoubtedly involving conduct that would generally be understood as criminal, seems needlessly duplicative of existing crimes prohibiting larceny and destruction of property (much like old crimes on the books creating separate crimes for stealing ginseng, or taking mules). Although boat-sewage disposal is an appropriate matter for state regulation, whether record-keeping violations in this area should be added to the criminal code is, at the very least, questionable (and, indeed, doubtful in the case of unlicensed sleep studies).

Criminal intent. For the boat-sewage record-keeping crime and the sleep-study without-a-license crime, individuals could be held criminally responsible for violating rules unknowingly, without any understanding that they were violating the law in the first place. In contrast to the boat-sewage record-keeping offense, a 2012 statute creating a misdemeanor offense for inadequate record-keeping, by retailers selling Sudafed and other medications that can be converted into illicit drugs,[41] requires prosecutors to prove that the retailer *willfully and*

knowingly violated the record-keeping requirement.[42] Meanwhile, a review of new crimes created by the North Carolina legislature since 2008 shows that various new crimes have alternately required no criminal intent, or required a hodgepodge of mental states on the part of the accused, including that he acted "willfully," "knowingly," "willfully and knowingly," or for some "purpose."[43] There is little indication that this patchwork of mental states required for various crimes is the product of considered deliberation; rather, it is likely a product of ad hoc decision making by different drafters, with varying priorities.

Regulatory crimes. Although many of the new crimes on the books enacted by statute are regulatory in nature, a substantial number of crimes are created with no act of the legislature whatsoever. As previously mentioned, various statutory provisions contain various "catchall" provisions that vest in administrative state and local agencies the effective authority to criminalize conduct through their own promulgation of regulations.[44] An individual who violates any provision of North Carolina's public health code, or "the *rules* adopted by the Commission or a local board of health" is guilty of a misdemeanor.[45] The state's agriculture and environmental codes are riddled with catchalls not only criminalizing the violation of any legislative provision within the various articles, but also violations of *any of the rules* promulgated by various boards, agency commissioners, and secretaries.[46] State laws creating licensing boards in medicine, dentistry, and nutrition also contain catchalls making misdemeanors the violation of any of the rules promulgated by these unelected boards.[47] Additionally, in North Carolina, most local ordinance violations are misdemeanors.[48] None of these catchall provisions—granting to state agencies, local officials, and licensing boards the effective authority to create new criminal offenses—contains any criminal-intent standard, notwithstanding the fact that much of the conduct prohibited under this regulatory conduct is unlikely to be intuitively criminal.

3. DISCUSSION AND POLICY RECOMMENDATIONS

It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.
—James Madison, The Federalist, No. 62

For all the aforementioned reasons, it is certain that many North Carolinians unknowingly commit crimes every day. Underlying the argument against overcriminalization is the fact that modern criminal codes, such as North Carolina's, have expanded so exponentially in recent decades that an ordinary person can no longer be assumed to know whether certain conduct is legal—unless advised by the armies of lawyers so common in modern large corporations.[49] Even though each new crime tends to be enacted with the best of intentions (usually in response to safety concerns or perceived regulatory needs expressed by legislators' constituents), there is rarely careful consideration given as to how a new crime would fit into the current criminal-law framework, how—or whether—it would be prosecuted, and what the risks the new offense would pose to innocent individuals. Therefore, many of the crimes passed, under the impetus of the necessity to prevent harmful conduct, are rarely, if ever, actually prosecuted.[50] Consequently, unnecessary laws pile up (old crimes are rarely pruned from the books), thereby eroding the integrity and logical cohesion of the criminal-justice system, as laws on the books go unused and unenforced.[51]

At the heart of the Anglo-American criminal-justice system is the principle that an individual charged with a crime should be provided with fair and adequate notice of the conduct deemed criminal.[52] A corollary principle, that ignorance of the law is not a legitimate excuse,[53] traces to a time when virtually all criminal laws were tied to the "moral code"[54]—including inherently evil crimes like murder, assault, or robbery—for which the risk of being unknowingly ensnared by the criminal law was exceedingly low. In addition, as a

general rule, innocent individuals were historically protected by intent requirements: traditional common law required that a crime *involve* not only a prohibited act but also the *intent* to commit that criminal act (*actus rea* and *mens rea*, respectively).[55] In short, the requirement that a criminal act be knowingly committed, not accidental, prevents the innocent from being unjustly targeted by criminal law.

To be sure, 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.[56] In fact, legislators often rely heavily on the judgment of prosecutors, thereby passing overly broad criminal statutes confident that no injustice will result. Although prosecutors tend to be well-intentioned public servants faithfully executing their duties, reliance on prosecutors as an exclusive backstop to protect the innocent creates, at a minimum, the serious risk of wide variance in treatment across jurisdictions. And—to the extent that law-enforcement officials and prosecutors pay attention to the plethora of regulatory crimes in states with criminal codes like North Carolina's—the enforcement of such crimes diverts scarce resources from the enforcement of serious violent and property crimes with real victims.

Moreover, assuming that prosecutorial discretion is a reliable check on sweeping, incoherent criminal laws is a perilous proposition—especially when considering the potential deprivation of individual liberty, disruption of life, and marring of reputation that criminal prosecution can entail. At the federal level, for instance, prosecutorial discretion did not prevent absurd convictions, such as the fisherman convicted of violating a post-Enron, anti-document-shredding statute for destroying three fish;[57] the Florida seafood importer sentenced to an eight-year prison sentence for transporting lobsters in plastic bags, rather than in cardboard boxes (as required by Honduran regulations);[58] or the engineer who pleaded guilty for diverting a backed-up sewage system into an outside storm drain to prevent flooding at a retirement home.[59]

North Carolinians have themselves been ensnared by their state's labyrinthine criminal-law regime. Take resident Steve Cooksey, who, after battling life-threatening diabetes, started an Internet blog in which he shared his experiences, described how a new diet helped him overcome his serious condition, and answered questions posed by blog readers.[60] Unknowingly, Cooksey ran afoul of the North Carolina Board of Dietetics and Nutrition,[61] which asserted that Cooksey's blog constituted an unlicensed practice of dietetics and, as such, was a misdemeanor under the catchall provision criminalizing any violation of dietetics or nutrition provisions in the general statutes.[62] What's more, according to the board, the crime also extended to ordinary advice exchanged in private e-mails and telephone calls between Cooksey's friends and readers.[63]

In another case of ordinary citizens running afoul of unelected licensing boards deputized by the legislature to create crimes, the North Carolina State Board of Dental Examiners sent "cease-and-desist" letters (with an implicit threat of criminal action) to teeth-whitening providers and landlords who rented them kiosk space in malls[64]—arguing that such services constituted the unlicensed practice of dentistry.[65] After the board's actions caused manufacturers and distributors of teeth-whitening products to flee the state,[66] the Federal Trade Commission filed suit, in a case currently before the U.S. Supreme Court.[67]

Possible Action Steps

In the last two legislative sessions, North Carolina's General Assembly has shown a renewed awareness of the potential overreach of criminal law, modifying sentencing practices and declassifying certain low-level misdemeanors. Although there is no simple solution to overcriminalization, three additional action steps would constitute progress in the right direction:

1. ***Create a Bipartisan Legislative Task Force.*** At the federal level, the U.S. House of Representatives formed a task force last year to focus on overcriminalization, with 10 members evenly split between Democrats and Republicans (including

North Carolina congressman George Holding).[68] In North Carolina, the recently enacted Justice Reinvestment Act was created through the efforts of a similar "Justice Reinvestment Working Group," which consisted of representatives from both chambers of the General Assembly, the governor's office, and various administrative and judicial offices.[69] A similar task force or working group looking at overcriminalization in North Carolina could conduct hearings on issues such as criminal-intent requirements, criminalization of administrative rules, and the scope and size of criminal law in the state.[70] In addition, the task force could set guiding principles for other lawmakers when creating new criminal offenses, with an emphasis on organizing and clarifying criminal laws for state residents. Guidelines for legislative drafters, suggested by a diverse array of policy groups to the congressional task force, include the following questions:[71]

- Should the conduct in question be a crime, or are there adequate civil, administrative, or other alternatives?
- Is a *new* criminal law absolutely necessary to discourage this conduct?
- If so, what should the criminal-intent requirement be?
- What is the appropriate punishment?

2. *Create a Commission to Review the Criminal Law.* Following or concurrent with the establishment of the legislative task force, the General Assembly could create an independent commission charged with consolidating, clarifying, and optimizing North Carolina's criminal statutes.[72] The commission's first task should be an accurate accounting of all the criminal offenses on the books in the state. Within that body of law, the commission should identify and recommend for repeal all the unnecessary and overbroad laws[73]—including outmoded laws, unutilized laws, and crimes needlessly duplicative of other offenses (such as specific crimes dealing with the vandalizing of portable toilets[74] or the stealing of ginseng).[75] Additionally, the commission could evaluate whether penalties are proportionate to the crimes (e.g., whether the penalty for providing tobacco products to an inmate[76] should be more severe than that for assault).[77] Finally, the commission should evaluate the propriety of catchall provisions criminalizing the violation of occupational licensing and administrative rules.[78]

The creation of such a body is not unprecedented and has, in fact, been utilized by nearby states.[79] In 2013, Tennessee created a commission to review statutes and make recommendations for repeal each year.[80] Last year, Virginia removed 14 offenses pursuant to the recommendation of its commission.[81] In Kansas, an "Office of the Repealer" (created in 2011 by the governor)[82] has already recommended 51 statutes and regulations for repeal.[83]

3. *Enact a Default* Mens Rea *Provision.* The Model Penal Code,[84] drafted by the American Law Institute (an independent group of lawyers, judges, and academics) to "assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment,"[85] contains a default *mens rea* culpability requirement when a criminal statute is silent as to culpability.[86] Although such a provision would not prevent the legislature from exercising its judgment to create crimes even in the absence of intent, the legislature would have to make that judgment clear in express language. Today, 14 states, including Tennessee, already have a default *mens rea* provision that parallels that of the Model Penal Code.[87]

Yet North Carolina lacks a default *mens rea* safeguard,[88] even though its penal code alone has six times as many sections as the Model Penal Code.[89] Still, the last six years of legislation indicate that North Carolina lawmakers generally favor including *mens rea* protections in newly promulgated criminal statutes[90] (including in a 2013 statute that, through a catchall provision, criminalized rules prohibiting various uses of, and transactions involving, precious metals).[91] But across a broad array of criminal statutes—especially among other catchall criminal statutes vesting the authority to create regulatory crimes with regula-

tory agencies, local bodies, and unelected licensing boards—criminal-intent requirements remain the exception, rather than the rule. The lack of a systematic and uniform framework in the promulgation of new laws means that the requisite mental culpability for committing crimes is often unclear and that, absent a default *mens rea* provision, individuals must assume that they are strictly liable for crimes that they unknowingly commit.

CONCLUSION

These three suggested reforms would properly empower the legislature in more wisely overseeing the creation of criminal law, generate sufficiently more coherence in criminal statutes, focus scarce criminal-enforcement resources on violent and property crimes (leaving regulatory offenses more broadly to civil enforcement), and reduce the chance that individuals—absent a clear decision by legislators that the public order requires a strict-liability crime—could be prosecuted for crimes that they unknowingly commit.

Additional ideas that might follow, depending on the findings of the task force and commission, could include: adopting, by statute, the rule of lenity (clarifying to courts that defendants should be given the benefit of the doubt when statutory language is ambiguous); eliminating certain offenses, converting them to civil infractions, or eliminating potential jail time for the offenses; or requiring that new offenses and sentencing enhancements be indicated as such in the caption of the bill—and be approved by both the subject matter committee and the committee with jurisdiction over the criminal justice system. Although the precise structure of such reforms are best left to policy makers closest to the needs of the state, the evidence strongly suggests that North Carolina would be well-advised to take sensible steps to reform its approach to criminal law.

ENDNOTES

[1] *See* State v. Pruner, 735 SE.2d 451 (N.C. Ct. App. 2012), *available at* http://statecasefiles.justia.com/documents/north-carolina/court-of-appeals/12-514.pdf?ts=1370457656; *see also* N.C. Gen. Stat. § 130A–248(b) (2011).

[2] *See* Institute for Justice, *Caveman Blogger Fights for Free Speech and Internet Freedom*, Litigation Backgrounder, *available at* https://www.ij.org/north-carolina-speech-backgrounder; *see also* Cooksey v. Futrell, 721 F.3d 226 (4th Cir. 2013) (holding that North Carolina's interpretation of the dietary laws runs afoul of the First Amendment), *available at* http://www.ca4.uscourts.gov/opinions/Published/122084.p.pdf.

[3] *See* Sasha Volokh, *How a State Dentistry Board Hounded Non-Dentist Teeth Whiteners Out of North Carolina*, Wash. Post (Jan. 28, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/28/how-a-state-dentistry-board-hounded-non-dentist-teeth-whiteners-out-of-north-carolina; *see also* N. Carolina State Bd. of Dental Examiners v F.T.C., 717 F.3d 359 (4th Cir. 2013) (holding that the state scheme bringing the provision of teeth whitening products under the domain of the North Carolina Board of Dentistry was subject to federal antitrust laws). However, that decision is now up for review at the United States Supreme Court, *see North Carolina State Board of Dental Examiners v. FTC*, No. 13-534, *available at* http://www.scotusblog.com/case-files/cases/north-carolina-board-of-dental-examiners-v-federal-trade-commission/.

[4] *See* N.C. Gen. Stat. § 130A-25; § 106-50.41; § 106-65.48; § 113A-42; 113-187.

[5] *See* Jeff Welty, *Overcriminalization in North Carolina*, N.C. L. REV. (forthcoming fall 2014); *see e.g.*, South Carolina Code of Laws, Title 16, Crimes and Offenses, *available at* http://www.scstatehouse.gov/code/title16.php.

[6] In a forthcoming article, Professor Jeff Welty of the School of Government at the University of North Carolina at Chapel Hill assesses in some detail the growth of criminal law in North Carolina, to which this issue brief is deeply indebted. *See* Welty, *supra* note 5.

[7] *See, e.g.*, *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong. (2010).

[8] *See, e.g.*, Alex Kozinski and Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* In the Name of Justice 43–56 (Timothy Lynch, ed., 2009).

[9] *See, e.g.*, Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Civ. Justice Rpt. 12 (Manh. Inst. For Pol'y Res. 2009), *available at* http://www.manhattan-institute.org/html/cjr_12.htm; James R. Copland, *Regulation by Prosecution: The Problem with Treating Corporations as Criminals*, Civ. Justice Rpt. 13 (Manh. Inst. For Pol'y Res. 2010), *available at* http://www.manhattan-institute.org/html/cjr_13.htm; Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2005).

[10] Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 537 (2012).

[11] *See* Kozinski and Tseytlin, *supra* note 8.

[12] *See* Welty, *supra* note 5.

[13] *Cf*. National Center for State Courts, *Criminal Caseloads Continue to Decline*, Court Statistics Project, http://www.courtstatistics.org/Criminal/20121Criminal.aspx (showing 20 million state criminal cases annually) with *United States Department of Justice*, United States Attorneys' Annual Statistical Report 6, 12 (2012), http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (showing 140,000 federal cases annually).

[14] *See* Welty, *supra* note 5 (citing Darryl K. *Brown, Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 239 (2007)).

[15] *Id*.

[16] *See id*. ("North Carolina's criminal law, then, may be expanding more slowly than the federal criminal law, but the difference is one of degree rather than kind. In fact, one could argue that the state's 170 part-time legislators are keeping up remarkably effectively with the 535 full-time, heavily staffed, members of Congress.").

[17] *Id*.

[18] *See id*., at Appendix II.

[19] *Id*.

[20] *Id*; *see* N.C. Gen. Stat. § 130A-25; § 106-50.41; § 106-65.48; § 113A-42; § 113-187.

[21] *See e.g.*, N.C. Gen. Stat. § 90.41(c); § 90-40; § 90-356(5), § 90-366.

[22] *See* N.C. Gen. Stat. § 14-4(a).

[23] Welty, *supra* note 5, at n. 15 ("The Administrative Office of the Courts tracks over 1,150 different criminal offenses, but because the AOC's system is built to track actual cases, offenses that are never charged may not be tracked.").

[24] *Id*.; South Carolina Code of Laws, Title 16, Crimes and Offenses, *available at* http://www.scstatehouse.gov/code/title16.php.

[25] Welty, *supra* note 5.

[26] *Id*.

[27] Welty, *supra* note 5, at n.12 ("Appendix I lists the new crimes created in the legislative sessions between 2008 and 2013. During that time, 91 new crimes were enacted in Chapter 14, while 112 crimes were enacted in other Chapters of the General Statues.")

[28] *See* Jamie Markham, *The Justice Reinvestment Act: An Overview*, N.C. Crim. L. Blog (June 30, 2011), http://nccriminallaw.sog.unc.edu/?p=2628.

[29] *See* The Urban Institute, *The Justice Reinvestment Initiative: Experiences From the States* (2013), *available at* http://www.urban.org/UploadedPDF/412879-the-justice-reinvestment-initiative.pdf; Markham, *The North Carolina Justice Reinvestment Act* (University of North Carolina School of Government, 2012), *available at* http://sogpubs.unc.edu//electronicversions/pdfs/jratoc.pdf?.

[30] Ch. 538, 1993 N.C. Sess. Laws 2298, 2298 (codified at N.C. Gen. Stat. §§15A-1340.10 to 1340.33 (2007).

[31] Welty, *Misdemeanor Reclassification, the Right to Counsel, and the Budget*, N.C. Crim. L. Blog (July 23, 2013), http://nccriminallaw.sog.unc.edu/?p=4368.

[32] *Id*.

[33] *Id*.

[34] Welty, *supra* note 5 (citing Report of the Courts Commission to the North Carolina General Assembly 13 (1985)).

[35] *Id*. ("This is so even though the study period includes what could be described as a historical anomaly with respect to the frequency of downgrades.").

[36] *Id*. at n.41 ("It excludes five misdemeanors created in 2009 by local act, applicable only to certain counties, as the Administrative Office of the Courts does not track such offenses.).

[37] *Id*.

[38] N.C. Gen. Stat. § 14-253; § 14-82; § 14-79.

[39] Welty, *supra* note 5 (citing N.C. Gen. Stat. § 14-186).

[40] N.C. Gen. Stat. § 14-86.2; § 77-128; § 90-677.3.

[41] N.C. Gen. Stat. § 90-113.52A.

[42] *Id*.

[43] *See eg, id.*; *see also* Welty, *supra* note 5, at Appendix I.

[44] *See* Copland, *What's Wrong-And Right- With New York Criminal Law,* in One Nation Under Arrest 173 (Paul Rosenzweig & Brian W. Walsh eds., 2010).

[45] N.C. Gen. Stat. § 130A-25.

[46] *See e.g.*, N.C. Gen. Stat. § 106-50.41, § 106-65.48, § 113A-42, § 113-187.

[47] *See e.g.*, N.C. Gen. Stat. § 90.41(c); § 90-40; § 90-356(5), § 90-366.

[48] *See* N.C. Gen. Stat. § 14-4(a).

[49] *See e.g.*, *id*.

[50] *See* Welty, *supra* note 5. Examining the frequency with which crimes created during the 2009 and 2010 legislative sessions were charged in 2012, Welty found, "two-thirds of the newly-minted crimes were not charged even a single time, and 75% of the crimes were charged zero or one times across the state in 2012. This strongly suggests that many unnecessary criminal laws are being enacted each year.

[51] *See* John S. Baker Jr., *Mens Rea and State Crimes* 10 (Federalist Soc'y 2012), *available at* http://www.fed-soc.org/publications/detail/mens-rea-and-state-crimes.

[52] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. Rev. 335 (2005).

[53] *See* Edwin Meese III and Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2012) [hereinafter Meese & Larkin].

[54] *See id.* (citing Oliver Wendell Holmes, Jr., The Common Law 45–46, 125 (Belknap, 2009) (1881) ("[T]he fact that crimes are also generally sins is one of the practical justifications for requiring a man to know the criminal law"); WAYNE R. LAFAVE, CRIMINAL LAW §5.6, §1.3(f) (5th ed., 2010); Livingston Hall & Selig J. Seligman, Mistake of Law and Mens Rea, 8 U.CHI.L.REV. 641, 644 (1940) ("[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom' ")).

[55] William Blackstone, 4 Commentaries, at 432 (9th ed., Callahan, 1913).

[56] *See* Welty, *supra* note 5.

[57] *See* Yates v. United States, U.S. Sup. Ct., No. 13-7451, decision below 733 F.3d 1059 (11th Cir. 2013).

[58] *See* Michael Johnson, *Congress reviewing "overcriminalization,"* Wash. Examiner (Oct. 4, 2010), *available at* http://www.examiner.com/article/congress-reviewing-overcriminalization.

[59] *See* Gary Fields and John R. Emshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, Wall St. J. (Dec. 21, 2011), *available at* http://online.wsj.com/news/articles/SB10001424052970204903804577082770135339442.

[60] Adam Liptak, *Blogger Giving Advice Resists State's: Get a License*, N.Y. Times (Aug. 6, 2012), *available at* http://www.nytimes.com/2012/08/07/us/nutrition-blogger-fights-north-carolina-licensing-rebuke.html?_r=0.

[61] *Id*.

[62] Institute for Justice, *supra* note 2; N.C. Gen. Stat. § 90-366.

[63] Institute for Justice, *supra* note 2.

[64] Jonathan L. Lewis and Lee H. Simowitz, *FTC: dentists not shielded from teeth-whitening competition*, Baker & Hostetler LLP (June 13, 2013), *available at* http://www.lexology.com/library/detail.aspx?g=fcf51ded-3caf-43fb-9753-e71d0daa13fe.

[65] *Id*.; N.C. Gen. Stat. § 90.40.

[66] Lewis & Simowitz, *supra* note 64; Volokh, *supra* note 3.

[67] Debra Cassens Weiss, *SCOTUS accepts teeth-whitening case; could decision impair state bars' ability to regulate lawyers?*, ABA J. (Mar. 3, 2014), *available at* http://www.abajournal.com/news/article/scotus_accepts_teeth-whitening_case_could_case_impair_state_bars_ability_to/.

[68] *See* Press Release, United States House of Representatives Judiciary Committee, House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014), *available at* http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee-reauthorizes-bipartisan-over-criminalization-task-force; *see also* H.R. Res., Over-Criminalization Task Force Resolution of 2014, *available at* http://judiciary.house.gov/_cache/files/337718ed-ed2f-4b33-a926-33a6bc7ccd32/over-crim-task-force-resolution.pdf.

[69] *See* The Urban Institute, *Justice Reinvestment Initiative State Assessment Report* (2014), *available at* http://www.urban.org/UploadedPDF/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf; Markham, *supra* note 29.

[70] *See*, *generally*, National Association of Criminal Defense Lawyers, Criminal Defense Issues, https://www.nacdl.org/overcrimtaskforce/ (last visited Apr. 29, 2014).

[71] The Heritage Foundation, Criminal Law Checklist for Federal Legislators, http://www.heritage.org/criminallawchecklist%E2%80%8E (last visited Apr. 29, 2014).

[72] *See* Welty, *supra* note 5.

[73] *See id*.; *see also* Vikrant Reddy & Marc A. Levin, *12 Steps for Overcoming Overcriminalization*, Pol'y Perspective, (Texas Public Pol'y Found. 2012), *available at* http://www.rightoncrime.com/wp-content/uploads/2012/05/12-Steps-for-Overcoming-Overcriminalization.pdf.

[74] N.C. Gen. Stat. § 14-86.2.

[75] N.C. Gen. Stat. § 14-79.

[76] N.C. Gen. Stat. § 14-258.1 ("Any person who knowingly gives or sells any tobacco product, as defined in N.C. GEN. STAT. § 148-23.1, to an inmate in the custody of the Division of Adult Correction of the Department of Public Safety and on the premises of a correctional facility or to an inmate in the custody of a local confinement facility, or any person who knowingly gives or sells any tobacco product to a person who is not an inmate for delivery to an inmate in the custody of the Division of Adult Correction of the Department of Public Safety and on the premises of a correctional facility or to an inmate in the custody of a local confinement facility, other than for authorized religious purposes, is guilty of a Class 1 misdemeanor").

[77] N.C. Gen. Stat. § 14-33(a) ("Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor").

[78] *See* Reddy & Levin, *supra* note 73, at 1.

[79] *See* Welty, *supra* note 5.

[80] *Id*. (citing Tennessee General Assembly website for the Officer of Repealer, Tennessee General Assembly, http://www.capitol.tn.gov/joint/staff/legal/repealer.html (last visited Feb. 6, 2014)).

[81] *Id*. (citing Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 239 (2007) (noting the frequent use of the ratchet metaphor)).

[82] *Id*. (citing Kansas Department of Administration website for the Office of the Repealer, Kansas Department of Administration, https://admin.ks.gov/offices/repealer (last visited Feb. 6, 2014)).

[83] *Id*. (citing Tim Carpenter, *State 'Repealer' Lists 51 Objections*, Topeka Capital Journal, Jan. 20, 2012, http://cjonline.com/news/2012-01-20/state-repealer-lists-51-objections.).

[84] Model Penal Code (1962); *see* Baker, *supra* note 51, at 16.

[85] *See* Welty, *supra* note 5 (citing Statement of the purpose of the Model Penal Code on the ALI Publications Catalog website, The American Law Institute, https://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=92, (last visited Jan. 31, 2014)).

[86] *See* Baker, *supra* note 51, at 16.

[87] *Id*.

[88] *See* Baker, *supra* note 51, at Appendix 2.

[89] *See* Welty, *supra* note 5.

[90] *See* Welty, *supra* note 5, at Appendix I.

[91] N.C. Gen. Stat. § 66-424(a).