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NORTH CAROLINA OVERCRIMINALIZATION UPDATE 2017



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What Is Overcriminalization?

This term describes the rapid growth in the number of criminally enforceable rules and regulations. Overcriminalization has drawn increasing scrutiny by politicians,¹ judges,² scholars,³ and policy analysts.⁴ Critics have often focused on how modern regulatory crimes govern putatively innocent conduct but can ensnare those who have little reason to know that they are breaking the law. Critics have also looked at how regulations with criminal penalties are often promulgated by unelected, politically unaccountable administrative agencies and other bodies to which legislatures have delegated powers to create new crimes.

Introduction

In May 2014, the Manhattan Institute published an issue brief, *Overcriminalizing the Old North State: A Primer and Possible Reforms for North Carolina*.⁵ It showed that North Carolina had a criminal code that contained 765 sections—more than six times as many as in the Model Penal Code.⁶ That paper found that North Carolina lawmakers created 204 new crimes during 2009–14, of which 55% fell *outside* the state’s criminal code. Many of these new crimes, about half of which were felonies, did not explicitly require the state to make a showing of criminal intent (*mens rea*) on the part of the accused.

The report also identified a number of old, duplicative, or outmoded criminal statutes that the authors suggested were (and remain) ripe for repeal. In addition to suggesting the repeal of such laws, the authors outlined other reforms that lawmakers in North Carolina should consider adopting, including creating a bipartisan task force or commission to review and revise the criminal laws and enacting a default criminal-intent standard that would protect citizens who unknowingly violate criminally enforceable statutes or regulations governing conduct that is not intuitively wrong. This update looks briefly at the actions of North Carolina’s 2015–16 legislative session—including both newly enacted crimes and concurrent developments in the state’s criminal law.

New Crimes Created in 2015–16

In the 2015–16 legislative session, the North Carolina General Assembly created 114 new criminal offenses: 31 in 2015 and 83 in 2016 (see **Figure below**). These offenses were contained in 12 statutes enacted in 2015 and 11 enacted in 2016; 32 offenses were in a single 2016 banking act,⁷ and another 27 were in a single 2016 agriculture act.⁸ Among the newly created offenses, 22% were felonies and 78% fell outside North Carolina’s criminal code.

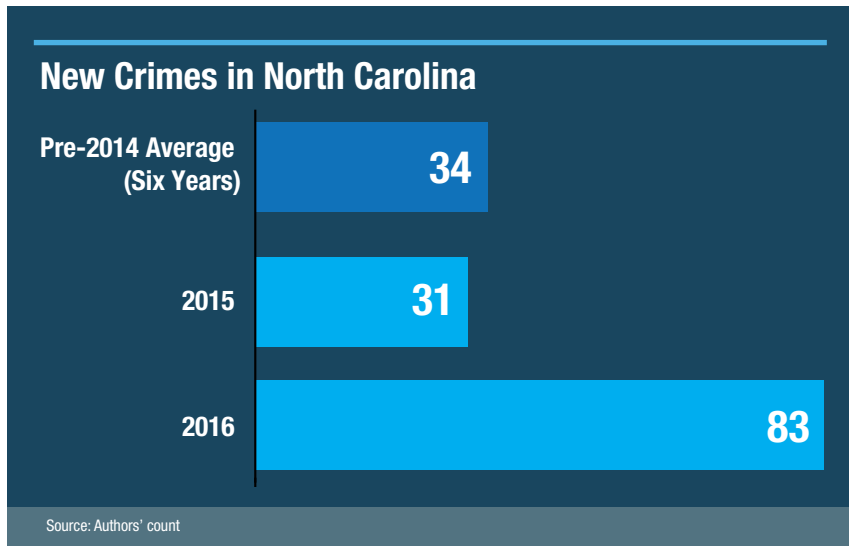
Unfortunately, many of the new crimes enacted in 2015 and 2016 concern ordinary business activity. Among new

criminal offenses in the state are those governing the manufacture and sale of bedding,⁹ as well as the transmission of money.¹⁰

In addition, many of the new laws enacted in 2015 and 2016, in keeping with trends documented in our earlier report,¹¹ grant unelected administrative authorities the effective power to add new crimes to the state’s books. The 2016 act governing the manufacture and sale of bedding criminalized not only the provisions of that legislation but also “the rules, regulations, or standards promulgated” under it by the state’s Commissioner of Agriculture.¹² The 2016 statute governing the conduct of those licensed to engage in the business of money transmission criminalized the violation of the *federal* Bank

Secrecy Act,¹³ the *federal* Electronic Funds Transfer Act,¹⁴ and the violation of all “applicable State and federal laws and regulations related to the business of money transmission.”¹⁵

Though many of the crimes created during the 2015–16 session do require the government to prove meaningful levels of criminal intent,¹⁶ others do not, including a 2015 statute criminalizing the sale of containers for the liquids used in e-cigarettes that do not meet certain child-resistant packaging specifications.¹⁷



2017–18 Reform Prospects

The Manhattan Institute’s 2014 report recommended the creation of “a commission to review the criminal law, one charged with consolidating, clarifying, and optimizing North Carolina’s criminal statutes.”¹⁸ This recommendation now appears to have legislative momentum: lawmakers led by Representative Dennis Riddell (R., Alamance) have drafted legislative language—included in several bills currently under consideration—that would create a “Criminal Code Recodification Commission.”¹⁹ As currently drafted, this legislation would charge the commission with eliminating “unnecessary, inconsistent, or unlawful provisions in the code” and placing

limits on “the ability of administrative boards, agencies, local governments, or other entities to create crimes.”²⁰ The draft legislation also specifically mentions the absence of criminal-intent requirements in many North Carolina criminal statutes, though the legislation would not itself adopt a default *mens rea* requirement in state law. The North Carolina General Assembly reconvenes for a special session on August 3, 2017, and is scheduled to go into session again in September. Ideally, the legislation could be enacted this summer or fall to jump-start the commission’s efforts; if not, one hopes that the legislature will take it up when it reconvenes in January 2018.

Recommendations

The current state of the criminal law in the Old North State is not good. Crimes are scattered throughout state statutes—not to mention in volumes of state, and even federal, regulations. The current criminal laws are almost impossible for the average individual or small business to navigate, a defect that affects both liberty and legal compliance. Enacting legislation to create a Criminal Code Recodification Commission would set North Carolina on a path that should make the criminal law easier to understand for all citizens, particularly owners of small businesses, farms, and nonprofit enterprises.

Lawmakers should also consider passing legislation that would establish a default criminal-intent (*mens rea*) standard in North Carolina, in keeping with similar laws that have been enacted in 15 other states. Such a standard would require the state to prove that a criminal defendant knew or had reason to know that his actions were against the law when enforcing statutes or regulations that are silent as to criminal intent. A default provision would not bar the legislature from creating a strict-liability offense, but it would require lawmakers to do so explicitly in the operative statute.

Endnotes*

- ¹ See, e.g., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2010).
- ² See, e.g., Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, IN THE NAME OF JUSTICE 43–56 (Timothy Lynch, ed., 2009).
- ³ Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 (2012).
- ⁴ 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); James R. Copland, *Regulation by Prosecution: The Problem with Treating Corporations as Criminals*, Civ. Justice Rpt. 13 (Manh. Inst. for Pol'y Res., 2010); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2005).
- ⁵ James R. Copland & Isaac Gorodetski, *Overcriminalizing the Old North State: A Primer and Possible Reforms for North Carolina*, Issue Brief 28, May 6, 2014.
- ⁶ Model Penal Code (1962).
- ⁷ Session Law 2016-81, House Bill 289.
- ⁸ Session Law 2016-113, Senate Bill 770.
- ⁹ See *id.*
- ¹⁰ See Session Law 2016-81, *supra* note 7.
- ¹¹ See Copland & Gorodetski, *supra* note 5.
- ¹² See Session Law 2016-113, *supra* note 8.
- ¹³ See Session Law 2016-81, *supra* note 7 at § 53-208.51(4) (criminalized via § 53-208.58).
- ¹⁴ *Id.* at § 53-208.51(5) (criminalized via § 53-208.58).
- ¹⁵ *Id.* at § 53-208.51(7) (criminalized via § 53-208.58).
- ¹⁶ See, e.g., Session Law 2016-78, House Bill 287 at § 58-2-164(b1) (criminalizing a “knowing” violation with the “intent to deceive an insurer”).
- ¹⁷ See Session Law 2015-141, Senate Bill 286 at § 14-401.18A(b)-(c).
- ¹⁸ See Copland & Gorodetski, *supra* note 5.
- ¹⁹ Draft language on file with authors; available upon request.
- ²⁰ *Id.*

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