

RECOGNIZING AND REMEDIATING OVERCRIMINALIZATION IN NORTH CAROLINA: SOLUTIONS FOR A MODERN CRIMINAL CODE

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Not one of us is perfect—on that matter we can all certainly agree. But how many of us are criminals? More than you might think. How many of us are guilty of keeping a disorderly house,¹ permitting dogs to run at night,² or using profane language over the telephone?³ We, fair citizens, are criminals according to the laws of North Carolina.

While these examples exist more in absurd hypotheticals rather than practical application, the complexity and illogicity of the North Carolina criminal code is not limited to these offenses. The state’s criminal code has grown to contain numerous offenses that are duplicative, contradictory, or that criminalize social conduct that is neither uncommon nor socially objectionable. Worse yet, the complete criminal code remains inaccessible to the common citizen as its corpus includes regulatory, local ordinance, and uncodified common law crimes, all of which reside outside of the General Statutes. Sadly, North Carolina has become overcriminalized.

“Overcriminalization” is a general term that scholars have adopted to encompass several concepts including: (1) whether too much conduct has been made criminal; and (2) whether the criminal code is too voluminous to be understood and followed.⁴ A recent estimate places the number of criminal offenses codified within the General Statutes at just over 1,600, with about half of those offenses appearing in Chapter 14, (aptly entitled “Criminal Law”).⁵ Over fifty

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1. N.C. GEN. STAT. § 14-188 (2021).

2. N.C. GEN. STAT. § 67-12 (2021).

3. N.C. GEN. STAT. § 14-196(a)(1) (2021).

4. Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1938 (2014); see also Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform-Legacy & Prospects*, 7 J.L. ECON. & POL’Y 597, 608 (2011) (noting the various interpretations of “overcriminalization,” including criminalizing “relatively trivial conduct” and redundancy); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals & Matress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749–50 (2005) (noting the multiple “forms” of overcriminalization, including laws that deal with “common and innocuous” conduct).

5. Mike Schietzelt, *Criminal Law Reform in North Carolina.*, JOHN LOCKE FOUND. 8 (Apr. 2020), <https://www.johnlocke.org/wp-content/uploads/2020/04/Criminal-Law.pdf>.

chapters contain at least one felony offense, while misdemeanors are spread over 142 separate chapters.⁶ Often, the same conduct is criminalized by multiple, and sometimes contradictory, offense provisions.⁷ As of 2014, North Carolina's criminal code was fifty-five percent and thirty-eight percent larger than the criminal codes of Virginia and South Carolina, respectively.⁸ This problem continues to grow. A study by Professor Jeff Welty of the UNC School of Government indicates that North Carolina created an average of over thirty-four new crimes annually (evenly split between felonies and misdemeanors) over a five-year period.⁹ Most tellingly, a recent study ranks North Carolina's criminal code as the forty-third most effective code in the United States.¹⁰

Overcriminalization not only imposes tangible costs on society¹¹ but is also destructive to the rule of law by delegitimizing the criminal law within public perception.¹² Some commentators have begun to view state legislatures as "offense factories" more focused on manufacturing volumes of offenses rather than crafting narrowly tailored statutory solutions.¹³ As one scholar ominously noted over twenty years ago, we are moving "ever closer to a world in which the law on the books makes everyone a felon."¹⁴

North Carolina's growing state of overcriminalization is more than a hypothetical concern and has not gone unnoticed in recent years. Scholars and advocacy groups alike have recognized the negative effects of a convoluted and disorganized criminal code.¹⁵ These negative effects have garnered bipartisan attention as the conservative-leaning John Locke Foundation and a criminal justice task force

6. Jessica Smith, *Criminal Code Recodification for North Carolina*, U.N.C. SCH. GOV'T 1 (Mar. 10, 2017), <https://www.sog.unc.edu/sites/default/files/articles/Criminal%20Code%20Recodification%20for%20North%20Carolina%203.10.2017.pdf>.

7. *Id.* at 2-3, 5 (providing the general crime of larceny as an example of an offense that overlaps with more specific offenses (e.g., larceny of motor fuel, larceny of pine needles, etc.)).

8. James R. Copland & Isaac Gorodetski, *Overcriminalizing the Old North State: A Primer and Possible Reforms for North Carolina*, MANHATTAN INST. FOR POL'Y RSCH. (May 6, 2014), https://media4.manhattan-institute.org/sites/default/files/ib_28.pdf.

9. Welty, *supra* note 4, at 1942.

10. Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 60 (2000).

11. See, e.g., *Daily Cost Per Inmate for the Fiscal Year Ended June 30, 2023*, N.C. DEP'T ADULT CORR., (2023) (noting that North Carolina taxpayers pay around \$30,000 per year for every person incarcerated by the Department of Adult Corrections); see also Welty, *supra* note 4, at 1963 (discussing how overcriminalization, often viewed as a criminal justice tool, places additional burdens on prosecutors by requiring them to stay up to date on the substance and nuance of frequent additions to the criminal code).

12. Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 265 (2003) (opining that citizens and public officials have become "remarkably complacent" about the deterioration in the rule of law).

13. Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 634 (2005).

14. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

15. See generally, Welty, *supra* note 4.

convened by liberal North Carolina Governor Roy Cooper have both called for similar criminal law reforms.¹⁶ As will be discussed, while some reforms have been enacted, comprehensive recodification of the criminal code has remained elusive.

The North Carolina criminal code has grown disorganized and overly burdensome over the decades, leaving our society in a state of overcriminalization. Part I of this Article will explore the purposes and goals of modern criminal codes, Part II will survey past efforts at state code revision, and Part III will conclude by proposing both short and long-term reforms. The author's intent is to detail solutions that will reform and preserve an effective and comprehensible criminal code rather than to conduct a complete audit of North Carolina criminal law.

I. PURPOSE OF CRIMINAL CODES

The most basic function of criminal law is to protect society from ourselves. As James Madison more eloquently explained: “[i]f all men were angels, no government would be necessary.”¹⁷ But as we all know, and as rocker Gregg Allman freely admitted, people are certainly no angels.¹⁸ Criminal codes seek to prevent crime in society through two methods: (1) they define and provide notice of conduct that is “deemed sufficiently injurious to the interests of the individual or community to warrant the protection of a criminal law,” and (2) they declare punishments for such conduct “geared primarily to the gravity of the offense.”¹⁹ Thus, an ideal criminal code would: (1) provide clear and obvious notice of what constitutes a criminal offense; and (2) state a punishment that is rational and proportionate to the seriousness of the offense.

A. Codes Provide Notice of Crimes

The concept of notice sets the rules of conduct for both living and remaining in society. Notice gives clear direction as to what is prohibited, permitted, or required without which “there is no basis on which to condemn an actor for a violation and little hope that the criminal law can gain future compliance.”²⁰ As Justice Oliver Wendell Holmes noted, criminal laws are to be “prophecies of what the courts will do in fact, and nothing more pretentious.”²¹ In an effort to rank state criminal codes, Professor Paul Robinson of the University of Pennsylvania and others devised several drafting rules to ensure that

16. Schietzelt, *supra* note 5; see also *Recodification*, CONSERVATIVES FOR CRIM. JUST. REFORM (last visited Sept. 29, 2024), <https://www.cjrncc.org/issues/recodification>; N.C. TASK FORCE FOR RACIAL EQUAL. IN CRIM. JUST., REP. 2020 at 1, 3 (2020).

17. THE FEDERALIST NO. 51 (James Madison).

18. GREGG ALLMAN, *I'm No Angel, on I'M NO ANGEL* (Epic Records 1987).

19. 1 JENS DAVID OHLIN, *WHARTON'S CRIMINAL LAW* §1:1 (16th ed. 2024).

20. Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 770 (1990).

21. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

criminal codes effectively communicate the law's commands to the public:

Offenses ought to be drafted in a way that makes the provisions understandable to a layperson. Thus, the rules of conduct should use common and plain words where possible and provide straightforward definitions for other words. The sentences comprising each provision should be as short and clear as is feasible.²²

Although these rules sound simple and appear rooted in common sense, applying them to a state code spread over 100 chapters of the General Statutes (all with their own definitions) is no easy task. In 1962, the American Law Institute published the Model Penal Code ("MPC") with the goal of increasing public understanding of criminal conduct by promulgating a section of general definitions that are applicable to all code offenses.²³ The drafters also intended to avoid the inevitable competing judicial interpretations that arise from ambiguous terminology, while striving to retain the lawmaking prerogative of the legislative branch.²⁴

In essence, the idea of notice is one of fundamental fairness. A criminal code must provide clear and understandable notice of criminal conduct if its laws are to be viewed as legitimate.²⁵ The idea of notice as a legitimating force is not new but was present at our nation's founding²⁶ and was a keystone of antiquity's early codes, such as the Roman Republic's Twelve Tables.²⁷ Indeed, the North Carolina Constitution recognizes that criminal laws must be available to the public otherwise "the whole social basis of republican government

22. Robinson, et al., *supra* note 10, at 10.

23. MODEL PENAL CODE § 1.13 (AM. L. INST. 2021).

24. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 332 (2007) (discussing the benefits of the MPC's "General Part").

25. See Dru Stevenson, *Toward A New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1558 (2005); see also Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 196 (1994):

Likewise, the existence of a detailed written description of the criminal law's prohibitions and adjudicatory rules gives the criminal justice system stability and legitimacy that it would not otherwise have. This is so even if the public never reads the description of prohibitions and even if judges and juries do not strictly follow the adjudicatory rules. The knowledge of the rules' existence, that they have been carefully crafted, and that they are authoritative, gives the public a sense of confidence and order, just as the existence of Robert's Rules gives the meeting participants a sense of confidence and order.

26. THE FEDERALIST NO. 62 (James Madison) ("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.")

27. See generally Michael Steinberg, *The Twelve Tables and Their Origins: An Eighteenth-Century Debate*, 43 J. HIST. IDEAS 379 (1982).

[is] jeopardized if the people [do] not know exactly what is prohibited.”²⁸

B. Codes Punish Unwanted Conduct

Criminal codes and the laws contained within would be dead letters if they only provided a list of prohibited conduct. An effective code must also provide punishments for unwanted and harmful conduct. There are four classical theories of punishment: (1) retribution, (2) deterrence, (3) rehabilitation, and (4) incapacitation.²⁹ Retribution finds its origin in simple human emotion as it represents lawful (and usually more orderly) revenge for a past wrong.³⁰ The remaining theories are best viewed through a classical utilitarian lens as they are focused on protecting society as a whole rather than punishing an individual offender.³¹ Although Western criminal law does not directly align with a specific religious or ethical code, offenses are often differentiated based on a moral schema and can be separated into *mala in se* and *mala prohibita* offenses.³² *Mala in se* offenses involve acts which are classified by the law as crimes precisely because they are condemned by traditional moral principles (e.g., murder, rape, theft, etc.).³³ *Mala prohibita* offenses are prohibited only because the government sees a need for regulation in a particular area (e.g., speeding, vehicle registration, etc.).³⁴ In most cases, *mala in se* offenses are punished more harshly because of the existence of moral depravity within the commission of the prohibited conduct.³⁵ Regardless of their objective or moral underpinning, offenses within a

28. JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 63 (2d ed. 2013).

29. See generally OHLIN, *supra* note 19.

30. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (“The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.”).

31. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (Oxford Univ. Clarendon Press rev. ed. 1879); See also *Ex parte U. S.*, 242 U.S. 27, 38 (1916):

Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies.

32. See OHLIN, *supra* note 19, at §1:6.

33. *Id.*

34. *Id.*

35. Susan Dimock, *The Malum Prohibitum—Malum in se Distinction and the Wrongfulness Constraint on Criminalization*, 55 DIALOGUE: CANADIAN PHIL. REV. 9, 10 (2016).

criminal code would have little effect unless they prescribe adequate punishments.³⁶

Criminal codes outline minimum standards that allow members of society to interact peacefully and remain in society. They are not guides to being upstanding or productive citizens. For a criminal code to be effective, it must provide clear notice of the prohibited conduct and an adequate punishment for engaging in such conduct. Criminal laws exist not for the good man, but for the bad man “who cares nothing for an ethical rule” but is more apt “to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”³⁷

II. BRIEF HISTORY OF THE NORTH CAROLINA CRIMINAL CODE AND ATTEMPTS AT REFORM

A. *Adoption of English Common Law*

At the close of the Revolutionary War, the newly created State of North Carolina was left without a legal system.³⁸ By acquiescing to the Treaty of Paris, King George III recognized the former colonies as “free sovereign and Independent States” thereby terminating the authority of both Parliament and of all judicial officials appointed by the Crown.³⁹ According to North Carolina Supreme Court Justice Samuel Ashe, the state was “thrown into a similar situation with a set of people shipwrecked and cast on a maroon’d [sic] island—without laws, without magistrates, without government, or any legal authority.”⁴⁰ Fortunately, the General Assembly had the foresight to enact legislation shortly after the nation declared independence providing that:

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.⁴¹

36. 18 U.S.C. § 3553(a)(2).

37. Holmes, *supra* note 21, at 459.

38. See Bayard v. Singleton, 1 N.C. 5, 6 (N.C. Super. 1787).

39. Treaty of Paris, Art. I (1783).

40. Bayard, 1 N.C. at 6.

41. N.C. GEN. STAT. § 4-1 (2021).

This statute remains in effect,⁴² and the term “common law” is understood to be the common law of England as of the signing of the Declaration of Independence.⁴³ The North Carolina criminal code has explicitly incorporated crimes that were felonies at common law, including larceny, robbery, and murder.⁴⁴

Leading into the mid-twentieth century, North Carolina’s criminal code, like those of most other states, remained in a state of dormancy.⁴⁵ State codes remained “more of a collection of ad hoc statutory enactments” than a clear, definitive, and systemic statement of the law.⁴⁶ North Carolina’s criminal code was no exception to this tradition of desuetude; it became abundantly clear that drastic reform was needed.

B. The North Carolina Criminal Code Commission

Shortly after the creation of a unified state court system in 1966, North Carolina Attorney General Robert Morgan appointed a special committee to make recommendations for improving the state’s criminal law and procedure statutes which were “hopelessly outdated” and “bore little resemblance to the actual practice of law.”⁴⁷ After its members were appointed in August 1969, the committee released its final report in July 1970.⁴⁸ The committee’s key recommendation was that the Attorney General appoint a “blue ribbon Commission” to undertake a holistic review of the state’s substantive criminal and procedural statutes.⁴⁹ The committee advised that procedural reform be the new Commission’s first priority.⁵⁰

At Attorney General Morgan’s request, the General Assembly created the Criminal Code Commission in March 1971.⁵¹ The Commission was initially comprised of twenty-six bipartisan, geographically diverse members, including nonlawyers.⁵² The Commission also hired three law professors (including future United States Associate Attorney General Walter Dellinger) to serve as “consultant-draftsmen.”⁵³ Over two years, the Commission met twenty-three

42. *Id.*

43. *Gwathmey v. State Through Dept. of Environment, Health, and Natural Resources*, 464 S.E.2d 674, 679 (N.C. 1995).

44. N.C. GEN. STAT. § 14-1(1) (2021); *see also* *State v. Bowers*, 161 S.E.2d 11, 13 (N.C. 1968).

45. *Robinson & Dubber*, *supra* note 24, at 322-23 (noting that only Louisiana had made a “serious effort” to reform its criminal code since the nineteenth century).

46. *Id.* at 323.

47. LEGISLATIVE PROGRAM AND REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA BY THE CRIMINAL CODE COMMISSION (1973).

48. *Id.*

49. *Id.*

50. *Id.*

51. S.J. Res. 37, Gen. Assemb., 1971 Sess. (N.C. 1971).

52. LEGISLATIVE PROGRAM AND REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA BY THE CRIMINAL CODE COMMISSION, *supra* note 47, at i-ii. (noting that the Commission was later expanded to thirty members in 1973).

53. *Id.* at ii.

times in an effort to “prepare a balanced legislative reform that would eliminate from our law, where desirable, those practices which frustrate the effective and efficient administration of justice.”⁵⁴ The group’s initial focus on criminal procedure reform resulted in a 1973 draft titled the “Criminal Procedure Act,” which created a new Chapter 15A and codified uniform state criminal pre-trial procedure for the first time.⁵⁵ This proposal covered areas such as investigative and arrest procedure, bail, discovery, and pre-trial proceedings.⁵⁶ This proposal was enacted in the 1974 legislative session and became effective on September 1, 1975.⁵⁷

The Commission met an additional thirty-seven times and in 1977 delivered a subsequent report that made further recommendations relating to criminal trial and appellate procedure.⁵⁸ Those reforms were enacted in the 1977 legislative session and took effect on July 1, 1978.⁵⁹

As its last act, the Commission turned to substantive criminal law reform and delivered a proposed draft bill to the 1983 legislative session.⁶⁰ This proposal, introduced as House Bill 1338, created an updated state criminal code by adopting key principles of the Model Penal Code, such as: (1) setting forth standard and universal definitions; (2) abolishing common law offenses; (3) defining standards of culpability; and (4) defining and codifying attempt and other inchoate crimes.⁶¹ House Bill 1338 was “postponed indefinitely” in July 1983 and lapsed at the end of the legislative session having never received a vote.⁶²

C. The Criminal Code Revision Study Committee

The 1985 legislative session saw the creation of a similar but new entity, the Criminal Code Revision Study Committee.⁶³ This non-standing committee was comprised of twelve members (eight state legislators, two law professors, a district attorney, and a defense attorney) and was directed to “study the *substantive* criminal law and make findings and recommendations thereon.”⁶⁴ Using House Bill 1338 as a starting point, the Committee met twelve times over two

54. *Id.*

55. *Id.* at 1.

56. *See id.*

57. H.B. 256, 1973 Gen. Assemb., 2d Sess. (N.C. 1974); S.B. 840, 1975 Gen. Assemb. 1st Sess. (N.C. 1975).

58. LEGISLATIVE PROGRAM AND REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA BY THE CRIMINAL CODE COMMISSION, *supra* note 47.

59. S.B. 239, 1977 Gen. Assemb., 1st Sess. (N.C. 1977).

60. REPORT OF THE CRIMINAL CODE REVISION STUDY COMMITTEE (1985).

61. H.B. 1338, 1983 Gen. Assemb. Sess. (N.C. 1983); *see also* REPORT OF THE CRIMINAL CODE REVISION STUDY COMMITTEE, *supra* note 60, at 7–8, 11.

62. N.C. INST. OF GOV'T LEGIS. SERV., FIRST SESSION 1983 & SECOND SESSION 1984 BILL HISTORY, at 291 (1984).

63. REPORT OF THE CRIMINAL CODE REVISION STUDY COMMITTEE, *supra* note 60, at 1.

64. N.C. H.B. 1338, *supra* note 61 (emphasis added).

years and solicited public comment.⁶⁵ The Committee's final recommendation was a slightly amended version of House Bill 1338 with expanded definitions, elimination of the diminished first degree murder offense by reinstating the elements of premeditation and deliberation, and deletion of the revised Article on controlled substances.⁶⁶ The Committee reforms were incorporated into House Bill 406, which was filed in April 1985 and "postponed indefinitely" in July 1986, thus suffering the same fate as House Bill 1338.⁶⁷

*D. North Carolina Courts Commission
Recommendations & 1985 Legislation*

While the Criminal Code Revision Study was developing its recommendations, the North Carolina Courts Commission⁶⁸ made its own attempt at criminal recodification. Following public hearings and after soliciting stakeholder input, the Courts Commission put forth its report to the 1985 General Assembly.⁶⁹ This report contained several recommendations. Most notably, the report recommended decriminalizing traffic offenses as non-criminal infractions, while retaining adjudication of such offenses within the court system (as opposed to an administrative agency).⁷⁰ The Courts Commission found that of the nearly 800,000 traffic offenses charged in 1983-1984 approximately eighty-seven percent were handled summarily via waiver of appearance, dismissal, or disposal.⁷¹ Recodifying this large volume of crimes as infractions would streamline court operations by removing any criminal penalty besides from a fine and encouraging defendants to avoid adjudication.⁷²

As an additional enforcement mechanism, the Courts Commission recommended that a defendant's driver's license be revoked if they failed to appear or pay the appropriate fine.⁷³ This revocation would supplant an order for arrest for failure to appear—a much more drastic and expensive enforcement action for law enforcement, the court system, and defendants.⁷⁴ An ancillary, yet equally laudable, benefit of the infraction proposal is that individuals con-

65. REPORT OF THE CRIMINAL CODE REVISION STUDY COMMITTEE, *supra* note 60, at 4–5.

66. *Id.* at 4.

67. H.B. 406, 1986 Gen. Assemb., Reg. Sess. (N.C. 1986).

68. Created in 1963, the North Carolina Courts Commission is a twenty-eight-member, multidisciplinary body whose duty is "to make continuing studies of the structure, organization, jurisdiction, procedures and personnel of the Judicial Department and of the General Court of Justice and to make recommendations to the General Assembly for such changes therein as will facilitate the administration of justice." N.C. GEN. STAT. § 7A-508 (1979).

69. REPORT OF THE COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY (1985).

70. *Id.* at 13.

71. *Id.*

72. *Id.* at 15.

73. *Id.*

74. REPORT OF THE COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY 15 (1985).

victed of minor traffic offenses will no longer be marked with a criminal record.⁷⁵ The Courts Commission correctly found that improperly classifying minor motor vehicle offenses as crimes “tends to dilute the effect of that [criminal] classification.”⁷⁶ The General Assembly adopted these recommendations in 1985 and created infractions, defined as “noncriminal violation[s] of law not punishable by imprisonment,” for the first time in state history.⁷⁷

E. Recent Reform Efforts

The past decade brought additional efforts from both the legislative and judicial branches to reform the criminal code. In the 2013 budget bill, the General Assembly enacted several provisions amending criminal law. This legislation expanded upon the 1985 reforms by limiting the penalty for most Class 3 misdemeanors⁷⁸ (the most minor classification of crime) to only a fine and by reclassifying over a dozen misdemeanors to Class 3 status.⁷⁹ One likely aim of these amendments was to reduce appointed counsel costs by limiting the maximum penalty faced by indigent defendants.⁸⁰ The U.S. Constitution generally affords an indigent defendant the right to counsel when facing incarceration or even the threat of a suspended sentence.⁸¹ However, neither the Constitution nor North Carolina law extends this entitlement to indigent defendants facing only a small fine.⁸² Thus, most defendants charged with these regraded offenses will no longer be entitled to counsel at the state’s expense.

In 2018, the General Assembly passed legislation seeking to create a reliable catalog of existing crimes as a starting point for potential reform.⁸³ This legislation required every state entity (including boards, commissions, and municipalities) that had the authority to create criminal penalties to create and submit a list of those crimes to the General Assembly.⁸⁴ Nearly 500 state agencies, licensing boards, and municipalities submitted reports, which totaled hundreds of regulatory crimes not contained within the state’s General Statutes.⁸⁵ The bill also directed the North Carolina Administrative Office of the Courts (NCAOC) to compile a list of all common law and statutory

75. *Id.* at 14–15.

76. *Id.* at 14.

77. H.B. 533, 1985 Gen. Assemb., Reg. Sess. (N.C. 1985).

78. S.B. 402, § 18B.13.(a), 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

79. *Id.* at 18B.14.(a).

80. See Jeff Welty, *Misdemeanor Reclassification, the Right to Counsel, and the Budget*, U. N.C. SCH. GOV’T: N.C. CRIM. L. (July 23, 2013), <https://nccriminallaw.sog.unc.edu/?p=4368>.

81. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972); *Alabama v. Shelton*, 535 U.S. 654, 662 (1979).

82. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); N.C. GEN. STAT. § 7A-451(a)(1) (2023) (“An indigent person is entitled to services of counsel in “[a]ny case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged.”).

83. H.B. 379, 2018 Gen. Assemb., Reg. Sess. (N.C. 2018).

84. *Id.* at §§ 1, 3.

85. JOINT LEGIS. ADMIN. PROC. OVERSIGHT COMM., <https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/472/Documents/4340>.

crimes and identify any crimes that meet one or more of the following criteria:

- (1) The statute is duplicative.
- (2) The statute is inconsistent with other statutes, rarely charged, fails to state a mens rea, or contains undefined terms.
- (3) The statute appears to be obsolete.
- (4) The statute has been held to be unconstitutional by an appellate court.⁸⁶

The NCAOC released its report in January 2019, which listed over 700 statutory offenses that met these criteria.⁸⁷

After receiving this information in 2019, the General Assembly enacted a minor reform to the state's regulatory scheme by subjecting all new or amended administrative rules (such as those promulgated by an occupational licensing board) that create new criminal offenses to legislative review.⁸⁸ Previously, administrative rules were only subject to legislative review if they received at least ten letters of objection from the public.⁸⁹ This past requirement generally shielded regulatory action from any significant scrutiny as most regulatory actions pass by unnoticed by the general public.⁹⁰ The significance of legislative review is that the process automatically delays the effective date of a proposed rule and gives the legislature time to review and take any disapproval or modification action before the proposed rule goes into effect.⁹¹ Although a delayed proposed rule eventually goes into effect if the General Assembly fails to take action, this new provision ensures legislative supremacy over lawmaking. This provision also serves as a check against unnecessary regulatory crimes by subjecting all new such crimes to legislative scrutiny, even if there is no objection during the initial rulemaking.

The 2021 legislative session marked the end of recent criminal code reform efforts. An omnibus criminal justice reform bill included provisions that decriminalized certain local ordinances and created another working group designed to rewrite the state's criminal code.⁹² First, the legislation required that any municipal ordinance

86. H.B. 379, *supra* note 83, at § 2.

87. N.C. ADMIN. OFF. OF THE COURTS, REPORT OF NORTH CAROLINA CRIMES TO THE CRIMINAL RECODIFICATION WORKING GROUP (2019).

88. S.B. 584, § 1, 2019 Gen. Assemb., Reg. Sess. (N.C. 2019); N.C. GEN. STAT. § 14-4.1(a) (2021).

89. N.C. GEN. STAT. § 150B-21.3(b1) (2021).

90. JASON A. SCHWARTZ, 52 EXPERIMENTS WITH REGULATORY REVIEW 1-2 (2010).

91. N.C. GEN. STAT. § 150B-21.3(b1) (2021) (stating that a proposed rule becomes effective on the thirty-first legislative day if the General Assembly has failed to act on the rule).

92. S.B. 300, § 13, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

that creates a misdemeanor or infraction to specify the criminal penalty within the ordinance, thereby giving increased notice to the community.⁹³ The bill also restrained municipal crime-making by prohibiting local governments from imposing criminal penalties in certain ordinance types (e.g., land use planning, outdoor advertising, business registration or licensing).⁹⁴

The legislature rounded out its 2021 reform efforts by creating a new Bipartisan North Carolina Legislative Working Group on Criminal Law Recodification which was given the ambitious statutory charge “to make recommendations to the General Assembly regarding a streamlined, comprehensive, orderly, and principled criminal code which includes all common law, statutory, regulatory, and ordinance crimes.”⁹⁵ The body (hereinafter “the Working Group”) was to be comprised entirely of lawmakers, with no outside members.⁹⁶ The Working Group was directed to solicit feedback from the Administrative Office of the Courts, the Attorney General, the Office of Indigent Defenses Services, and other enumerated stakeholders in its mission to apply the following principles to the entirety of North Carolina criminal law:

- (1) Incorporate existing statutory and common law offenses into Chapter 14 of the General Statutes, harmonizing additions with current Chapter content.
- (2) Apply consistent terminology across statutes and define all terminology.
- (3) Specify the required mental state or that an offense is a strict liability crime.
- (4) Eliminate redundant crimes and multiple punishment for the same conduct.
- (5) Simplify offense numbering.
- (6) Eliminate or modify unconstitutional provisions to ensure lawfulness.
- (7) Eliminate outdated laws.
- (8) Apply consistent, logical offense grading, with advice from the North Carolina Sentencing Policy and Advisory Commission.⁹⁷

93. *Id.* at § 13.(b).

94. *Id.* at § 13.(b)(1).

95. *Id.* at § 20.(a).

96. *Id.* at § 20.(b).

97. S.B. 300, §§ 20.(c), (f), 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

Much like the commissions and committees of decades past, the Working Group was expected to produce a final report of its work and deliver its findings and recommendations to the General Assembly.⁹⁸ But this report was not to be merely a summary of the Working Group's activities followed by bullet point recommendations. Instead, the legislature envisioned a much more robust and comprehensive product. The specific language is presented in its entirety to give the reader an idea of the near Herculean effort expected from the Working Group:

SECTION 20.(g) The Working Group shall provide the following deliverables:

- (1) For common law crimes and crimes included in the North Carolina General Statutes:
 - a. Create a database of all statutory and common law crimes, including statute number or common law designation; offense short title; elements; link to the statute; punishment; special and key features; frequency of charging, if available; and any proposed changes and the status of those changes in order to track decisions by the Working Group.
 - b. Draft legislation amending, recodifying, or proposing changes to North Carolina criminal statutes using a format that is consistent with drafting conventions used by the North Carolina General Assembly, as directed by the Working Group.
- (2) For crimes created by local ordinances:
 - a. Create a database of ordinance offenses, including ordinance title, general description, elements, punishment, and key feature coding. The Working Group will sample ordinances from diverse jurisdictions or review all, as time allows.
 - b. Report on common ordinance crimes, including charging data, if available, and including presentation of a range of policy options for addressing ordinance crimes consistent with the Working Group's goals.
 - c. Draft legislation using a format that is consistent with drafting conventions used by the North Carolina General Assembly, as directed by the Working Group.

98. *Id.* at § 20.(a).

(3) For crimes created by administrative boards and bodies:

- a. Create a database of all crimes created by administrative boards and bodies that make it a crime to violate any regulation created by an administrative board or body, with exemplary regulations and punishment levels.
- b. Report on policy options for addressing regulatory crimes consistent with the Working Group's goals.
- c. Draft legislation using a format that is consistent with drafting conventions used by the North Carolina General Assembly, as directed by the Working Group.⁹⁹

Alas, this moonshot failed to reach the stars (or even leave the launching pad) and the Working Group terminated at the end of 2022 without ever having met or even appointing members.¹⁰⁰ As is to be expected from a memberless working group that never meets, a final report was never produced.¹⁰¹

Despite many laudable reform efforts over the past forty years, the North Carolina criminal code continues to fall short of what a modern code should be. Even with recent reforms, the criminal code continues to unnecessarily grow in both size and complexity.

III. A NEW APPROACH TO CRIMINAL CODE REFORM

Rightsizing and reorganizing the current North Carolina criminal code is only the first step towards an ideal code. Structural changes to how proposed criminal laws are vetted and a new method of periodically evaluating existing offenses is needed to guard against future degradation and desuetude.

A. *Cleaning Up the Code: The "Three Rs"*

The next effort at comprehensive reform must begin with a spring cleaning of our current code. To tackle this chore, we must employ the Three Rs: Repeal, Revise, and Recodify.

i. Repeal

"You have sat too long for any good you have been doing lately . . . Depart, I say; and let us have done with you. In the name of God, go!"¹⁰² All of us have things that have outlived their usefulness in our

99. *Id.* at § 20.(g).

100. *Id.* at § 20.(e); N.C. GEN. ASSEMB., BIPARTISAN NORTH CAROLINA LEGISLATIVE WORKING GROUP ON CRIMINAL RECODIFICATION, <https://www.ncleg.gov/Committees/Committee-Info/NonStanding/6765/Membership>.

101. See N.C. GEN. ASSEMB., *supra* note 100.

102. Robert Chambers, THE BOOK OF DAYS: A MISCELLANY OF POPULAR ANTIQUITIES IN CONNECTION WITH THE CALENDAR, INCLUDING ANECDOTE, BIOGRAPHY, & HISTORY, CURIOSITIES OF

lives, but how many of us have the fortitude of Oliver Cromwell to banish such things from existence? Unfortunately, North Carolina's criminal code is filled with laws that, like the Rump Parliament, have outlived their usefulness and should depart to let us be done with them. To organize and hasten this departure, this Article adopts the criteria laid out in the NCAOC's 2019 legislative report¹⁰³ and proposes repeal of statutes that are obsolete, unconstitutional, or duplicative.

a. Obsolete

Obsolete offenses are those that are anachronistic or criminalize conduct that is now generally accepted (or at least tolerated) in society as noncriminal.¹⁰⁴ Many of these obsolete offenses derived from "immoral" conduct that society previously sought to criminalize. Many offenses go unenforced and include activities such as cohabitation of a hotel room by an unmarried couple¹⁰⁵ and unmarried fornication.¹⁰⁶ Other obsolete offenses are regulatory in nature and criminalize conduct that no longer poses an injurious risk to the public. Examples include permitting dogs to run at night,¹⁰⁷ the failure of a railroad executive to account with successors,¹⁰⁸ and the unimaginable crime of keeping a disorderly house.¹⁰⁹ These and other obsolete offenses no longer serve a legitimate public purpose, are practically unenforceable, and should be repealed.

b. Unconstitutional

For the purposes of this Article, an "unconstitutional" offense is one that has been held as such by a federal or state appellate court or one that has a *high likelihood* of being declared unconstitutional under existing precedent if it were to be challenged. Statutes that have already been held as unconstitutional include the criminalization of using profane language on the telephone¹¹⁰ and cyberbullying.¹¹¹ Interestingly, the previously discussed offense of unmarried fornication was held unconstitutional and enjoined by the superior court but was never appealed, so the trial court order enjoys no precedential value.¹¹² Offenses that have a high likelihood of being struck down by

LITERATURE AND ODDITIES OF HUMAN LIFE AND CHARACTER Vol. I, 528–29 (London, W. & R. Chambers, Ltd. 1864) (quoting Oliver Cromwell's 1653 Speech dismissing the Rump Parliament).

103. N.C. ADMIN. OFF. OF THE COURTS, *supra* note 87.

104. *See* Beale, *supra* note 4, at 750–53.

105. N.C. GEN. STAT. § 14-186 (2021).

106. N.C. GEN. STAT. § 14-184 (2021).

107. N.C. GEN. STAT. § 67-12 (2021).

108. N.C. GEN. STAT. § 14-253 (2021).

109. N.C. GEN. STAT. § 14-188 (2021).

110. N.C. GEN. STAT. § 14-196(a)(1); *Radford v. Webb*, 596 F.2d 1205 (4th Cir. 1979).

111. *State v. Bishop*, 787 S.E.2d 814, 814 (N.C. 2016).

112. *Hobbs v. Smith*, No. 05-CVS-267, 2006 WL 3103008 (N.C. Super. Aug. 25, 2006).

an appellate court if challenged include unmarried cohabitation, unauthorized wear of the American Legion emblem,¹¹³ and cyberbullying of a school employee.¹¹⁴ Offenses that are merely of questionable constitutionality and those more susceptible to as-applied challenges do not meet the high likelihood standard. These offenses will not be included in the list of recommended repeals in deference to the judicial principal that all statutes carry a presumption of constitutionality.¹¹⁵

c. Duplicative

Duplicative offenses are defined as those that criminalize conduct that has already been made unlawful for a broader offense.¹¹⁶ For example, simple assault is generally criminalized. However, the statute contains *nine* different crimes based on victim status.¹¹⁷ Larceny is generally criminalized with different penalties based on the value of the stolen property.¹¹⁸ Why then do we need additional offenses for stealing milk crates,¹¹⁹ ginseng,¹²⁰ pine needles,¹²¹ or kitchen grease?¹²² For the sake of notice and general fairness to the public, these duplicative offenses should be repealed.

d. Rarely Charged Offenses

Some scholars have also adopted the category of “rarely applied” offenses and advocated for their repeal.¹²³ The author has decided against including this category for several reasons.¹²⁴ First, how rare must an offense be?¹²⁵ Some minor crimes are charged often (e.g., speeding, larceny), while other serious crimes, such as malicious castration¹²⁶ and burning of a school house,¹²⁷ are (thankfully) charged

113. N.C. GEN. STAT. § 14-395 (2021).

114. N.C. GEN. STAT. § 14-458.2 (2021).

115. *Baker v. Martin*, 410 S.E.2d 887, 889 (N.C. 1991) (“In determining the constitutionality of a statute we are guided by the following principle: ‘[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.’”).

116. 30B ELSPETH B. CYPHER, MASSACHUSETTS PRACTICE SERIES, CRIMINAL PRACTICE & PROCEDURE § 68:14 (4th ed. 2014).

117. N.C. GEN. STAT. § 14-33 (2021) (exemplifying a female, a sports official, or a school employee).

118. N.C. GEN. STAT. § 14-72 (2024).

119. N.C. GEN. STAT. § 14-72.4 (2024).

120. N.C. GEN. STAT. § 14-79 (2024).

121. N.C. GEN. STAT. § 14-79.1 (2024).

122. N.C. GEN. STAT. § 14-79.2 (2024); *see also* Smith, *supra* note 6, at 2–3 (giving a broader analysis of duplicative criminal offenses).

123. Welty, *supra* note 4, at 1948–49.

124. We will have use for “rarely charged” offenses later in the Article. *See infra* Part IV(B).

125. N.C. ADMIN. OFF. OF THE COURTS, *supra* note 87, at 2 (AOC report defines “rarely charged” as fewer than 100 charges in a calendar year.)

126. *See* N.C. GEN. STAT. § 14-28 (2023).

127. *See* N.C. GEN. STAT. § 14-60. (2024).

very rarely or not at all.¹²⁸ Should there be a sliding scale based on severity and average occurrence of the offense? Second, many offenses that are classified as rarely applied would already be ripe for repeal based on their status of also being obsolete, unconstitutional, or duplicative. Perhaps we should heed President Lincoln's advice that "the best way to repeal a bad law is to strictly enforce it."¹²⁹

ii. Revise

For crimes that are still needed but are imperfectly drafted, revision is the most viable solution. The 2019 NCAOC report identified dozens of criminal provisions that contained undefined terms or failed to state a *mens rea*.¹³⁰ These omissions hinder proper notice and increase the risk of judicial confusion during the initial prosecution or appellate review of a conviction. These harms could be eliminated (or at least significantly mitigated) by adopting several principles embodied within the MPC. First, Chapter 14 should be amended to include a section of general definitions applicable to the entire chapter.¹³¹ Such a section would ensure that terms are fully and consistently defined throughout the code. In a similar fashion, general requirements of culpability, or *mens rea*, should be outlined within Chapter 14.¹³² All degrees of culpability should be clearly defined, and each criminal offense should include a clear culpability standard that is based upon a voluntary act or omission.¹³³ The General Assembly should also create a global default standard of "knowingly" to avoid assignment of strict liability to offenses that lack a specific *mens rea* and require a greater degree of culpability for prosecution.¹³⁴ The legislature should also create a standalone chapter (perhaps Chapter 14A) to serve as an index of all statutory crimes. Such an index would serve as a quick reference to attorneys, judicial officials, and the public and would also identify all criminal offenses residing in other chapters of the General Statutes. Applying these principles of revision will result in a more organized code, thus reducing the opportunity for misunderstanding by the public or judicial stakeholders.

128. AOC Charge Count Report 2022 (on file with author).

129. See TRYON EDWARDS, A DICTIONARY OF THOUGHTS 327-28 (Britkin Publ'g Co. rev. ed. 1927).

130. See N.C. ADMIN. OFF. OF THE COURTS, *supra* note 87.

131. See MODEL PENAL CODE § 1.13 (2021).

132. See MODEL PENAL CODE § 2.02 (2021).

133. See *id.*

134. Smith, *supra* note 6, at 2 ("For some crimes no mental state is specified, yet is unclear whether the legislature intended to create a strict liability crime; meanwhile the code fails to define the various mental states that are used."); see also Paul H. Robinson, *Strict Liability's Criminogenic Effect*, 12 CRIM. L. & PHIL. 411 (2018) (discussing concerns related to strict liability *mens rea*).

iii. Recodify

The last of the “three Rs” involves structural changes intended to make the code more streamlined and effective. First, this Article proposes abolishing all uncodified crimes to limit the expanse of the criminal code to those offenses clearly defined in statutes. Uncodified common law offenses that remain needed should be codified within Chapter 14 to remain in effect. Building off the 1985 and 2013 legislative reforms, the General Assembly should recodify additional low-level misdemeanors to infractions. Such Chapter 14 offenses include unlawful posting of advertisements,¹³⁵ ticket scalping,¹³⁶ and parking in a private space.¹³⁷ High volume motor vehicle offenses that could be reduced without jeopardizing public safety include improper attachment of registration plates,¹³⁸ failure to clean registration plates,¹³⁹ and expired registration.¹⁴⁰ Finally, N.C. Gen. Stat. § 14-4 should be further amended to require all municipalities to post ordinance crimes on a public website and provide that any offenses not posted default to infractions.

B. Keeping the Code Clean: Proposed Solutions for Code Preservation

Cleaning up the existing criminal code is only half the battle. As history demonstrates, active management of the code is needed to prevent the natural degradation that is sure to occur.¹⁴¹ The author proposes several strategies for effectuating these goals: the assistance of the existing state commissions, periodic review of existing criminal offenses, and sunsets of newly created crimes.

i. The General Statutes Commission

The General Statutes Commission (“GSC”) was created in 1945 to assist the General Assembly in preparing and managing the General Statutes.¹⁴² The GSC is comprised of thirteen members including legislators, attorneys, and six members appointed by the dean of each of the state’s law schools.¹⁴³ The legislature has granted the GSC broad statutory duties including “[t]o make a continuing study of all

135. N.C. GEN. STAT. § 14-145 (2021).

136. N.C. GEN. STAT. § 14-344 (2021); *see generally Scalp*, MIRRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/scalp> (last visited Sept. 30, 2024).

137. N.C. GEN. STAT. § 14-401.9 (2021).

138. N.C. GEN. STAT. § 20-63(d) (2021).

139. N.C. GEN. STAT. § 20-63(e) (2021).

140. N.C. GEN. STAT. § 20-111(2) (2021) (note that N.C. GEN. STAT. § 20-88.03(a) already provides for escalating administrative penalties for failure to timely renew a registration plate).

141. *See generally* Smith, *supra* note 6.

142. N.C. GEN. STAT. §§ 164-12, 13 (2021).

143. N.C. GEN. STAT. § 164-14 (2021). Note that membership does not include a representative from the High Point University School of Law which announced its opening in Spring 2022 but did not admit its inaugural class until Fall 2024. *See Kenneth F. Kahn School of Law*, HIGH POINT UNIV., <https://www.highpoint.edu/law> (last visited Oct. 8, 2024).

matters involved in the preparation and publication of modern codes of law” and “[t]o recommend to the General Assembly the enactment of such substantive changes in the law as the Commission may deem advisable.”¹⁴⁴ Despite its broad mission, the GSC has focused its recent efforts on identifying needed technical corrections and reviewing model legislation from the Uniform Laws Commission.¹⁴⁵

The GSC could contribute to the preservation of the criminal code in two ways. First, it should review all bills proposing *new* criminal offenses and indicate whether the proposed crimes are duplicative of any existing offenses. This review should be completed before the bill is heard in the relevant legislative committee to give members adequate time to consider the GSC’s findings and draft possible amendments before the bill reaches the floor of either chamber. Second, the GSC should review a biannual report of crimes charged fewer than 100 times per year (to be produced by the Administrative Office of the Courts) and make recommendations for repeal to the General Assembly prior to the start of each new legislative long session.¹⁴⁶ Both new functions are within the GSC’s existing statutory authority,¹⁴⁷ but the General Assembly should modify the GSC’s membership to include representatives from both the North Carolina Conference of District Attorneys¹⁴⁸ and the Office of Indigent Defense Services.¹⁴⁹ Including these members would add practical expertise to the biannual reviews and would enhance the legitimacy of recommendations by providing for greater representation of judicial stakeholders.

ii. The Sentencing and Policy Advisory Commission

The Sentencing and Policy Advisory Commission (“SPAC”) is an independent commission charged with, among other duties, making “recommendations to the General Assembly for the modification of sentencing laws and policies, and for the addition, deletion, or expansion of sentencing options as necessary to achieve policy goals.”¹⁵⁰ Whenever the legislature proposes a new criminal offense in a filed

144. N.C. GEN. STAT. § 164-13 (2021).

145. See generally N.C. GEN. ASSEMB., GENERAL STATUTES COMMISSION NON-STANDING COMMITTEE, www.ncleg.gov/Committees/CommitteeInfo/NonStanding/151/Documents (last visited Sept. 30, 2024).

146. See Welty *supra* note 4, at 1965 (suggesting legislative review of crimes charged fewer than ten times over a four-year period).

147. See generally N.C. GEN. STAT. § 164-13.

148. N.C. GEN. STAT. § 7A-411 (2021) (stating that the conference was created in 1983 to “assist in improving the administration of justice in North Carolina by coordinating the prosecution efforts of the various district attorneys, by assisting them in the administration of their offices, and by exercising the powers and performing the duties provided [by law].”).

149. N.C. GEN. STAT. § 7A-498.3 (2021) (explaining that the Office of Indigent Defense Services oversees statewide defense services to indigent persons, including those services provided by public defender offices and by private contract counsel).

150. N.C. GEN. STAT. § 164-36(a) (2021).

bill, the SPAC is directed to determine whether the bill places the offense in the correct classification and, if not, to recommend the proper classification.¹⁵¹ The SPAC makes these recommendations via multiple reports to the General Assembly during each legislative session.¹⁵²

To further assist the General Assembly with criminal policymaking, the SPAC should slightly expand its mission by creating a continuous report (updated at the close of each legislative session) of enacted criminal offenses that the Commission finds to be incorrectly classified. This consolidated report will keep attention on offenses that are incorrectly classified and will ideally increase both public and legislative scrutiny of misclassified crimes as the report continues to grow over time.

iii. Statutory Review Entities in Other Jurisdictions

Although novel to North Carolina, the use of a multi-disciplinary commission to review potentially outdated or unnecessary crimes is not new to other jurisdictions. In January 2011, former Kansas Governor Sam Brownback fulfilled a campaign promise by creating an Office of the Repealer.¹⁵³ This Office was directed to investigate all Kansas laws and regulations to determine if any were “unreasonable, unduly burdensome, duplicative, onerous, or in conflict” and make recommendations for repeal or modification to the Kansas Legislature.¹⁵⁴ The Office of the Repealer recommended the repeal of over fifty laws and regulations during its first year¹⁵⁵ but now appears to be defunct.¹⁵⁶

In 2013, Tennessee created an Office of the Repealer within the legislature’s legal services office.¹⁵⁷ Specifically, this office was directed to solicit public feedback concerning statutes (both civil and criminal) and rules that may be “be anachronistic, obsolete, defective, duplicative, contradictory, unnecessary or incomprehensible”; this office was also directed to review such suggestions and recommend statutes and rules that are appropriate for legislative repeal or

151. N.C. GEN. STAT. § 164-43(f) (2021).

152. See N.C. SENT’G AND POL’Y ADVISORY COMM’N, REVIEW OF PROPOSED LEGISLATION PURSUANT TO N.C.G.S. 164-43, REPORT #2 (2023), <https://www.nccourts.gov/assets/documents/publications/SPAC-Legislative-Review-Report-2-06072024.pdf>.

153. See Monica Davey, *One Candidate’s Idea: Office of the Repealer*, N.Y. TIMES, June 12, 2010; Kan. Exec. Order No. 11-01 (2011), <https://kgi.contentdm.oclc.org/digital/collection/p16884coll3/id/1820/rec/2>.

154. Kan. Exec. Order No. 11-01, *supra* note 153.

155. Tim Carpenter, *State “Repealer” Lists 51 Objections*, TOPEKA CAP. J. (Jan. 20, 2012, 8:50 AM), <http://cjonline.com/news/2012-01-20/state-repealer-lists-51-objections>.

156. *Office of the Repealer*, KAN. DEPT. OF ADMIN., <https://admin.ks.gov/offices/repealer> (last visited Sept. 30, 2024) (“The Page You Requested is No Longer Available.”).

157. 2013 Tenn. Pub. Acts 475.

revision.¹⁵⁸ Since its inception, the Office of the Repealer has reviewed twenty-four statutes and recommended that ten be either repealed or modified.¹⁵⁹ The office appears to be slowing, having only reviewed four statutes in the past five years (including zero in 2017-2018) after peaking at twelve reviews in 2014.¹⁶⁰

Another review entity, and perhaps the most comprehensive, resides overseas in the United Kingdom. Known simply as The Law Commission, this independent agency was created in 1965 to continuously review and make recommendations pertaining to the laws of England and Wales.¹⁶¹ The Commission is overseen by five commissioners who are appointed by the Lord Chancellor and Secretary of State for Justice¹⁶² for five-year terms.¹⁶³ The Commission conducts multiple law reform projects per year, over two-thirds of which have been enacted by Parliament either in full or in part since 1965.¹⁶⁴ The project most relevant to this Article is the Statute Law Repeals, which is intended to “modernise and simplify the statute book” by reducing its size and eliminating obsolete and unnecessary statutes that “masquerade as live law.”¹⁶⁵ This project is conducted by a permanent team of attorneys whose sole duty is to identify and research obsolete statutes without regard to political considerations.¹⁶⁶ Since 1965, the Commission has championed nineteen enacted bills resulting in the repeal of over 3,000 Parliamentary Acts dating as far back as 1267.¹⁶⁷

Recent attempts to create a standalone review commission in North Carolina have not been successful.¹⁶⁸ However, the expertise and resources of the General Statutes Commission and Sentencing

158. *Id.*

159. See TENN. GEN. ASSEMB., OLS REVISOR, <https://www.capitol.tn.gov/joint/staff/legal/revisor.html> (last visited Oct. 1, 2024) (the author reviewed each report and conducted a manual count).

160. *Id.*

161. Law Commissions Act 1965 c. 22 (U.K.); see also L. COMM’N, <https://lawcom.gov.uk> (last visited Oct. 1, 2024).

162. See generally *Ministerial role: Lord Chancellor and Secretary of State for Justice*, GOV. U.K., <https://www.gov.uk/government/ministers/secretary-of-state-for-justice> (last visited Oct. 1, 2024) (noting that this position is similar but not identical to the United States Attorney General).

163. *Who we are*, L. COMM’N, <https://lawcom.gov.uk/about/who-we-are> (last visited Oct. 1, 2024).

164. See *Implementation Table*, L. COMM’N, <https://lawcom.gov.uk/our-work/implementation/table> (last visited Oct. 1, 2024).

165. *Statute Law Repeals*, L. COMM’N, <https://lawcom.gov.uk/our-work/statute-law-repeals> (last visited Oct. 1, 2024).

166. *Statute Law Repeals at the Law Commission: A Review of Our Work*, Brochure to *Statute law repeals*, L. COMM’N, https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaece923f/uploads/sites/30/2015/03/slr_review.pdf (last visited Oct. 1, 2024).

167. THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, *STATUTE LAW REPEALS: TWENTIETH REPORT DRAFT STATUTE LAW (REPEALS) BILL, 2014-15*, HC LC 357, at 18 (U.K.).

168. Recall the Bipartisan North Carolina Legislative Working Group on Criminal Law Recodification created in 2021. See, e.g., S.B. 300, § 20(a), 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

and Policy Advisory Commission could be leveraged to provide the General Assembly with additional information and insight to prevent future code degradation.

iv. Sunsets

A final strategy for code preservation would be the expanded use of legislative expiration dates, known colloquially as “sunsets.”¹⁶⁹ Several scholars have explored sunsets and their ability to restrain criminal law.¹⁷⁰ The sunset is designed to act as a final check if both previously discussed reforms fail to stop unclear criminal provisions.¹⁷¹ Sunsets ensure further legislative review by forcing the legislature to act or let a criminal provision expire.¹⁷² To that end, this Article suggests that the General Assembly include a two-year sunset on any new criminal offenses that are deemed duplicative by the General Statutes Commission or inconsistent by the Sentencing and Policy Advisory Commission following the review processes previously discussed. This period would give the legislature and the public an entire legislative session to evaluate the practical implications and continuing need for the newly created offense.

Additionally, municipalities should be required to conduct periodic reviews of all ordinances that carry criminal penalties. This review would be similar to the administrative rule requiring a periodic review process and would mandate that municipalities review and readopt all ordinances that create criminal offenses on a regular schedule (e.g., every five years). Any ordinance not readopted within the review period would be repealed by operation of law. This mechanism would create a “self-weeding garden” of unnecessary ordinance crimes, while requiring little oversight from the General Assembly or any state agency. Incorporating sunsets into statutes and ordinances will reduce the accumulation of unnecessary offenses by forcing policymakers to take action to extend the life of the offense or let it expire.

IV. CONCLUSION

North Carolina has not only become overcriminalized, but the state’s criminal code ranks among the least effective in the country.¹⁷³ Criminal offenses are not even consolidated into one location, with numerous offenses scattered throughout the state’s administrative code or tucked away in local ordinances. Many of these offenses are

169. Melissa J. Mitchell, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1696 (2005).

170. *E.g.*, *id.* at 1673 (proposing use of sunsets to remove unnecessary laws); David Schraub, *Doctrinal Sunsets*, 93 S. CAL. L. REV. 431, 440 (2020) (analyzing sunsets in judicial doctrine); Manoj Viswanathan, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656, 659 (2007).

171. *See* Mitchell, *supra* note 169, at 1673.

172. *See id.* at 1699–1700.

173. Robinson et. al., *supra* note 10, at 61.

obsolete, duplicative, vague, or unconstitutional. For these reasons, much of the criminal code is unenforceable and its unnecessarily complex nature hinders public notice and burdens prosecutors, judges, attorneys, and other judicial stakeholders.

Despite past legislative reforms, the code will remain overcriminalized unless more substantial action is taken. By making use of the “Three Rs” (repeal, revise, recodify), better engaging existing statutory commissions, and attaching sunsets and review schedules to new crimes, North Carolina can both clean up the existing criminal code and create new guardrails to protect against future overcriminalization. North Carolina is proud to be “First in Flight,”¹⁷⁴ let us now turn our efforts into becoming first in criminal justice.

174. *History To-Go: The Wright Brothers*, MUSEUM OF THE CAPE FEAR HIST. COMPLEX, <https://museumofthecapefear.ncdcr.gov/history-go-wright-brothers> (last visited Oct. 10, 2024).

