

SEPTEMBER 13, 2016



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Time to clean up the criminal code?

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# Time to clean up the criminal code?

By Sharon McCloskey - 5/7/2014 - in Law and the Courts Print This Article



Steven Pruner learned the hard way that in North Carolina, selling a hot dog can get you jail time.

Imagine his surprise when, in 2011, the vendor was charged and later convicted for operating his cart without a license near Duke University Medical Center – an offense which got him 45 days in the custody of the Durham County sheriff (a sentence later suspended to probation).

Steve Cooksey almost suffered a similar fate when, after fighting his own diabetes and sharing insights into his recovery on his blog, he learned that his advice to readers constituted the unlicensed practice of dietetics, a misdemeanor offense under catchall provisions of the administrative code.

Those are just two examples of how a rapidly growing body of offenses in North Carolina is casting unknowing citizens as criminals and ensnaring them in an already bloated and underfunded system.

It's not a problem that's unique to this state — the overcriminalization of laws — but it is at least noteworthy enough in North Carolina to have caught the attention of the unlikely alliance of groups working to bring attention to the problem nationwide.

Those groups include the conservative Heritage Foundation and the National Association of Criminal Defense Lawyers, whose efforts on the federal level have led to the creation of a bipartisan task force in the U.S. House of Representatives to address an expansion of criminal laws spiraling out of control.

And they include the right-leaning Manhattan Institute, which in a report issued earlier this week labeled the state as somewhat of an outlier among southern states in overcriminalizing its laws.

North Carolina has continued to identify new crimes while at the same time allowing agencies to convert regulatory and licensing offenses into crimes, the report stated.

In most instances those latter offenses lack any element of intent – meaning that people can be prosecuted even when they didn't knowingly act in violation of the law (as happened to Pruner).

Add those to offenses already long on the books – many of which are never prosecuted – and you have a situation which makes it impossible for the average citizen to know precisely what is and is not against the law and which also vests a dangerous amount of discretion in the hands of prosecutors.

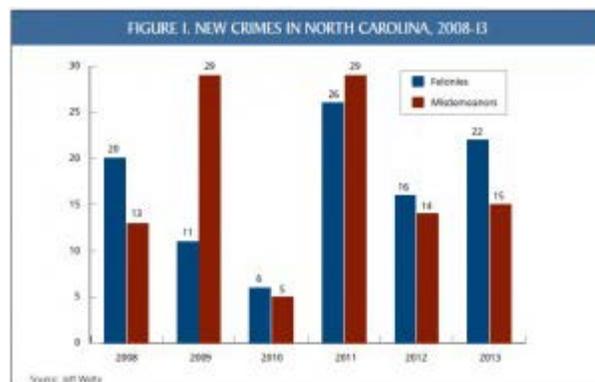
“In essence what we're doing is making lots of individuals criminals, and then relying upon prosecutorial discretion to save them,” said James Copland, a senior fellow at the Manhattan Institute and an author of the report. “So, we've got the laws on the books but we really won't enforce them criminally unless we want to get somebody for something else – then we'll selectively come after them. That's really not a way to run a criminal justice system.”

### By the numbers

North Carolina has created an average of 34 new crimes over each of the past six years, half of which are felonies, according to the report. That does not include regulatory and licensing offenses which exist outside the state criminal code.

Among the new crimes created in 2009 and 2010, less than one-fourth were subsequently charged more than once—and fewer than one-third charged at all—in 2012.

The authors – who relied in large part upon work done by Jeffrey Welty, a criminal law professor at the University of North Carolina School of Government who will release his own detailed research in a law review article this fall – also found that North Carolina's 765-section criminal code was 55 percent larger than Virginia's and 38 percent larger than South Carolina's criminal codes.



Source: Jeff Welty

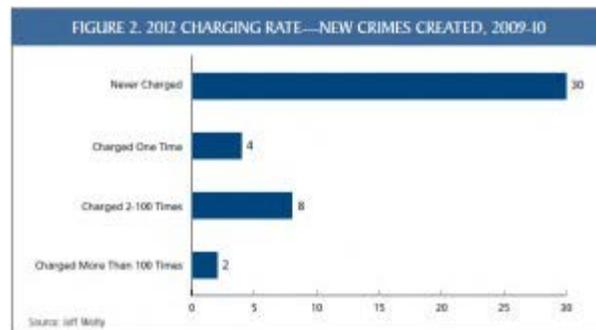
At the same time, the state has done little to rid the books of crimes that are antiquated or rarely prosecuted. Old crimes, including various moral offenses like unmarried couples sharing a hotel room, exist alongside new crimes that are often unnecessary and otherwise covered under existing crimes — theft of a portable toilet, for example.

Duplication is not the only problem. Inconsistencies are of greater concern. For example, a person can be charged with improper recordkeeping regarding sewage disposal from boats without knowing that was unlawful. But a charge of improper recordkeeping regarding the sale of Sudafed or other drugs convertible into illicit drugs requires a showing of intent.

There have been some countertrends though, according to Welty.

One took place a few decades ago when most motor vehicle violations were reclassified from misdemeanors to infractions. “That was a sea change,” he said.

More recently, the General Assembly reclassified certain misdemeanors and made others punishable only by fine. That move was motivated more by budget concerns than by concerns over the bloating of criminal offenses.



Source: Jeff Welty

“Because imprisonment was no longer on the table for some of those misdemeanors, defendants lost their right to counsel,” Welty said. “The point of it was to save \$2 million in appointed counsel costs. So this really wasn’t done out of a sense to decriminalize things – most were just reclassified – it was an effort to save money.”

### **Piecemeal criminalization**

The process of adding new crimes bit by bit without a view towards what’s already on the books is not unique to North Carolina, but it is an unfortunate byproduct of the legislative process.

“Sometimes it’s legislators reacting to specific incidents,” Welty said. “Sometimes it’s out of a genuine need for new legislation as a result of changing circumstances or changing modes of criminality. And sometimes it’s a desire to appear to be tough on crime or to be doing something.”

There’s rarely careful consideration given, though, as to how a new crime would fit into the current framework, or how or whether it would be prosecuted, or what risks the new offense would pose to innocent individuals.

And there’s rarely any momentum behind pruning or reducing the criminal law, Welty added.

“There’s nothing in it for a legislator in being the one who tries to take crimes off the books,” he said. “There’s no political or personal gain in that.”

The danger with such a scattershot approach is that criminal laws become so complex and so widely dispersed that it becomes impossible for individuals to know what exactly the law requires of them.

“The fundamental principle underlying criminal law is supposed to be the rule of legality, which means that you’re on clear notice

that what you're doing is a crime beforehand," said Jim Copland.

"So how does that fail? It fails if the law is written too ambiguously. It fails if there are so many laws that there's no way you can comply unless you have a team of lawyers. And it fails when you're taking away this intent element – that you know you're violating the law or cutting it close."

There's also the danger that laws are inconsistently enforced across the state, selectively enforced against certain individuals, or not enforced at all, each of which diminishes respect for the rule of law.

"Inevitably, when the law is so expansive it fosters a situation in which prosecutors and the courts have an unreasonable burden placed on them," Welty said. "When a large number of violations have to be let go or not prosecuted or dealt with minimally, that's a situation where citizens start to think the law is arbitrary and enforced capriciously and lose respect for it."

### **Relief in sight?**

Both Welty and Copland agree that institutional pressures supporting overcriminalization are strong, and that a comprehensive review of North Carolina's criminal laws, though possible, is not likely in the short term.

"Virginia did a code review and wound up repealing a dozen or so of their laws," Welty said. "So it's not impossible, but it's tough."

Other possibilities include the creation of a bipartisan task force, commission or other entity to review the laws. Kansas, for example, has an Office of the Repealer charged with that task.

Copland also reinforced the need for lawmakers to enact some sort of default intent requirement, particularly for regulatory and licensing offenses, so that people are not strictly liable for conduct they never knew was criminal. Or better yet, decriminalize those offenses.

"What you want your criminal justice system to be focused on is the violent crime, property crime and real economic fraud crimes that do serious damage to society and hurt innocent people," he said.

If for no other reason, Copland mused, lawmakers here should see the need to revisit its criminal laws as a rare opportunity to work across the aisle, pointing to the joint work of the Heritage Foundation and defense lawyers in this area.

"It does require breaking out of the partisan fight," he said. "North Carolina could use that right now."

*(Above image of hotdog stand is licensed under the Creative Commons Attribution-Share Alike 3.0 Unported license.)*

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## ABOUT THE AUTHOR



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