



State of North Carolina
General Statutes Commission
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Note: Places where staff made changes to the previous draft to shorten it and in response to comments at the May meeting are in blue. Suggestions from members of the General Statutes Commission were added outright in black. Places that staff intends to call to the Commission's attention at the June meeting are highlighted.

INTERIM REPORT ON STUDY OF CRIMES DEFINED BY ORDINANCE OR RULE
PURSUANT TO SECTION 6 OF S. L. 2019-198, **AS AMENDED BY SECTION 4.35(A) OF**
S. L. 2020-3

SUBMITTED TO THE **2020 REGULAR SESSION OF THE**
2019 GENERAL ASSEMBLY
AND THE
JOINT LEGISLATIVE OVERSIGHT COMMITTEE ON GENERAL GOVERNMENT
[JUNE 5, 2020]

VIA PAPER AND ELECTRONIC SUBMISSION

EXECUTIVE SUMMARY

The General Assembly directed the General Statutes Commission to study reports describing conduct criminalized by ordinance or rule that were submitted by State agencies, boards, and commissions, and by counties, cities, towns, and metropolitan sewerage districts, and to determine whether any of the conduct should instead be criminalized by statute. The poor quality of many of the reports hindered the Commission's ability to accumulate the information needed to make this determination. Moreover, the determination necessitates policy and value judgments that the Commission is not best suited to make. Instead, this determination should be made as part of a more comprehensive effort to recodify the State's criminal laws. The Commission recommends that the General Assembly establish a criminal code recodification commission, consisting of persons with expertise in criminal law, to complete this study and to study and make recommendations regarding the State's criminal laws.

BACKGROUND

Section 1 of S.L. 2018-69, as amended by Section 3 of S.L. 2019-198 (Senate Bill 584, Criminal Law Reform),¹ directed "[a]ll State agencies, boards, and commissions that have the power to define conduct as a crime in the North Carolina Administrative Code [to] create a list of all crimes defined by the agency, board, or commission that are in effect or pending implementation" and to "submit the list to the Joint Legislative Administrative Procedure Oversight Committee no later than November 1, 2019."

¹ S.L. 2018-69, as amended by S.L. 2019-198, may be subsequently referred to in this report under the short reference "S.L. 2019-198." That session law can be accessed from the General Assembly's website and is available here: <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S584v5.pdf>

Section 3 of S.L. 2018-69, as amended by Section 4 of S.L. 2019-198 directed “[e]very county with a population of 20,000 or more according to the last federal decennial census, city or town with a population of 1,000 or more according to the last federal decennial census, or metropolitan sewerage district that has enacted an ordinance punishable pursuant to G.S. 14-4(a) [to] create a list of applicable ordinances with a description of the conduct subject to criminal punishment in each ordinance” and to “submit the list to the Joint Legislative Administrative Procedure Oversight Committee no later than November 1, 2019.”²

Section 6 of S.L. 2019-198, as amended by Section 4.35(a) of S.L. 2020-3 (Senate Bill 704, COVID-19 Recovery Act),³ directed the General Statutes Commission to study “the reports received [by the Joint Legislative Administrative Procedure Oversight Committee] and make recommendations regarding whether any conduct currently criminalized either (i) by an ordinance of a county, city, town, or metropolitan sewerage district or (ii) in the North Carolina Administrative Code by an agency, board, or commission, should have criminal penalties provided by a generally applicable State law.” The Commission was directed to “report to the 2021 General Assembly and to the Joint [Legislative] Oversight Committee on General Government on or before March 1, 2021.”

The General Statutes Commission was created by the General Assembly in 1945. The statutory provisions relating to the Commission are found in Article 2 of Chapter 164 of the General Statutes (G.S. 164-12, et seq.). The Commission’s documents relating to this study are available through the Revisor of Statutes, Bill Drafting Division, North Carolina General Assembly, 300 N. Salisbury Street, Suite 401, Raleigh, North Carolina 27603-5925; telephone (919) 733-6660; fax (919) 715-5459.

SUMMARY OF PROCEEDINGS

The General Statutes Commission (“Commission”) discussed the study at its meetings on October 4, 2019, February 7, 2020, March 6, 2020, April 3, 2020, May 1, 2020, and [June 5, 2020].

During this period, the Commission received input and information from its staff and the following persons: Rose Williams, Associate Executive Director of Public and Government Affairs, North Carolina League of Municipalities; Erin Wynia, Chief Legislative Counsel, North Carolina League of Municipalities; Jeff Smythe, Police Chief, City of Burlington; Dorothy Kibler, Deputy City Attorney, City of Raleigh; Jordan Smith, Assistant County Attorney, Pitt County; Adam Pridemore, Legislative Counsel, North Carolina Association of County Commissioners; Senator Andy Wells, North Carolina Senate; Representative Dennis Riddell, North Carolina House; Jon Guze, Director of Legal Studies, John Locke Foundation; Paul Stam, Attorney, Stam Law Firm, PLLC; Whitney B. Fairbanks, Interim Director, North

² The original deadline for both reports was December 1, 2018; the 2019 amendments extended that deadline. S.L. 2018-69 also instructed the Administrative Office of the Courts to compile a list of statutory crimes that are obsolete, duplicative, or unconstitutional, or for which the definition fails to state a mens rea, contains undefined terms, or is inconsistent with the definitions of other crimes. The Administrative Office of the Courts submitted its report on January 31, 2019. That report can be accessed from the Joint Legislative Oversight Committee on Justice and Public Safety’s webpage and is available here:

https://www.ncleg.gov/documentsites/committees/JLOCJPS/Reports/FY%202018-19/AOC-Criminal_Recodification_Working_Group_-2018_01_31.pdf

³ Session Law 2020-3 can be accessed from the General Assembly’s website and is available here: <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2020-3.pdf>

Carolina Office of Indigent Defense Services, North Carolina Administrative Office of the Courts; and Tarrah Callahan, Executive Director, Conservatives for Criminal Justice Reform. Other persons in attendance during this period included Christopher Simmons, Senior Associate City Attorney, City of Raleigh, and Demetrius Deloutch, Government Affairs Associate, North Carolina League of Municipalities. The Commission thanks all who have provided input and information regarding this study.

October 4, 2019, Meeting

At the Commission's October 4, 2019, meeting, staff reported the enactment of the legislative directive to study crimes defined by rules adopted by State agencies, boards, and commissions and crimes defined by ordinances adopted by counties, cities, towns, and metropolitan sewerage districts. Staff also provided general information relating to the study.

The Commission heard brief comments from Rose Williams, Associate Executive Director of Public and Government Affairs for the North Carolina League of Municipalities. Ms. Williams informed the Commission that she understands there is broad consensus not to decriminalize all ordinances and there is a realization that some crimes defined by ordinance need to be kept for their own reasons and the study was thought to be a way to make that determination.

The Commission opened a docket to conduct the study (DN 19-2).

February 7, 2020, Meeting

At the Commission's February 7, 2020, meeting, staff reported on the status of the reports⁴ submitted by agencies, boards, commissions, counties, cities, and towns. A list⁵ of the counties and a list⁶ of the cities and towns ("municipalities") that were required to report and the dates on which the reports were submitted are available on the webpage of the Joint Legislative Administrative Procedure Oversight Committee.

State Agencies, Boards, and Commissions

Forty-one agencies, boards, and commissions submitted reports. Seven either provided a list of rules that define a crime or cited a statute that criminalizes a violation of **any** of its rules. The remaining 34 reported that none of their rules define a crime.

⁴ These reports can be accessed from the Joint Legislative Administrative Procedure Oversight Committee's webpage and is available here:

[https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/472#SL%202018-69%20\(as%20modified%20by%20SL%202019-198\)%20Reports](https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/472#SL%202018-69%20(as%20modified%20by%20SL%202019-198)%20Reports)

⁵ This list can be accessed from the Joint Legislative Administrative Procedure Oversight Committee's webpage and is available here: [https://www.ncleg.gov/documentsites/committees/JLAPOC/SL%202018-69%20\(as%20modified%20by%20SL%202019-198\)%20Reports/Counties/2019%20Counties%20Required.pdf](https://www.ncleg.gov/documentsites/committees/JLAPOC/SL%202018-69%20(as%20modified%20by%20SL%202019-198)%20Reports/Counties/2019%20Counties%20Required.pdf)

⁶ This list can be accessed from the Joint Legislative Administrative Procedure Oversight Committee's webpage and is available here: [https://www.ncleg.gov/documentsites/committees/JLAPOC/SL%202018-69%20\(as%20modified%20by%20SL%202019-198\)%20Reports/Municipalities/2019%20Cities%20Required.pdf](https://www.ncleg.gov/documentsites/committees/JLAPOC/SL%202018-69%20(as%20modified%20by%20SL%202019-198)%20Reports/Municipalities/2019%20Cities%20Required.pdf)

The Commission's discussion concerning the reports submitted by agencies, boards, and commissions included the following observations:

- The intent of the study's directive appears to be for the Commission to review administrative rules that describe criminal conduct to determine whether that conduct should instead be both described and criminalized in a statute of general applicability.
- Section 6 of S.L. 2019-198 directs the Commission to review the reports and make recommendations as to whether any conduct criminalized in the rules "should have criminal penalties provided by a generally applicable State law." It appears, however, that for each agency, board, or commission that has reported having rules that criminalize conduct, there already exists a "generally applicable State law" that criminalizes the violation of the rules of that agency, board, or commission. In other words, there is always a statute providing that the violation of a rule is a crime; the rule just describes the conduct that constitutes the crime. For example, G.S. 87-48(a) provides that any person violating "any rule of the Board [of Examiners of Electrical Contractors]" is guilty of a Class 2 misdemeanor.
- While the report of the Board of Examiners of Electrical Contractors notes G.S. 87-48(a), the report also states, "The foregoing statute appears to make violations of the rules of the Board a criminal offense. The Board has not sought to prosecute criminally any person for violation of the rules of the Board through the Court system in North Carolina."
- The Board of Examiners for Nursing Home Administrators reports that G.S. 90-288(2) "provides that any violation of the Board's law or administrative rules constitutes a Class 1 misdemeanor, however the Board has not adopted any administrative rules that constitute a crime." The report submitted by the Private Protective Services Board states that G.S. 74C-17(b) provides that any violation of the Board's law or administrative rules constitutes a Class 1 misdemeanor. The report, however, lists only eight rules describing conduct that constitutes a crime if violated. The Commission understands these reports to mean that the agency has not adopted any rules that would identify specific crimes in addition to the broad statutory provision.
- Lack of uniformity in administrative rules is an issue in that people may be subjected to potential criminal penalties for violations of behavior with one board but not with another board.

Note: Following the Commission's discussion at this meeting, staff compiled a chart⁷ of 101 General Statutes sections that make the violation of the rules of a particular agency, board, or commission a crime. The rules do not appear to duplicate statutory crimes. The chart also provides the following information, as applicable: (i) the agency, board, or commission given this authority, (ii) the location of its rules in the Administrative Code, (iii) the offense codes associated with rule violations,⁸ and (iv) whether any cases were filed under the offense codes.⁹ In Fiscal Year 2018-2019, there were at least 2 cases filed in superior court and 571 cases filed in district court that appear to arise from rule violations.

⁷ This chart can be accessed from the General Statutes Commission's webpage and is available here:

<https://www.ncleg.gov/documentsites/committees/BCCI-151/DN%2019-2%20Crimes%20Report%20Documents/Statutes%20Criminalizing%20Rule%20Violations.pdf>

⁸ Information about the offense codes was drawn from the Administrative Office of the Court's Courts Offense Codes and Classes spreadsheet, which can be accessed from its website and is available here:

<https://www.nccourts.gov/documents/publications/nc-courts-offense-codes-and-classes>

⁹ Information about the number of cases filed was drawn from the Administrative Office of the Court's Misdemeanor Non-Motor Vehicle Case Activity reports, which can be accessed from its website and are available here: <https://www.nccourts.gov/documents/publications/misdemeanor-non-motor-vehicle-case-activity-report>

Counties

Eighty-four of the required counties submitted a report. The following four did not: Bertie, Greene, Lenoir, and Stokes.

Staff reported that a review of the reports revealed that, while some commonality exists among most counties as to subject areas regulated by ordinance, almost all the reports provide insufficient information on the elements of a crime created by individual ordinances. For example, some reports:

- List titles only and provide a link to the county's website.
- List the titles of ordinances and provide descriptive terms of what the ordinances regulate or govern.
- List chapters of codes of ordinances and catchlines of the various sections within each chapter.
- Report a "violation of this chapter or subchapter" rather than describe the conduct that is criminalized under the chapter or subchapter.

Staff provided a chart¹⁰ prepared after staff's own preliminary investigation of county ordinances identifying common subject areas addressed by these ordinances and the number and names of the counties adopting ordinances in that area. The chart also includes the counties that were not required to report based on the population threshold set out in S.L. 2019-198 and the counties that were required to report but did not do so. The major subject areas listed and the number of counties with ordinances in these subject areas are:

- Animals (71 counties)
- Solid Waste/Garbage (70 counties)
- Noise (66 counties)
- Watershed/Water, Etc. (59 counties)
- Emergency Management (57 counties)
- Subdivision/Unified Development Ordinance (55 counties)
- Flood Damage Prevention (46 counties)
- Businesses (41 counties)
- Fire Prevention (39 counties)
- Zoning/Unified Development Ordinance (35 counties)
- Discharge of Firearms (29 counties)
- Ambulance Services (27 counties)
- Manufactured Homes (22 counties)
- Parks and Recreation (20 counties)
- Hazardous Waste (20 counties)
- Solicitation/Begging (19 counties)
- Sewer Use (17 counties)

¹⁰ This chart can be accessed from the General Statutes Commission's webpage and is available here: <https://www.ncleg.gov/documentsites/committees/BCCI-151/DN%2019-2%20Crimes%20Report%20Documents/GSC%20Study-Crimes%20Defined%20by%20County%20Ordinances.pdf>

- Smoking (17 counties)
- Vehicle Short-Term Lease Tax (16 counties)
- Height Restriction (15 counties)
- 911 Service (15 counties)
- Alarm Systems (14 counties)
- Cable Television (13 counties)
- Hunting (13 counties)

While counties clearly have ordinances with common subject areas, a list of subject areas is not adequate to determine what conduct, if any, should be criminalized in a State statute instead of a local ordinance. Either the counties would need to provide a more detailed description or staff would need to undertake an ordinance-by-ordinance review of all the codes of ordinances of all 100 counties to determine what specific conduct under an ordinance may be prosecuted as a crime. The reason is because of the significant variation among counties with respect to the particular conduct criminalized within the same subject area, for example, in the category of "Animals."

Staff reported further that G.S. 14-4(a) provides, "[I]f any person shall violate an ordinance of a county, city, town, or metropolitan sewerage district created under Article 5 of Chapter 162A, he shall be guilty of a Class 3 misdemeanor and shall be fined not more than five hundred dollars (\$500.00)." G.S. 153A-123(b) reads in relevant part, "Unless the board of commissioners has provided otherwise, violation of a county ordinance is a misdemeanor or infraction as provided by G.S. 14-4." G.S. 160A-175(b) reads in relevant part, "Unless the Council shall otherwise provide, violation of a city ordinance is a misdemeanor or infraction as provided by G.S. 14-4." G.S. 153A-123(b) and G.S. 160A-175(b) provide authority for counties and municipalities to make ordinance violations an infraction rather than a misdemeanor.

The Commission's discussion concerning the reports submitted by counties included the following observations:

- A core problem is that G.S. 14-4(a) contains the blanket statement that an ordinance violation is punishable as a Class 3 misdemeanor. The presumption should not be that every ordinance violation is a crime.
- A simple and possibly effective approach is to change the default provision in G.S. 14-4(a) to make a violation of an ordinance punishable by a civil penalty. Before discussing this approach any further, however, the Commission decided to hear from stakeholders on possible problems if ordinance violations became infractions rather than misdemeanors and asked staff to seek their input for the Commission's next meeting.
- A sense of the total number of prosecutions for ordinance violations during a given period would be helpful information in considering any change to G.S. 14-4(a).
- For any given subject area that is addressed by county ordinances, there appear to be significant, material variations in the conduct prohibited and the penalty imposed. As a result, developing a State-wide statute criminalizing conduct in these areas that is suitable to all counties may not be realistic. Some ordinances may criminalize behavior that could be dangerous for situations in a specific locality but should not apply statewide.
- Information on whether the penalties are uniform from county to county for the same type of conduct could be helpful. Ultimately, however, it is not a question of uniform penalties but

uniformity as to criminalized conduct.

- The reports submitted by counties vary [too](#) significantly to [allow a meaningful review based on the reports](#) by May 1.

Municipalities

Based on information available on the webpage of the Joint Legislative Administrative Procedure Oversight Committee, 287 of the required municipalities submitted a report and the following 47 required municipalities did not submit a report: Andrews, Badin, Banner Elk, Bayboro, Belville, Beulaville, Blowing Rock, Broadway, Brunswick, Cahaj's Mountain, Chadbourn, Clyde, Dobson, Drexel, Ellerbe, Elm City, Garysburg, Jamesville, Jefferson, Kure Beach, Navassa, Norlina, Norwood, Pilot Mountain, Plymouth, Polkton, Princeville, Ranlo, Red Oak, River Bend, Robersonville, Rockwell, Rowland, Sawmills, Siler City, Southern Pines, Spencer, Spring Hope, Spruce Pine, Stedman, Swepsonville, Taylorsville, Wallburg, Warsaw, Weldon, Woodfin, and Yadkinville.

Staff reported that, like the reports submitted by counties, a review of the reports submitted by municipalities revealed that, while there is some commonality among most of the municipalities as to subject areas regulated by ordinance, [almost all](#) the reports provide insufficient information as to the elements of individual ordinances that [would cause](#) specified conduct [to be a crime](#). A review of submitted reports shows substantial variation in [attempts](#) to comply with the legislative directive. For example, some of the 287 reports provide:

- Topics or titles of ordinances only.
- Titles of ordinances with very brief or general descriptions.
- Titles to chapters with summary descriptions of chapters.
- Section numbers only.
- Entire code of ordinances and [a statement](#) that all ordinances are subject to a criminal penalty.
- A link to the code of ordinances.
- Chapter titles only.
- Index of ordinances.
- A statement that all violations of the code of ordinance are criminalized and a link to the code.

Subject areas that are reported as having ordinances punishable as a Class 3 misdemeanor include:

- Animals or animal control
- Emergency management
- Emergency medical services
- Fire prevention and protection
- Water usage
- Sewer use
- Solid waste
- Hazardous waste
- Flood damage prevention
- Soil erosion and sedimentation control
- Fire alarms

- Noise
- Junkyard control
- Smoking or using or consuming tobacco products in city buildings and vehicles
- Street addressing, road naming, address posting
- Special events and mass gatherings
- Amusements, for example, billiard parlors and commercial shooting ranges
- Pawnbrokers
- Sexually oriented businesses
- Massage parlors
- Peddlers and solicitors
- Consuming alcoholic beverages and littering, for example, littering beer cans and bottles and whiskey bottles
- General offenses relating to protection of markers and operation of boats on lakes
- Unified development ordinances combining numerous regulations and standards governing zoning, subdivisions, and land use.

Metropolitan Sewerage Districts

The webpage of the Joint Legislative Administrative Procedure Oversight Committee does not show any reports submitted by metropolitan sewerage districts.

Concluding Observation at February Meeting

The Commission raised the desirability of requesting new reports in a clearer format that would provide the information that the Commission needs from agencies and local governments; the request in [S.L. 2019-198](#) is open-ended. The Commission concluded that it is being asked (i) to review the conduct described in administrative rules of each State agency, board, and commission that has reported and determine whether in fact that conduct should be defined in a general statute instead of in the rules and (ii) to do the same for conduct described in ordinances adopted by counties, municipalities, and metropolitan sewerage districts. [The absence of adequate reports](#) would [make this](#) an exhaustive task.

March 6, 2020, Meeting

At the Commission's March 6, 2020, meeting, the Commission heard from Jeff Smythe, Police Chief of the City of Burlington; Dorothy Kibler, Deputy City Attorney for the City of Raleigh; and Jordan Smith, Assistant County Attorney for Pitt County. Others [present](#) included Christopher Simmons, Senior Associate City Attorney for the City of Raleigh; Erin Wynia, Chief Legislative Counsel for the North Carolina League of Municipalities; Adam Pridemore, Legislative Counsel for the North Carolina Association of County Commissioners; Demetrius Deloutch, Government Affairs Associate for the North Carolina League of Municipalities; and Jon Guze, Director of Legal Studies for the John Locke Foundation.

Police Chief Jeff Smythe's Comments

Police Chief Jeff Smythe commented that having a criminal enforcement option along with a civil enforcement option allows municipalities [to seek](#) voluntary compliance with their ordinances in every

circumstance. No civil penalty or warning will correct the worst situation; police ultimately need the power of arrest to be able to fix it. Police have very professional levels of training and are highly skilled at stepping into unique circumstances and using discretion and discernment to establish the best outcome. In some narrow circumstances, police will need to arrest someone to fix a problem. Arrest is very costly for police and is used only as a last resort. The threat of arrest, however, is a powerful tool that police leverage to negotiate effectively. The goal is not to arrest people but to seek voluntary compliance.

With respect to the issue of duplication between State crimes and ordinance crimes, Chief Smythe stated that police officers are trained to locate any applicable State statute first. If there is a gap in the elements of the crime that they need to fill, they will look at an ordinance and then apply either the statute or the ordinance depending on which one most closely fits.

Chief Smythe also stated some level of local control should be established and maintained for municipalities to discern what is best with respect to the culture of their community. Arrest can be the best solution for the community for the worst circumstances, and it is in the community's best interest for the police to have that tool.

Dorothy Kibler's Comments

Dorothy Kibler commented that it is critical for local governments to have the tools that are necessary to obtain compliance with their ordinances. That includes the ability to charge bad actors with a criminal misdemeanor. It is important for a police officer to have the ability to make a physical arrest when responding to a noise complaint in the middle of the night after a warning has not stopped a bad actor. The misdemeanor enforcement tool is important for dealing with a problem as it occurs and for dealing with chronic violators. Raleigh's experience has been that it is most effective to have multiple avenues of enforcement, which allow the City to warn potential violators, and if the City is ignored, to use civil penalties, and if that fails, to charge a criminal misdemeanor.

Ms. Kibler noted that a police officer cannot make a physical arrest for an infraction. The civil penalty imposed may not be an adequate deterrent against future violations.

Enforcement of an ordinance in civil court can be a long and burdensome process. Non-compliance with a non-criminal ordinance requires a local government to seek an injunction, which means either hiring a lawyer or having one on staff. Unlike Raleigh, many small jurisdictions do not have lawyers on staff. For these jurisdictions, seeking civil penalties or injunctive relief is a big investment, especially for chronic ordinance violators. These jurisdictions rely on their district attorney's office for enforcement.

Raleigh has successfully sought injunctive relief. Some people, however, have refused to comply with the court order, been held in contempt, and ended up in jail about a year after the violation.

In practice, Raleigh rarely pursues misdemeanor enforcement of code violations. Raleigh's code tracks G.S. 160A-175 with a provision that if there is no specified penalty, the criminal misdemeanor penalty is available. Most of Raleigh's code provisions have an associated civil penalty but allow for misdemeanor enforcement if code violators do not comply after being asked.

What local governments want is compliance. They do not want to bring civil lawsuits and do not want to seek criminal enforcement. So, they make efforts to warn people of what is required, for example, that they will need a permit to do certain things, whether through the police officer on the ground or through the local government's website.

Ms. Kibler gave the following responses to questions from members of the Commission and staff:

- Requiring counties and municipalities to review their ordinances to affirmatively specify in each ordinance that a violation of the ordinance is a misdemeanor after considering various factors that must be used in making that determination would be easy for Raleigh because Raleigh has a team of lawyers but harder for other jurisdictions. From her perspective, having the current default provision makes sense because of the way local governments use it.
- Requiring the governing board to discuss whether the conduct should be criminalized before enacting an ordinance could result in the loss of much of the flexibility that police officers have to assess the situation on the ground. Ms. Kibler's experience has been that police officers do a very good job in determining how best to obtain compliance. That discretion should not be taken away because it would potentially harm neighbors or other citizens who are suffering through that code violation. So, from her perspective, maintaining that flexibility is critically important.
- In response to a concern that extremely vague ordinances may not be enforced uniformly and that there could be different interpretations among people at the same police department about what is a violation, Ms. Kibler stated that police officers undergo substantial training to make sure that ordinance violations are enforced consistently.
- If State law regulates conduct clearly and unequivocally, a local government cannot duplicate a State statute. On the issue of duplication with State law, State law preempts county or municipal ordinances. G.S. 160A-174 provides guidelines for the adoption of ordinances.
- The number of misdemeanor charges is not so important, because the mere possibility of charging a person with a misdemeanor is deterring bad behavior.
- As to uniformity among ordinances, her perspective is that local problems require local solutions. Having the discretion to charge a misdemeanor for conduct criminalized by ordinance is better than having a statewide statute criminalizing the conduct. Ms. Kibler knew of no issues currently addressed by ordinance at the local level that would be better addressed by a statewide statute.

Jordan Smith's Comments

Jordan Smith commented that, as a general matter, counties typically regulate a little less than municipalities. Civil enforcement methods are not perfect tools. The ability to send out demand letters telling a person that the person's violation of an ordinance subjects the person to criminal prosecution as well as civil enforcement has an impact on people; it has value and makes them comply with the ordinance. In Mr. Smith's experience, criminal enforcement is one tool that is used very sparingly and is not anything that is overused.

Possible remedies include civil penalties, but in Pitt County's case, the County is often dealing with people who may be judgment-proof. The cost of seeking a civil penalty far exceeds the amount recovered, and the County does not get the money. People are aware of that limitation.

Injunctive relief is a long, drawn-out process. The county must file and serve a complaint and go through discovery. In Pitt County, Mr. Smith said he can get on the court calendar quickly, but even so, it takes six months. Injunctions are an extreme remedy. A judge must be convinced of the ordinance violation and that the judge should issue the injunction. The latter is usually the problem, because in Mr. Smith's experience, it is not a thing judges want to do. Judges prefer to issue some type of monetary relief and be done with the case. If injunctive relief is obtained, the only remedy to enforce the injunction is to go back to court to obtain an order of contempt, which judges are even less likely to issue. He has successfully gotten injunctions for violations of Pitt County ordinances at times and at times he has not.

Obtaining a temporary restraining order when pursuing injunctive relief depends on the facts, the violation, and how likely it is that the violation is an immediate threat to public health and safety.

Mr. Smith gave the following responses to questions from members of the Commission and staff:

- As to statewide uniformity, many issues that local governments deal with are local issues. Local elected officials want to be able to do what they think best serve their constituents. For most issues, Mr. Smith thinks it is necessary to have local autonomy; subdivision and zoning issues might have statewide import.
- In his experience in Pitt County, he has not run across any local ordinances that he would consider frivolous. In Pitt County, his office is mindful of how ordinances are enforced and very rarely are they enforced criminally. However, the option to enforce criminally is valuable to Pitt County.
- In adopting ordinances in Pitt County, there is reliance on the default provision of G.S. 14-4 that criminalizes ordinances; there has not been much discussion or debate about whether there is a need to decriminalize an ordinance.
- Speaking solely as an assistant county attorney and not on behalf of his board of county commissioners, he does not desire any change to the way the system operates now. He would advocate for more local government flexibility and autonomy in most cases.

Erin Wynia and Adam Pridemore's Comments

In response to a question, Erin Wynia stated that, speaking very generally, the 30 largest cities have in-house counsel; the remaining 520 are required to have an attorney but they do it through contracting attorneys. Adam Pridemore stated that he thinks that at least three-fourths of the 100 counties have at least one county attorney.

Also, in response to a question, Mr. Pridemore stated that he does not know of any specific issues that are currently addressed by local ordinances that would be better addressed by a statewide statute; he prefers ordinances since they can be used to address the specific situation for the local community.

Observations by the Commission and Staff

Following the presentations, the Commission noted that, having heard from local government representatives who are satisfied with the status quo, it should hear from people who are not satisfied with the status quo. The Commission raised the possibility of hearing from someone associated with the Criminal Law Recodification Working Group referenced in S.L. 2018-69, the John Locke Foundation, and the UNC School of Government. Staff agreed to investigate having speakers at the April meeting.

Next, the Commission discussed the reporting deadline of May 1 and the possibility of seeking an extension of the deadline. Staff reported that the deadline cannot be met if the goal of the study is to identify all county and municipal ordinances that have common criminalized conduct that should be [set out in](#) State statutes rather than local ordinances. That level of detail would require a review of all codes of ordinances on 100 county websites and approximately 550 municipality websites and the rules of [all](#) agencies, boards, and commissions [in](#) the North Carolina Administrative Code to determine whether there is commonality among the elements of the offenses and, where there is commonality, whether the criminalized conduct should be [set out in](#) generally applicable State statutes. The number of such ordinances [and rules](#) could be in the thousands.

Staff reported [trying to obtain](#) further clarification of the study directive [and being](#) informed that the Commission is being asked to look for:

- Commonality amongst county jurisdictions that have similar criminalized behavior in their ordinances that should be considered by the General Assembly as candidates for general statutes.
- County ordinances that do not rise to the necessity of a misdemeanor charge and may safely be moved to an infraction.

The Commission discussed whether to look [only](#) at commonality among the subject areas addressed by ordinances, for example, noise or animals, or whether [its review should be more specific, given the previously-noted enormity of the task. It considered comparing ordinances in a few subject areas but expressed doubt as to how it would be feasible to say more than a subject area was](#) frequently addressed at the county level with criminal penalties. There was doubt expressed that the General Assembly would address criminalized conduct at the State level to the same degree [as](#) at the local level. [The Commission concluded by consensus that it should not attempt its own more specific investigation into county and municipal ordinances to determine exactly what conduct each of them criminalize.](#)

Staff [reported information from](#) a blog post prepared by Professor Jessica Smith with the UNC School of Government. [Professor Smith reported](#) at least 10,946 charges for ordinance violations in 2018.

Note: Following the Commission's discussion, staff examined an Administrative Office of the Courts report for 2018 charges:

2018 Charges

Felonies	367,637
Misdemeanors, other than traffic	480,737
Traffic misdemeanors (includes DWI)	1,108,473
Infractions	719,617
Other ¹¹	35,830
Total	2,712,294

¹¹ There are a number of charges that are described as "free text" and are not listed as felonies, misdemeanors, or infractions. Some of these charges likely are for misdemeanors.

The sum of non-traffic misdemeanor charges (480,737), traffic misdemeanor charges (1,108,473), and other charges (35,280) equals 1,625,040, so the percentage of misdemeanor charges that were for local ordinance violations was at least 0.67358% (10,946 divided by 1,625,040).

April 3, 2020, Meeting

At the Commission's April 3, 2020, teleconference meeting, the Commission heard from Senator Andy Wells, North Carolina Senate; Jon Guze, Director of Legislative Studies for the John Locke Foundation; Paul Stam, Attorney, Stam Law Firm, PLLC; Whitney B. Fairbanks, Interim Director of the North Carolina Office of Indigent Defense Services for the North Carolina Administrative Office of the Courts; and Tarrah Callahan, Executive Director of Conservatives for Criminal Justice Reform.

Senator Wells' Comments

Senator Andy Wells, one of the primary sponsors of S.L. 2019-198, stressed the importance of the Commission charge under the session law. He also stressed the importance of having increased transparency and consistency across the State with respect to the State's criminal law.

Senator Wells stated that he wanted the Commission to hear the perspective of those in the General Assembly who had worked on the issue of criminal law reform. He mentioned an email from Representative Riddell, a key player in criminal law reform; in some ways they agree, and in some ways, they do not agree on the process going forward. He understood the problems with trying to meet the May 1 reporting deadline based on the quality of information received from local governments. With that in mind, he would welcome a proposal from the Commission that tweaked the reporting requirement but at the same time he would like to know that the study was moving forward. The conversation about criminal law reform began seriously about three years ago with a philosophically diverse group from across State government that included among others, Mark Martin, the former Chief Justice of the North Carolina Supreme Court, and Dan Forest, the Lieutenant Governor. There has been a consensus in the Senate for consolidating criminal statutes in one place in the General Statutes, including criminal ordinances adopted by the 500 plus municipalities and 100 counties across the State. There is no way for a lay person to find out what is a crime in North Carolina without having to hire an attorney to do the search.

Senator Wells gave a brief history of the criminal law reform legislation enacted during the last two legislative sessions, noting that S.L. 2019-198, which received strong bipartisan support, was enacted after a lack of response from local governments in providing the information requested in S.L. 2018-69. He understood the Commission at its last meeting heard from local government representatives who do not appear to support the effort to consolidate the criminal code. As the son of a former city manager, he understood local governments like discretion, but he would like to see some consolidation.

If the Commission lacked the necessary information from the local governments, he suggested that the Commission look at creating its own list of those crimes that should be criminal but would apply to local governments under an opt-in process, such as exists elsewhere in State statutes. He had previously given the following example to the Revisor of Statutes: there is a good argument that a citizen should not fire a fifty-caliber or greater rifle inside a municipality's limits. This conduct could be defined as a crime in the General Statutes and a municipality could choose whether to opt into the statute. That crime would then be in a place where everybody can find it as a State statute. Senator Wells asked that any such list

be created in a somewhat timely manner so that the process can move forward, although it need not be all-encompassing. The General Assembly could then sunset the corresponding local ordinances.

Senator Wells emphasized that criminal law reform is a personal liberty issue, a criminal justice system simplification issue, and a cost-saving issue. Rather continuing to slide dates back, he would like to see some type of step being taken to move this project ahead.

Senator Wells provided the following information in response to questions from members of the Commission:

- Senator Wells was not saying that there should not be local crimes, just that they should be organized in a way that the average citizen who is not an attorney could find them.
- The opt-in approach would require legislation by the General Assembly with subsequent opt-in by local bill of cities or counties that were not originally included.
- A state statute would eliminate the need to have a local ordinance criminalizing similar conduct.
- Concerns cover several layers: whether there should be a criminal penalty at all, whether it is consistent across the State, and how to make it easily accessible to the public.
- Senator Wells had the same inconsistency and lack of transparency concerns about occupational licensing boards that he had about local governments.
- The establishment of a multi-disciplinary group, like a criminal law recodification commission, has been part of the debate during this process. Generally, the House has been more interested in establishing another commission and the Senate has been more interested in getting this done by using available resources.

Representative Riddell's Comments

Representative Dennis Riddell addressed the Commission by email. Considering the testimony received during the Commission's March meeting and the current healthcare crisis that requires 100% of the General Assembly's attention, he proposed the following:

- Introducing legislation once the General Assembly reconvenes to move back the Commission's reporting date from May 1 to some date in 2021.
- Having the Commission determine whether this study would be facilitated by requiring the relevant local authorities, agencies, and boards to resubmit their crime lists in a well-designed, pre-determined format.
- Possibly having the Commission recommend establishment of a recodification commission, based on previous similar models that undertook review of statutory matters, for example, raise the age.

Representative Riddell also informed the Commission that, in his opinion, the question of whether some administrative crimes can be replaced by statutory crimes is just one part of a larger question that needs to be addressed. In his view, the best way to address all the issues would be to create an expert commission to analyze and recodify North Carolina's criminal law. He will urge the General Assembly to create such a commission during the coming session.

Jon Guze's Comments

Jon Guze commented that the task assigned by S.L. 2019-198 is very specific. Section 6 requires the Commission to study the crime reports submitted by local governments and regulatory agencies and respond to a single question, namely, whether any conduct currently criminalized by an ordinance of a county, city, town, or metropolitan sewerage district or by rules promulgated by an agency, board, or commission, should have criminal penalties provided by a generally applicable State law. As staff explained at the Commission's February meeting, the reports submitted by local authorities and administrative agencies vary widely in format, and—in many instances—in the reliability and helpfulness of the information they provide. The John Locke Foundation also reviewed those reports and concurred with staff's analysis.

Given the current state of the crime reports, the John Locke Foundation did not think it feasible for the Commission to make a final determination about whether any existing ordinance or regulatory crimes should be replaced with new statutory crimes—certainly not by May 1, and probably not at all unless something could be done to improve the quality of the reports. As was discussed at the Commission's February meeting, the task would be facilitated if the relevant local authorities, agencies, and boards were required to resubmit their crime lists in a well-designed, pre-determined format, but, even with clear, consistent, and complete crime lists in hand, the task would require many hours of analysis by legal and policy experts.

Mr. Guze stated that, in his view, the most constructive way forward would be for the Commission to recommend that the General Assembly relieve the Commission of its responsibility for determining whether any conduct currently criminalized by ordinance or regulation should be replaced by a generally applicable State law, and, instead, assign that task to a group of experts with the time and resources to carry it out properly. The ideal group to undertake that task would be a criminal law recodification commission like the one previously recommended by Professor Jessica Smith.

Other Comments

Paul Stam commented that he has been interested in this issue for 20 or 30 years and that he agreed with Mr. Guze that the Commission is not the right venue. The Commission has been ordered by law to do something that the Commission cannot possibly do by May 1.

Whitney B. Fairbanks provided comments emphasizing the need for a careful and thoughtful approach to any kind of criminal law recodification, one led by subject-matter experts such as Professor Jessica Smith and others like her at the UNC School of Government. From the perspective of the Office of Indigent Defense Services, she would urge the General Assembly to consider the topic of overcriminalization and to implement fixes to some of the issues that overcriminalization has created. She would also urge the General Assembly to do it in a thoughtful and careful manner.

Tarrah Callahan stated that she worked closely with the other speakers and Professor Smith on the issue of overcriminalization. Ordinance crimes prosecuted as misdemeanors strain court resources and law enforcement, with 10,946 prosecutions for ordinance violations in 2018. These are either already covered under the criminal statutes or would be better dealt with as infractions. Although most charges did not lead to convictions, those accused now have a criminal record that prevents them from gainful employment and housing and the ability to be productive citizens of the community.

Ms. Callahan also stated that she agreed with Mr. Guze that the task of addressing which local crimes should be statewide crimes is a significant request of the Commission that is not possible in the amount of time the Commission was given and ought to be assigned to a commission that is focused fulltime on recodifying North Carolina's criminal code.

May 1, 2020, Meeting

At the Commission's May 1, 2020, teleconference meeting, the Commission reviewed a draft interim report and directed staff to make certain revisions, to be reviewed by the Commission at its June 5, 2020, meeting.

FINDINGS

The Commission makes the following findings:

1. S.L. 2019-198 directed (i) every State agency, board, and commission empowered to define conduct as a crime in the North Carolina Administrative Code to create a list of all crimes defined by the agency, board, or commission and (ii) every county with a population of 20,000 or more, municipality with a population of 1,000 or more, and metropolitan sewerage district that has enacted an ordinance punishable pursuant to G.S. 14-4(a) to create a list of "applicable ordinances with a description of the conduct subject to criminal punishment in each ordinance." The lists were to be submitted to the Joint Legislative Administrative Procedure Oversight Committee no later than November 1, 2019.
2. S.L. 2019-198 also directed the Commission to study these reports and make recommendations regarding whether any conduct currently criminalized by an administrative rule or by an ordinance "should have criminal penalties provided by a generally applicable State law." The Commission was originally directed to report on or before May 1, 2020, to the 2020 Regular Session of the 2019[?] General Assembly and the Joint Legislative Oversight Committee on General Government. The deadline has been extended to March 1, 2021, by Section 4.35(a) of S.L. 2020-3.
3. The limited relevant data submitted by agencies, boards, commissions, counties, and municipalities hinders the Commission's ability to accumulate the information needed to comply with the goals of the study charge. The reports are not in a searchable database and vary substantially in describing the conduct subject to criminal punishment in each rule and ordinance. Given the large number of reports received, the widely varying formats, and—in many instances—the poor quality of the reports, it is not feasible for the Commission to provide final recommendations about replacing existing administrative rule and local ordinance crimes with new statutory crimes by May 1.
4. The Commission heard from various interested parties about the benefits and drawbacks of criminal ordinances and administrative rules. Those parties expressed widely disparate views on the need to consolidate criminal laws at the state level.
5. The percentage of misdemeanor charges that are for local ordinance violations is very small.
6. The issue of ordinance crimes is a small piece of the larger project of criminal code recodification.
7. In 1971, the General Assembly created a criminal code commission (1971 Joint Resolution 24) and tasked it to study and revise the State's criminal law and procedure. The existence of the commission was extended for a period of approximately 10 years because of the magnitude of the tasks assigned to the commission and the importance of its work. The membership of the

commission consisted of 26 to 30 members and included legislators, judges, prosecutors, defense lawyers, law professors, law enforcement personnel, and laypersons.

8. **Determining** whether any conduct made criminal by rule or ordinance should have criminal penalties provided by statewide law instead of by rule or ordinance necessitates policy and value judgments, including the following:
- What conduct should be made criminal.
 - What conduct should be an infraction.
 - What conduct should be subject to a civil penalty.
 - What conduct is better enforced through a means other than the threat of imprisonment or the payment of money.
 - What issues are better left to local decision-makers in light of significant variation among counties and municipalities.
 - How much authority agencies and local governments should have to impose sanctions.
 - How to provide local governments with effective authority to enforce their regulations if not through the threat of criminal prosecution, especially smaller local governments[?].

The Commission is not the group best suited for establishing the answers to these policy issues.

9. Commentators who addressed the Commission concerning criminal reform described a comprehensive effort to recodify the State's criminal laws. The task delegated to the Commission is better addressed by those undertaking the more comprehensive task.

RECOMMENDATION

The Commission recommends that the General Assembly establish a criminal code recodification commission, modeled on the one described in Section 10 of Senate Bill 114 (Seventh Edition) of the 2017 legislative session.¹² The Commission believes that such a commission, consisting of persons with expertise in criminal law, would be better suited than is the General Statutes Commission to study and make recommendations regarding the State's criminal laws.

This the [5th day of June 2020].

Respectfully submitted,

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Sabra J. Faires, Vice Chairman

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¹² This bill can be accessed from the General Assembly's website and is available here:
<https://www.ncleg.gov/Sessions/2017/Bills/Senate/PDF/S114v7.pdf>