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RESPONDING TO THE TIME-BASED FAILURES OF THE CRIMINAL LAW THROUGH A CRIMINAL SUNSET AMENDMENT

RICHARD E. MYERS II*

Abstract: The libertarian genius of the drafters of the U.S. Constitution recognized that liberty is defended best when it is difficult to pass a law. They therefore split power vertically and horizontally—between the states and the federal government, and among the executive, legislative, and judicial branches—and barred some laws from being passed at all. The obstructive mechanisms intended to defend liberty, however, also stymie attempts to restore liberty. This Article proposes a constitutional amendment that would redress that oversight by creating a twenty-five-year limit on the effect of all criminal legislation. It would force regular legislative oversight of the criminal codes. It would redistribute power among the branches by reducing the courts' incentives to create new conceptions of substantive due process to redress perceived process failures. And it would reset the checks and balances for each generation in favor of liberty. This Article is intended to provoke a renewed discussion of the issues of generational entrenchment, overcriminalization, and the structural bases that result in what Professor William Stuntz has called "the pathological politics of the criminal law."

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The earth belongs always to the living generation. . . . The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. . . . Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right.

—Thomas Jefferson to James Madison, September 6, 1789

No criminal law passed by the United States or any of the several states may remain in effect for more than 25 years from its date of passage. . . . Any new criminal law must be passed individually through the republican procedures of the jurisdiction in which it is to apply.

—Proposed Amendment XXVII
(The Criminal Sunset Amendment)

INTRODUCTION

The American system of substantive criminal law is in danger of succumbing to explosive overgrowth, at least according to some critics.¹ They decry the overbreadth and overdepth of the law, demonstrating both that there are laws on the books that criminalize behavior we no longer condemn and that there are too many laws that apply to the behavior we do condemn.² They point out that we have substituted procedural protections, judicial intervention, and executive discretion for careful legislative attention to the substantive criminal law.³ As a result, they say, we are undercutting the perceived legitimacy of the law at numerous turns.⁴

Critical scholars have spent the last generation detailing the process failures that have led to what Professor William Stuntz famously termed

¹ See Gene Healy, *Introduction to GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING*, at vii (Gene Healy ed., 2004) [hereinafter *GO DIRECTLY TO JAIL*]; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001); Erik Luna, *Overextending the Criminal Law*, CATO POLICY REPORT (Cato Inst., Washington, D.C.), Nov./Dec. 2003, at 1, 15, reprinted in *GO DIRECTLY TO JAIL*, *supra*, at 1-4.

² See Healy, *supra* note 1, at 2; Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 768-69 (2004); Stuntz, *supra* note 1, at 512-19; Luna, *supra* note 1, at 11.

³ See Stuntz, *supra* note 1, at 519-22 (explaining the effective power of adjudication that prosecutors receive because of the criminal code's breadth and depth); *id.* at 540-42 (describing the role of appellate judges in shaping the criminal law in ways favorable to defendants); William J. Stuntz, *Substance, Process and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 3-4 (1996) [hereinafter Stuntz, *Civil-Criminal*] (describing the procedural protections accompanying criminal adjudications).

⁴ See Stuntz, *supra* note 1, at 522 (describing the effect of overcriminalization on the law's expressive function); Luna, *supra* note 1, at 16 (noting the effect of overcriminalization on the moral force of the penal code).

the "pathological politics of criminal law."⁵ In many respects they are right because the politics of the criminal law are deeply flawed.⁶ Although the flaws may not be fatal, they are very real, and they lead to a widely held perception that the criminal law is broken and needs fixing.⁷ So why is the criminal law such a mess? Many of these problems and concerns share a common source: the intransigence of criminal law.⁸ Once on the books, criminal law is difficult to repeal.⁹ It stays with us, despite changing moral convictions and majority preferences.¹⁰ The intransigence, in turn, pressures other parts of the system.¹¹

This Article examines one source of this intransigence: the Constitution's failure to optimally account for change over time in social attitudes regarding crime.¹² Because of the flawed politics that the critics have described, it is incredibly hard for politicians to change criminal law to match changing social mores.¹³

This Article explores the intransigence problem in greater depth through an examination of the following claims. Our essentially conservative Constitution, with all of its checks and balances, systematically introduces a time lag into the criminal law that has widespread detrimental effects.¹⁴ The Constitution requires a check-proof majority to go from the absence of a law to the presence of a law, but it also requires that same check-proof majority to go from the presence of a law to the absence of one.¹⁵ In many cases, the time lag between the end of a majority on one side of the decision to criminalize conduct

⁵ See Stuntz, *supra* note 1, at 505.

⁶ See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 132–33 (2001) (criticizing the politics of criminal law because legislatures enact punitive measures regardless of evidence supporting contrary policies and engage in impulsive action without understanding the underlying problems). See generally Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

⁷ See, e.g., Husak, *supra* note 2, at 756; Ellen S. Podgor, *Foreword to Overcriminalization: The Politics of Crime*, *supra* note 6, at 541–43; Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 634 (2005).

⁸ See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773–75 (2005); Stuntz, *supra* note 1, at 509; Luna, *supra* note 1, at 16.

⁹ See Beale, *supra* note 8, at 773; Luna, *supra* note 1, at 16.

¹⁰ See Beale, *supra* note 8, at 773; Luna, *supra* note 1, at 16.

¹¹ See Stuntz, *supra* note 1, at 510.

¹² See Beale, *supra* note 8, at 773–74 (analyzing why outdated moral statutes remain on the books).

¹³ See Stuntz, *supra* note 1, at 508 ("American criminal law's historical development has borne no relation to any plausible normative theory.").

¹⁴ See Beale, *supra* note 8, at 773–74.

¹⁵ See U.S. CONST. art. 1, § 7.

and the rise of a new check-proof majority on the other is unacceptably long; in some cases, it is potentially infinite.¹⁶ This Article argues further that the lag is a component of many perceived problems in the criminal law, often in non-obvious ways. The obvious problems arise in the legislative process failures associated with checks and balances that apply to any law.¹⁷ But there are others. For example, the lag has led to the increased development of multiple doctrines that seek to ameliorate the problem.¹⁸ Expanded judicial review, widespread and largely unregulated prosecutorial discretion, and jury nullification are routes for the other branches or the people to try to intercede to correct for the time lag.¹⁹ But these all come with costs to the perceived legitimacy of the law.²⁰ As a result, at any given time, significant portions of the criminal code are out of touch with majority sentiment.²¹ And taken together, these ameliorative doctrines introduce so much noise into the system that they undercut other important goals of the criminal law, such as the transmission of rules and the inculcation of values.²² There would be less need for apparently "countermajoritarian" and noise-inducing solutions if the law more closely tracked majority values.²³

Is this time-lag problem endemic to democracy? Must it be this way? The answer to both questions is a qualified "no." Two changes to the Constitution, in a single amendment, could address much of the time-lag problem. Two hundred years ago, Thomas Jefferson proposed to James Madison a sunset requirement on all law, and even the Constitution itself, because Jefferson foresaw that social commitments could undergo drastic change over time.²⁴ He believed that the Constitution that Madison was then drafting would erect significant barriers to legislative action that would make it likely for gulfs to open between popu-

¹⁶ See Beale, *supra* note 8, at 773-74.

¹⁷ See Stuntz, *supra* note 1, at 510 (calling this dynamic "surface politics").

¹⁸ See 15A AM. JUR. 2D *Common Law* § 2 (2000); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1155 (2007); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 646 n.19 (2002).

¹⁹ See 15A AM. JUR. 2D *Common Law* § 2; Brown, *supra* note 18, at 1155; Krug, *supra* note 18, at 646 n.19.

²⁰ See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 5-7 (1995).

²¹ See Beale, *supra* note 8, at 773-74.

²² See Stuntz, *supra* note 1, at 522.

²³ See *id.*

²⁴ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 12 THE PAPERS OF JAMES MADISON 382, 385 (Charles F. Hobson et al. eds., Univ. Press of Va. 1979).

lar sentiment and enacted law.²⁵ Jefferson's vision has come to pass, particularly in the criminal law.²⁶

Ultimately, this Article intends to suggest that there is a common component to many of the problems of the criminal law that may not be immediately apparent, and to suggest that reexamining some of the existing critiques in light of a greater appreciation of the time-lag problem may provide a new access point for thinking about them. At the end of this Article, I offer a proposed Criminal Sunset Amendment.²⁷ Even for those who reject out-of-hand law professor suggestions that we amend the Constitution, the proposed amendment works as a thought experiment, allowing the reader to reconsider the current system. I consider the benefits and the costs of the proposed amendment, in hopes of throwing current compromises into sharper relief.²⁸

This Article examines the time-lag problem of the criminal law in five Parts. Part I examines the political failures that make repeal an inefficient solution to the time lag produced by changing moral commitments.²⁹ Part II examines the special concerns that arise in the criminal law as a result of the limitations of repeal.³⁰ Part III considers the problems that have evolved in the absence of a fully functional mechanism to account for changing commitments and in the absence of other mechanisms for limiting the law's duration.³¹ Part IV examines the issue of sunset provisions from several angles.³² It considers the Framers' thoughts on time-based change in the law, including their thoughts on sunsets.³³ It examines emerging scholarship on sunsets.³⁴ It then describes a proposed Criminal Sunset Amendment in detail.³⁵ Part V considers objections to the Amendment and current doctrine's ability to address changing values over time.³⁶

²⁵ See *id.*

²⁶ See Beale, *supra* note 8, at 773; Stuntz, *supra* note 1, at 508.

²⁷ See *infra* notes 280–285 and accompanying text.

²⁸ See *infra* notes 286–383 and accompanying text.

²⁹ See *infra* notes 37–86 and accompanying text.

³⁰ See *infra* notes 87–150 and accompanying text.

³¹ See *infra* notes 151–241 and accompanying text.

³² See *infra* notes 242–328 and accompanying text.

³³ See *infra* notes 246–263 and accompanying text.

³⁴ See *infra* notes 264–275 and accompanying text.

³⁵ See *infra* notes 277–328 and accompanying text.

³⁶ See *infra* notes 329–383 and accompanying text.

I. THE LIMITATIONS OF REPEAL

Attitudes toward behavior change over time. Groups that were once subjugated are now free.³⁷ Behavior that was once considered subversive, obscene, or irreligious is now commonplace.³⁸ Majorities strong enough to overcome the checks and balances that slow legislation and enact a law at one point in time may pass away, but the same obstructive genius intended to defend liberty stymies attempts by a new majority to restore liberty.³⁹ These limitations are inherent in the U.S. Constitution's republican system, in part because the system takes for granted that laws passed by one generation will continue in place until repealed by another.⁴⁰

But this need not be so. In a 1789 letter to James Madison proposing that all laws—and the Constitution itself—should sunset every nineteen years, Thomas Jefferson warned that the power of repeal is not the equivalent of the power to pass a law in the first instance.⁴¹ He cautioned:

It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law had been expressly limited to 19 years only. . . . But the power of repeal is not an equivalent. It might be indeed if every form of government were so per-

³⁷ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 3 (2004). Klarman argues that a variety of social and political factors transformed the racial status quo that once oppressed blacks. *Id.* at 4.

³⁸ See Beale, *supra* note 8, at 750–51. Beale surveys state Blue Laws, which regulate behavior on Sundays, and other state laws that prohibit swearing, spitting, and other now commonplace behavior. See *id.* at 750–51 & nn.5–7.

³⁹ See Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 122 (1991) ("Checks and balances . . . impede the repeal of old laws, including those that have over time come to violate entitlements that philosopher-judges deem fundamental; and this survival of old laws is a particularly important, if frequently unnoticed, form of hiding.").

⁴⁰ See generally Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970). Bernstein summarizes:

We take for granted that statutes once enacted continue in force until a later legislature takes affirmative action by a fresh majority to repeal or amend. Few statutes other than appropriation measures are enacted for limited periods; practically none expires with the legislature that enacted it despite the sometimes tenuous majority that enacted it. Although that majority no longer commands voter support, its law continues in force until a new coalition can be mustered to enact a new statute.

Id. at 574 n.10.

⁴¹ Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385.

fectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents; and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.⁴²

Practice has proved Jefferson prescient. The Framers' obstructionist system of checks and balances is libertarian if laws are being written on a blank slate, but not once the laws are on the books.⁴³ The system of checks and balances is very conservative, as it preserves the prior state.⁴⁴ It requires more than a majority to go from the absence of law to the presence of law, but it also requires more than a majority to go from the presence of law to the absence of law.⁴⁵ A moral proposition that once commanded a majority and made a particular behavior worthy of the criminal sanction may remain criminal law long after that majority has dissipated, until a supermajority on the other side develops.⁴⁶

The limitations of repeal are particularly acute in the criminal law, where it may be particularly difficult to regularly change the laws to fit changing moral conceptions.⁴⁷ The law should expand and contract as social mores change, but as Professor Stuntz has noted, "The more accurate generalization is that criminal law expands in different areas at

⁴² *Id.* at 385–86.

⁴³ See Beale, *supra* note 8, at 773–74.

⁴⁴ See *id.*

⁴⁵ See Calabresi, *supra* note 39, at 122 n.36 ("Although unwanted, unworkable, and incapable of reenactment[, the anti-contraception statute at issue in *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965)] was politically hard to repeal. It was easier for legislators to use checks and balances to duck the issue than to vote one way or the other on it."). Stuntz disagrees that criminal laws require a majority of popular support, as the significant benefits to legislators for passing nearly any criminal legislation, even when supported by only a minority of voters, outweighs the diffuse costs that are, in most cases, simply passed on to the enforcers. Stuntz, *supra* note 1, at 528.

⁴⁶ See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1710–11 (2001) (suggesting that the Supreme Court engages in democracy-forcing interventions in cases where it must "make sure that the then-sitting legislature was being 'responsive to the people,' rather than to the clamoring of a narrow interest group well positioned to block legislative reform").

⁴⁷ See Beale, *supra* note 8, at 773–74.

different times and places, but it always expands."⁴⁸ Stuntz argues that this constant expansion is clear evidence of the pathology of criminal law.⁴⁹ Stuntz's position is widely held,⁵⁰ though not universal.⁵¹ Professor Darryl Brown's research indicates that legislatures "routinely decline to enact proposals that fit the stereotype of politically irresistible proposals for expanded liability and harsher sentences,"⁵² and "have long and continuing records of repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions."⁵³

But Professor Brown, like Stuntz's other critics, must fall back on desuetude and non-enforcement through prosecutorial discretion to bolster their arguments that the politics of the criminal law are not as pathological as most commentators insist.⁵⁴ Moreover, it is still problematic if the politics of criminal law closely reflect ordinary politics.⁵⁵ Criminal law ought to be different from ordinary law because it punishes, often very severely, based on what should be broadly held moral commitments.⁵⁶ Given the stakes, the politics of criminal law should be better, not worse, than ordinary politics.⁵⁷ For those who are convinced that Professor Brown has it right—or mostly right—I would agree. This

⁴⁸ Stuntz, *supra* note 1, at 527–28.

⁴⁹ See *id.*

⁵⁰ See DAVID A. J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION* 271–72 (1982); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1157 n.10 (2005); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1536 (1997); Husak, *supra* note 2, at 769; Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 267–68 (2003); V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 926 n.4 (2004); Robinson & Cahill, *supra* note 7, at 638; James A. Strazzella et al., *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 7–11; Luna, *supra* note 1, at 4; John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation* 9 (Fed. Soc'y for Law & Pub. Pol'y Paper, Oct. 1, 2004), available at http://www.fed-soc.org/publications/pubID.940/pub_detail.asp; Paul Rosenzweig, *The Overcriminalization of Social and Economic Conduct* 3, 18 (The Heritage Found., Legal Memorandum No. 7, Apr. 17, 2003), available at http://www.heritage.org/Research/LegalIssues/upload/40268_1.pdf. See generally *Overcriminalization: The Politics of Crime*, *supra* note 6.

⁵¹ See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 248 (2007).

⁵² *Id.*

⁵³ *Id.* at 225.

⁵⁴ See *id.* ("Further, when legislatures leave out-dated crimes on the books, other components of democratic governance compensate: politically accountable prosecutors rarely prosecute (and thus effectively nullify) many crimes the public cares little about—and that scholarship complains about.").

⁵⁵ See Robinson & Cahill, *supra* note 7, at 644–45.

⁵⁶ See RICHARDS, *supra* note 50, at 277.

⁵⁷ See GARLAND, *supra* note 6, at 132–33.

might suggest that my proposal is unnecessary. My proposal, however, is more nuanced. In my view, the problem is not that the criminal law never changes; instead, the problem is that the criminal law, at any given time, is sufficiently out of phase with public opinion such that a significant perception exists that the law does not reflect community values.⁵⁸ This perception is the underlying basis that results in the widespread sentiments expressed by Professor Stuntz and those like him.⁵⁹ Therefore, it is entirely possible for Professor Brown to be correct in his assertion that the politics of the criminal law are surprisingly ordinary, while the arguments contained in this article also remain correct: ordinary politics are insufficient to maintain widespread public faith that the criminal law accurately represents current public sentiment.⁶⁰

To understand the reasons why repeal is an inadequate mechanism for synchronizing public attitudes toward crime with the law on the books, it is necessary to understand first a little about the interrelationship between the expressive functions of the criminal law and the efforts required to repeal a criminal statute.⁶¹ To say that the criminal

⁵⁸ See Beale, *supra* note 8, at 773–74; see also ROBINSON & DARLEY, *supra* note 20, at 50 (conducting empirical studies to compare community views and criminal codes).

⁵⁹ See, e.g., Stuntz, *supra* note 1, at 528.

⁶⁰ See Brown, *supra* note 51, at 225.

⁶¹ See Stuntz, *supra* note 1, at 519 (“Broad codes cannot be enforced as written; thus, the definition of the law-on-the-street necessarily differs, and may differ a lot, from the law-on-the-books. Expressive theories of criminal law have not yet taken good account of this problem, and the problem is severe, maybe devastating.”). For discussions of the expressive function of the law, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 254–56 (1991); Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 221–22 (1965); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 949, 953, 979 (1997); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 22, 24, 37; Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389, 414; Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 47 (1989); Michael Harper, *Comment on the Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 23, 26 (1996); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 407 (1958); Sanford H. Kadish, *Some Observations on the Use of Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 435–40 (1963); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351, 362, 365 (1997); Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2445–48 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 947 (1995); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1863 (1992); Richard H. McAdams, *Comment: Accounting for Norms*, 1997 WIS. L. REV. 625, 634; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 397–400 (1997); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 540 (1996); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 910 (1994); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76

law has an expressive function as well as an instrumental function is to recognize that we make a statement about our collective values when we choose to criminalize certain behaviors.⁶² According to this view, when the legislature has determined that a particular behavior merits being treated as criminal, it is stating that the behavior is immoral.⁶³ The people who commit crimes are criminals, and they are no longer worthy of full participation in the social order.⁶⁴ Federal law prohibits all felons from possessing firearms.⁶⁵ Felons are barred from receiving many federal and state benefits.⁶⁶ In many states, they are stripped permanently of the right to vote and are in effect exiled from the course of ordinary politics.⁶⁷ Labeling something a crime expresses an important social consensus about the reprehensibility of the behavior.⁶⁸ There is a significant risk of generational lag in this area, as laws remain on the books but fall further and further out of touch with the sentiments of a majority.⁶⁹

B.U. L. REV. 201, 206-09 (1996) [hereinafter Robinson, *Utility of Desert*]; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457, 471-72, 474 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000).

⁶² See ROBINSON & DARLEY, *supra* note 20, at 202; Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1840 (2000); Robinson, *Utility of Desert*, *supra* note 61, at 471.

⁶³ See Christopher Bennett, *State Denunciation of Crime*, 3 J. OF MORAL PHIL. 288, 298 (2006); Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 149, 159 (2001); Hamish Stewart, *Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law*, 5 BUFF. CRIM. L. REV. 47, 66 (2001). This view is not universal because some view crime definition as simply another method of social ordering devoid of moral content. See Matthew D. Adler, *Expressive Theories of the Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1369-70 (2000). For people with this view, the choice of the criminal sanction is more about the selection of optimal methods of enforcement. See *id.*

⁶⁴ See Bennett, *supra* note 63, at 290-91.

⁶⁵ 18 U.S.C. § 922(g) (2000 & Supp. V 2005).

⁶⁶ See generally U.S. DEPT. OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 1 (1996) (summarizing state disenfranchisement laws and laws governing other civil disabilities).

⁶⁷ Ten states ban felons from voting for life, and five more ban them for some period of time after they have completed their sentence. *Id.* at app. Forty-eight states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense. *Id.* Thirty-five states prohibit felons from voting while they are on parole, and thirty of those also exclude felony probationers. *Id.*

⁶⁸ See Bennett, *supra* note 63, at 290-91.

⁶⁹ See Beale, *supra* note 8, at 773-74. Professor Brown has done an excellent job of demonstrating that, once there is a new supermajority, the criminal law does change. See Brown, *supra* note 51, at 234-35 (discussing, inter alia, the repeal of alcohol prohibition, miscegenation statutes, and anticontraception statutes).

The expressive function of the law can exacerbate the lag between values and the law because the political statement made by the passage of a criminal law and the statement made by the repeal of the same law are not equivalent.⁷⁰ As a result, the political costs of such votes are significantly different as well.⁷¹ Consider the dynamic at work in a particular case where public perception toward a type of behavior has changed over time: in the initial state, when no law has passed, the behavior in question may be considered deplorable—because it is dangerous, foolish, or immoral—but not considered criminal. Then a law is passed making the statement that the particular behavior is deplorable, illegal, and probably immoral. Over time, some people will believe that that behavior, while still deplorable or immoral, need not be criminal. Others will believe that the behavior is no longer deplorable or immoral, and should not be criminal. Some may even believe the behavior is affirmatively good.

The political danger lies in the difficulty in calibrating a vote along this spectrum of varying beliefs in an era of sound-bite politics where criminal statutes become campaign material.⁷² Voting to overturn a law has the potential to be seen as condoning the behavior, and even politicians who take pains to explain a different basis for their decision run the risk that their opponents will assert that they condone the behavior.⁷³ Once a behavior has been criminalized, public sentiment must undergo a dramatic change in favor of the behavior to decriminalize it.⁷⁴ Decriminalization is inherently difficult because it requires a positive act: stopping law enforcement officials from interfering with behavior that a legislator might find foolish, costly, or detrimental to the public good, but that he might still reasonably believe should not be criminal.⁷⁵

An example of this dynamic at work can be seen in efforts to repeal controlled substances laws.⁷⁶ Imagine the universe of politicians

⁷⁰ See Beale, *supra* note 8, at 773–74.

⁷¹ See *id.*

⁷² See Robinson & Cahill, *supra* note 7, at 644–45.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See, e.g., H.R. REP. NO. 104-486 (1996); WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 137–90 (1996); DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY 38 (2005); DOUGLAS HUSAK, LEGALIZE THIS!: THE CASE FOR DECRIMINALIZING DRUGS 125–78 (2002); Philip B. Heymann, *Introduction: Drug Policy with a New Focus*, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 1, 11 (Philip B. Heymann & William N. Brownsberger eds., 2001).

who wish to decriminalize controlled substances. Some subset of the proponents of decriminalization, Group A, the consequentialists, may believe that drug use is stupid, dangerous, and deplorable. They may simultaneously believe that it should not be criminal for instrumental reasons—prohibition effects lead to massively skewed markets, and addiction leads to inflexible demand with artificially inflated prices, creating massive spillover effects such as violent crime and property crime resulting from the artificially inflated prices. Group B, the health-care modelers, may believe that criminalizing addiction is not a statement of their moral position. Some politicians will belong to both groups. But opposing politicians are able to treat votes from Groups A and B as indistinguishable from the votes of Group C, the libertines, who believe that drug use is good, moral, and should be condoned. Politicians who would naturally fall into Group A may be unwilling to vote for decriminalization because, although in the absence of the law they would never vote for it, in its presence they believe that a vote for repeal is tantamount to condoning the behavior. Similar analyses could apply to abortion, gambling, prostitution, assisted suicide, or multiple other behaviors.⁷⁷

Given the political and practical barriers to reducing the criminal law by repeal, it would be difficult for the criminal law to carefully track the moral position of a current majority of the population.⁷⁸ Sex, drugs, and pornography; alcohol, tobacco, and firearms; murder, rape, and robbery—each of these things is the province of criminal law, and applying the criminal law to each is controversial in some instances. For each of these things there has been significant generational change in attitudes, sometimes in favor of harsher punishment, sometimes in favor of greater freedom. And there are significant regional differences in views toward each, especially at the margins. Changes over time can result in different laws reflecting those different attitudes existing simultaneously on the books.⁷⁹

Even murder statutes are rife with shifting value judgments, such as the beginning and ending of life, the status of the fetus, the criminality of assisted suicide, the basis for reduction of murder to manslaughter, and defenses based on various medical and psychological ail-

⁷⁷ See generally RICHARDS, *supra* note 50 (exploring the legal landscape of such topics to criticize overcriminalization from an antiutilitarian perspective of human rights).

⁷⁸ See Beale, *supra* note 8, at 773–74.

⁷⁹ See *id.* But see Stuntz, *supra* note 1, at 512 (arguing that the scope of core crimes, like murder, have not broadened significantly since the days of Blackstone).

ments.⁸⁰ Thus, statutes addressing issues with almost universal agreement about the core crime, like murder, could benefit from the periodic reexamination of the value judgments at the margins.⁸¹

When the law becomes incoherent, or when the public senses that the law is out of touch with the times, it undermines the criminal law's moral authority.⁸² This moral authority is not just philosophically good, it is also instrumentally good because it can then be more effective at the margins, even in those cases not clearly condemnable, if it is seen as generally respectful of where the margins in fact lie.⁸³ The limitations of repeal make it inherently difficult for the criminal law to accurately track the changes at the margins.⁸⁴

Ordinary politics exacerbates the problems created by the limitations of repeal: they treat criminal laws no differently than other legislation, often incorporating them into omnibus legislation or using them as candidates for logrolling.⁸⁵ Permitting the legislature to create crimes through votes on broader legislative packages further muddies the clear moral message that should be sent by the criminal law.⁸⁶

II. OVERCRIMINALIZATION

The limitations of repeal inevitably lead to perceived overcriminalization.⁸⁷ Numerous commentators on the criminal law have pointed out that the criminal law expands almost continually, and that it is incredibly difficult to repeal a criminal law once it is on the books.⁸⁸ There is likewise broad agreement within the academy that too much criminal law has resulted.⁸⁹ The solutions that the commentators propose in re-

⁸⁰ *But see* Stuntz, *supra* note 1, at 512.

⁸¹ *But see id.*

⁸² *See id.* at 520.

⁸³ Paul H. Robinson, *Testing Lay Intuitions of Justice, How and Why*, 28 HOFSTRA L. REV. 611, 612 (1999) ("If [the criminal law] earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as an appropriate guide in those borderline cases . . .").

⁸⁴ *See* Beale, *supra* note 8, at 773-74.

⁸⁵ The American Bar Association's Task Force on Federalization of Criminal Law criticizes the federalization of criminal law through the standard legislative mechanisms. Strazella, *supra* note 50, at 53. The Task Force also suggests that Congress should implement institutional mechanisms to ensure a more coherent analysis of perceived crime problems, given the often piecemeal nature of federal crime legislation at present. *Id.*

⁸⁶ *See* Stuntz, *supra* note 1, at 522.

⁸⁷ *See* Beale, *supra* note 8, at 773-74.

⁸⁸ *See, e.g.,* Stuntz, *supra* note 1, at 527-28. *See generally* Overcriminalization: The Politics of Crime, *supra* note 6.

⁸⁹ *See generally* Overcriminalization: The Politics of Crime, *supra* note 6.

sponse to this overcriminalization vary widely, depending on their view of the appropriate purposes of the criminal law and their philosophical positions on the appropriate limiting principles.⁹⁰ Nevertheless, retributivists, utilitarians, and legal realists unite in decrying the scope and the range of the criminal law.⁹¹

There are at least three strands to the overcriminalization argument.⁹² The first considers the criminal law's breadth: too much conduct is prohibited.⁹³ The laws on the books either do not reflect society's moral consensus regarding the behavior that deserves the criminal sanction or they defy some limiting principle.⁹⁴ A second considers the criminal law's depth: there are too many overlapping laws, even if they apply to conduct we actually want to prohibit.⁹⁵ In combination, this excess makes it incredibly difficult to determine what the law actually is, and it opens the way for manipulation and abuse as these provisions are selected and applied.⁹⁶ A cluttered criminal code fails to teach the public what values society has chosen.⁹⁷ The third major overcriminalization criticism—that the laws are excessively punitive—is beyond the scope of this Article.⁹⁸

A. Breadth

A principal concern for the commentators is breadth; the laws cover too much conduct.⁹⁹ Overbreadth in the criminal law brings multiple costs, including overdetering desirable behavior because conduct that society no longer condemns remains subject to the risk of criminal

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *infra* notes 99–150 and accompanying text.

⁹³ See Stuntz, *supra* note 1, at 512–19.

⁹⁴ See, e.g., HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249–363 (1968); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193–94 (1991); Hart, *supra* note 61, at 407; Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI., 157, 160 (1967); Kadish, *supra* note 61, 435–40.

⁹⁵ See Stuntz, *supra* note 1, at 518–19.

⁹⁶ See *id.* at 519–23.

⁹⁷ See *id.* at 522.

⁹⁸ See, e.g., GARLAND, *supra* note 6, at 8–9. To the extent that critics believe that the criminal law is too punitive because public sentiment is too punitive, a proposal that more properly aligns the law on the books and public conceptions of morality may actually be viewed as counterproductive. See *id.*

⁹⁹ See Stuntz, *supra* note 1, at 514–18.

sanction.¹⁰⁰ Incomprehensibility compounds the problems that depth creates, making law abiding citizens into inadvertent criminals.¹⁰¹

Dead-letter laws raise additional concerns.¹⁰² They are the thicket of laws that remain on the books long after the circumstances that brought them into being.¹⁰³ Desuetude and unconstitutional statutes still on the books confound the promulgation and transmission functions of the law.¹⁰⁴ The law cannot educate the public about core social values if it imparts conflicting views.¹⁰⁵ If ordinary citizens cannot read the criminal code and decipher for themselves the scope of the behavior that is covered, then the code is failing in one of its critical functions.¹⁰⁶ If the readers of the criminal code have to resort to case law and administrative letters of interpretation to determine whether or not they are engaging in criminal behavior, the concept of notice becomes a laughingstock.¹⁰⁷ If significant portions of the code are desuetudinal, or partially enforced, or of questionable status, the code can become affirmatively misleading.¹⁰⁸

Imagine a particular person trying to decide if he can engage in consensual sexual intercourse with someone who is not his spouse. He reads the criminal code and finds in it bans on fornication and cohabitation. He is assured that no one ever enforces those laws and that he can ignore them. Additionally, someone suggests that the law might be unconstitutional, although no court has so ruled. The choice these people face, as do many others similarly situated, is no longer between obeying and disobeying the law (essentially a binary choice), but between breaking some laws and not others along a continuum.¹⁰⁹ The

¹⁰⁰ See Beale, *supra* note 8, at 773–74.

¹⁰¹ See Stuntz, *supra* note 1, at 522. Professor Stuntz notes that these criticisms are becoming dated as scholars and society have widened the concept of harm beyond the classic positions that date back to John Stuart Mill. See *id.* at 507 & n.2 (citing Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999)).

¹⁰² See Beale, *supra* note 8, at 773–74.

¹⁰³ For a discussion of odd and antiquated statutes that remain on the books, see Luna, *supra* note 1, at 1, 15 and Beale, *supra* note 8, at 750–51.

¹⁰⁴ See Stuntz, *supra* note 1, at 521 (noting that broad criminal codes ensure sending inconsistent messages to the public because they are not enforced as written).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ For a version of this argument based on general concerns regarding regulatory overcriminalization, see James V. DeLong, *The New "Criminal" Classes: Legal Sanctions and Business Managers*, in GO DIRECTLY TO JAIL, *supra* note 1, at 9, 36–37. DeLong writes:

Overuse of punitive sanctions damages the moral fabric of the culture. . . .
[W]hen people who regard themselves as responsible moral actors learn that

choice, then, is not whether to be law abiding but where to draw the line along the lawbreaking continuum. One could have a meaningful debate in a room full of law professors, prosecutors, defense attorneys, and judges about what precisely constitutes the current state of the criminal law as applied to many different classes of conduct. To expect the ordinary citizen to choose for herself, at her peril, which of the laws on the books to obey because they may or may not be enforceable, is fundamentally unfair.¹¹⁰ In addition, such breadth threatens the moral force that criminal law carries.¹¹¹

Revival is a special situation of criminal law that aggravates the overbreadth problem.¹¹² It arises when a statute remains on the books after a court declares it to be unconstitutional.¹¹³ The statute then lies dormant and unenforced.¹¹⁴ Constitutional politics change, however, and a statute long-unenforced can come back to life after decades.¹¹⁵ The obvious examples are the myriad antiabortion and anti-contraception statutes that linger on the books after *Roe v. Wade*,¹¹⁶ its successors, and *Griswold v. Connecticut*.¹¹⁷ After *Lawrence v. Texas*, anti-sodomy,

they have committed criminal offenses that they have never even heard of, their first reaction is disbelief. Their second is contempt for the law. The developing perception is that one cannot possibly keep up with all the rules and cannot afford to try. The rational person must shrug and accept the possibility of criminal conviction as one of the risks of life

Id. Other scholars have suggested that the moral authority of the law is a more important component than the risk of punishment in ensuring compliance. See ROBINSON & DARLEY, *supra* note 20, at 5-7, 201-15; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19-68 (1990).

¹¹⁰ See DeLong, *supra* note 109, at 36-37.

¹¹¹ Luna, *supra* note 1, at 7. Professor Luna explains:

[O]vercriminalization weakens the moral force of the criminal law. . . . When the criminal sanction is used for conduct that is widely viewed as harmless or undeserving of the severest condemnation, the moral force of the penal code is diminished, possibly to the point of near irrelevance among some individuals and groups.

Id.

¹¹² William M. Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1903 (1993).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 410 U.S. 113, 164 (1973). In *Roe*, the Supreme Court held that a constitutional right to privacy protects a woman's decision to have an abortion prior to the fetus's viability. *Id.*

¹¹⁷ 381 U.S. 479, 485 (1965). In *Griswold*, the Supreme Court held that a constitutional right to privacy protects a married couple's right to contraception. *Id.*

adultery, and cohabitation statutes are receiving similar scrutiny.¹¹⁸ The Court's pronouncements, however, are not permanent.¹¹⁹ Stare decisis and discussion of "super-precedents" notwithstanding, the Court's foray into very political areas has led to an increasingly politicized process of choosing who sits on the Court.¹²⁰ Areas that some justices believed they took off the political table will come back into play. And they may be coming back into play with statutes—passed long ago and unenforced for generations—awaiting the enforcers.¹²¹ Some scholars have suggested that the courts develop a doctrine that forbids revival.¹²² Although the liberty principle has much to recommend it, this Article demonstrates that the structural bias in our constitutional system is actually conservative, not libertarian.¹²³ If there is no law in place, the bias is in favor of keeping it off the books.¹²⁴ Once there is a law in place, however, the bias is in favor of keeping it on the books.¹²⁵

B. *Depth*

The second concern about the scope of the criminal law is depth—too many laws cover the same conduct.¹²⁶ Too much depth in the criminal law makes it incomprehensible.¹²⁷ There is no question that the number of crimes on the books has exploded, with more than

¹¹⁸ 539 U.S. 558, 578 (2003). In *Lawrence*, the Supreme Court held that a constitutional right to privacy protects a homosexual couple's right to engage in consensual sexual activity in the privacy of the home. *Id.*

¹¹⁹ See *id.* at 578 (overruling *Bowers v. Hardwick* because it "was not correct when it was decided, and it is not correct today").

¹²⁰ See Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875, 884 (2008) ("One of the chief flaws of Justice Brennan-style non-originalism is that it takes hotly contested issues like abortion out of the democratic process in the fifty states, where compromise is possible, and puts them under the power of the Supreme Court, which cannot produce compromise solutions. The constitutionalization and nationalization of the abortion dispute in *Roe v. Wade* has embittered the confirmation process for all federal judges and has roiled our politics for more than three decades."). See generally DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999).

¹²¹ See Calabresi, *supra* note 120, at 884.

¹²² See Treanor & Sperling, *supra* note 112, at 1906 ("[G]iven the essentially libertarian bias of our constitutional system of governance, a statute that has once been unconstitutional under governing case law should not be revived if it constrains individual liberty . . .").

¹²³ See Beale, *supra* note 8, at 773–74.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See Stuntz, *supra* note 1, at 518.

¹²⁷ See *id.* at 522.

three thousand federal crimes now listed.¹²⁸ A truly accurate count is almost impossible because other statutes criminalize violations of additional thousands of administrative regulations.¹²⁹ An increasingly mobile society compounds the problem because citizens are constructively responsible for knowing the state criminal code and the common law crimes in every jurisdiction they enter.¹³⁰ The law undermines its own legitimacy, and, perversely, its own ability to alter behavior through law abidingness, when it becomes so complex as to be unknowable.¹³¹

Excessive depth can also lead to perceived illegitimacy for another reason—it permits selective prosecution¹³² and differential prosecution.¹³³ A prosecutor can select charges with higher penalties for disfavored defendants, stack charges against defendants so long as there is a different element in each crime, and dismiss charges for some defendants and not others via plea deals.¹³⁴

¹²⁸ Baker, *supra* note 50, at 3; Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 (1995).

¹²⁹ Baker, *supra* note 50, at 8.

¹³⁰ We expect people to know and follow the law. "Ignorance of the law is no excuse" is a basic maxim of criminal law, familiar to both lawyers and layman. See *The Commercen*, 14 U.S. (1 Wheat.) 382, 386 (1816).

¹³¹ At any given time, with regard to a particular behavior, we expect people to be able to sort through the following possibilities and act accordingly: There is a rule. There was a rule. There is a rule, but it is unenforceable. There is a rule, but it might be unenforceable. There is a rule, but it is unenforced. There is a rule, but I can't understand it. There is a rule, but it is unfair. There might be a rule, but I can't find it. There is a rule, but it is only enforced against certain classes of people. The rules don't apply to me because There are conflicting rules. Some rules have safe harbors, and this behavior does or does not fit. There is a general rule and a specific rule, and they seem to conflict, so I choose this one because There are multiple rules, with different people charged with enforcing them, and they give conflicting advice, so I will choose this action because

¹³² Krug, *supra* note 18, at 645. Selective prosecution occurs when prosecutors choose to enforce the laws against specific classes of people. *Id.* Although there are many examples of benefits of choosing certain classes of defendants based on the nature of their crimes, the power to select brings with it the risk that defendants will be selected for invidious reasons, such as race or politics. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408, 410 n.66 (2001).

¹³³ Krug, *supra* note 18, at 645. Differential prosecution discriminates between defendants by punishing some who commit a specific type of conduct under one statute, with a specific penalty scheme, and other defendants under a different statute, with very different penalties. *Id.*

¹³⁴ See, e.g., Davis, *supra* note 132, at 408, 438; Krug, *supra* note 18, at 650–52; Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2088 (2000). One response to the problem has been real offense sentencing, which empowers judges to address the potential abuses at sentencing. Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1119–21 (2005).

C. Unintended Consequences

The limitations of repeal also exacerbate the ill effects of the law's unintended consequences.¹³⁵ It is impossible to know in advance the real-world results of a criminal law.¹³⁶ This might result in what Professor Stuntz has termed self-defeating criminal laws.¹³⁷ Stuntz argues that the passage of a criminal law in some instances reveals the social costs and benefits of the prohibited behavior, and in others reveals the social costs of the sentiment that led to the crime's creation.¹³⁸ Where the law reveals the price to be too high, the proponents of the law have sown the seeds to destroy the value they were trying to enshrine.¹³⁹ For example, he shows that the Prohibition laws were designed to enforce a new norm against drinking, but their enforcement caused a backlash against the system.¹⁴⁰ Once it became a matter for legal enforcement, society realized that it was a cost it was not willing to bear and overturned Prohibition.¹⁴¹

The law of unintended consequences can also result in excessively costly, but not self-defeating laws.¹⁴² Laws that would not have passed given the full price in unintended or unforeseen consequences might remain on the books, even though a majority of the population and the current legislature would not now vote for it.¹⁴³

Assume that, at time A, prior to the passage of the law, there are three groups of legislators. Group X, the absolutists, wants the criminal law at any cost. Group X is not large enough to assure passage of the law. Group Y, the relativists, wants the law at some prices, but not at others. Group Z, the libertarians, opposes the law. If at time A the apparent cost of the law is within the range that Group Y is willing to pay, the measure will pass, and the behavior will become a crime. Imagine that at a later time, B, the cost of the measure has been shown to exceed the price that Group Y legislators were willing to pay. At the revealed price, the law is not worth it to them and they would transfer their support to Group Z. The essentially conservative system of separa-

¹³⁵ See generally Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936) (exploring the reasons for unintended, though not necessarily undesirable, effects of purposive social conduct).

¹³⁶ See *id.* at 898.

¹³⁷ William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1872 (2000).

¹³⁸ *Id.* at 1896.

¹³⁹ *Id.* at 1874–75.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1874–80.

¹⁴² Beale, *supra* note 8, at 773–74.

¹⁴³ See *id.*

tion of powers, however, which requires multiple parties to agree to a substantive change, means that Group X likely can obstruct the repeal of the law.¹⁴⁴ This type of veto-gate disconnect further undermines the moral authority of the criminal law.¹⁴⁵

This Article, then, falls somewhere in a middle ground between Professors Stuntz and Brown.¹⁴⁶ The generalization it proposes is neither that the criminal law always expands, nor that the politics of criminal law differ little from ordinary politics.¹⁴⁷ Instead, it suggests that the best generalization is that, at any given time, a significant portion of the criminal law on the books does not comport with majority sentiments because the limitations of repeal too often cause an unacceptable time lag between changed public sentiments and the criminal law.¹⁴⁸ In many cases, the time lag between new majority sentiment and new criminal law is significant, and, in other cases, permanent.¹⁴⁹ The lag creates the perception that the criminal law is out of touch, or perhaps immoral.¹⁵⁰

III. PARTIAL SOLUTIONS AND THEIR COSTS

Current doctrine includes multiple partial solutions to the problem of changing attitudes toward crime and the failure of repeal to adequately reflect them.¹⁵¹ Desuetude, judicial construction of statutes, constitutionalization of the criminal law, prosecutorial discretion, and jury nullification all operate in part to ameliorate the problems of changing commitments.¹⁵² Each solution, however, comes at a cost that

¹⁴⁴ Alexander M. Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40, 62-63 (1961) ("[G]reater strength must be mobilized to repeal a statute than to resist its enactment."). Bickel argues that it would be foolish and paralyzing for the legislature to reconsider the statute book continually. *Id.* He believes the statute book will be examined and altered when necessary because popular will rejects how the laws are enforced. *Id.* For further discussion of his views, see *infra* notes 193-209 and accompanying text.

¹⁴⁵ See McNollgast, *The Political Economy of Law*, in 2 LAW AND ECONOMICS HANDBOOK 1651, 1685-86 (A. Mitchell Polinsky & Stephen Shavel eds., 2007). For a discussion of veto-gates, see *infra* notes 302-316 and accompanying text.

¹⁴⁶ See Brown, *supra* note 51, at 225; Stuntz, *supra* note 1, at 527-28.

¹⁴⁷ See Brown, *supra* note 51, at 225; Stuntz, *supra* note 1, at 527-28.

¹⁴⁸ See Beale, *supra* note 8, at 773-74.

¹⁴⁹ See *id.*

¹⁵⁰ See Stuntz, *supra* note 137, at 1872 ("In a legal system structured as ours is, criminalization can work against the very norms on which it rests, meaning that popular norms may tend to move in the *opposite* direction from the law.").

¹⁵¹ See *infra* notes 154-241 and accompanying text.

¹⁵² See *infra* notes 154-241 and accompanying text.

could be reduced by a structural mechanism that would make them less necessary.¹⁵³ This Article considers each in turn.

A. *Desuetude*

One way that the law has attempted to come to grips with the moral judgments of a dead generation is the legal concept of desuetude.¹⁵⁴ The doctrine of desuetude provides that obsolete statutes cannot be invoked after a sufficiently lengthy period of disuse.¹⁵⁵

As Professor Alexander Bickel articulated in his article, *The Passive Virtues*, the current widespread disobedience of a statute does not make it desuetudinal.¹⁵⁶ Instead, a longstanding government policy of non-enforcement drives desuetude.¹⁵⁷ When prosecutors have ignored the existence of a law in the face of known widespread violation of that law, the public is lulled into believing that the law will no longer be enforced.¹⁵⁸ After some period, a law that has not been enforced can no longer be enforced.¹⁵⁹

There are complications in deciding, first, how long a period of non-enforcement is "too long" and, second, how much discretion prosecutors should have in overlooking certain violations and enforcing others.¹⁶⁰ The courts determine the length of that period and enforce desuetude against the government.¹⁶¹ This increases the relative power of the courts and undermines the executive's capacity to exercise prosecutorial discretion.¹⁶² Even a fairly robust enforcement of desuetude is unlikely to lead to judicial overreaching, its proponents say, because the instances of desuetudinal enforcement of statutes will be rare.¹⁶³ But precisely because it is exceedingly rare, desuetude is not a particularly

¹⁵³ See *infra* notes 154–241 and accompanying text.

¹⁵⁴ See Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81 (1976) ("Desuetude" is the ancient doctrine that long and continuous failure to enforce a statute, coupled with [sic] open and widespread violation of it by the populace, is tantamount to repeal of the statute.").

¹⁵⁵ See *id.*

¹⁵⁶ See Bickel, *supra* note 144, at 62–63.

¹⁵⁷ *Id.* at 63.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Allen, *supra* note 154, at 83 (rejecting desuetude in part to restrict the power of the executive to render a law ineffective through non-enforcement).

¹⁶¹ See Bickel, *supra* note 144, at 63.

¹⁶² Allen, *supra* note 154, at 82–83.

¹⁶³ CASS R. SUNSTEIN, *ONE CASE AT A TIME* 111 (1999).

useful doctrine.¹⁶⁴ Desuetude also raises significant separation of powers issues because the executive, through non-enforcement, and the judiciary, through a due-process-based refusal to enforce desuetudinal statutes, are permitted to override the legislature.¹⁶⁵

B. Judicial Construction

American law also deals with change over time through the constant readjustments possible with judicial construction.¹⁶⁶ Adjusted moral commitments are translated into different legal commitments in the form of criminal law.¹⁶⁷ In a system where criminal law is developed through the common law, there may be more room for this constant process of renegotiation of rights, freedoms, and responsibilities.¹⁶⁸ Judges can constantly reevaluate the balance of social forces and adjust the law accordingly.¹⁶⁹ The historical trend of the criminal law in the United States, however, is away from common law and toward statutory law, which is further refined by applying the principle of legality and the rule of lenity.¹⁷⁰ It is, for example, an oft-repeated aphorism that there is "no federal common law of crimes."¹⁷¹ Given the trend, the hardening of the law's outlines in the form of legisla-

¹⁶⁴ Cass Sunstein, a proponent of desuetude, believes it would improve the judicial minimalism that he has favored in his recent writing. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 96-99 (2005); see also SUNSTEIN, *supra* note 163, at 109-10. Professor Allen takes a contrary view. See Allen, *supra* note 154, at 81-82. He notes that, although the doctrine has roots dating back as far as the Roman jurist Julian, the practice is exceedingly rare. *Id.* Moreover, Allen argues, the courts and prosecutors violate separation of powers and legislative primacy when they rely on the doctrine. *Id.* at 84. Allen rejects Bickel's view of *Poe v. Ullman*, 367 U.S. 497 (1961) (discussed *infra* at notes 193-209 and accompanying text), arguing that desuetude has been rejected by all of the states that had considered the issue squarely. *Id.* at 84 & n.101 ("The potential for abuse emanating from long dormant statutes often seems to trouble courts, but they usually find a way to dispose of the case without resort to desuetude.").

¹⁶⁵ See Allen, *supra* note 154, at 82-83 ("The basis for [the] consistent rejection of desuetude by the courts is a respect for the doctrine of separation of powers.").

¹⁶⁶ Strong judicial construction can result effectively in desuetude because statutes can be interpreted out of existence. Bickel, *supra* note 154, at 62.

¹⁶⁷ See 15A AM. JUR. 2D *Common Law* § 2 (2000) ("The Common Law has an inherent capacity for growth and change.").

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 30-33 (4th ed. 2006); PACKER, *supra* note 94, at 79-102. See generally FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* (1996); Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95 (1997); Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988).

¹⁷¹ See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

tion, which experiences change only marginally by judicial construction between periods of legislative attention, has made possible a significant disconnect between the law on the books and the society's current moral judgments.¹⁷² In most instances, textual limitations leave very little room for judicial construction to align them.¹⁷³

C. Constitutionalization

Much of the judicial branch's former common law power to regulate the definition of crimes has moved into the constitutional law arena.¹⁷⁴ The courts, relying on various federal and state constitutional provisions, declare laws unconstitutional because they violate explicit constitutional text or "evolving standards" divined by the courts.¹⁷⁵ For many legal commentators, the legislature's inability to align the criminal law with contemporary values legitimized additional judicial oversight of the substantive law.¹⁷⁶ A significant disconnect between the law and current values leads to a pressure on the system that seeks relief in the judiciary.¹⁷⁷ The perceived legitimacy of the substantive statutes affects judicial opinions in areas such as the First Amendment, the Fourth Amendment, the Eighth Amendment, and substantive due process.¹⁷⁸

Some of the changes the Court has made are now popular. It was once a crime to argue for the overthrow of the government.¹⁷⁹ It was

¹⁷² See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

¹⁷³ Robinson, *supra* note 170, at 394 ("Prior and precise written rules make decisions on liability more predictable and uniform than they would be if decisionmakers enjoyed more discretion, but such rules also tend to leave decisionmakers less able to adapt solutions to individual circumstances.").

¹⁷⁴ See DRESSLER, *supra* note 170, at 35.

¹⁷⁵ See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

¹⁷⁶ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25 (1962) (arguing, not specifically regarding criminal law, that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess"); cf. *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

¹⁷⁷ See BICKEL, *supra* note 176, at 25.

¹⁷⁸ See, e.g., *Roper*, 543 U.S. 551 (Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (substantive due process); *New York v. Ferber*, 458 U.S. 747 (1982) (First Amendment); *Furman v. Georgia*, 408 U.S. 238 (1972) (Eighth Amendment); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (Fourth Amendment).

¹⁷⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969) (overturning Ohio law forbidding "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform").

once a crime for a black person to marry a white person.¹⁸⁰ It was once a crime for a doctor to dispense contraceptives.¹⁸¹ There are still laws on the books in many states that would ban these behaviors, but they cannot be enforced because of cases like *Brandenburg v. Ohio*,¹⁸² *Loving v. Virginia*,¹⁸³ and *Griswold v. Connecticut*.¹⁸⁴ The constitutionalization of crime should cause a one-way ratchet in favor of increased freedom because constitutional limitations privilege certain classes of behavior, thereby taking classes of crimes away from the legislature and off the books.¹⁸⁵ Perversely, this movement, engendered by legislative failure to act where the Court thought support for a law had disappeared, has made it more difficult for legislatures to account for changing social attitudes towards crime.¹⁸⁶

The judicial invalidation of statutes creates what Professor Bickel famously denominated the countermajoritarian difficulty.¹⁸⁷ Dozens of leading scholars, including John Hart Ely, Cass Sunstein, Mark Tushnet, William Stuntz, and Akhil Amar have grappled with how much judicial invalidation is proper, and under what conditions.¹⁸⁸ Each comes to his or her own conclusion, but all admit that there is a cost to overturning statutes that reflect the will of the people.¹⁸⁹

Stare decisis, precedential limits on lower courts, and limited judicial resources combine to restrain the courts' ability to reverse course if it appears they made a mistake.¹⁹⁰ Constitutionalizing the mistake takes

¹⁸⁰ *Loving v. Virginia*, 388 U.S. 1, 4 (1967) (overturning Virginia law barring interracial marriage).

¹⁸¹ *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

¹⁸² 395 U.S. at 449.

¹⁸³ 388 U.S. at 12.

¹⁸⁴ 381 U.S. at 479.

¹⁸⁵ See *Brandenburg*, 395 U.S. at 449; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 479.

¹⁸⁶ Cf. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792 (2006) ("Constitutional law makes legislative regulation of constitutionalized subjects politically costly."). Stuntz argues that the constitutionalization of criminal law has made it more punitive and harsh because it provided incentives for legislators to expand criminal codes and disincentives for them to regulate policing and trial procedures. *Id.* Similarly, here, once the Court has asserted a position, the legislature has reduced incentive to bring the criminal code in line with popular sentiments. Cf. *id.*

¹⁸⁷ See BICKEL, *supra* note 176, at 16.

¹⁸⁸ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); SUNSTEIN, *supra* note 163; MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Stuntz, *supra* note 186.

¹⁸⁹ See generally ELY, *supra* note 188; SUNSTEIN, *supra* note 163; TUSHNET, *supra* note 188; Amar, *supra* note 188; Stuntz, *supra* note 186.

¹⁹⁰ See BICKEL, *supra* note 176, at 30 (discussing the stability of the Court as an institution); SUNSTEIN, *supra* note 163, at 49 (discussing the error costs for wrong, wide rulings).

the ability to readjust away from the legislature.¹⁹¹ This cost is compounded when courts are asked to show fidelity to generations-old constitutional text, particularly when applied to unforeseen and unforeseeable circumstances.¹⁹² Bickel noted that what he called "the passive virtues" were a way that the justices could avoid the countermajoritarian difficulty by acting in a way that was democracy-forcing.¹⁹³ The passive virtues are tools with which the Court can avoid direct confrontation with the will of the legislature, acting instead to return the problem to the legislature for resolution.¹⁹⁴ Professor Sunstein has updated Bickel's work with his writing on minimalism, suggesting that the courts should self-consciously leave room for the legislature to work.¹⁹⁵ If the real problem is a perception that the law on the books is out of touch with the prevailing views of society, then the Court's solution should be to test that perception by forcing society to tell it so.¹⁹⁶

How often does this democracy reinforcement happen, and through what mechanism? Professor Bickel asserted, "It would be foolish of course, and it would ensure paralysis, to expect continual expression of the legislative will through continual reconsideration of the statute book."¹⁹⁷ But why? Why is it so foolish to expect continual expression of the legislative will through continual reconsideration of the statute book? If by continual he meant each term, then I agree. And if by foolish he meant that it was not the Court's job in our current system to create such a requirement, I also agree. But if he meant that it would be foolish to construct a constitutional system that required a periodic and systematic reconsideration of the law, then we part company.

Bickel was writing in response to the Supreme Court's opinion in *Poe v. Ullman* and the selective enforcement of statutes regulating birth control.¹⁹⁸ The birth control statute in *Poe* had been enforced three times in the thirty years prior to the decision.¹⁹⁹ But a doctor who

¹⁹¹ See Stuniz, *supra* note 186, at 792.

¹⁹² See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 212 (2005) (discussing the emergence of judicial review as the refusal to enforce laws contrary to the Constitution).

¹⁹³ BICKEL, *supra* note 176, at 156.

¹⁹⁴ *Id.*

¹⁹⁵ SUNSTEIN, *supra* note 163, at 26 ("Cautious judges can promote democratic deliberation with more minimalist strategies, designed to bracket some of the deeper questions but also to ensure both accountability and reflection.").

¹⁹⁶ Bickel, *supra* note 144, at 61.

¹⁹⁷ *Id.* at 63.

¹⁹⁸ *Poe*, 367 U.S. at 498; Bickel, *supra* note 144, at 59.

¹⁹⁹ Bickel, *supra* note 144, at 61.

wanted to prescribe birth control was told that he could be prosecuted for a violation of the almost universally unenforced law.²⁰⁰

Bickel believed that the Court should reset the balance in favor of liberty through a variety of democracy-forcing measures, which he has famously called the passive virtues.²⁰¹ He suggested desuetude as the method through which the *Poe* case should be decided, but the executive chose to attempt to enforce the law only once.²⁰² As Bickel saw it, "The unenforced statute is not, in the normal way, a continuing reflection of the balance of political pressures. When it is resurrected and enforced, it represents the ad hoc decision of the prosecutor, unrelated to anything that may realistically be taken as present legislative policy."²⁰³ In his consideration of any enduring vitality in the forces that led to the anticontraception statute at issue in *Poe*, he also recognized that passage and repeal were not equivalent.²⁰⁴ It did not matter to Bickel that the opponents of the unenforced statute were unable to muster a majority to overturn it.²⁰⁵ "The legislature has voted against repeal," he noted, "[b]ut that is not the same as voting to enact a statute."²⁰⁶

Nevertheless, Bickel criticized the Court for stepping in to act in the breach in *Poe*.²⁰⁷ Bickel believed the Court was simply the wrong institution and considered the problem perhaps insoluble as it then stood.²⁰⁸ He believed that the Court should have waited for the statute to be enforced and then enjoined it under the doctrine of desuetude. In his view, *Poe* was the wrong case at the wrong time.²⁰⁹

Bickel's concern about *Poe*, and cases like it, remains salient given the countermajoritarian difficulty for cases today.²¹⁰ In *Poe*, it was clear that the Court was grappling with a problem that is inherent in our constitutional structure.²¹¹ The system we have, with unenforced statutes that remain in place, predictably gives rise to this problem.²¹² Courts are discouraged from reviewing statutes not on the basis of textual conflict with the Constitution or the evenhanded administration of the laws, but

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 63.

²⁰⁴ Bickel, *supra* note 144, at 61.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Bickel, *supra* note 144, at 61.

²¹⁰ SUNSTEIN, *supra* note 163, at 49.

²¹¹ Bickel, *supra* note 144, at 61.

²¹² *Id.*

rather on the judges' own sense that times have changed.²¹³ The Court arguably gets this right, sometimes, in cases such as *Poe*,²¹⁴ or in the cases designed to dismantle Jim Crow, such as *Loving v. Virginia*²¹⁵ and *Brown v. Board of Education*.²¹⁶ But it has arguably gotten it wrong in other cases, such as *Furman v. Georgia*, where some members of the Court decided that the American public no longer supported the death penalty.²¹⁷ And it exacerbated a critical social and political divide and politicized the selection of Supreme Court justices in *Roe v. Wade* and subsequent abortion cases.²¹⁸ The Court faces significant institutional hurdles that may render it the worst branch to bear this burden; it is limited by the case and controversy requirement, it lacks the resources to engage in extended fact-finding, and it depends on litigants and amici curiae to present its view of the world.²¹⁹

D. Prosecutorial Discretion

Perhaps the most important safety valve for outdated criminal codes is prosecutorial discretion.²²⁰ In most states, elected prosecutors operate under significant political constraints, which couple with resource constraints to make prosecutors unlikely to enforce unpopular laws—especially against popular defendants.²²¹ Proponents of prosecutorial discretion argue that it is incredibly difficult to write a law that is not somewhat overinclusive or somewhat underinclusive.²²² Overinclusive laws that empower prosecutors to enforce them in ways

²¹³ SUNSTEIN, *supra* note 163, at 49.

²¹⁴ 367 U.S. at 509.

²¹⁵ 388 U.S. at 12.

²¹⁶ 347 U.S. 483, 495 (1954).

²¹⁷ 408 U.S. at 239–40; see STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 267 (2002) (noting that *Furman* “touched off the biggest flurry of capital punishment legislation the nation had ever seen”); JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 413–14 (1994) (arguing that the *Furman* majority thought that the tide had turned on the death penalty, but public support for the death penalty increased after *Furman* in an apparent reaction to the decision); Carole S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 411–12 (1995) (noting that “it seems fair to say that *Furman* galvanized political opposition to abolition”).

²¹⁸ 410 U.S. 113, 162 (1973).

²¹⁹ See SUNSTEIN, *supra* note 163, at 255–58 (exploring the limits of judicial capacities and the judicial role).

²²⁰ See William F. McDonald, *The Prosecutor's Domain*, in *THE PROSECUTOR* 15, 17 (William F. McDonald ed., 1979) (discussing the role of the prosecutor in the adversarial criminal justice system).

²²¹ See *id.*

²²² See Krug, *supra* note 18, at 645–46.

considered fair by the majority can ameliorate the drafting problem, but such discretion may hide problems with the substantive criminal law.²²³ Many opponents of prosecutorial discretion argue that discretion is a core component of the overcriminalization problem.²²⁴ As Professor Brown has noted:

Because most obscure or superfluous statutes in criminal codes are effectively nullified by prosecutors, legislatures' incentives to update codes and repeal antiquated statutes are greatly reduced. If American jurisdictions had mandatory-prosecution policies, coupled with investigatory resources to pursue most violations, legislatures would likely repeal crimes much more quickly that no longer accord with majoritarian preferences.²²⁵

Scholars such as Donald Dripps have suggested that cabinining prosecutorial discretion might be a way to force the law on the books closer to current sentiments.²²⁶ If prosecutors had to enforce all laws against all possible defendants, politically powerful or not, then the powerful would very quickly change the laws.²²⁷ The politically weak would benefit as a result.²²⁸

Prosecutorial discretion comes with other costs: lack of transparency, perceived racial inequality, and all of the problems with the bureaucratic oversight of agents who provide a service that is difficult to measure.²²⁹ Trusting prosecutors to fairly enforce the law may be efficient, but it leads to concentrations of power and perceptions that that such concentration leads to the rule of men, not laws.²³⁰ As Professor Stuntz puts it:

As criminal law expands, both lawmaking and adjudication pass into the hands of the police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of the progression is clear: criminal

²²³ See *id.*

²²⁴ Brown, *supra* note 51, at 261.

²²⁵ *Id.*

²²⁶ Dripps, *supra* note 50, at 1176 ("Legislators know very well that prosecutors ameliorate the law in practice; the more opaque and standardless the process by which this amelioration occurs, the more it favors the privileged over the disempowered.").

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See, e.g., Davis, *supra* note 132, at 438; Krug, *supra* note 18, at 650-52.

²³⁰ Stuntz, *supra* note 1, at 509.

codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments.²³¹

E. Jury Nullification

Another adjustment the system now makes is jury nullification.²³² Jury nullification occurs in a criminal case when a jury acquits a defendant despite the government's showing of proof beyond a reasonable doubt.²³³ It may do so because it dislikes the law generally, or because it dislikes the particular application.²³⁴ Although it may once have been considered proper, conventional wisdom does not consider it the jury's role to decide whether a law comports with current conceptions of morality.²³⁵ Juries are often instructed that it is their sworn duty to follow the law as given to them by the trial judge, regardless of what they might think of it.²³⁶ Jury nullification is controversial.²³⁷ Advocates argue that it returns a moral dimension to the law because it allows the jury to serve as the conscience of the community.²³⁸ Opponents view it as a necessary evil that may introduce all sorts of biases back into the courtroom that will undercut the rule of law.²³⁹

²³¹ *Id.*

²³² See Brown, *supra* note 18, at 1155 (arguing that the power to nullify is an important addition to the system that may take place within, not in contravention to, the rule of law); Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1254-56 (1995) (arguing that the jury can serve as a check on systemic legislative failures).

²³³ See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 360 (1987) (defining jury nullification); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) (same).

²³⁴ GREENAWALT, *supra* note 233, at 360.

²³⁵ See AKHIL REED AMAR, *THE BILL OF RIGHTS* 81-118 (1998) (discussing evolving role of juries); Richard E. Myers II, *Restoring the Peers in the "Bulwark": Blakely v. Washington and the Court's Jury Project*, 83 N.C. L. REV. 1383, 1404-06 (2005).

²³⁶ See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 1040 (4th ed. 2004).

²³⁷ See Brown, *supra* note 18, at 1149.

²³⁸ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182-1203 (1991) (arguing that the Framers viewed the jury's right as central to the protection of popular and local will).

²³⁹ See *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) ("Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.").

Each of the foregoing solutions in current doctrine comes at a cost.²⁴⁰ If, taken together, they were doing an adequate job of addressing the limitations of repeal, then the proposed solution would be unnecessary. They are not, however, and a systemic solution would simultaneously reduce the need for their exercise and decrease the negative side effects of their appropriate exercise.²⁴¹

IV. THE CRIMINAL SUNSET AMENDMENT

One way to reduce the impact of the time lag between moral sentiments and the law would be to amend the Constitution to enact at least part of the original Jeffersonian proposal.²⁴² A Criminal Sunset Amendment that would enact Jefferson's vision would leave each of the current doctrinal solutions in place but would change the background against which they operated, hopefully for the better.²⁴³ The existing solutions would be less dramatic in their results and less often needed if the legislature regularly reevaluated the law on the books.²⁴⁴ This section details the early constitutional thought on sunseting laws, the mechanics of the amendment itself, and the possible costs of a sunset provision.²⁴⁵

A. *Sunsets at the Dawn of the American Constitutional Order*

The idea that there should be temporal limits on legislation, or even on the Constitution itself, is not new.²⁴⁶ Thomas Jefferson proposed precisely this principle to James Madison in 1789 as the Ameri-

²⁴⁰ See *supra* notes 155-239 and accompanying text.

²⁴¹ See *infra* notes 276-328 and accompanying text.

²⁴² See Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385.

²⁴³ See *infra* notes 276-328 and accompanying text.

²⁴⁴ See *infra* notes 279-332 and accompanying text.

²⁴⁵ See *infra* notes 246-328 and accompanying text.

²⁴⁶ See AMAR, *supra* note 192, at 62. Amar explains:

Had the Constitution disfavored all statutes, it could have required that every federal law expire after a certain period. But it did no such thing, outside a narrow category of laws dealing with standing armies.

Instead, the Constitution structured an ingenious system of constitutional checks and choke points designed to minimize the likelihood that an *arguably unconstitutional* federal law would pass and take effect. If constitutional interpreters outside the legislature deemed a statute unconstitutional, they could—via executive pardons and nonenforcement, grand-jury refusals to indict, judicial review, jury acquittals, and the like—render the statute a virtual dead letter and thereby restore a libertarian baseline for most practical purposes.

can constitutional order was being born.²⁴⁷ Jefferson was drawing on an idea that had deep roots in the radical politics of his period.²⁴⁸ Noah Webster,²⁴⁹ Thomas Paine,²⁵⁰ and Jean-Jacques Rousseau²⁵¹ all professed similar views.²⁵² These thinkers were grappling with the radical changes taking place in France and America, and searching for theoretical justifications for those changes.²⁵³ As Professor Rubenfeld has noted, they were developing theories to justify their own breaks with the past at the same time that they were writing constitutions that would claim to bind the future legitimately.²⁵⁴

Jefferson argued that every generation has a right to the constitution and laws of its own choosing.²⁵⁵ In a letter to Madison dated September 6, 1789, Jefferson wrote, "Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right."²⁵⁶ Jefferson would have sunset all laws, and

²⁴⁷ See Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385.

²⁴⁸ See JED RUBENFELD, *FREEDOM AND TIME* 17–18 (2001).

²⁴⁹ Giles Hickory [Noah Webster], *On Bills of Rights*, AM. MAG., Dec. 1787, at 13, 14. Webster believed that "the very attempt to make perpetual constitutions is the assumption of the right to control the opinions of future generations; and to legislate for those over whom we have as little authority as over a nation in Asia." *Id.*

²⁵⁰ THOMAS PAINE, *Rights of Man*, in *THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE* 244, 251 (Philip S. Foner ed., Citadel Press 1961) (1791). Paine wrote, "Every age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it." *Id.*

²⁵¹ JEAN-JACQUES ROUSSEAU, *On the Social Contract or Essay About the Form of the Republic* (Geneva Manuscript), in *ON THE SOCIAL CONTRACT WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY* 157, 168 (R.D. Masters ed., J.R. Masters trans., Bedford/St. Martin's Press 1978) (1762) ("Now the general will that should direct the State is not that of a past time but of the present moment, and the true characteristic of sovereignty is that there is always agreement on time, place and effect between the direction of the general will and the use of public force.").

²⁵² RUBENFELD, *supra* note 248, at 17–18.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385.

²⁵⁶ *Id.* For discussions of the letter, see ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 62–96 (1950); STAUGHTON LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* 77–86 (1968); DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 302–08 (1994); CHARLES A. MILLER, *JEFFERSON AND NATURE: AN INTERPRETATION* 160–64 (1988); RUBENFELD, *supra* note 248, at 16–28; GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 132–48 (1978); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 17–18 (1977); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 14 J.L. & ECON. 467, 480–82 (1976); Merrill D. Peterson, *Mr. Jefferson's "Sovereignty of the Living Generation,"* 52 VA. Q. REV. 437, 437–44 (1976); Merrill D. Peterson, *Thomas Jefferson, the Founders, and Constitutional Change*, in *THE AMERICAN FOUNDING: ESSAYS*

even the Constitution itself.²⁵⁷ In Jefferson's view, the power of repeal was an insufficient protection to liberty because it was not the equivalent of the power to refuse to enact in the first instance.²⁵⁸ Even at the earliest date, he recognized that the checks and balances that our Constitution enacted to limit passing a law also frustrate its repeal, enabling a determined minority to check the popular will to repeal.²⁵⁹

Madison believed Jefferson's sunset proposal would create unacceptable instability in property regimes, business, or inheritance, and his views prevailed.²⁶⁰ He believed that the impediments would make

ON THE FORMATION OF THE CONSTITUTION 275-93 (J. Jackson Barlow et al. eds., 1988) [hereinafter Peterson, *Constitutional Change*].

²⁵⁷ Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385-86. The relevant portion of Jefferson's letter to Madison states:

Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right. It may be said that the succeeding generation exercising in fact the power of repeal, this leaves them as free as if the constitution or law has been expressly limited to 19 years only. In the first place, this objection admits the right, in proposing an equivalent. But the power of repeal is not an equivalent. It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly & without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal & vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents: and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.

Id.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 13 THE PAPERS OF JAMES MADISON, *supra* note 24, at 18, 18-26. The relevant passage states in full:

Unless such laws should be kept in force by new acts regularly anticipating the end of the term, all the rights depending on positive laws, that is, most of the rights of property would become absolutely defunct; and the most violent struggles be generated between those interested in reviving and those interested in new-modelling the former State of property. Nor would events of this kind be improbable. The obstacles to the passage of laws which render a power to repeal inferior to an opportunity of rejecting, as a security agst. oppression, would here render an opportunity of rejecting, an insecure provision agst. anarchy. Add, that the possibility of an event so hazardous to the rights of property could not fail to depreciate its value; that the approach of the crisis would increase this effect; that the frequent return of periods superseding all the obligations depending on antecedent laws & usages, must by weak[en]ing the reverence for those obligations, co-operate with motives to licentiousness already too powerful; and that the uncertainty incident to such

reenactment of critical legislation too uncertain, upsetting expectations and repeatedly laying the republic open to the corrupting influence of factions that he especially feared.²⁶¹ Even if Madison was right in his response to the full Jeffersonian proposal—that sunseting all laws (and the Constitution itself) does too much, the existing Constitution arguably does too little.²⁶² This is particularly true in the case of the criminal law because of the political and structural dynamics that underlie legislation in this area and the detrimental effects, such as overcriminalization and lack of legitimacy, that could be improved.²⁶³

B. Modern Thinking About Sunsets

Recent scholarship has begun to focus on the political dynamics that arise as a result of what Professor Jacob Gersen has termed “temporary legislation.”²⁶⁴ He includes in his discussion of sunsets “duration clauses” and constitutionally mandated limits, such as those found in Article I, Section 8, Clause 12 of the Constitution, which limits military appropriations to two years.²⁶⁵

a state of things would on one side discourage the steady exertions of industry produced by permanent laws, and on the other, give a disproportionate advantage to the more, over the less, sagacious and interprising part of the Society.

I find no relief from these consequences, but in the received doctrine that a tacit assent may be given to established Constitutions and laws, and that this assent may be inferred, where no positive dissent appears. It seems less impracticable to remedy, by wise plans of Government, the dangerous operation of this doctrine, than to find a remedy for the difficulties inseparable from the other.

Id. at 20. Scholars suggest that Madison’s view won out. See RUBENFELD, *supra* note 248, at 43 (“The written constitutionalism introduced by America in the late eighteenth century, ushering democracy into the modern world, flatly rejects the ideal of democracy as governance by the will of the living. Jefferson lost the battle over the basic contours of American constitutionalism.”).

²⁶¹ Letter from James Madison to Thomas Jefferson, *supra* note 260, at 20.

²⁶² See Letter from Thomas Jefferson to James Madison, *supra* note 24, at 386.

²⁶³ See Strazzella, *supra* note 50, at 54 (suggesting that all federal criminal statutes have a federal sunset provision of five years to enable “future Congresses an opportunity to assess claims made prior to enactment about what a particular statute might accomplish in dealing with crime.”).

²⁶⁴ Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 247 (2007).

²⁶⁵ U.S. CONST. art. I, § 8, cl. 12; Gersen, *supra* note 264, at 247–98. The clause grants Congress the power “[t]o raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.” U.S. CONST. art. I, § 8, cl. 12. In *The Federalist* No. 26, Hamilton justified that limitation because it would force democratic reconsideration of any commitment to a standing army and would allow public debate and read-

Professor Gersen recognizes a number of benefits that derive from temporary legislation.²⁶⁶ He observes:

From an informational perspective, temporary legislation provides concrete advantages over its permanent cousin by specifying windows of opportunity for policymakers to incorporate a greater quantity and quality of information into legislative judgments. By redistributing the decision costs of producing legislation, temporary measures also facilitate experimentation and adjustment in public policy.²⁶⁷

Professor Gersen has written a positive account of the strengths and weaknesses of sunsets and other time-based approaches to legal problems.²⁶⁸ His survey of such provisions shows the long, successful history of temporary legislation in this country and abroad.²⁶⁹ His examination verifies that temporary legislation should not be considered novel, strange, or suspicious.²⁷⁰ In fact, he concludes:

Temporary legislation is a staple of legislatures, both old and modern. . . . The legislative form produces both informational and distributive benefits, which affect the selection of optimal public policy and the distribution of authority in government. . . . Normatively, temporary legislation should not be globally eschewed, and at least in specific policy domains such as responses to newly recognized risk, there should be a presumptive preference in favor of temporary legislation.²⁷¹

In examining a number of modern uses in his article, Gersen states:

To name only a handful of applications, temporary legislation has been used in immigration policy, taxation of life insurance, election law, agricultural policy, judicial rules, international trade policy, internet taxation, congressional responses to judicial decisions, bankruptcy law, energy policy, telecom-

justment of fiscal commitments if it became apparent that the army might become a threat to the liberty of the citizenry. See THE FEDERALIST NO. 26 (Alexander Hamilton).

²⁶⁶ Gersen, *supra* note 264, at 248.

²⁶⁷ *Id.*

²⁶⁸ See generally *id.*

²⁶⁹ *Id.* at 249-50.

²⁷⁰ *Id.* at 250 (noting that an understanding of history "helps undermine the notion that temporary legislation is a new, peculiar or particularly suspect legislative tool").

²⁷¹ Gersen, *supra* note 264, at 298.

munications policy, government reform, and tax policy generally. . . . State legislatures have relied equally on temporary legislation, both historically and recently, enacting temporary legislation to control the payments of colonial rents, to regulate slavery, to govern welfare policy, in the riot acts, in tax policy, in bankruptcy policy, on physician-assisted suicide, and even in policies on cameras in courtrooms.²⁷²

Gersen's article demonstrates that limiting the duration of legislation in many different contexts has not been catastrophic—instead it has had positive results.²⁷³ His arguments in favor of temporary legislation in contexts where public understanding of a problem is changing apply with equal force where the public's moral sentiments are subject to change.²⁷⁴ His examination of the historic record on temporary legislation suggests that there is important work yet to be done by legal historians to unearth the way sunsets have worked in numerous contexts.²⁷⁵

C. *The Structure of the Proposed Criminal Sunset Amendment*

Jefferson's proposal did not command a specific mechanism, although he clearly believed that these temporal limitations should apply not only to all laws, but also to the Constitution itself.²⁷⁶ There are definitely costs associated with the radical present-oriented theory of government.²⁷⁷ The instability that would result in property regimes or in regulated markets would be unacceptable.²⁷⁸ There are reasons to believe that those areas have politics that differ from the politics of criminal law in significant ways.²⁷⁹ This Article proposes a sunset amendment limited to the criminal laws to enact part of Jefferson's

²⁷² *Id.* at 255–56.

²⁷³ *Id.*

²⁷⁴ *See id.*

²⁷⁵ *Id.* at 249–61.

²⁷⁶ Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385.

²⁷⁷ *See THE FEDERALIST* No. 62 (James Madison) (Jacob E. Cooke ed., 1961). Madison noted the tension between these two values when he cautioned:

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; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow.

Id. at 421.

²⁷⁸ Letter from James Madison to Thomas Jefferson, *supra* note 260, at 20.

²⁷⁹ *See, e.g.,* Robinson & Cahill, *supra* note 7, at 638; Stuntz, *supra* note 1, at 523–65.

vision and respond to Madison's fears.²⁸⁰ Here is the full text of the proposed amendment:

No criminal law passed by the United States or any of the several states may remain in effect for more than 25 years from its date of passage. The sunset date for any criminal law enacted prior to the date of this amendment is calculated as follows: The year of most recent enactment will be divided by 25. The remainder plus five will be added to the date of ratification of this amendment, and the law will sunset on that date.

Any new criminal law must be passed individually through the republican procedures of the federal government or the state government in which it is to apply.

As drafted, the Criminal Sunset Amendment takes Jefferson's idea of nineteen years as the age of a generation and amends it to twenty-five years, both to reflect changes in the actuarial tables and because twenty-five is a nice, round number.²⁸¹ Under the proposed law, approximately four percent of the criminal laws would be subject to sunset each year, on a rolling basis.²⁸² The amendment applies to both the federal and state governments, although one could imagine significant federalism-based arguments for applying the restrictions to the federal government only. The amendment leaves significant uncertainty regarding the entire field of common law crime, which will not have been enacted by the legislature.²⁸³ It includes a five-year lag between the en-

²⁸⁰ Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385-86; Letter from James Madison to Thomas Jefferson, *supra* note 260, at 20. Professor Donald Dripps has suggested something similar. See Donald A. Dripps, *The Liberal Critique of the Harm Principle*, 17 CRIM. JUST. ETHICS 3, 4 (1998). He proposed requiring a two-thirds supermajority for all criminal laws, with a 10-year sunset. *Id.* "I suggest a constitutional provision that forbids imposing penal liability not authorized by legislation which has been approved by two-thirds of the legislature within ten years of the charged conduct." *Id.* at 12. His contemporary supermajority rule has a very different focus and analysis from this one. *Id.* Jefferson's idea of a generational reevaluation of the law inspired my proposal. See Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385-86.

²⁸¹ See Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385-86.

²⁸² States that adopted comprehensive criminal codes would face years that were very heavy on criminal legislation, although it is possible that gradual amendments to the code would smooth that over time.

²⁸³ Some states have a reception statute, and the proposed amendment might bring all of the common law crimes under scrutiny at the same time, based on that reception statute. See, e.g., FLA. STAT. ANN. § 775.01 (West 2005). Recently, states have moved away from common law crimes and toward statutory codification. See DRESSLER, *supra* note 170, at 30. The federal courts have stated that there is no federal common law of crimes. See *United*

actment date and the first wave of sunsets, to permit the legislature time to identify those laws due to sunset and draft replacements, either by reenacting existing law or by proposing new law.²⁸⁴

One critical feature of the amendment is the provision to require each bill be enacted separately through the republican procedures that each state requires for the passage of criminal laws. This prevents the amendment's effect from devolving into a ritualistic re adoption of the criminal code at the beginning of each legislative session. This furthers the rationing requirement by requiring individualized legislative attention to each crime. This one-crime, one-vote requirement also removes the possibility of larding criminal bills with pork to buy passage, or of slipping a criminal provision into another bill so that it will pass virtually unnoticed and undebated. The downside is that it will adversely affect legislative attempts to rationalize the criminal code through periodic revision and adoption of a comprehensive criminal code.²⁸⁵ The single crime provision would require a significant investment of legislative time to pass an entire criminal code piecemeal.

1. Testing Commitments

The amendment would test some of our commitments to using the criminal law to regulate behavior because there are restrictions on the legislature's time.²⁸⁶ There are potential substitutes for criminal law, given the multiple social and legal sources for the rights and responsibilities that society holds paramount.²⁸⁷ Law is only one way to deal with

States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). The common law could serve as an emergency backstop in the event of process failure, so even proponents of the proposed sunset legislation might feel more comfortable leaving the common law in place. See DRESSLER, *supra* note 170, at 30–32. A careful consideration of the merits of common law crimes and their enforcement is beyond the scope of this Article.

²⁸⁴ The amendment as drafted might have the perverse result of more recent laws expiring sooner than older laws, but that would be true only during the first twenty-five years after it takes effect.

²⁸⁵ For a positive account of the value of such periodic revisions, see generally Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159 (1995). For a more recent analysis of their degradation over time due to the primacy of ordinary politics, see Robinson & Cahill, *supra* note 7, at 638. It would be possible to draft around this by making an exception for those states that choose to adopt and maintain a comprehensive code.

²⁸⁶ See Gersen, *supra* note 264, at 260 (discussing the 1970s and 1980s sunset legislation that imposed considerable administrative costs on the reviewing legislative committees).

²⁸⁷ See ELLICKSON, *supra* note 61, at 131; see also GARLAND, *supra* note 6, at 49 (discussing the "informal social controls exerted by families, neighbours and communities, together with the disciplines imposed by schools, workplaces and other institutions" as a framework of norms and sanctions that support the law).

a moral commitment, and a particularly inflexible one.²⁸⁸ Family, religion, educational institutions, and social networks are all additional sources of inculcation and enforcement of these values.²⁸⁹ Over time, the appropriate mix of these sources changes, as does the way in which each approaches a particular situation.²⁹⁰ These norm-enforcement resources can be optimally allocated.²⁹¹ If society believes there are certain actions in which no person may responsibly engage, then it likely will continue to ban them outright.²⁹² The issue becomes significantly more difficult when there can be a responsible and an irresponsible exercise of the same behavior.²⁹³ For those behaviors, we resort to a variety of sorting mechanisms—we license the behavior so that we can sort the actors who may engage in it; we turn the behavior from a right to a revocable privilege; we permit the behavior but focus on the irresponsible exercises of it; we ban the harmful results, not the behavior.²⁹⁴ The Criminal Sunset Amendment will permit us to reassess which of these tools we wish to employ with regard to the particular behavior in light of revealed practice under the criminal law.

2. Changing Views of the World

The criminal law might need to change for other reasons. The way we understand the world changes—often dramatically—over time. We can expect regular adjustment of at least some commitments based on politics, religion, and science in a democratic, pluralistic, and technologically advanced society.²⁹⁵ Technological advancement may ameliorate the harm that resulted from a particular behavior.²⁹⁶ Changing

²⁸⁸ GARLAND, *supra* note 6, at 49.

²⁸⁹ *See id.*

²⁹⁰ *See id.* at 158–63.

²⁹¹ *See* TYLER, *supra* note 109, at 22–27.

²⁹² *See id.* at 23.

²⁹³ *See id.* (discussing attempts to reduce incidents of drunk driving).

²⁹⁴ *See id.*

²⁹⁵ *See* RONALD DWORKIN, *LAW'S EMPIRE* 188 (1986).

If people accept that they are governed not only by explicit rules laid down in past political decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances, without the need for detailed legislation or adjudication on each possible point of conflict.

Id.

²⁹⁶ *See* ROBINSON & DARLEY, *supra* note 20, at 5–7 (arguing that community views on morality should dictate the criminal laws).

views on race, gender, or pluralism may change the way we regulate behavior.²⁹⁷ A changing religious composition of the electorate may require reexamination of the religious underpinnings of much of secular law. Conversely, new conceptions of harms may emerge which will alter attitudes toward specific behavior.²⁹⁸

For example, antimiscegenation laws based on moral commitment to the separation of the races were once commonplace.²⁹⁹ They had deep roots in religion, social structures, and pseudoscience for a significant portion of American history.³⁰⁰ We fought a war to overturn the principal social structure that underlay them and then spent a century adjusting our other values before the Supreme Court constitutionalized the commitment to racial equality in the Jim Crow cases.³⁰¹

Likewise, as science changes the relationship between behavior and consequences, harm-based moral commitments can be expected to change as cause and effect are reevaluated. For example, a moral commitment to chastity that is based partly on the fear of unwanted pregnancy, and unknown or unknowable paternity, appears different when contraception and DNA testing alter the relationship between the behavior and the problem. This is not to suggest that, on balance, society will inevitably change its moral commitments in light of new information. There may be significant reasons to remain opposed to a particular behavior, but technological advancement can significantly alter the balance of harms.

3. Putting Policy into Action

We may adapt the mix of methods used to actualize a retained commitment, or we might significantly change our commitment. In either case, the inputs into important decisions regarding criminal law policy will change over time. Given these changes, it is worth periodically forcing society through the exercise of renewing its commitment to criminal policy in light of new information.

A change in the basic constitutional structure like the Sunset Amendment would have deep and wide systemic effects, fundamentally altering the balance of power between institutional players. Readers familiar with the political science literature on positive political theory

²⁹⁷ See *id.*

²⁹⁸ See *id.*

²⁹⁹ KLARMAN, *supra* note 37, at 63.

³⁰⁰ See *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

³⁰¹ See generally KLARMAN, *supra* note 37.

of law will recognize the Sunset Amendment as an attempt to imagine the effect on the American political system of a new balance among legislative power, veto gates, executive power, bureaucratic power, and the reversionary outcome in the event of inaction.³⁰² Positive political theory and the public choice school of economics both spend significant energy on studying the concept of the veto gate, which places power with particular institutional players to block legislation from going forward.³⁰³ A person or group that controls a veto gate may deny even a firm opposing majority the ability to adopt a new policy.³⁰⁴ The result of this power depends on the reversionary policy in the particular system.³⁰⁵ Reversionary policy is the default the system applies if the legislature and associated veto players fail to take action.³⁰⁶ It might be the status quo ante, but it might be something different.³⁰⁷ Where there are sunset provisions, the reversionary policy is not the status quo but the absence of the sunseting policy. Thus, "[p]ositive agenda control confers much greater power if the reversionary policy is no policy at all, as with budgets and sunset provisions, than if the reversionary policy is a continuation of the status quo."³⁰⁸ Positive political theory predicts that a change like the Criminal Sunset Amendment, which makes sweeping changes to the reversionary policy, will empower the actors who control agendas at the expense of the rest of the body politic.³⁰⁹

Recall the overbreadth and overdepth concerns raised by the limitations of repeal.³¹⁰ The Criminal Sunset Amendment would address

³⁰² McNollgast, *supra* note 145, at 1652 (defining positive political theory as how "the structure and process of legislative, bureaucratic and judicial decision-making influences the law," and evaluating "these procedures using the principle of democratic legitimacy").

³⁰³ *Id.* at 1685-86. McNollgast explains:

Any person or group with the power to block or significantly to delay policy is referred to as a veto gate or gatekeeper. . . . The United States . . . represents the end of the spectrum with a large number of veto gates because it has a bicameral legislature that is decentralized into numerous committees plus a President with veto power. In the House of Representatives alone, the substantive committees and their subcommittees, the Rules Committee, the Speaker and the Committee of the Whole each constitute veto gates through which legislation normally must pass, and the Senate has even more veto gates due to their lax restrictions on debate.

Id.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1686.

³⁰⁶ *Id.*

³⁰⁷ McNollgast, *supra* note 145, at 1686.

³⁰⁸ *Id.*

³⁰⁹ *See id.*

³¹⁰ *See supra* notes 99-134 and accompanying text.

both issues. Unlike many of the philosophical critiques that test the breadth of the law against first principles, for a republican like Jefferson, the test of the breadth question is ultimately democratic.³¹¹ Setting aside for a moment the generational effects of the Bill of Rights precluding certain classes of crime from ever entering the criminal code without regard to current sentiments, the elected legislatures are the representatives of the current generation.³¹² The Sunset Amendment is intended to enforce the "principles of democratic legitimacy," in that it seeks to align the moral statements of the criminal law with the current moral judgment of the community as spoken by its representatives.³¹³ By forcing periodic reconsideration at some point during each generation, the Criminal Sunset Amendment would determine whether the law on the books reflected current moral and political values.³¹⁴ It would make legislators currently accountable for the state of the law; they cannot blame their predecessors and the bureaucrats, in this case police and prosecutors, when a particular class of cases proves unpopular.³¹⁵ Mandatory sunset would potentially rationalize the political statement that a decision to criminalize conduct makes; or it would at least reduce message confusion because of the greater symmetry between a prior vote to criminalize conduct and a current failure to vote to decriminalize conduct.³¹⁶

The Criminal Sunset Amendment also addresses the overdepth issue by creating scarcity.³¹⁷ Passing legislation is expensive and time-consuming.³¹⁸ Rather than pass, for example, four hundred statutes addressing false statements in different contexts, the legislatures will ration the false statements crimes and also ensure that the conduct it wants prohibited remains covered. Fewer choices for the system may result in a less flexibility, but it will enhance the rule of law.³¹⁹ Additionally, the amendment would render the revival problem moot by impos-

³¹¹ See Letter from Thomas Jefferson to James Madison, *supra* note 24, at 385.

³¹² See Beale, *supra* note 8, at 773-74.

³¹³ See McNollgast, *supra* note 145, at 1685.

³¹⁴ See Beale, *supra* note 8, at 773-74.

³¹⁵ See Dripps, *supra* note 50, at 1176.

³¹⁶ See Beale, *supra* note 8, at 773-74.

³¹⁷ See Robinson & Cahill, *supra* note 7, at 639 (describing the problems that the criminal code's depth creates for interpretations of laws, the law's moral authority, and notice requirements).

³¹⁸ McNollgast, *supra* note 145, at 1687.

³¹⁹ See Robinson & Cahill, *supra* note 7, at 644 (arguing that the criminal code's depth created by overlapping statutes causes harm because it treats less serious offenses more harshly and calls into question the law's moral authority).

ing a libertarian bias on the system.³²⁰ Recall that the revival problem arises when a statute that was deemed unconstitutional remains on the books, subject to possible revival at a later date if the courts reverse course.³²¹ Because such statutes are unlikely to be reenacted after a court rules they are unconstitutional, over time those statutes would fall off the books.³²²

Legislatures, interest groups, and prosecutors all would have an incentive to monitor the code for provisions set to sunset and would seek to have the ones they wanted to maintain slated for reenactment. It is easy to envision a standing committee on the criminal code with a staff of attorneys who would propose legislation each session to revise and maintain the code as necessary.³²³ One possible benefit of the new dynamic would be a realignment of prosecutorial interests.³²⁴ Prosecutors tend to be particularly conservative about the law already on the books and particularly influential before the legislature.³²⁵ They have an institutional interest in retaining a broad range of charging options and an interest in retaining statutes that have been considered and upheld by the courts.³²⁶ The new dynamic, which inherently requires legislative action, might align prosecutorial and good government interests in favor of clearly drafted statutes.³²⁷

The Amendment would also limit some of the problems associated with judicial enforcement of current social mores through its interpretation of open-textured constitutional provisions. The Supreme Court may not be in a position to mandate continual expression of the legislative will, but that is a failure of the Constitution, and one that would be remedied by the Criminal Sunset Amendment.³²⁸ If the system forthrightly sent the criminal code back to the legislature on a regular basis for such a recalibration, then many of the unintended consequences—and the distrust of the judiciary that results—could be avoided.

³²⁰ See Treanor & Sperling, *supra* note 112, at 1903.

³²¹ See *id.*

³²² See *id.* It is possible that the legislature might opt to reenact a law that has been deemed unconstitutional. For example, in 2006, South Dakota explicitly enacted a law making abortion a crime. See S.D. CODIFIED LAWS § 22-17-7 (2005 & Supp. 2008). Legislators knew that the law was unconstitutional under existing Supreme Court precedent but enacted it solely for the purpose of forcing the Supreme Court to revisit the issue. See *id.*

³²³ See Robinson & Cahill, *supra* note 7, at 653–54 (recommending a standing law commission to oversee and review criminal law reform).

³²⁴ See Stuntz, *supra* note 1, at 534.

³²⁵ See *id.*

³²⁶ See *id.*

³²⁷ See *id.*

³²⁸ See U.S. CONST. art. III.

V. COSTS OF PASSING THE CRIMINAL SUNSET AMENDMENT

We can readily anticipate different critiques to the Criminal Sunset Amendment, each of which could be, or has been, the basis of a separate paper.³²⁹ Some would be aimed at the reduction in perceived responsibility that each of the branches will feel in light of the new legal regime's temporary nature.³³⁰ Others would be aimed at the increased overall costs to the system, as existing problems with democratic rule are exacerbated by cycling more often through an already flawed system.³³¹ Finally, there is value to a system with the appearance of dealing with eternal verities, or truths about man and his behavior that come from outside the political system.³³² Given these concerns, we can expect to hear the criticisms in the following subsections.

A. *Might the Amendment Do Too Much?*

One possible criticism is the sweeping nature of the change—the Amendment simply does too much, given the nature of the problem. One suggestion made in response to the ideas in this Article is drafting the Amendment to address only *malum prohibitum* crimes, rather than crimes that are *malum in se*.³³³ At the very least, murder should be easy to exempt, shouldn't it? Such an approach is ultimately circular. It depends on our ability to divine within the current criminal code certain crimes that are truly immoral, or wrong in themselves. It then collapses

³²⁹ Sunsets enjoyed a brief vogue in the 1970s. See Gersen, *supra* note 264, at 260. Good government advocates suggested that sunsets would be an excellent way to check the newly burgeoning administrative state by forcing agencies to return to the legislature for reauthorization. See generally Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511 (1976) (describing the use of sunsets as a method for controlling bureaucracies); Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393 (1981) (describing sunset laws); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978) (using historical analysis to evaluate the "Sunset Movement").

³³⁰ See Gersen, *supra* note 264, at 266 ("By requiring that future-period legislatures reenact policy, the current-period majority exercises agenda control, transfers decision costs to the future, and makes current-period legislative bargains vulnerable to changes in legislative preferences").

³³¹ See *id.* at 264–66 (comparing the relative enactment and maintenance costs between temporary legislation and permanent legislation).

³³² See *id.* at 271 (advocating for temporary legislation to make policy in areas of newly recognized risk).

³³³ *Malum prohibitum* is defined as "an act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." BLACK'S LAW DICTIONARY 444 (3d pocket ed. 2006). *Malum in se* is defined as "a crime or act that is inherently immoral." *Id.*

to a substantive analysis based on some external defining principle, drawn from philosophy or religious commitments. These supercommitments undermine the validity of the Sunset Amendment, which depends on regular legislative oversight as the mechanism for testing the currency of any of these philosophies.³³⁴

The courts make such adjustments all the time through interpretation or reinterpretation of existing statutory language.³³⁵ Judicial reinterpretation of statutes comes at significant institutional risk.³³⁶ The Supreme Court stepped in to make a critical value judgment on the appropriate penalties for murder in *Furman v. Georgia*.³³⁷ It abolished at least one version of the death penalty, with some predicting that it was the first step toward total abolition.³³⁸ But it missed on its calibration of popular sentiment regarding capital punishment, and it was forced to backtrack.³³⁹

One could argue that the political back and forth shows an imperfect, not broken, system that has accommodated society's varying views over time. Reopening old debates on apparently fixed questions is not necessarily a good thing, and the checks the Framers chose show the importance of a Burkean conservatism—in the close cases it is not so bad if things are wrongly decided, so long as they are decided, as it removes the rancor that comes from public debate.³⁴⁰ According to this view, only when criminal law strays too far from the once-achieved consensus and cries out for repeal is the resulting social dislocation justified. If there is a fixed time for reconsideration of the murder statute, for example, it will create a lobbying target for those forces who want to reassess the definition of human life. Although a naïve proponent of the Criminal Sunset Amendment would believe that core statutes, such as those criminalizing murder or rape, would require little legislative attention, this person is overlooking the vitality of deeply committed interest groups that would be willing to bear the political costs of enforced holdout. And if murder would present significant difficulties, an

³³⁴ See ROBINSON & DARLEY, *supra* note 20, at 5–7 (defending the reasons community views should dictate the criminal code).

³³⁵ See DRESSLER, *supra* note 170, at 31–32.

³³⁶ See, e.g., BANNER, *supra* note 217, at 267; JEFFRIES, *supra* note 217, at 413–14; Steiker, & Steiker, *supra* note 217, at 411–12.

³³⁷ 408 U.S. 238, 239–40 (1972).

³³⁸ *Id.*

³³⁹ See BANNER, *supra* note 217, at 267; JEFFRIES, *supra* note 217, at 413–14; Steiker & Steiker, *supra* note 217, at 411–12.

³⁴⁰ See Peterson, *supra* note 256, at 290.

opponent can argue, it becomes clear that the rationing effect would render sunseting all criminal legislation too costly for it to be effective.

B. *Will We Undermine Legislative Commitment?*

A second concern is that legislatures will take their job less seriously because they know that the legislation is only temporary.³⁴¹ Professor Adrian Vermeule suggests that "the knowledge that a given law contains a sunset provision lowers the stakes of enacting it and may thus detract from . . . legislative deliberation."³⁴² If that critique is true for particular statutes that contain a sunset provision within them, a similar effect might be predicted for all criminal law if the Constitution were to force all criminal laws to sunset.³⁴³ The structure of the Criminal Sunset Amendment, with a generation-long commitment to the new law, undermines this criticism because the enacted policy will remain for the likely tenure of all of its current members and for much of the political life of the generation of voters who elected them.

A related risk is the possibility that gridlock will lead the legislature to drop the ball and fail to readopt a murder statute, for example.³⁴⁴ This is possible given the possibility that there will be vehement disagreement about the broader contours of the murder statute. The political costs would be potentially catastrophic, however, so it is extremely unlikely that the legislature would let the core of the intentional murder statute lapse because of a debate about beginning or end of life issues. The possibility that a key statute might lapse also invites questions regarding the possible role of the courts and the common law as a backstop to the legislature.³⁴⁵ If the legislature knows that the courts will act as a backstop, it is possible that they will be more inclined to let key statutes lapse. An increased reliance on the courts to create criminal common law may actually undercut the amendment's professed legality goals.³⁴⁶ This criticism is self-limiting because the courts in most states simply lack that power; most states have abolished the creation of new common law crimes by statute.³⁴⁷

³⁴¹ See Adrian Vermeule, *Libertarian Panics*, 36 *RUTGERS L.J.* 871, 887 (2005).

³⁴² See *id.*

³⁴³ See *id.*

³⁴⁴ See Gersen, *supra* note 264, at 265 (discussing the maintenance costs necessary to keep a statute from sunseting).

³⁴⁵ See DRESSLER, *supra* note 170, at 31–32.

³⁴⁶ See ALLEN, *supra* note 170, at 82.

³⁴⁷ See DRESSLER, *supra* note 170, at 30.

C. Will It Undercut the Courts' Substantive Role?

It is also possible that courts will be less willing to strike down legislation that they know is only temporary. They already prefer to leave the enforcement of a great many rights to the legislature, and proponents of an active judiciary would prefer that the stakes remain high. The Criminal Sunset Amendment would shift the balance of power away from the courts and make their appropriate role more limited, as it would deprive particular judicial tools of some of their power.³⁴⁸ Tools such as desuetude and judicial pronouncements regarding widespread changes in social mores will be more limited because they will be operating in light of recent legislative pronouncements.³⁴⁹ Those recent pronouncements will be more likely to reflect current judgments of the renegotiated balance between the social forces and concerns, thereby reducing the courts' watchdog role.³⁵⁰ Supporters of the amendment would consider this a benefit, not a cost. Keeping the courts in check is an intended consequence of passing the amendment. Even if it is a cost, it is an option so rarely exercised as to make each instance remarkable.³⁵¹

D. Will It Overburden the Legislature?

The next criticism is that rationing of the criminal law and the perpetual strain on the legislative calendar will tie already overworked legislatures in knots.³⁵² Reigniting fresh battles over criminal laws for which there is widespread support, but where a significant minority is committed to deeply held outlier beliefs, is counterproductive and unsettling to society.³⁵³ The organized minority may be able to block passage of widely

³⁴⁸ See Bickel, *supra* note 144, at 62-63.

³⁴⁹ See *id.*

³⁵⁰ See Beale, *supra* note 8, at 773-74.

³⁵¹ See, e.g., *Lambert v. California*, 355 U.S. 225, 229-30 (1957). In the most famous federal example, *Lambert v. California*, the court struck down a Los Angeles ordinance requiring felons to register. *Id.* The dissent presciently predicted the holding to be a "a derelict on the waters of the law," as it has never been followed. *Id.* at 232 (Frankfurter, J., dissenting).

³⁵² Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?* 112 HARV. L. REV. 379, 401 (1998) (citing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 43-84 (1962)). Zelinsky summarizes, "The legislative process is not costless; time and man-hours devoted to one piece of legislation are not available for others; by expending political capital on one law, a legislator has less to expend on others; even routine legislation can absorb significant amounts of legislative time, energy, and decisionmaking capacity." *Id.*

³⁵³ See Letter from James Madison to Thomas Jefferson, *supra* note 260, at 20.

desired legislation, leading to a net loss for the public good. Conversely, the minority might have to endure the pain of losing the battle repeatedly, renewing resentments and possibly radicalizing the minority.

Creating a focal point in time for such deeply held beliefs may in fact be unsettling, but such political battles are part of the rough and tumble of democratic politics. Ensuring that there will be a time when the nation or the state will be forced to reexamine a particular policy will allow the public to focus its energy on issues that matter to them at a specified time. This agenda-setting function is a net good because it may help to overcome the inertia that now excessively empowers vocal and organized minorities. It also might give solace to losers in the democratic system because they will know with certainty that the issue and their objections will be revisited.

E. *Will It Exacerbate Public Choice Problems?*

Perhaps special interests will be excessively empowered, increasing their ability to impede legislation.³⁵⁴ Public choice theory already suggests that democracy is deeply flawed because rational actors pursue their own self-interests, singly or in combinations, in ways that harm the public good.³⁵⁵ The Criminal Sunset Amendment would increase the opportunities for these self-interested actors to do that harm. Some legislative process scholarship suggests that public-regarding "republican moments" are rare because they require public attention to the process, and that can be fleeting.³⁵⁶ As envisioned by Professor Pope:

Republican moments have five defining features. . . . (1) [L]arge numbers of Americans engage in serious political discourse; (2) their arguments are couched primarily in moral rather than pecuniary terms and appeal to the common good rather than private interest; . . . (3) the subjects of the debate include fundamental aspects of the social, political, or economic order[;] . . . (4) representative politics are overshadowed by extra-institutional forms of citizen participation such

³⁵⁴ See Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 356–58 (2006).

³⁵⁵ See generally JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

³⁵⁶ Republican moments are more common than the exceedingly rare "constitutional moments," as defined by Professor Bruce Ackerman, but are considered exceptions from ordinary politics. James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 288, 311 (1990).

as popular assemblies, militant protest, and civil disobedience; and (5) social movements and voluntary associations displace interest groups and political parties as the leading forms of political organization.³⁵⁷

Classic republican moments are rare, but smaller republican upsurges, driven by factors one, two, and three, might occur more often. The Criminal Sunset Amendment would limit the lasting impact of these rare, public-regarding moments, ultimately undercutting the occasional upwelling of American virtue. Public attention is also rationed by voters who are "rationally ignorant,"³⁵⁸ and will be "wasted" on re-fighting these old battles. In a similar vein, the conditions that gave rise to particular legislation might be forgotten. For example, the worst of the abuses that led to food and drug regulation or the market failures that led to the Great Depression and subsequent securities regulation have faded from modern memories. Some might worry that a modern legislature would let laws lapse because they no longer fully appreciate the continuing need for them.

This is a troubling issue. The rise of public interest groups, however, such as environmental and consumer lobbying organizations, will create a counterbalancing interest. Moreover, having a fixed date to focus lobbying and drafting efforts might make it easier for such groups to organize public attention on particular issues, especially at the federal level.³⁵⁹

F. *Will It Create the Perception of Instability?*

Another significant cost of the Criminal Sunset Amendment may be perceived instability. The amendment would alter the traditional American balance, now considered very stable, which may have multiple hidden, beneficial effects.³⁶⁰ The high number of veto players in

³⁵⁷ See *id.*

³⁵⁸ Political economists say rational ignorance occurs because voters know that the marginal effect of their vote is low and the cost of gaining information on multiple issues is high, so they reduce their participation in the political process unless the outcomes of politics become so unbearable that the cost-benefit balance tips. See generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

³⁵⁹ Because the amendment would apply to all fifty states as well, there might be a movement by the well-organized groups to increase federal preemption of state law, particularly in the consumer and environmental protection arenas.

³⁶⁰ McNollgast, *supra* note 145, at 1687 (citing Gary W. Cox and Matthew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes*, in *PRESIDENTS, PARLIAMENTS AND POLICY* 65-66 (2001)).

the American system, and the conservative bias that results, makes this possible.³⁶¹

As the number of effective veto players increases, the government's ability to be resolute (to commit to policy) increases while its ability to be responsive (to change policy) decreases. . . . While numerous veto points reduce policy instability, the cost is that government action tends to be more responsive to particularistic interests rather than to broad policy goals than would be the case if the Constitution made a different tradeoff between resoluteness and responsiveness. This Constitutional structure does not imply an absence of collective goods or public-regarding legislation. Rather the tradeoff created by the Constitution shapes the terrain of policy tendencies that pervade lawmaking.³⁶²

Additionally, there is some value in certain criminal prohibitions being venerable. Laws that have been with us since time immemorial, that echo universal religious proscriptions and that are a core part of our culture, may earn more loyalty than laws that are seen as subject to regular change. The moral authority of the law might be undermined if it becomes apparent that crimes are not universal wrongs but are instead legislative determinations. Conversely, the law might be undermined further if it turns out that our old commitments were wrong, and people remain in prison for conduct we no longer consider criminal.

Supporters would respond that repeated passage of essentially the same criminal prohibition will increase, not decrease the sense that society is committed to the particular value. Laws that have been re-adopted since time immemorial are reinforced, not undermined, by going through the process. Refinement over time will improve and strengthen the criminal law. Forcing the system through the process of restating its commitments is one way to sort the wheat from the chaff. Rather than creating a perception of instability, it will demonstrate resolve as it tightens and focuses the expressive function of the law.

G. Will It Overburden the Frayed Civil/Criminal Distinction?

The Criminal Sunset Amendment would place additional pressure on the courts to define the civil/criminal line clearly because it adds an

³⁶¹ See *id.*

³⁶² See *id.*

additional political check on any legislation deemed criminal.³⁶³ The Supreme Court already struggles with this issue, and commentators are deeply divided on how to find a principled basis for drawing the line.³⁶⁴ An important underlying concern in this area is the substance/process debate over what makes law "criminal" in the first instance.³⁶⁵ Many scholars argue that something intrinsic within the nature of the law itself—the way in which it bans behavior, or perhaps the way in which it exacts punishment—places it on the criminal side of the civil/criminal line.³⁶⁶ The Supreme Court sees the legislatures as ascendant in deciding what behavior deserves condemnation as criminal, with only minor policing taking place at the outer boundaries.³⁶⁷ However the issue is decided, the Constitution guarantees certain additional procedural protections once that choice is made.³⁶⁸

Much ink has been spilled on the civil/criminal distinction, and, in recent years, on its precipitous decline.³⁶⁹ The criminal law is different from civil law for a number of important reasons. Here are a few of the claims that scholars and the Supreme Court have made about the difference:

- The criminal law has a socializing role as a system of moral education.³⁷⁰
- The criminal law exists to "focus censure and blame" or to inflict punishment in a manner that maximizes stigma and censure.³⁷¹

³⁶³ The civil/criminal distinction is used to decide numerous procedural rights, such as the right to a trial by jury and the right to an appointed attorney. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1348-57 (1990).

³⁶⁴ See *id.*; Kevin Cole, *Civilizing Civil Forfeiture*, 7 J. CONTEMP. LEGAL ISSUES 249, 249 (1996); Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground Between Criminal Law and Civil Law*, 101 YALE L.J. 1795, 1837-40 (1992).

³⁶⁵ See, e.g., Cheh, *supra* note 363, at 1350-57 (discussing the various schools of thought); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures, a Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 397-413 (1976).

³⁶⁶ See Clark, *supra* note 365, at 397-413.

³⁶⁷ See, e.g., *United States v. Ursery*, 518 U.S. 267, 287 (1996) (citing legislative intent as the primary factor in determining whether a case is civil or criminal, and refusing to disturb that determination absent clear proof that the proceeding was "so punitive either in purpose or effect" that the Court must find otherwise (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980))).

³⁶⁸ See Stuntz, *Civil-Criminal*, *supra* note 3, at 3-4.

³⁶⁹ See Coffee, *supra* note 94, at 375; John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Duties and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 117 (1981).

³⁷⁰ TYLER, *supra* note 109, at 176-78.

- The criminal law prohibits actions, as if they had no social utility, while the civil law prices actions, by exacting from actors the cost beyond the social utility of their actions.³⁷²
- The criminal law has multiple procedural protections designed in part to signify the difference in kind to society: trial by jury, proof beyond a reasonable doubt, the right to counsel, ex post facto protections, and regularization under the Eighth Amendment.³⁷³
- The criminal law carries consequences such as the loss of critical civil rights, perhaps most critically the right to vote, and other social costs, such as the loss of benefits and the exclusion from multiple professions and jobs.³⁷⁴

If the Criminal Sunset Amendment were adopted, the legislature, in order to guard its time, would revert to noncriminal government sanctions and social sanctions for some of the behavior that is now criminalized. One significant downside to substituting the civil law for the criminal law is the loss of the procedural protections that the criminal law provides.³⁷⁵ Critics already decry the use of civil commitment in place of criminal punishment for sex offenders, for example.³⁷⁶ They argue that the legislature has gone too far in this direction and that an amendment that encourages expansion of this trend is pernicious.

At the margins, the distinctions between criminal law and punitive civil regimes are often difficult to fathom. As Professor Aaron Fellmeth has said: "To the discredit of the juristic and legislative professions, the centrality of the distinction between the civil and criminal law to our jurisprudential paradigm has done nothing to enhance its clarity or its cogency."³⁷⁷ But the differences matter. The retributive

³⁷¹ John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876 (1992).

³⁷² Cole, *supra* note 364, at 254; Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1532 (1984).

³⁷³ LAFAVE, *supra* note 236, at 45.

³⁷⁴ U.S. DEPT. OF JUSTICE, *supra* note 66, at 6.

³⁷⁵ See LAFAVE, *supra* note 236, at 45.

³⁷⁶ See, e.g., Mark W. Pearce, *Civilly Committing Criminals: An Analysis of the Expressive Function of Nebraska's "Dangerous Sex Offender" Commitment Procedure*, 85 NEB. L. REV. 575, 577 (2007) (arguing that "the civil commitment of convicted sex offenders can, under certain circumstances, distort the interrelationship between criminal responsibility and psychological impairment that underlies the basic institutions of criminal justice and civil commitment in the United States"); Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1424-25 (2008).

³⁷⁷ Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005).

ist component that is a central element of the criminal law is supposed to be an expression of the moral condemnation of society and the basis for exclusion from full participation in society.³⁷⁸ If a society chooses to make someone an outcast, either actual or virtual, it has special responsibilities to define and exercise the sanction. This issue is not easily resolved. It is possible that, by emphasizing the centrality of the distinction, the amendment will lead to additional focus on the problem and the development of doctrinal solutions.

Each of the foregoing criticisms identifies real potential costs to passing the Criminal Sunset Amendment. Astute readers will be able to identify more, but they should also be able to identify other benefits to making sure the criminal law accurately identifies our current moral judgments.

H. *Is It Worth Doing?*

Note that nothing in the proposal would bar legislatures from adopting exactly the same statutes that they have in place, nor does it, in any way, guarantee that a harsher law would not replace the existing law when the time comes to reassess the crime. Recent scholarship by David Garland and others on the explosion of the use of the penal system as an instrument of social control suggests that we may still see mounting punishment even in a system where politicians must invest significant political capital to implement it.³⁷⁹

Some critics suggest that the system will go from a default of stasis to a default of action.³⁸⁰ Where nothing is happening, these critics argue, at least things are not getting worse. Criminal laws might be passed more readily if there is a steady stream of bills coming up that are necessary simply to maintain the status quo. An already excessively punitive culture might use the opportunity to increase penalties when the legislation returns for a vote. It is also possible that, by rationing the criminal law, the enforced scarcity might result in higher penalties attached to fewer statutes. The proposed amendment, however, does reset the checks and balances because criminal laws that were passed in exigent circumstances would be reconsidered on another day when passions

³⁷⁸ PACKER, *supra* note 94, at 37-39.

³⁷⁹ GARLAND, *supra* note 6, at 199 ("Imprisonment has emerged in its revived, reinvented form because it is able to serve a newly necessary function in the workings of late modern, neo-liberal societies: the need for a 'civilized' and 'constitutional' means of segregating the problem populations created by today's economic and social arrangements.")

³⁸⁰ I thank Professors Louis Bilonis, Donald Hornstein, and Bill Marshall for these observations.

have cooled. Every generation would reassess criminal laws to determine whether they meet the demands of the times. For sunset laws, there would be twenty-five years of historic practice to consider when deciding whether the laws were effective and how to update them to make them more so. Those twenty-five years of practice would also reveal the price of the law's unintended consequences. Until the law is passed, it is impossible to say how much of the majority that passed it would have been willing to buy it at the newly revealed price.

For some readers, any possible benefits might come at too high a cost. Legislative primacy in this area would be amplified, and although the checks and balances might operate more often at the legislative stage, the systems we have evolved to operate as a check at later stages would be affected too. The legal regime we have developed over time for ameliorating the harshest costs of the criminal system—prosecutorial discretion, sentencing considerations, desuetude, lenity, and a vigorous set of substantive protections based on various textual provisions—would face renewed opposition along multiple fronts because the regime would be operating in contravention to the recently stated will of the people. The costs of legislative primacy might send repercussions throughout the system. It would test the nation's rhetorical commitment to the will of the people. We might find that the Framers' fears of the dangers of faction were not at all exaggerated, and that the very fact that the ameliorative regime operates behind the mostly closed doors of the legal system is in fact liberty-enhancing, not liberty-reducing.³⁸¹ It is possible that prosecutorial discretion exercised in secret permits us to maintain a rhetorical moral stance while reducing the actual costs on the ground. Those who want more liberty and mercy might find that they are more likely to get it if it is rationed out in individual cases where the equities can be considered.

Where one stands on the Criminal Sunset Amendment depends in part on whether one thinks there is value in reinvigorating politics in the criminal arena. Politics comes with costs. We might see more log-rolling, like special interest groups and legislators trading favorable votes on one important criminal measure for favorable votes on other legislation. White-collar crime regimes might be particularly vulnerable to well-financed special interests. Legislative-process-failure scholars already decry closed door deals cut on particular provisions.³⁸² More process might mean more process failure. Renewed interest group ac-

³⁸¹ THE FEDERALIST No. 10 (James Madison).

³⁸² See MASHAW, *supra* note 355, at 84–85.

tion might result in additional legislator rent-extraction. And political battles expend emotional energy. Is it good for society to reopen political wounds every quarter century on such volatile issues as the definition of a human being? If the politics of the criminal law are genuinely pathological, a vigorous sunset regime would exacerbate at least some of the problems inherent in the system.

The Criminal Sunset Amendment leaves it to renewed political debate to decide on the normative bases for deciding how much criminal law is enough. The Amendment uses structure to enforce an essentially democratic system, but with a pro-liberty bias. If society cannot agree that behavior is worthy of current condemnation, then it would not be labeled a crime. Because this is a process-forcing amendment, it can operate easily in conjunction with other substantive, normative commitments. At the very least, it will extract information about current majority views and provide a more informed backdrop for action by the other branches of government.

A true Burkean conservative might never be convinced by the arguments in this Article. For the Burkean, the venerable status of a law is a significant benefit, not a cost.³⁸³ For the non-Burkean readers of this Article, however, the time lag problem may be considered sufficiently important that the polity should take measures short of a constitutional amendment. Although this article has proposed a comprehensive solution, in part to fully illustrate the nature of the problem, I am quite sure that measures short of the full sunset amendment would make significant inroads into the time lag problem. For example, a particular state, when redrafting its criminal code, might decide to place a sunset provision on all of the substantive crimes included therein. A state legislature might also adopt a standing rule that criminal provisions be considered singly, and that any new criminal provision last for only twenty-five years. Although such half measures might be less than ideal based on the arguments in this Article, they would constitute a significant improvement over the current state of the law.

CONCLUSION

Even if Madison was right to reject the full Jeffersonian proposal to sunset all laws and the Constitution, the current system does too little. The "act of force" by one generation on its successors is especially critical when that act chooses who the successor generation brands as a

³⁸³ See Peterson, *Constitutional Change*, *supra* note 256, at 290.

criminal. If we believe that past generations had different values from their successors, the problem is worse.

Examination of the time-based failures of the criminal law, as illuminated by the proposed Sunset Amendment, underscores the essentially conservative design of our system. Whether or not one thinks a sunset regime is a good idea, the absence of a constitutional mechanism to account for change over time and to ration the law on the books has affected the development of our system of separation of powers. Simply recognizing the role of generational lag in our criminal justice system has significant explanatory power. An amendment to the Constitution is unlikely, but there are other ways short of that to implement the ideas in this Article. States might pass their own sunset amendments. Penal code drafters could design rolling sunset provisions to require a phased second look at the substantive laws. Legislation creating regulatory schemes could mandate sunsets or reexamination periods for the regulations thereby designed. Legislatures could adopt sunset provisions as a drafting preference for criminal legislation going forward. The piecemeal solutions are less than satisfying because they are not comprehensive and fail to force the legislature to clean up the old code books. At least they would be a step in the right direction.

This Article suggests that many of the problems in current criminal codes result from the way it has developed over time. If we consider the criminal law as an organic system like a farm, tended by different farmers with different priorities, each basing their plans for production on market pressures from different times, we would expect to find haphazard production. It is not good, however, for any farm to have significant areas fall into disuse or suffer from massive overgrowth. Like any organic system, it needs careful tending and consistent maintenance to remain viable and productive. But like any maintenance system, the costs and benefits must be measured carefully. Clearcutting or setting massive fires are both ways to deal with overgrowth, but they may do more harm than good. There are other possible mechanisms—the criminal code movement of the 1970s and 1980s was an attempt to plow everything under and replant. But as Paul Robinson and others have noted, the overgrowth has started again. The Criminal Sunset Amendment imposes a maintenance schedule from the top, with a clear cost for failing to keep up—the law's expiration. In operation, it plainly has a republican bias. It believes that the earth belongs to the people—the living generation—and that they are the ones responsible for maintaining it. If one believes that the criminal law should reflect the current values of "we the people," and if one believes that democracy is at least better than the

alternatives, then thinking about how to empower the people's representatives and how to keep them responsive to the governed is worth doing. Jefferson and Madison both had important insights; stability and currency of the law will remain in constant tension, but regular maintenance is a worthwhile exercise.

The absence of a formal mechanism for forcing legislatures through their paces mandates other ways to bring the criminal law into accord with modern sensibilities. If the law is out of date, and is likely to remain that way, then the enforcers must adjust or else lose perceived legitimacy. Courts and prosecutors make these adjustments with an additional cost in perceived legitimacy. Although they may be a necessary accommodation, they are an evolutionary adaptation to an inherent problem of change in moral commitments over time. If we do away with prosecutorial discretion or limit courts' ability to interpret statutes in light of modern sensibilities, the hydraulic forces might force the legislatures to tend to the criminal code. Exploring the pros and cons of the Sunset Amendment is one way to understand the array of forces at play within the system. I believe that a formal, process-forcing mechanism is a more transparent way of dealing with the problem of changing moral commitments over time. It is more faithful to the rule of law and more responsive to democratic processes. It is more likely to lead to perceived legitimacy, and it would make the law more knowable and, hence, more useful as a norm-imparting device. Those who believe that democracy is fundamentally flawed and that introducing elite expertise into the system will ultimately lead to better results are likely to see the current state of the law as preferable. Legitimate reasons, like the Framers' fear of the dangers of factions, support that view. Madison and Jefferson would likely still disagree after watching more than two centuries of practice under the system they helped design. I side with Jefferson.