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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


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." In many respects they are right because the politics of the criminal law are deeply flawed. 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. So why is the criminal law such a mess? Many of these problems and concerns share a common source: the intransigence of criminal law. Once on the books, criminal law is difficult to repeal. It stays with us, despite changing moral convictions and majority preferences.

This Article examines one source of this intransigence: the Constitution's failure to optimally account for change over time in social attitudes regarding crime. 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.

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. 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. In many cases, the time lag between the end of a majority on one side of the decision to criminalize conduct

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5 See Stuntz, supra note 1, at 505.
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. 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. But there are others. For example, the lag has led to the increased development of multiple doctrines that seek to ameliorate the problem. 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. But these all come with costs to the perceived legitimacy of the law. As a result, at any given time, significant portions of the criminal code are out of touch with majority sentiment. 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. There would be less need for apparently "countermajoritarian" and noise-inducing solutions if the law more closely tracked majority values.

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. He believed that the Constitution that Madison was then drafting would erect significant barriers to legislative action that would make it likely for gulls 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").
19 See 15A Am. Jur. 2d Common Law § 2; Brown, supra note 18, at 1155; Krug, supra note 18, at 646 n.19.
21 See Beale, supra note 8, at 773-74.
22 See Stuntz, supra note 1, at 522.
23 See id.
lar sentiment and enacted law. Jefferson’s vision has come to pass, particularly in the criminal law.

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. 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.

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. Part II examines the special concerns that arise in the criminal law as a result of the limitations of repeal. 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. Part IV examines the issue of sunset provisions from several angles. It considers the Framers’ thoughts on time-based change in the law, including their thoughts on sunsets. It examines emerging scholarship on sunsets. It then describes a proposed Criminal Sunset Amendment in detail. Part V considers objections to the Amendment and current doctrine’s ability to address changing values over time.

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 286-283 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. Behavior that was once considered subversive, obscene, or irreligious is now commonplace. 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. 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.

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. 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-

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57 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.

58 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.

59 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.").


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.

61 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 repres-
sentation 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 constitu-
ents: 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' obstruc-
tionist 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 ac-
ccurate 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 in-
capable 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 bene-
fits 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
(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 peo-
ple,' rather than to the clamoring of a narrow interest group well positioned to block legis-
lative reform").
47 See Beale, supra note 8, at 773–74.
different times and places, but it always expands." Stuntz argues that this constant expansion is clear evidence of the pathology of criminal law. Stuntz's position is widely held, though not universal. 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," and "have long and continuing records of repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions."

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. Moreover, it is still problematic if the politics of criminal law closely reflect ordinary politics. Criminal law ought to be different from ordinary law because it punishes, often very severely, based on what should be broadly held moral commitments. Given the stakes, the politics of criminal law should be better, not worse, than ordinary politics. For those who are convinced that Professor Brown has it right—or mostly right—I would agree. This

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48 Stuntz, supra note 1, at 527-28.
49 See id.
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. This perception is the underlying basis that results in the widespread sentiments expressed by Professor Stuntz and those like him.

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.

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. To say that the criminal law does not reflect community values could be an understatement.

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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.

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. 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. The people who commit crimes are criminals, and they are no longer worthy of full participation in the social order. Federal law prohibits all felons from possessing firearms. Felons are barred from receiving many federal and state benefits. In many states, they are stripped permanently of the right to vote and are in effect exiled from the course of ordinary politics. Labeling something a crime expresses an important social consensus about the reprehensibility of the behavior. 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.


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


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.

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

See Beale, supra note 8, at 779-74. 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 284-85 (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.\(^\text{70}\) As a result, the political costs of such votes are significantly different as well.\(^\text{71}\) 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.\(^\text{72}\) 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.\(^\text{73}\) Once a behavior has been criminalized, public sentiment must undergo a dramatic change in favor of the behavior to decriminalize it.\(^\text{74}\) 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.\(^\text{75}\)

An example of this dynamic at work can be seen in efforts to repeal controlled substances laws.\(^\text{76}\) Imagine the universe of politicians

\(^\text{70}\) See Beale, supra note 8, at 773–74.
\(^\text{71}\) See id.
\(^\text{72}\) See Robinson & Cahill, supra note 7, at 644–45.
\(^\text{73}\) See id.
\(^\text{74}\) See id.
\(^\text{75}\) See id.
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-

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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.
spouse 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. Nevertheless, retributivists, utilitarians, and legal realists unite in decrying the scope and the range of the criminal law.

There are at least three strands to the overcriminalization argument. The first considers the criminal law's breadth: too much conduct is prohibited. 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. 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. 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. A cluttered criminal code fails to teach the public what values society has chosen. The third major overcriminalization criticism—that the laws are excessively punitive—is beyond the scope of this Article.

A. Breadth

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

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90 See id.
91 See id.
92 See infra notes 99-150 and accompanying text.
93 See Stuntz, supra note 1, at 512-19.
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. Incomprehensibility compounds the problems that depth creates, making law abiding citizens into inadvertent criminals.

Dead-letter laws raise additional concerns. They are the thicket of laws that remain on the books long after the circumstances that brought them into being. Desuetude and unconstitutional statutes still on the books confound the promulgation and transmission functions of the law. The law cannot educate the public about core social values if it imparts conflicting views. 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. 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. If significant portions of the code are desuetudinal, or partially enforced, or of questionable status, the code can become affirmatively misleading.

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. 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...When 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. In addition, such breadth threatens the moral force that criminal law carries.

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

See DeLong, supra note 109, at 36–37.

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.


Id.

Id.

Id.

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.

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. The Court’s pronouncements, however, are not permanent. 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. 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. Some scholars have suggested that the courts develop a doctrine that forbids revival. 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. If there is no law in place, the bias is in favor of keeping it off the books. Once there is a law in place, however, the bias is in favor of keeping it on the books.

B. Depth

The second concern about the scope of the criminal law is depth—too many laws cover the same conduct. Too much depth in the criminal law makes it incomprehensible. 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 JURIS-PURS: 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.\textsuperscript{128} A truly accurate count is almost impossible because other statutes criminalize violations of additional thousands of administrative regulations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{131}

Excessive depth can also lead to perceived illegitimacy for another reason—it permits selective prosecution\textsuperscript{132} and differential prosecution.\textsuperscript{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.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item 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).
\item Baker, supra note 50, at 8.
\item 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).
\item 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 . . . .
\item 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).
\item 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.
\end{enumerate}
\end{footnotesize}
C. Unintended Consequences

The limitations of repeal also exacerbate the ill effects of the law's unintended consequences. It is impossible to know in advance the real-world results of a criminal law. This might result in what Professor Stuntz has termed self-defeating criminal laws. 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. 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. 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. Once it became a matter for legal enforcement, society realized that it was a cost it was not willing to bear and overturned Prohibition.

The law of unintended consequences can also result in excessively costly, but not self-defeating laws. 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.

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 legislators were 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-

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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.
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.\textsuperscript{144} This type of veto-gate disconnect further undermines the moral authority of the criminal law.\textsuperscript{145}

This Article, then, falls somewhere in a middle ground between Professors Stun tz and Brown.\textsuperscript{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.\textsuperscript{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.\textsuperscript{148} In many cases, the time lag between new majority sentiment and new criminal law is significant, and, in other cases, permanent.\textsuperscript{149} The lag creates the perception that the criminal law is out of touch, or perhaps immoral.\textsuperscript{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.\textsuperscript{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.\textsuperscript{152} Each solution, however, comes at a cost that

\textsuperscript{144} Alexander M. Bickel, \textit{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. \textit{Id.} He believes the statute book will be examined and altered when necessary because popular will rejects how the laws are enforced. \textit{Id.} For further discussion of his views, see infra notes 193-209 and accompanying text.


\textsuperscript{146} See Brown, supra note 51, at 225; Stun tz, supra note 1, at 527-28.

\textsuperscript{147} See Brown, supra note 51, at 225; Stun tz, supra note 1, at 527-28.

\textsuperscript{148} See Beale, supra note 8, at 773-74.

\textsuperscript{149} \textit{See id.}

\textsuperscript{150} \textit{See Stun tz, 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.").}

\textsuperscript{151} See infra notes 154-241 and accompanying text.

\textsuperscript{152} See infra notes 154-241 and accompanying text.
could be reduced by a structural mechanism that would make them less necessary. 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. The doctrine of desuetude provides that obsolete statutes cannot be invoked after a sufficiently lengthy period of disuse.

As Professor Alexander Bickel articulated in his article, *The Passive Virtues*, the current widespread disobedience of a statute does not make it desuetudinal. Instead, a longstanding government policy of non-enforcement drives desuetude. 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. After some period, a law that has not been enforced can no longer be enforced.

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. The courts determine the length of that period and enforce desuetude against the government. This increases the relative power of the courts and undermines the executive’s capacity to exercise prosecutorial discretion. 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. But precisely because it is exceedingly rare, desuetude is not a particularly

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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 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.
B. Judicial Construction

American law also deals with change over time through the constant readjustments possible with judicial construction. Adjusted moral commitments are translated into different legal commitments in the form of criminal law. 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. Judges can constantly reevaluate the balance of social forces and adjust the law accordingly. 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. It is, for example, an oft-repeated aphorism that there is "no federal common law of crimes." Given the trend, the hardening of the law's outlines in the form of legisla-

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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.


168 See id.

169 See id.


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. In most instances, textual limitations leave very little room for judicial construction to align them.

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. 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. For many legal commentators, the legislature’s inability to align the criminal law with contemporary values legitimized additional judicial oversight of the substantive law. A significant disconnect between the law and current values leads to a pressure on the system that seeks relief in the judiciary. 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.

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

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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.
177 See BICKEL, supra note 176, at 25.
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.\textsuperscript{180} It was once a crime for a doctor to dispense contraceptives.\textsuperscript{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 \textit{Brandenburg v. Ohio},\textsuperscript{182} \textit{Loving v. Virginia},\textsuperscript{183} and \textit{Griswold v. Connecticut}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{186}

The judicial invalidation of statutes creates what Professor Bickel famously denominated the counter-majoritarian difficulty.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{190} Constitutionalizing the mistake takes

\textsuperscript{180} Loving v. Virginia, 388 U.S. 1, 4 (1967) (overturning Virginia law barring interracial marriage).
\textsuperscript{182} 395 U.S. at 449.
\textsuperscript{183} 388 U.S. at 12.
\textsuperscript{184} 381 U.S. at 479.
\textsuperscript{185} See \textit{Brandenburg}, 395 U.S. at 449; \textit{Loving}, 388 U.S. at 12; \textit{Griswold}, 381 U.S. at 479.
\textsuperscript{186} Cf. William J. Stuntz, \textit{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. \textit{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. \textit{Cf. id.}
\textsuperscript{187} See Bickel, supra note 176, at 16.
\textsuperscript{189} See generally Ely, supra note 188; Sunstein, supra note 163; Tushnet, supra note 188; Amar, supra note 188; Stuntz, supra note 186.
\textsuperscript{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. This cost is compounded when courts are asked to show fidelity to generations-old constitutional text, particularly when applied to unforeseen and unforeseeable circumstances. 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. 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. 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. 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.

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." 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. The birth control statute in Poe had been enforced three times in the thirty years prior to the decision. But a doctor who

191 See Stuntz, supra note 186, at 792.
192 See ARKIL 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.\footnote{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.\footnote{201} He suggested desuetude as the method through which the \textit{Poe} case should be decided, but the executive chose to attempt to enforce the law only once.\footnote{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.”\footnote{203}

In his consideration of any enduring vitality in the forces that led to the anticontraception statute at issue in \textit{Poe}, he also recognized that passage and repeal were not equivalent.\footnote{204} It did not matter to Bickel that the opponents of the unenforced statute were unable to muster a majority to overturn it.\footnote{205} “The legislature has voted against repeal,” he noted, “[b]ut that is not the same as voting to enact a statute.”\footnote{206}

Nevertheless, Bickel criticized the Court for stepping in to act in the breach in \textit{Poe}.\footnote{207} Bickel believed the Court was simply the wrong institution and considered the problem perhaps insoluble as it then stood.\footnote{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, \textit{Poe} was the wrong case at the wrong time.\footnote{209}

Bickel’s concern about \textit{Poe}, and cases like it, remains salient given the countermajoritarian difficulty for cases today.\footnote{210} In \textit{Poe}, it was clear that the Court was grappling with a problem that is inherent in our constitutional structure.\footnote{211} The system we have, with unenforced statutes that remain in place, predictably gives rise to this problem.\footnote{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

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\begin{itemize}
  \item \footnote{200} Id.
  \item \footnote{201} Id.
  \item \footnote{202} Id.
  \item \footnote{203} Id. at 63.
  \item \footnote{204} Bickel, supra note 144, at 61.
  \item \footnote{205} Id.
  \item \footnote{206} Id.
  \item \footnote{207} Id.
  \item \footnote{208} Id.
  \item \footnote{209} Bickel, supra note 144, at 61.
  \item \footnote{210} SUNSTEIN, supra note 163, at 49.
  \item \footnote{211} Bickel, supra note 144, at 61.
  \item \footnote{212} Id.
\end{itemize}
rather on the judges’ own sense that times have changed.\textsuperscript{213} The Court arguably gets this right, sometimes, in cases such as \textit{Poe},\textsuperscript{214} or in the cases designed to dismantle Jim Crow, such as \textit{Loving v. Virginia}\textsuperscript{215} and \textit{Brown v. Board of Education}.\textsuperscript{216} But it has arguably gotten it wrong in other cases, such as \textit{Furman v. Georgia}, where some members of the Court decided that the American public no longer supported the death penalty.\textsuperscript{217} And it exacerbated a critical social and political divide and politicized the selection of Supreme Court justices in \textit{Roe v. Wade} and subsequent abortion cases.\textsuperscript{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.\textsuperscript{219}

\textbf{D. Prosecutorial Discretion}

Perhaps the most important safety valve for outdated criminal codes is prosecutorial discretion.\textsuperscript{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.\textsuperscript{221} Proponents of prosecutorial discretion argue that it is incredibly difficult to write a law that is not somewhat overinclusive or somewhat underinclusive.\textsuperscript{222} Overinclusive laws that empower prosecutors to enforce them in ways

\textsuperscript{213} \textit{Sunstein}, supra note 163, at 49.
\textsuperscript{214} 367 U.S. at 509.
\textsuperscript{215} 388 U.S. at 12.
\textsuperscript{216} 347 U.S. 483, 495 (1954).
\textsuperscript{218} 410 U.S. 113, 162 (1973).
\textsuperscript{219} \textit{See Sunstein, supra note 163, at 255–58 (exploring the limits of judicial capacities and the judicial role).}
\textsuperscript{220} \textit{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).}
\textsuperscript{221} \textit{See id.}
\textsuperscript{222} \textit{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. Many opponents of prosecutorial discretion argue that discretion is a core component of the overcriminalization problem. 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.

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

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. 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. 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

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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 182, 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 COLO. L. REV. 1232, 1254–56 (1995) (arguing that the jury can serve as a check on systemic legislative failures).


234 Greenawalt, supra note 233, at 360.


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. 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.

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. 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. The existing solutions would be less dramatic in their results and less often needed if the legislature regularly reevaluated the law on the books. This section details the early constitutional thought on sunsetting laws, the mechanics of the amendment itself, and the possible costs of a sunset provision.

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. Thomas Jefferson proposed precisely this principle to James Madison in 1789 as the Ameri-
can constitutional order was being born.\textsuperscript{247} Jefferson was drawing on an idea that had deep roots in the radical politics of his period.\textsuperscript{248} Noah Webster,\textsuperscript{249} Thomas Paine,\textsuperscript{250} and Jean-Jacques Rousseau\textsuperscript{251} all professed similar views.\textsuperscript{252} These thinkers were grappling with the radical changes taking place in France and America, and searching for theoretical justifications for those changes.\textsuperscript{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.\textsuperscript{254}

Jefferson argued that every generation has a right to the constitution and laws of its own choosing.\textsuperscript{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."\textsuperscript{256} Jefferson would have sunset all laws, and

\begin{itemize}
\item \textsuperscript{247} See Letter from Thomas Jefferson to James Madison, supra note 24, at 385.
\item \textsuperscript{249} Giles Hickory [Noah Webster], On Bills of Rights, Am. Mag., Dec. 1787, at 13, 14.
\item \textsuperscript{250} 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.
\item \textsuperscript{251} 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.
\item \textsuperscript{252} 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.").
\item \textsuperscript{253} Rubenfeld, supra note 248, at 17-18.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Id.
\item \textsuperscript{256} Letter from Thomas Jefferson to James Madison, supra note 24, at 385.
even the Constitution itself.\textsuperscript{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.\textsuperscript{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.\textsuperscript{259}

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

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\textsuperscript{257} Letter from Thomas Jefferson to James Madison, supra note 24, at 385–86. The relevant portion of Jefferson’s letter to Madison states:

\begin{quote}
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.
\end{quote}

\textit{Id.}

\textsuperscript{258} Id.

\textsuperscript{259} Id.

\textsuperscript{260} Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in \textit{13 The Papers of James Madison, supra note 24, at 18, 18–26.} The relevant passage states in full:

\begin{quote}
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 weakening 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. Even if Madison was right in his response to the full Jeffersonian proposal—that sunsetting all laws (and the Constitution itself) does too much, the existing Constitution arguably does too little. 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.

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." 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.

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 interprizing 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.").

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

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

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.").


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.\textsuperscript{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.\textsuperscript{267}

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

\textsuperscript{266} Gersen, \textit{supra} note 264, at 248.
\textsuperscript{267} Id.
\textsuperscript{268} See generally id.
\textsuperscript{269} Id. at 249–50.
\textsuperscript{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").
\textsuperscript{271} Gersen, \textit{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

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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.\textsuperscript{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.\textsuperscript{281} Under the proposed law, approximately four percent of the criminal laws would be subject to sunset each year, on a rolling basis.\textsuperscript{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.\textsuperscript{283} It includes a five-year lag between the en-

\textsuperscript{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, \textit{The Liberal Critique of the Harm Principle}, \textit{17 CRIM. JUST. ETHICS} 3, 4 (1998). He proposed requiring a two-thirds supermajority for all criminal laws, with a 10-year sunset. \textit{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.” \textit{Id.} at 12. His contemporary supermajority rule has a very different focus and analysis from this one. \textit{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.

\textsuperscript{281} See Letter from Thomas Jefferson to James Madison, supra note 24, at 385–86.

\textsuperscript{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.

\textsuperscript{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 readoption of the
criminal code at the beginning of each legislative session. This furthers
the rationing requirement by requiring individualized legislative atten-
tion 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 virtu-
ally unnoticed and undebated. The downside is that it will adversely
affect legislative attempts to rationalize the criminal code through pe-
riodic revision and adoption of a comprehensive criminal code.285 The
single crime provision would require a significant investment of legisla-
tive 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 responsi-
bilities that society holds paramount.287 Law is only one way to deal with

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284 The amendment as drafted might have the perverse result of more recent laws ex-
piring 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.
analysis of their degradation over time due to the primacy of ordinary politics, see Robin-
son & 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 (discuss-
ing the "informal social controls exerted by families, neighbours and communities, to-
gether 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.\textsuperscript{288} Family, religion, educational institutions, and social networks are all additional sources of inculcation and enforcement of these values.\textsuperscript{289} Over time, the appropriate mix of these sources changes, as does the way in which each approaches a particular situation.\textsuperscript{290} These norm-enforcement resources can be optimally allocated.\textsuperscript{291} If society believes there are certain actions in which no person may responsibly engage, then it likely will continue to ban them outright.\textsuperscript{292} The issue becomes significantly more difficult when there can be a responsible and an irresponsible exercise of the same behavior.\textsuperscript{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.\textsuperscript{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.\textsuperscript{295} Technological advancement may ameliorate the harm that resulted from a particular behavior.\textsuperscript{296} Changing

\textsuperscript{288} GARLAND, supra note 6, at 49.
\textsuperscript{289} See id.
\textsuperscript{290} See id. at 158–63.
\textsuperscript{291} See TYLER, supra note 109, at 22–27.
\textsuperscript{292} See id. at 23.
\textsuperscript{293} See id. (discussing attempts to reduce incidents of drunk driving).
\textsuperscript{294} See id.
\textsuperscript{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.

\textsuperscript{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. 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.

For example, antimiscegenation laws based on moral commitment to the separation of the races were once commonplace. They had deep roots in religion, social structures, and pseudoscience for a significant portion of American history. 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.

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. 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. A person or group that controls a veto gate may deny even a firm opposing majority the ability to adopt a new policy. The result of this power depends on the reversionary policy in the particular system. Reversionary policy is the default the system applies if the legislature and associated veto players fail to take action. It might be the status quo ante, but it might be something different. Where there are sunset provisions, the reversionary policy is not the status quo but the absence of the sunsetting 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." 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.

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

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502 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").

503 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.

504 Id.

505 Id. at 1686.

506 Id.

507 McNollgast, supra note 145, at 1686.

508 Id.

509 See id.

510 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{316}

The Criminal Sunset Amendment also addresses the overdepth issue by creating scarcity.\textsuperscript{317} Passing legislation is expensive and time-consuming.\textsuperscript{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.\textsuperscript{319} Additionally, the amendment would render the revival problem moot by impos-

\begin{flushright}
\textsuperscript{311} See Letter from Thomas Jefferson to James Madison, supra note 24, at 385.
\textsuperscript{312} See Beale, supra note 8, at 773–74.
\textsuperscript{313} See McNollgast, supra note 145, at 1685.
\textsuperscript{314} See Beale, supra note 8, at 773–74.
\textsuperscript{315} See McNollgast, supra note 145, at 1687.
\textsuperscript{316} See Beale, supra note 8, at 773–74.
\textsuperscript{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).
\textsuperscript{318} McNollgast, supra note 145, at 1687.
\textsuperscript{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).
\end{flushright}
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 594.
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. 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. 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. 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. 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*. 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

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330 See Gersen, supra note 264, at 266 (“By requiring that future-period legislatures re-enact 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.\textsuperscript{334}

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

\[\textsuperscript{334} \text{See Robinson & Darley, supra note 20, at 5–7 (defending the reasons community views should dictate the criminal code).}\]

\[\textsuperscript{335} \text{See Dressler, supra note 170, at 31–32.}\]

\[\textsuperscript{336} \text{See, e.g., Banner, supra note 217, at 267; Jeffries, supra note 217, at 413–14; Steiker, & Steiker, supra note 217, at 411–12.}\]

\[\textsuperscript{337} 408 U.S. 238, 239–40 (1972).}\]

\[\textsuperscript{338} \text{Id.}\]

\[\textsuperscript{339} \text{See Banner, supra note 217, at 267; Jeffries, supra note 217, at 413–14; Steiker & Steiker, supra note 217, at 411–12.}\]

\[\textsuperscript{340} \text{See Peterson, supra note 256, at 290.}\]
opponent can argue, it becomes clear that the rationing effect would render sunsetting 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.\(^{347}\)

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\(^{341}\) 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 sunsetting).

\(^{345}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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.559

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.660 The high number of veto players in

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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.

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

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361 See id.
362 See id.
additional political check on any legislation deemed criminal. The Supreme Court already struggles with this issue, and commentators are deeply divided on how to find a principled basis for drawing the line. An important underlying concern in this area is the substance/process debate over what makes law "criminal" in the first instance. 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. 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. However the issue is decided, the Constitution guarantees certain additional procedural protections once that choice is made.

Much ink has been spilled on the civil/criminal distinction, and, in recent years, on its precipitous decline. 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.
- The criminal law exists to "focus censure and blame" or to inflict punishment in a manner that maximizes stigma and censure.

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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). 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).

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).

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

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))).

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


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 retributiv-

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

Some critics suggest that the system will go from a default of stasis to a default of action. 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

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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 Bilionis, 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 sunsetting 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. 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 logrolling, 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. 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 sunsetting 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

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.