

CLEANING OUT THE CLOSET: USING SUNSET PROVISIONS TO CLEAN UP CLUTTERED CRIMINAL CODES

INTRODUCTION

Imagine facing criminal charges for using bad language in front of a young child or being prosecuted for engaging in premarital sexual activity. Or, imagine a nonprofit advocacy organization being charged with a federal crime for engaging in peaceful protest. It is unlikely that those engaging in any of these acts are aware that their behavior constitutes a crime in some jurisdictions. Criminal prosecution for these acts, of course, is improbable. Under current federal and state criminal statutes, however, such prosecution is a possibility.¹

The penal law and criminal codes play an important and powerful role in our society. They are the instruments by which the legal system sets forth acceptable standards of conduct for society and grants the power to punish conduct straying from these standards.² While one aim of the penal law works to protect society against injury, there is ample room for abuse and injustice through the improper use of criminal codes.³

The potential for abuse often lies dormant within state or federal penal statutes. Many criminal codes are full of antiquated and unused provisions.⁴ Acts that were once deemed unacceptable and proscribed by statute may now

¹ See *infra* Part I.

² The commands of criminal law “are subject to one or more sanctions for disobedience which the community is prepared to enforce.” Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 403 (1958).

³ Professor Wechsler once noted:

[P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.

Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

⁴ See *infra* Part I.B.

be inoffensive and widely accepted by the community.⁵ Some statutory provisions, because social norms shift within society, are no longer administratively enforced, and thus fall into disuse.⁶ However, these dead letter laws remain on the statute books in a state of desuetude.⁷

Additionally, many codes, both state and federal, contain overlapping provisions that have the effect of criminalizing the same conduct; multiple statutes may punish the same crime.⁸ Both the unused and overlapping provisions clutter the criminal codes of our country and plague these codes with problems. While criminal codes are problematic in many ways,⁹ the issues of overlapping and obsolete provisions are the focus of this Comment.

Criminal code reform has been a focus of legal commentators' attention for quite some time. For decades, countless books and articles have been written about the problems associated with penal codes and the potential solutions to such problems.¹⁰ Although much has been written on the subject, there has been no solution set forth to date that has accomplished the goal of clearing the codes of their cluttered state. Moreover, as demonstrated later, the problems associated with the codes are as prevalent today as ever.

⁵ See Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964).

⁶ See *id.* at 390 (“[C]ommunity pressure may cause [a statute’s] nullification by nonenforcement rather than by an express legislative repeal.”).

⁷ See *id.* at 389. The laws “have significance only as lifeless, printed words on the statute books of the state despite the fact they have never been repealed by the legislature.” *Id.* The term desuetude is defined as “[l]ack of use; obsolescence through disuse.” BLACK’S LAW DICTIONARY 479 (8th ed. 2004). The concept of desuetude is rooted in civil law doctrine. See Bonfield, *supra* note 5, at 395. Arthur E. Bonfield provides an in-depth discussion on the development of the concept of desuetude. He traces its origins, beginning with the observation of Roman jurist Julian: “[l]ong continued custom is not improperly regarded as equivalent to a statute . . . [and] statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.” *Id.* at 395 (citation omitted). He then traces the concept through the Middle Ages to current times, both domestically and abroad. *Id.* at 395–401; see also Cory R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449 (1992).

⁸ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (“federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions”); see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 737 (1996) (noting the same problem).

⁹ Paul H. Robinson and coauthors identify several criterion that a clear and well-written criminal code would encompass (and also give examples of many codes that do not encompass such characteristics): a “comprehensive statement of the law’s commands,” a “comprehensive and accessible statement of its rules of adjudication,” an accurate assessment of who “does and does not deserve criminal liability,” and an accurate assessment of the “proper grade of liability and punishment.” Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 5–20 (2000).

¹⁰ See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Bonfield, *supra* note 5; Chivers, *supra* note 7; Robinson et al., *supra* note 9; Stuntz, *supra* note 8.

Part I of this Comment will illustrate the existence of unused and overlapping code provisions. Part II will examine the political process behind code drafting and suggest why the phenomenon of cluttered codes exists. Part III will identify and illustrate the issues that arise with having old and overlapping provisions on the books. Part IV will examine and critique potential solutions to the defects. Finally, in Part V, this Comment will propose the incorporation of sunset provisions into criminal statutes to aid in the effective and efficient cleanup of the codes, with an aim towards creating a criminal code that is current and streamlined.

I. THE STATE OF CRIMINAL CODES: EXISTENCE OF ANTIQUATED AND OVERLAPPING STATUTORY PROVISIONS

A. *The History of Penal Codes: From Past to Present*

A brief look at the development of criminal codes in the United States helps explain their current, chaotic state. Criminal code drafting has been undertaken in this country almost since its founding.¹¹ In the late 1800s, David Dudley Field sought to codify the various and disparate criminal laws of the United States.¹² This in turn prompted several states to adopt the criminal code that these efforts produced.¹³ After this initial surge of code adoption, however, virtually no state adopted codes until after World War II.¹⁴

The abandoned codification effort “revealed itself in a substantive criminal law that was often archaic, inconsistent, unfair and unprincipled, and was saved from disaster only by the sensible exercise of discretion of prosecutors and judges.”¹⁵ While academic commentators and commissions of inquiry recognized the need to fix this problem, state legislatures took no action.¹⁶

¹¹ Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 947 (1999). For an in-depth look at the nation’s foremost criminal code drafters and reformers see Ronald L. Gainer, *Federal Criminal Code Reform, Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998) and Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1108 (1978).

¹² Kadish, *supra* note 11, at 947 (describing Dudley’s codification efforts as “a systematic restatement of existing law, but not much more”).

¹³ *Id.*

¹⁴ *Id.* Louisiana was the one exception, adopting a criminal code in 1942. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Following World War II, the American Law Institute embarked on a project to reexamine and reform the nation's substantive criminal law.¹⁷ The final product of this effort was realized in 1962 with the submission of the Proposed Final Draft of the Model Penal Code (MPC).¹⁸ The MPC was successful in encouraging States to reexamine their own codes.¹⁹

While thirty-four states revised their codes in the wake of the MPC, many states' reforms were modest.²⁰ Further, approximately one-third of the states did not adopt a modern code during the recodification wave.²¹ Many of the newer codes contain drafting flaws; furthermore, certain provisions in these revised codes that once may have been useful are now badly out of date.²²

Professor William J. Stuntz provides some insight into the current state of penal codes and their rapid rate of growth.²³ From the year 1856 to 1951, Illinois' criminal code grew from 131 to 460 separate crimes.²⁴ Influenced by the MPC reforms underway at the time, in 1961 Illinois substantially reduced the number of crimes on its books.²⁵ By 1996, Illinois had reduced the number of separate offenses in its 1961 criminal code to 263.²⁶ Since then, however, the number of crimes has steadily climbed its way back up, reaching 421 in 2000.²⁷ Stuntz argues that the growth pattern and number of crimes in the Illinois code are a fair representation of other state codes.²⁸ For example, over the past 150 years Virginia's criminal code has grown from 170 to 495 offenses and the Massachusetts code has grown from 214 to 535 offenses.²⁹

¹⁷ *Id.* at 948. The effort was funded by foundations and assisted by an abundance of legal and social science scholars. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* This period of reform came between 1962 and 1983. *Id.*

²¹ Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States From Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 169 (2003).

²² *Id.*

²³ Stuntz, *supra* note 8, at 513.

²⁴ *Id.*

²⁵ *Id.* at 514.

²⁶ *Id.* at 514 n.25.

²⁷ *Id.* at 514. Stuntz counted crimes by counting only separate code sections, even if each section defined more than one crime. He also excluded sections that did not define criminal offenses. *Id.* at 514 n.21. Therefore, his count used a conservative method.

²⁸ *Id.* at 514.

²⁹ *Id.*

The federal code has grown in much the same manner.³⁰ One hundred eighty-three separate offenses were included in the title on federal crimes in 1873; today title 18 of the United States Code, which enumerates federal criminal offenses and criminal procedure, includes over 1000 distinct crimes.³¹ Even that lofty number represents fewer than half of the total number of federal offenses that are on the books.³² These numbers illustrate the sheer size of criminal codes today and perhaps shed some light on how our codes have become cluttered.

B. Antiquated and Obsolete Statutes

Criminal law scholars and legislators responsible for creating criminal statutes openly acknowledge that many laws in codebooks have virtually no application in today's law enforcement scheme. In 1998, an Alabama state representative was quoted as saying that his state has "far too many laws on the books, and a large number of them are antiquated to the point of lunacy."³³ He also recognized the danger in these provisions, stating that such laws may be the basis for unfounded lawsuits.³⁴ Further, allowing such laws to remain on the books undermines the legitimacy of the law.³⁵

1. "Morals" Laws

Laws proscribing sexual activity often remain on the books and yet are continually unenforced. These laws are often referred to as regulating crimes

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 515–16. Many other acts punished as crimes are found in other sections of the code. *See, e.g.*, 15 U.S.C. § 1 (2000) (providing that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy . . . shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine . . . or by imprisonment not exceeding 10 years, or by both . . ."); 26 U.S.C. § 7201 (2000) (providing that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 . . . or imprisoned not more than 5 years, or both . . .").

³³ *Alabama Doesn't Cotton to Leftover Laws*, NAT'L L.J., Mar. 16, 1998, at A23 (listing some of the laws to which the representative referred, such as no hunting on Sundays, minimum fifty dollar fines for purchasing any domestic animal or fowl between sunset and sunrise, and boat operators being subject to arrest for refusing to surrender the vessel to a sheriff demanding the vessel for use in a posse).

³⁴ *Id.* This danger is discussed *infra* Part III.

³⁵ *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 986 (2003) (stating that if the community views specific laws as unjust, it "may spread to a generalized contempt for the criminal justice system. Legal codes then no longer serve as a guide to just and moral behavior . . .").

against morality and are frequently the focus of scholars criticizing desuetudinal statutes.³⁶ Morality laws are typically those forbidding sexual acts such as sodomy,³⁷ fornication,³⁸ and adultery.³⁹ As of 2003, sodomy was still on the books as a crime in fourteen jurisdictions.⁴⁰ As of 2003, fornication remained a criminal act in eleven jurisdictions,⁴¹ while twenty-four jurisdictions still criminalized adultery.⁴² In some of those jurisdictions, adultery is considered a felony.⁴³ In other jurisdictions, adultery is merely a misdemeanor.⁴⁴ In some jurisdictions, statutes addressing adultery provide only a civil remedy.⁴⁵ In the remaining jurisdictions, no statute at all addresses adultery.⁴⁶ “[I]t is commonly thought that adultery charges are never prosecuted. This is true to a great extent”⁴⁷

Further, the Supreme Court’s recent decision in *Lawrence v. Texas*⁴⁸ held a state sodomy law to be an unconstitutional infringement of the Due Process Clause of the Fourteenth Amendment. As state courts now interpret this holding, the validity of many laws regulating morals has been called into question. Therefore, such laws are not only unenforced, but also are now in

³⁶ See, e.g., Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000); Hillary Greene, Note, *Undeud Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL’Y REV. 169 (1997).

³⁷ See, e.g., IDAHO CODE ANN. § 18-6603 (2004) (providing that “[t]he infamous crime against nature is a felony”).

³⁸ See, e.g., N.C. GEN. STAT. § 14-184 (2003) (providing that “[i]f any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor . . .”).

³⁹ See, e.g., FLA. STAT. ANN. § 798.01 (West 2001) (enacted 1874) (criminalizing open adultery by providing that, “[w]here either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense [of living in open adultery]”).

⁴⁰ See *Sodomy Laws in the United States* (2005), <http://www.sodomylaws.org/usa/usa.htm>.

⁴¹ Melanie C. Falco, Comment, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723, 738 n.120 (2004) (listing the states still criminalizing fornication).

⁴² *Id.* at 744 n.176 (listing the states still criminalizing adultery).

⁴³ RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 103–10 (1996). Those states that consider adultery to be a felony are Massachusetts, Michigan, Oklahoma, and Wisconsin. Falco, *supra* note 41, at 746 n.187.

⁴⁴ POSNER & SILBAUGH, *supra* note 43, at 103–10. For example, in Maryland, it is punishable by a mere ten dollar fine. MD. CODE ANN., CRIMINAL LAW § 10-501 (2002). Given that the amount of the fine remains today set at ten dollars proves, to some degree, the lack of attention given to this statute.

⁴⁵ See, e.g., ALASKA STAT. § 25.24.050 (2005) (stating that adultery provides grounds for divorce).

⁴⁶ POSNER & SILBAUGH, *supra* note 43, at 103–10.

⁴⁷ *Id.* at 103 (referring to acts of adultery); see also *id.* at 98 (referring to acts of fornication). It is true, however, that the adultery statute is sometimes used by the states in criminal prosecutions where the state may not be able to prove a more serious offense.

⁴⁸ 539 U.S. 558 (2003).

fact *unenforceable*.⁴⁹ Thus, these unobserved, unenforced, and in some cases, unenforceable laws lie dormant in many criminal codes.

2. *Other Antiquated Laws*

Laws regulating morals are not the only type of unenforced statutes that are clogging codes. Even those who are not in the business of scholarship or legislating find laughable many of the activities and behavior that American jurisdictions criminalize. Entire books have been written on the “loony” criminal laws that exist.⁵⁰

To illustrate, Massachusetts outlaws dueling between two opponents who want to use water pistols.⁵¹ New Jersey subjects anyone who slurps soup in a public restaurant to a fine, arrest, and potential time in jail.⁵² In Alabama, a statute bans children from playing dominoes on the Sabbath.⁵³

These laws may seem arbitrary, silly, and old-fashioned. That is because they are. It may seem like citizens engage in this type of behavior all the time without running into any sort of trouble with the law. That is because they do. These laws may make us laugh and seem to be of little importance; however, they are still on the books prohibiting (or requiring) behavior, and disobeying them could theoretically result in criminal charges.

C. *Overlapping Statutes*

In addition to the obsolete laws that remain on the statute books, there are also many duplicate statutes and overlapping crimes.⁵⁴ As William Stuntz explains, “[s]eparate criminal offenses are rarely completely separate; the more common pattern is a few general offenses with a host of more targeted crimes,

⁴⁹ See, e.g., *Martin v. Zihel*, 607 S.E.2d 367, 371 (Va. 2005) (applying the reasoning of *Lawrence* and holding a fornication statute unconstitutional because it subjected private, consensual conduct to criminal penalties, thus infringing on due process rights.); see also *Falco*, *supra* note 41, at 738 n.119 (“The Court’s decision in *Lawrence* . . . calls into question the validity of the existing fornication statutes.”).

⁵⁰ See, e.g., SHERYL LINDSELL-ROBERTS, *LOONY LAWS AND SILLY STATUTES* (1994); ROBERT WAYNE PELTON, *LOONY LAWS THAT YOU NEVER KNEW YOU WERE BREAKING* (1990); PETER WALLENSTEIN, *BLUE LAWS AND BLACK CODES: CONFLICTS, COURTS, AND CHANGE IN TWENTIETH-CENTURY VIRGINIA* (2004).

⁵¹ PELTON, *supra* note 50, at 69.

⁵² *Id.* at 73.

⁵³ *Id.* at 25.

⁵⁴ See Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 770 (2004). Having overlapping code provisions will be unavoidable to a certain extent. Misner, *supra* note 8, at 746.

and the targeted crimes themselves overlap.”⁵⁵ These overlapping crimes, like obsolete statutes, exist at both the state and federal level.⁵⁶

One example of these overlapping crimes exists in the Mississippi Code, which contains section upon section of crimes relating to homicide.⁵⁷ Mississippi not only has a provision criminalizing homicide generally;⁵⁸ its code also contains many specific provisions that separately criminalize acts such as homicide by the overloading of a boat,⁵⁹ homicide resulting from a drunken doctor unintentionally causing death,⁶⁰ and homicide resulting from the negligent management of a steamboat.⁶¹ Many or most of these specific provisions relating to homicide could just as easily fall under one general homicide provision, thus avoiding overlapping crimes.⁶²

Another example of overlapping crimes is illustrated by the property damage offenses contained within the Illinois Code.⁶³ Although the code contains a general statute criminalizing the act of damaging property,⁶⁴ there are also provisions that specifically criminalize the acts of damaging library materials,⁶⁵ animal facilities,⁶⁶ and delivery containers.⁶⁷ The same is true for theft offenses—although there is a general provision in the Illinois Code prohibiting theft, there are also several specific theft offenses that overlap with the general provision.⁶⁸

⁵⁵ Stuntz, *supra* note 9, at 518.

⁵⁶ See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1519 (1993) (noting that “[f]ederal criminal statutes are remarkably broad and frequently overlapping”).

⁵⁷ See Robinson et al., *supra* note 9, at 36 (citing MISS. CODE ANN. § 97-3-15 *et seq.* (2000)).

⁵⁸ *Id.* (citing MISS. CODE ANN. § 97-3-47 (2000)).

⁵⁹ *Id.* (citing MISS. CODE ANN. § 97-3-41 (2000)).

⁶⁰ *Id.* (citing MISS. CODE ANN. § 97-3-39 (2000)).

⁶¹ *Id.* (citing MISS. CODE ANN. § 97-3-43 (2000)).

⁶² See generally *id.* at 37 (suggesting that Mississippi’s litany of enumerated homicide offenses may add precision, but the number of offenses unnecessarily complicates the code at the expense of its simplicity). If these different types of homicide warrant different levels of punishment, the punishments for specific types of crime could be meted out in the rules of adjudication, not in the definition of conduct. *Id.* at 37 n.103.

⁶³ Robinson & Cahill, *supra* note 21, at 170.

⁶⁴ *Id.* (citing 720 ILL. COMP. STAT. ANN. 5/21-1 (2003)).

⁶⁵ *Id.* (citing 720 ILL. COMP. STAT. ANN. 5/16B-2.1(2003)).

⁶⁶ *Id.* (citing 720 ILL. COMP. STAT. ANN. 215/4 (2003)).

⁶⁷ *Id.* (citing 720 ILL. COMP. STAT. ANN. 5/16E-3(a)(3)(2003)).

⁶⁸ *Id.* (citing 720 ILL. COMP. STAT. ANN. 5/16-1 (2003); ILL. COMP. STAT. ANN. 5/16E-3(a)(1) (2003); ILL. COMP. STAT. ANN. 5/16E-3(a)(4) (2003); ILL. COMP. STAT. ANN. 5/16A-3(a) (2003); ILL. COMP. STAT. ANN. 5/16B-2(a) (2003)).

II. THE POLITICAL PROCESS BEHIND CODE DRAFTING: WHY DO OVERLAPPING STATUTES AND OBSOLETE LAWS CLUTTER OUR CODES?

Thus far, this Comment has examined the issues of overlapping and antiquated statutes that remain on the criminal codebooks. This Part will examine *why* so many criminal codes contain these overlapping and antiquated statutes by looking at the political process behind code drafting. Some of the driving forces behind the issues are society's goal of preserving morals, legislative reliance on prosecutorial discretion, and legislative responses to the public's demands. Each of these forces is examined in more detail below.

A. *The Goal of Preserving Morals*

In the American system of government, it has long been the case that legislators are generally reluctant to repeal existing laws.⁶⁹ It seems that it is a far easier task to get a legislature to enact a new law than it is to get a legislature to repeal an existing one.⁷⁰ Rather than repeal laws that are virtually obsolete, legislatures allow such laws to remain on the statute books even though they are neither enforced nor observed.⁷¹

The failure of legislatures to remove traditionally unenforced statutes from the codebooks often occurs with respect to laws regulating morality.⁷² In Arizona, for example, when the state legislature adopted a revised criminal code, a majority of legislators refused to go on the record as in favor of repealing any statutes relating to sexual offenses.⁷³ And in Utah, although the

⁶⁹ See Bonfield, *supra* note 5, at 390; Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1240 (2004) ("Because it is so much harder to get legislatures to *do* something that it is to get them *not* to do something, statutes linger on the books long after they should be revised or removed.")

⁷⁰ James T. Adams, *Hoover and Law Observance*, in JULIA JOHNSEN, SELECTED ARTICLES ON LAW ENFORCEMENT 334, 340 (1930); see also THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1962) (observing that "codes appear to be increasing in size rather than diminishing").

⁷¹ ARNOLD, *supra* note 70, at 160.

⁷² One author notes that many criminal laws are not enforced as a matter of deliberate law enforcement policy. This phenomenon of nonenforcement often occurs in the area of sex crimes. Even though many states keep prohibitions against adultery and fornication on the statute books, "these laws are almost never enforced." POSNER & SILBAUGH, *supra* note 43, at 3; see, e.g., Chivers, *supra* note 7, at 474 n.137 (citing example where Connecticut state commission recommended that the adultery law be abolished, but was not because "Connecticut legislators did not believe it was worth the effort since the law was never enforced").

⁷³ Misner, *supra* note 8, at 746. However, more recently, in the wake of *Lawrence v. Texas* and only after the Supreme Court held such statutes were unconstitutional did the Arizona legislature repeal its unused fornication law. Joanna Grossman, *The Virginia Supreme Court Strikes Down the State's Fornication Law, Indicating That Other States' Antiquated Laws Will Fail If Challenged*, FINDLAW, Jan. 25, 2005, <http://writ.corporate.findlaw.com/grossman/20050125.html>.

legislature did not repeal its fornication statute, the Attorney General issued a statement suggesting that the state would not enforce the law against consenting adults.⁷⁴ It is often said that these unenforced criminal laws survive “in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.”⁷⁵

Arguably, laws that society is not prepared to enforce should be repealed; merely keeping laws written down in the statute books is an improper use of law.⁷⁶ As Curtis Bok writes:

[t]he thought is prevalent that fornication and adultery are matters of morals against which it is unwise and effectively impossible to legislate. The real correctives lie elsewhere: in the individual conscience, in religious affiliations, in the fear of being found out, and in the enforcement of the laws aimed against disease and illegitimacy.⁷⁷

While commentators and legal scholars give much attention to the morality laws that remain written in our codes although seldom or never enforced,⁷⁸ there are many other less controversial laws that, although not enforced, remain in the statute books as well.⁷⁹ Though there is less written on why this type of law remains in the codes, the answer may be simply that it is easier to rely on the broad discretion given to police and prosecutors in deciding which laws to enforce than to bother with assembling the whole legislature to vote and repeal them.

B. Reliance on Prosecutorial Discretion to Identify Shifting Social Norms

Another driving force behind the existence of so many overlapping and unused statutes remaining on the books is legislative reliance on the prosecutor. The type of conduct that is proscribed by society is constantly shifting and changing with time,⁸⁰ and the American criminal law system

⁷⁴ Grossman, *supra* note 73.

⁷⁵ ARNOLD, *supra* note 70, at 160.

⁷⁶ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 96 (1990) (noting that “legislators, who would be aghast at any enforcement effort, nevertheless often refuse to repeal [unenforced statutes]”).

⁷⁷ CURTIS BOK, *PROBLEMS IN CRIMINAL LAW* 48 (1955).

⁷⁸ See, e.g., Chivers, *supra* note 7; Greene, *supra* note 36; Leslie, *supra* note 36.

⁷⁹ See Bonfield, *supra* note 5, at 389 n.2 (citing series of laws that remain on the statute books though never enforced and presumably, widely ignored).

⁸⁰ “[W]hat is seen as outrageous varies with time and place.” James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1527 (1981).

relies, to an extent, on prosecutors to administer the law in a way that comports with the currently accepted conduct of our society. Legislatures often overcriminalize conduct with the expectation that the prosecutors will choose which laws to actually enforce.⁸¹

In the American criminal justice system, the American prosecutor is given a great amount of discretion in deciding whether to charge someone with a crime and also in deciding what charges will be brought.⁸² Thus, a prosecutor has the ability to “decide that one statute duly enacted by the people’s representatives shall not be enforced at all”⁸³ Where a prosecutor decides not to file charges, there is typically no opportunity for judicial review of this decision.⁸⁴ Some commentators criticize this system because it gives the prosecutor virtually unchecked power in the administration of law.⁸⁵ However, because of the current breadth of the criminal law, there is at least some need within our penal system for the exercise of prosecutorial discretion.

Additionally, there are controls placed on prosecutors that, although often overlooked, do place some limits on their use of discretion.⁸⁶ Limits on prosecutorial discretion will, in theory, lead to decisions that tend to reflect the social norms of society. One limitation that controls how the American prosecutor uses his discretion in deciding whether to charge and what charges

⁸¹ See Standen, *supra* note 56, at 1521 (“[T]he tremendous breadth of our criminal statutes probably represents a rather sophisticated attempt by Congress to err on the side of over inclusion, accepting discretion as a concomitant evil.”); see also Mirjan Damaska, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 129 (1981) (expressing the idea that because American substantive criminal law contains many antiquated and overlapping statutes, there is a need to “correct” for overreaching penal statutes).

⁸² See William T. Pizzi, *Understanding the Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1336–37 (1993).

⁸³ KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 189 (1969); see also JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PROSECUTING CRIME 780 (2003) (“The breadth of criminal legislation necessarily means that much conduct that falls within its literal terms should not always lead to prosecution”).

⁸⁴ Pizzi, *supra* note 82, at 1336–37. Compare the American prosecutor to prosecutors in the civil law tradition, where there is less discretion and decisions are subject to close judicial supervision. *Id.* at 1327. The civil law prosecutor’s decision of whether to file charges is very limited; the practice “demands that a prosecutor file criminal charges whenever the evidence is strong enough to support such charges.” *Id.* at 1332. The prosecutor also remains isolated from political pressures. JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 91 (1977).

⁸⁵ See DAVIS, *supra* note 83; Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 7 (1932) (expressing that this authority might “border on anarchy”); Vorenberg, *supra* note 80, at 1522 (stating that it “seems anomalous at best that, in a system dedicated to due process, great and essentially unreviewable powers are vested in the prosecutor”).

⁸⁶ See Pizzi, *supra* note 82, at 1338.

to bring arises by virtue of his position as an elected official.⁸⁷ Because the prosecutor's position is political in nature, he or she must be able to explain and defend his use of discretion to his constituents.⁸⁸ One commentator observed that "[i]f someone is to decide which laws will be aggressively enforced, which laws will be enforced occasionally, and which laws will never be enforced, it makes sense that the person who has to answer to the voters will make those determinations."⁸⁹ Given that the prosecutor must answer to the public, it is a logical step to conclude that the decisions he or she makes will generally reflect the ideals of the average citizen; otherwise, that prosecutor risks being voted out of office.

Another limitation that causes the prosecutor's decisions to reflect generally social norms is the fact that the prosecutor must prove charges brought against an individual to a jury. In the criminal justice system, the jury provides an inherent "check" on the prosecutors and their discretion. Prosecutors are operating within a system where jurors may make the final decision as to the guilt or innocence of the defendant.

Juries are composed of citizens who bring their own values into the courtroom.⁹⁰ Given that prosecutors' offices have limited resources and cannot prosecute all cases,⁹¹ when choosing which penal code provisions to invoke they will consider the values of those jurors that will hear the case, thus reflecting social norms.

The idea that prosecutors reflect the norms of society may lead one to accept a theory where society need not worry about the outdated and overlapping provisions that remain on the books because prosecutors can always be trusted to make charging decisions in line with societal values. This is not always the case, however. There is still potential for abuse and the "power in the prosecutor to dig up obsolete law, or to use laws passed for one purpose . . . to accomplish an entirely different result may be viewed with

⁸⁷ Ninety-seven percent of state prosecutors are elected. *Id.* at 1338.

⁸⁸ *See id.*; Vorenberg, *supra* note 80, at 1526–27 ("Since visibility focuses greater scrutiny on the prosecutor, only a prosecutor whose political position is unusually secure can disappoint expectations that are part of the climate in which he works.").

⁸⁹ Pizzi, *supra* note 82, at 1339.

⁹⁰ *See* FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 43 (1970).

⁹¹ *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 55 (2002).

alarm.”⁹² Further, we cannot rely on jury trials to help align prosecutions with social norms. In criminal courts, guilty pleas before trial occur in an overwhelming number of cases.⁹³ In the year 2000, ninety-five percent of all convictions in the federal system resulted from guilty pleas or *nolo contendere* pleas rather than trials.⁹⁴

Additionally, if a stated aim is to declutter the codes, legislative reliance on prosecutorial discretion is not a solution to the “problem” at all, but rather, an impetus. So long as legislatures continue to rely on prosecutorial discretion, there is a perverse incentive for those who make the laws to keep overlapping and obsolete code provisions on the books.⁹⁵

C. *Legislative Reactions to Public Demands*

A final political force that plays a role in cluttering the criminal codes is the manner in which legislatures respond to public demands. In the current political climate, there appear to be political rewards associated with supporting criminal legislation.⁹⁶ This is especially true if the legislation is aimed at combating the subject of a recent public outcry for action.⁹⁷ Alternatively, there appear to be political penalties if a legislator is to oppose or attempt to narrow criminal legislation.⁹⁸ Because of these perceived rewards and penalties, legislators have a tendency to enact criminal statutes for symbolic and political purposes without any requirement that any prosecutions ever actually be brought under such statutes.⁹⁹

Often, when a high-profile story about a criminal act upsets the public, legislators operating in the aforementioned political climate respond by

⁹² ARNOLD, *supra* note 70, at 160; see *United States v. Greenpeace, Inc.*, 314 F. Supp. 2d 1252 (S.D. Fla. 2004).

⁹³ MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES* 993 (2d ed. 2003).

⁹⁴ *Id.* Further, in large urban counties in 1998, nine out of ten felony defendants pleaded guilty to criminal charges rather than going to trial. *Id.*

⁹⁵ See Stuntz, *supra* note 8, at 579–80 (arguing that the problem of “too much law” can be potentially—but not likely—remedied by the abolition of discretion).

⁹⁶ Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 772 (1999).

⁹⁷ *Id.* Richman describes public outrages as having “inspired some of the greatest excesses of substantive federal law making.” *Id.* at 802.

⁹⁸ *Id.* at 772.

⁹⁹ *Id.*; see also Brian T. Fitzpatrick, *Congressional Re-election Through Symbolic Politics: The Enhanced Banking Crime Penalties*, 32 *AM. CRIM. L. REV.* 1, 29 (1994) (“Merely passing a law can make an anxious public feel better because ‘something is being done’. . . . The political benefit, notably re-election, may consequently flow back to lawmakers from placated constituents.”).

creating “new” criminal legislation for that particular offense.¹⁰⁰ Legislators do this without any regard for the fact that many times the acts they are criminalizing are already fully criminalized and prosecuted under other statutes in existence.¹⁰¹

For example, in 1992, a Maryland woman was killed in a carjacking theft. The national public outcry over the story resulted in special carjacking legislation at both the state and federal levels.¹⁰² The legislation was enacted notwithstanding the fact that the criminal behavior at issue was already covered by existing criminal laws such as auto theft, robbery, assault, kidnapping, and homicide.¹⁰³ While this is but one example, this same “pattern” can be repeated countless times.¹⁰⁴

III. PROBLEMS ASSOCIATED WITH UNUSED AND OVERLAPPING PROVISIONS

With a general understanding of the issues and why they exist, this Comment will now examine the abuse and problems that can and do stem from allowing overlapping and obsolete provisions to linger on the pages of the codebooks.

A. *Administrative Abuse*¹⁰⁵

Reliance on prosecutorial discretion weeds out archaic criminal provisions to an extent, but abuse of such provisions is ever-present in our justice system. Perhaps a very recent example will serve to illustrate the dangers of letting these provisions lie dormant in the books.

1. *United States v. Greenpeace, Inc.*¹⁰⁶

On April 12, 2002, just outside the Port of Miami, several members of Greenpeace, Inc. boarded a cargo vessel that was believed to be transporting

¹⁰⁰ Robinson & Cahill, *supra* note 21, at 170–71.

¹⁰¹ *Id.* at 171.

¹⁰² Stuntz, *supra* note 8, at 531.

¹⁰³ *Id.*

¹⁰⁴ Other examples of this legislative reaction to public outcry were seen in response to the Lindbergh kidnapping, when Congress put kidnappings in the realm of federal jurisdiction, and the special punitive treatment given to crack cocaine after Len Bias died of an overdose. Richman, *supra* note 96, at 773.

¹⁰⁵ Administrative abuse as used in this Comment refers to abuse by those such as prosecutors, police, and others in arena of public law enforcement.

¹⁰⁶ 314 F. Supp. 2d 1252 (S.D. Fla. 2004).

illegally logged mahogany into the United States. Members intended to board the vessel and unveil a banner urging President Bush to stop illegal logging.¹⁰⁷ Before the members could carry out their plan, however, they were taken into custody.¹⁰⁸ Members were charged with, and pled guilty to, misdemeanors.¹⁰⁹ This is not, however, the end of the story. In July of 2003, the government obtained an indictment *criminally* charging Greenpeace itself with conspiring to violate and violating 18 U.S.C. § 2279, a statute that prohibits the boarding of a vessel before it docks.¹¹⁰

Congress enacted § 2279 in 1872.¹¹¹ The original purpose of enacting the provision was to prevent “sailor-mongering,” or the luring of sailors off of their ships by prostitutes as the ships came into port.¹¹² Until it was used to prosecute Greenpeace, the statute had only been invoked twice; the last reported case discussing § 2279 was in 1890.¹¹³

In refusing Greenpeace’s initial motion to dismiss,¹¹⁴ the court reasoned that where criminal laws are in disuse to the point where they are no longer

¹⁰⁷ *Id.* at 1255.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1255–56.

¹¹⁰ 18 U.S.C. § 2279 (2000) provides in relevant part:

Whoever, not being in the United States service, and not being duly authorized by law for the purpose, goes on board any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, shall be fined under this title or imprisoned not more than six months, or both.

Activists say that this is the first time an advocacy organization was subjected to criminal penalties for the actions of its followers. Joe Garofoli, *Protesters Wary of New Tactic by Feds: Obscure 1872 Law Cited in Case Against Greenpeace*, S.F. CHRON., Dec. 30, 2003, at A1.

¹¹¹ *Greenpeace*, 314 F. Supp. 2d. at 1256.

¹¹² *The Right to Peaceful Protest*, DENV. POST, May 25, 2004, at B6. One nineteenth-century opinion provided a discussion regarding the enactment of the statute:

The evil which this section is intended to prevent and remedy is apparent, and in this district notorious. For instance, lawless persons, in the interest or employ of what may be called “sailor-mongers,” get on board vessels bound for Portland as soon as they get in the Columbia river, and by the help of intoxicants, and the use of other means, often savoring of violence, get the crews ashore, and leave the vessel without help to manage or care for her. The sailor thereby loses the wages of the voyage, and is dependent on the boarding-house for the necessities of life, where he is kept, until sold by his captors to an outgoing vessel, at an enormous price.

United States v. Sullivan, 43 F. 602, 604–05 (C.C.D. Or. 1890).

¹¹³ See *Sullivan*, 43 F. at 602–05 (holding that the statute applies to foreign vessels); see also *United States v. Anderson*, 24 F. Cas. 812, 812 (C.C.S.D.N.Y. 1872) (holding that the government need not prove that the defendant was not in the United States service or was not authorized by law to go on board).

¹¹⁴ Greenpeace advanced several arguments for the dismissal of their indictment. One argument was that § 2279 is unconstitutionally vague in that it does not provide notice that will allow citizens to understand what

known to exist and are yet enforced against innocent parties, nonenforcement does not reflect the validity of the law but is only an ameliorating factor in enforcement.¹¹⁵ The court also stated, “the failure of the executive branch to enforce the law does not result in its modification or repeal”¹¹⁶ Although refusing the motion to dismiss, the court did note several peculiarities about the case. Specifically, the judge stated that,

First, it involves a statute which . . . has been gathering dust for over a century. Though section 2279’s lack of use does not prevent the government from going forward against Greenpeace, it does point to how uncommon such a prosecution is. Second, the indictment is a rare—and maybe unprecedented—prosecution of an advocacy organization for conduct having to do with the exposition of the organization’s message.¹¹⁷

This court’s reasoning is representative of the general attitude throughout the United States with respect to the judicial abrogation of long-dead statutes—that it is not the place of the courts to repeal such statutes. It is, instead, the function of the legislature.¹¹⁸

Despite the court’s refusal to abrogate § 2279, it is clear that the specific evil this statute was enacted to remedy is no longer a problem. However, because it remains on the books as a federal crime, a federal prosecutor was able to invoke the statute to prosecute an act that the legislature surely never intended to criminalize under this statute.¹¹⁹ This case was eventually thrown out because there was insufficient evidence to be presented to the jury.¹²⁰ But the fact remains that Greenpeace faced serious prosecution under a long-dead statute. And, in the absence of legislative repeal, it remains on the books, ready for the next prosecutor to wield as a weapon in an improper prosecution.

behavior is prohibited by the statute. *Greenpeace*, 314 F. Supp. 2d. at 1257–58. The judge held that there was not enough evidence for him to rule on the issue. *Id.* at 1258. Constitutional vagueness is often the reasoning of a court in striking down a statute that has long gone unenforced.

¹¹⁵ *Greenpeace*, 314 F. Supp. 2d. at 1258.

¹¹⁶ *Id.* (internal citations omitted).

¹¹⁷ *Id.* at 1264.

¹¹⁸ See Chivers, *supra* note 7, at 449 (observing that the “American Rule” is generally that disuse does not give courts the power to abrogate a statute); see also 1 SUTHERLAND, STATUTORY CONSTRUCTION § 2034 (3d ed. 1943) (citing cases).

¹¹⁹ The press referred to the prosecution as an “unprecedented act of political intimidation.” *The Right to Peaceful Protest*, *supra* note 112. Federal officials countered these contentions by stating that there was no political motivation by the decision of the U.S. Attorney to prosecute, and that “politics play no part in [their] prosecutorial decisions . . . [they] base [their] decisions solely on the facts of the case.” Garofoli, *supra* note 110.

¹²⁰ *The Right to Peaceful Protest*, *supra* note 112.

2. “Charge Stacking”

A second instance where administrative abuse can be observed is where the prosecutor engages in charge stacking, or over charging. As legislators engage in the politics of code drafting,¹²¹ and new crimes are passed that overlap with existing crimes,¹²² the prosecutor is given more opportunity to stack charges against a defendant.¹²³ The ability of the prosecutor to engage in this type of behavior is, in part, a direct result of having a substantive criminal law of overlapping crimes, where one criminal act gives rise to liability under a number of different statutes.¹²⁴

In the realm of environmental criminal legislation, for example, title 18 of the *United States Code* contains traditional penal statutes.¹²⁵ However, specific environmental legislation such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹²⁶ and the Resource Conservation and Recovery Act (RCRA)¹²⁷ also provide their own criminal provisions.¹²⁸ These provisions act as an “overlapping net,” and provide ample opportunity for charge stacking:

An offender is charged with one count of transporting hazardous waste in violation of RCRA. He could also be charged with conspiring to transport hazardous waste and/or aiding or abetting in the transportation of hazardous waste. A one-count indictment, with some creative prosecutory accounting, has now become a three-count indictment with the various penalties attached.¹²⁹

Prosecutors often use the tactic of charging a defendant with a number of different crimes to gain leverage for plea negotiations.¹³⁰ The abusive situation that may then arise is that charges will be brought, “not in the good faith belief

¹²¹ See *supra* Part II.

¹²² See *supra* Part I.C.

¹²³ See William J. Stuntz, *Reply: Criminal Law’s Pathology*, 101 Mich. L. Rev. 828, 837 (2002).

¹²⁴ See JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 782 (2003).

¹²⁵ Stephen Longoria, *The Criminal Prosecution of Environmental Offenders: No Longer a Cost of Doing Business*, 60 TEX. B.J. 1118, 1126 (1997).

¹²⁶ 42 U.S.C. § 103 (2000).

¹²⁷ 42 U.S.C. § 6901 (2000).

¹²⁸ Longoria, *supra* note 125, at 1126.

¹²⁹ *Id.*

¹³⁰ DRESSLER & THOMAS, *supra* note 124, at 782.

that they fairly reflect the gravity of the offense, but rather as a harassing and coercive device . . . that they will induce the defendant to plead guilty.”¹³¹

B. *Injustice in Civil Applications*

While the above section discusses the problems associated with renewed enforcement of previously disused criminal provisions on the administrative side (in criminal proceedings), there are also problems that have been identified with the application of these statutes in noncriminal or private actions. This type of application is sometimes referred to as a “secondary application” of the criminal law.¹³²

Hillary Greene, in a note entitled *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, identifies a case illustrative of this secondary application and its potentially unjust effects.¹³³ In *Zysk v. Zysk*,¹³⁴ an action was brought by plaintiff against her husband for injuries sustained when he knowingly transferred herpes to her before they were married.¹³⁵ In the state of Virginia at that time, any unmarried person engaging in sexual intercourse was guilty of fornication, a class four misdemeanor.¹³⁶ The Supreme Court of Virginia barred recovery by plaintiff, holding that because she had engaged in a “very illegal act” she was not permitted to recover tort damages.¹³⁷

Thus, the defendant was able to escape tort liability in this case—the court reasoned that the public interest invaded by the defendant’s action could be protected by a prosecution by the State.¹³⁸ Because sufficient protection was provided by criminal sanctions, the court stated, there was no need to compensate a “consenting participant.”¹³⁹

The problem with this reasoning, observes Greene, is that the court ignored the fact that the State chose not to prosecute either of the Zysks under the

¹³¹ *Id.*; see also Husak, *supra* note 54, at 771.

¹³² Greene, *supra* note 36, at 172.

¹³³ See *supra* note 36.

¹³⁴ 404 S.E.2d 721 (Va. 1990).

¹³⁵ *Id.* at 721. The husband apparently did not inform plaintiff of his condition nor did he in any way try to prevent the transmission of the disease. Plaintiff and husband separated eight months after they were married. *Id.*

¹³⁶ *Id.* at 722.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

fornication statute.¹⁴⁰ The court also ignored the fact that the fornication statute had fallen into complete disuse,¹⁴¹ the last reported conviction under such statute occurring in 1849.¹⁴² Arguably, the public interest is not sufficiently protected by the State and there is injustice in allowing a defendant to use the law in his favor “without regard to its state of nonenforcement.”¹⁴³

C. *Sending Inconsistent Messages to the Public*

A more general but equally problematic consequence of having cluttered codes is that lawmakers and enforcers send inconsistent messages to the public. First, criminal codes send inconsistent messages regarding what conduct society is actually willing to punish. One would imagine that if all laws were compiled into a single source, then such codification would increase the chance that citizens will know what the criminal law expects of them.¹⁴⁴ However, the truth is that “[a]nyone who reads criminal codes in search of a picture of what conduct leads to a prison term . . . will be seriously misled.”¹⁴⁵

Consider the earlier discussion of laws regulating sexual activity.¹⁴⁶ Where the law tracks the moral beliefs of our society, such as laws against murder or rape, people can simply follow their conscience to obey the law; it is not necessary that they actually “‘know’ the law in order to comply with it.”¹⁴⁷ But because there is such a wide range of moral opinion regarding sex in our country, “conscience is not a sure guide to legality any more. No longer is it ‘obvious’ (if it ever was) that sexual relations between consenting adults of the same sex is a crime . . . or that adultery and fornication are crimes.”¹⁴⁸

And the codes do not provide society with any sort of clear answer. Although many codes proclaim these acts criminal, state action (or, rather, nonaction) does not show that we are actually prepared to prosecute a violator.¹⁴⁹ Thus, mixed messages are sent to the public with respect to what constitutes a crime worthy of punishing, and it seems that lawmakers do not

¹⁴⁰ Greene, *supra* note 36, at 175.

¹⁴¹ *Id.*

¹⁴² *Id.* at 175 n.31; see *Commonwealth v. Lafferty*, 47 Va. (6 Gratt.) 672 (1849).

¹⁴³ Greene, *supra* note 36, at 180.

¹⁴⁴ Robinson et al., *supra* note 9, at 1.

¹⁴⁵ Stuntz, *supra* note 8, at 506–07.

¹⁴⁶ See *supra* notes 36–49 and accompanying text.

¹⁴⁷ POSNER & SILBAUGH, *supra* note 43, at 2.

¹⁴⁸ *Id.*

¹⁴⁹ See discussion *supra* Parts I–II.

really mean what they say regarding what constitutes a punishable crime.¹⁵⁰ If we do not enforce the laws that are on the books, society cannot deduce the “rule of law,” or what the criminal law commands.

Second, criminal codes send inconsistent messages regarding what a person’s punishment will be if he or she engages in prohibited behavior. Robert Misner identifies a situation that illustrates this consequence.¹⁵¹ In *United States v. Batchelder*,¹⁵² a defendant with felon status was charged and convicted of possessing a firearm.¹⁵³ The defendant, in possessing the firearm, violated two separate provisions of the Omnibus Crime Control and Safe Streets Act of 1968.¹⁵⁴ Both provisions prohibited the exact same behavior but provided different levels of punishment.¹⁵⁵ Under one provision the maximum prison sentence was five years;¹⁵⁶ under the other the maximum prison sentence was two years.¹⁵⁷

Although the defendant could have been sentenced under either provision, he was sentenced under the provision that provided for the longer prison term.¹⁵⁸ While the Seventh Circuit had doubts about the justice of a statutory scheme that provided different punishments for identical acts,¹⁵⁹ the Supreme Court allowed the greater sentence to stand.¹⁶⁰ Thus, as a result of overlapping provisions, we have a system in which inconsistent messages are sent to an individual regarding what his punishment will be if he violates more than one criminal code provision.

Lastly, some criminal statutes are rarely used to prosecute because other statutes that do virtually the same job are used instead. When a prosecutor chooses to enforce some congressional or legislative acts in lieu of others, a message may unintentionally be sent to the public that we no longer care about

¹⁵⁰ See Greene, *supra* note 36, at 182–83.

¹⁵¹ See Misner, *supra* note 8, at 747.

¹⁵² 442 U.S. 114 (1979).

¹⁵³ *Id.* at 116.

¹⁵⁴ *Id.* at 115–16. The substantive elements of 18 U.S.C. § 922(h) (1976), which is part of title IV of the Act, are identical to 18 U.S.C. app § 1202(a) (1976), which is contained in title VII of the Act. *Id.* at 117.

¹⁵⁵ *Id.*

¹⁵⁶ 18 U.S.C. § 924(a) (1976) (authorizing maximum penalty of \$5000 fine and five years imprisonment); see 18 U.S.C. § 922(h) (1976) (defining the crime).

¹⁵⁷ 18 U.S.C. app. § 1202(a) (1976).

¹⁵⁸ *Batchelder*, 442 U.S. at 114.

¹⁵⁹ See *United States v. Batchelder*, 581 F.2d 626, 633–34 (7th Cir. 1978), *rev’d*, 442 U.S. 114 (1979) (stating that the court had “serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct”).

¹⁶⁰ See *Batchelder*, 442 U.S. at 123.

the aims of the unenforced act, or that the unenforced act is of lesser importance now than it used to be. For example, The Violence Against Women Act (VAWA) was passed in 1994.¹⁶¹ In the year 1997, only five defendants were sentenced under the Act's provisions nationwide.¹⁶²

Initially, passing the Act seemed to tell the public that society was prepared to punish those who engage in domestic abuse.¹⁶³ But, the lack of enforcement of the Act would seem to tell the public the opposite—that the laws are in place but the prosecutors do not take protecting those under the law seriously.¹⁶⁴ In truth, it may be that prosecutors are charging those committing acts of domestic violence under other statutes that prohibit the same behavior. However, the public may not be aware of this alternate path of prosecution and perceive that such prosecution is not taking place. Thus, criminal codes send another inconsistent message to society.

IV. POTENTIAL SOLUTIONS TO THE PROBLEM OF OVERLAPPING AND UNUSED CODE PROVISIONS

A. *Code Reform*

One potential solution to cleaning up the codes is active code reform. There has even been support for the promulgation of a MPC Second.¹⁶⁵ Although the MPC led the way to a significant amount of criminal code reform, there are still problems that exist with such an undertaking. Often, while there are good intentions associated with an active effort to clean up criminal codes and rid them of their old and inconsistent provisions, the end result is less than successful.¹⁶⁶ The difficulties associated with actively trying to reform a criminal code are well illustrated by the failures of the federal and California code reform efforts.

¹⁶¹ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

¹⁶² TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 21 (1998). These defendants were sentenced under the provision of the Violence Against Women Act criminalizing interstate domestic violence. *Id.*

¹⁶³ Stuntz, *supra* note 8, at 521.

¹⁶⁴ *Id.*

¹⁶⁵ See Robinson & Cahill, *supra* note 21, at 176 (suggesting that a MPC Second could counteract the trend of code degradation).

¹⁶⁶ See Kadish, *supra* note 11, at 949.

1. Federal Code Reform Efforts

In 1966, Congress established a National Commission on Reform of Federal Criminal Laws.¹⁶⁷ The Commission was instructed to make a complete review of the state of the federal criminal law and to make recommendations regarding their recodification, “including the repeal of unnecessary or undesirable statutes”¹⁶⁸ In 1971, the Commission submitted a proposal for a new federal criminal code.¹⁶⁹ The final report consisted of 317 pages, and the proposed code was based in large part on the MPC.¹⁷⁰ However, after ten years of consideration by Congress, no new code was adopted.¹⁷¹

Academic commentator Robert Joost observes that a primary purpose of code reform is efficiency in the criminal justice system, and this end will be achieved when we have a code that is easy to understand and apply.¹⁷² He points out one example of the overlapping nature of the federal code as it exists in its present state: “There are 159 U.S. Code sections today that pertain to offenses involving false statements to government officials, and 134 sections that pertain to theft and fraud. The country does not need 293 sections in these two areas. Many are duplicative; some contain sentences more than 200 words long.”¹⁷³ This demonstrated inability of Congress to restructure a criminal code that is full of unused and duplicative provisions is evidence of the need for a different solution to remedy the cluttered criminal codes that exist at both the federal and state levels.

2. California Code Reform Efforts

Another example of failed active code reform is demonstrated by California’s unsuccessful efforts to promulgate a revised code. In 1963, The

¹⁶⁷ Robert H. Joost, *Viewing the Sentencing Guidelines as a Product of the Federal Criminal Code Effort*, 7 FED. SENT’G REP. 118 (1994).

¹⁶⁸ *Id.* (quoting Act of Nov. 8, 1966, Pub. L. No. 89-801, § 3, 80 Stat. 1516, 1516–17).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; see also Kadish, *supra* note 11, at 949 n.13 (“These proposals stimulated over a decade of extensive congressional consideration only to founder in the end, leaving the disarray of archaic and illogical criminal laws as they were.”).

¹⁷² Joost, *supra* note 167, at 120.

¹⁷³ *Id.* Joost also discusses the advantages of having a new code: “A new code could replace them all with 10 to 20 sections written in plain English. Such a change would make it easier for judges to charge juries, for jurors to understand instructions, and for prosecutors to assess and present cases A new code of offenses would help prosecutors evaluate cases and consistently charge offenders.” *Id.*

Joint Legislative Committee for the Revision of the Penal Code was authorized by statute to begin reform on the California Penal Code.¹⁷⁴ In 1969, after many of the proposals set out were met with concern, the project staff of professional code drafters was dismissed.¹⁷⁵

Senator Donald L. Grunsky, who made the decision to dismiss the staff, gave examples of the recommendations by the drafters that were met with dissent.¹⁷⁶ Among them were the proposals to change the provisions dealing with consensual sexual acts between adults and to ease the penalties for marijuana violations.¹⁷⁷ Professor Herbert L. Packer, one of the dismissed project members, stated in a letter to the Senator that, “you evidently think that the provisions of penal law, however controversial, should be decided by the state’s prosecutors.”¹⁷⁸

The issues encountered in the process of attempting to revise California’s code buttress the idea previously discussed—that legislators are hesitant to actively remove from the books provisions that have been in force for a long period of time, no matter how the statutes are perceived or used currently.¹⁷⁹ These examples of failed attempts at significant code reform give some insight into the general difficulties of active code reform.

First, code reform is clearly a time-consuming process. It took the Federal Commission five years to even submit a draft of the reformed code, and another ten years of extensive Congressional consideration before the code ended up right back at its starting point, with no adoption of a new code.¹⁸⁰ The efforts in California also reveal a time-consuming process. After six years of work, the legislative committee was prepared to dismiss its drafters and start the process all over again.¹⁸¹

¹⁷⁴ See *Letters*, 22 STAN. L. REV. 160, 160 (1969) (letters from Herbert L. Packer, Professor, Stanford Univ. Sch. of Law).

¹⁷⁵ *Id.* at 161.

¹⁷⁶ See *id.* at 162. Although Senator Grunsky apparently stated an intention to recruit another group of scholars to continue with the reform, Professor Packer retorted that, “hell will freeze over before you can recruit an equally distinguished and expert staff . . . we think you must be aware that what you have done is to destroy the chances for any meaningful revision of the California Penal Code . . .” *Id.* at 163.

¹⁷⁷ *Id.* at 162.

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* Part II.

¹⁸⁰ See *supra* Part IV.A.1.

¹⁸¹ See *supra* notes 175–77 and accompanying text.

Second, a painstaking amount of thought and effort goes into the redrafting of an entire penal code. With respect to the California reform, Professor Packer stated in his letters that “each and every proposal was supported by an elaborate and painstaking statement of reasons”¹⁸² One may wonder if the end result of active reform is worth all of the time and effort that goes into the process.

Some legal scholars note that their experience with code reform “persuades [them] that the dynamics of local criminal law politics make it very difficult, if not impossible, to achieve general criminal law recodification”¹⁸³ They further explain: “Each of the players in the criminal justice process who has some political clout to either support or block a recodification effort . . . will tend to start out with serious fears and reservations that are hard to surmount.”¹⁸⁴ When the time, effort, and difficulties associated with code reform are considered, it becomes apparent that a better solution to declutter the criminal codes must be advanced.

B. Judicial Abrogation

Another potential solution to the problem of dead letter laws that are resurrected in abusive situations is the judicial abrogation of such statutes. This idea has been pushed by many legal scholars over the years, but has not been well received by the courts; in general, judges refuse to remove desuetudinal statutes unless such statute contains some sort of constitutional infirmity.¹⁸⁵ In addition, to the extent that a goal is to remove from the books overlapping and unused provisions, judicial abrogation is a less than efficient method.

¹⁸² *Letters*, *supra* note 174, at 162.

¹⁸³ Robinson & Cahill, *supra* note 21, at 173. The authors go on to state that perhaps the reform would be possible with the kind of outside assistance that was provided by the MPC in the 1960s and 1970s. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ For example, in January 2005, the Virginia Supreme Court struck down the state’s criminal ban on fornication as unconstitutional. *Martin v. Zihler*, 607 S.E.2d 367 (Va. 2005). In *Martin*, a woman brought a suit seeking tort damages against her ex-boyfriend for knowingly infecting her with herpes. He filed a demurer, alleging that because she herself had engaged in the “criminal” conduct of fornication, she should not recover in tort for damages sustained in the commission of a crime. *Id.* The facts in this case are almost identical to those of *Zysk v. Zysk*, discussed *supra* Part III, in which the court found for the defendant and held that the plaintiff was in fact barred from recovery. 404 S.E.2d 721 (Va. 1990). However, in *Martin*, the court invalidated the state’s fornication law as unconstitutional under the Fourteenth Amendment, following the reasoning in *Lawrence v. Texas*, 539 U.S. 558 (2003). *Martin*, 607 S.E.2d at 369–70.

One proponent of judicial abrogation of statutes is Judge Guido Calabresi. He advanced this idea in his 1982 book, *A Common Law for the Age of Statutes*.¹⁸⁶ Calabresi first recognized both the obsolescence of statutes as a growing problem and that legislative processes tend to be an impediment to solving the problem.¹⁸⁷ He then proposed that the courts take an active role in the removal of such statutes by forcing legislative reconsideration once a court has determined that a statute is obsolete.¹⁸⁸ If no legislative action were taken, the courts would have the power to strike down an obsolete statute, either replacing it with a new rule or leaving the area without a statute.¹⁸⁹ Calabresi argued that this is essentially what courts are already doing, although they couch such abrogation in strained construction and constitutional invalidation of the statutes.¹⁹⁰

While Calabresi's proposal is one that has great potential to cut down on the existence of obsolete statutes, several infirmities should be noted. First, there is a separation of powers issue noted by Calabresi himself. As he points out, judicial abrogation without explicit legislative authorization presents a serious problem.¹⁹¹ Critics of his work have noted the same constitutional problem with Calabresi's proposal.¹⁹²

Second, this method seems rather inefficient. For a court to abrogate a statute, it would first have to hear a case where a party invokes an obsolete statute. This would lead to the elimination of obsolete statutes one at a time, on a case-by-case basis. For the same reason, this method would not prevent all instances of abuse associated with the use of obsolete statutes. In fact, it seems that an attempt to abuse such a statute would have to take place before the courts could make a move to abrogate the offending statute.

Finally, judicial abrogation does not really provide a solution with respect to overlapping statutes and its associated problems. For these reasons, even if judicial abrogation were a constitutional exercise, a more efficient method to clean up criminal codes should be advanced.

¹⁸⁶ CALABRESI, *supra* note 10.

¹⁸⁷ *Id.* at 1, 6.

¹⁸⁸ *Id.* at 116.

¹⁸⁹ *Id.* at 147–48.

¹⁹⁰ *Id.* at 166.

¹⁹¹ *Id.*

¹⁹² See Alfred Hill, *Calabresi: An Addendum*, 82 COLUM. L. REV. 1779 (1982).

V. PROPOSAL: INCORPORATION OF A SUNSET PROVISION INTO CRIMINAL CODES

A. *A Brief Introduction to the Sunset Provision*

A sunset provision is a timing mechanism used by both federal and state legislatures to keep laws from becoming frozen on the statute books.¹⁹³ It provides for the automatic expiration of a law after a fixed amount of time unless the legislature makes an affirmative act of reauthorization.¹⁹⁴ The idea is that the sunset provision places the burden of proving the need for the statute's reenactment on those seeking its extension.¹⁹⁵

The notion of sunsetting a law was first recognized by Thomas Jefferson.¹⁹⁶ Although he did not use such terminology, he expressed the idea that every law would naturally expire after some amount of time.¹⁹⁷

The modern concept of sunset provisions was first articulated by political theorist Theodore J. Lowi in 1969.¹⁹⁸ He proposed setting a time limit on every law that created a federal agency.¹⁹⁹ He advanced this idea of legislative sunsetting as a way of fueling legislative oversight and any necessary reorganization of federal agencies.²⁰⁰ In 1976, Colorado was the nation's first state to pass a sunset law.²⁰¹ By the early 1980s, following Colorado's example, thirty-four other states had also passed sunset laws.²⁰²

Currently, sunset provisions are found in many laws and statutes passed by Congress and state legislatures.²⁰³ Some of the more recent legislation to boast

¹⁹³ Katyal, *supra* note 69, at 1237; *see also* Chris Mooney, *A Short History of Sunsets*, LEGAL AFF., Feb. 2004, at 67, 67 ("Sunsetting was once heralded as a cure-all to the ills of inefficient government, a legislative device capable of eliminating obsolete and antiquated statutes . . .").

¹⁹⁴ Mooney, *supra* note 193, at 67.

¹⁹⁵ *Id.* at 68.

¹⁹⁶ *Id.* at 67.

¹⁹⁷ *Id.* Thomas Jefferson thought that a law should expire after nineteen years, which in his era was deemed to be the length of a generation. *Id.*

¹⁹⁸ *Id.* at 68.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*; *see also* Bruce Adams & Betsy Sherman, *Sunset Implementation: A Positive Partnership To Make Government Work*, PUB. ADMIN. REV., Jan.–Feb. 1978, at 78.

²⁰² Mooney, *supra* note 193, at 68.

²⁰³ *See* STAFF OF SUBCOMM. ON THE LEG. PROCESS, 98TH CONG., A COMPILATION OF STATE SUNSET STATUTES (Subcomm. Print 1983); *see also* DOUG ROEDERER & PATSY PALMER, SUNSET EXPECTATION AND

sunset provisions includes: the Bush tax cut passed in 2001 which is set to terminate in 2010,²⁰⁴ the USA PATRIOT Act passed in 2001 containing certain provisions that will expire within four years,²⁰⁵ and the Independent Counsel Act (ICA), which had a built in sunset requiring the statute to lapse automatically after five years.²⁰⁶ Because of the sunset provision, there is no ICA provision on the books today.²⁰⁷

B. Steps to Implementation

1. Choosing Which Statutes to Sunset

If sunset provisions are a potential solution to unburden codes of their clutter, a threshold issue must be decided: to which crimes and statutes should sunset provisions apply. It seems clear that it would not be desirable to give any and all crimes the opportunity to disappear from the codebooks.

There is a set of crimes that society might identify as “core” crimes. One way to define these core crimes is those offenses that have been punished in all Anglo-American jurisdictions for centuries²⁰⁸ and are derived from the common law of England.²⁰⁹ These crimes also make up the FBI’s crime index and include those of murder, manslaughter, rape, robbery, larceny, arson, assault, kidnapping, burglary, and auto theft.²¹⁰ Because these crimes are considered the centerpiece of criminal law, statutes prohibiting these behaviors are not those which would be accompanied by sunset provisions. But, those statutes prohibiting behaviors that overlap with such core crimes may very well be good candidates for sunset provisions.²¹¹

EXPERIENCE (1981) (discussing states’ use of sunset legislation and various sunset review agendas implemented).

²⁰⁴ Mooney, *supra* note 193, at 67.

²⁰⁵ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

²⁰⁶ See *Independent Counsel Reauthorization Act of 1994*, Pub. L. No. 103-270, §2, 108 Stat. 732, 332.

²⁰⁷ See Katyal, *supra* note 69, at 1242.

²⁰⁸ Husak, *supra* note 54, at 756. Husak gives two other ways that “core” crimes might be defined. One way is those crimes that consume the bulk of the workload in the criminal justice system. *Id.* A second way is to apply a normative criterion to determine core crimes; that is, those crimes that contain features that commentators consider to be important. *Id.*

²⁰⁹ Stuntz, *supra* note 8, at 512.

²¹⁰ *Id.* Stuntz points out that the rest of criminal law consists of “everything else” and that while the core crimes are the focus of criminal law courses, literature, and conversation about crime, it is the second, other group that actually “dominates criminal codes.” *Id.*

²¹¹ This Comment does not seek to identify each and every statute which should or should not contain a sunset provision. Instead, it recognizes that there is some set of crimes which should not be given the chance

2. *How Each Sunset Should Be Triggered*

A second step in implementing the sunset provisions is deciding how the sunset should be triggered. There are several possible ways that a sunset could be triggered. One approach is to simply set a date on which the provision will be removed from the books.²¹² A second approach is to have a conditional sunset where certain criteria must be met before the sunset is triggered.²¹³ A final approach is a default sunset. Under this approach, the sunset is triggered on either a set date or when set criteria are met, unless those who oppose the sunset of the statute can demonstrate why it should not be removed from the books.²¹⁴

The application of sunset provisions to criminal codes is an idea that is likely to be met with some resistance from lawmakers, enforcers, and possibly the general public. It is hard to imagine that the above groups would enthusiastically support this solution if the sunset automatically terminated a criminal provision after a certain amount of time, as in the first approach. It also seems unlikely that, even if conditions were established for a sunset, a legislature would allow such a statute to sunset without at least a chance to oppose its lapse, as in the second approach. Therefore, this Comment suggests that a variant of the default sunset be adopted.

Under the proposed scheme, each criminal statute that contains a sunset provision would be given a condition. The condition might be that if the statute is not used to prosecute X instances of the behavior in Y amount of years, it would then be up for review in the legislature. If the condition set for the statute is met, the legislature would look at the data gathered on the statute, such as its enforcement record, and the burden of proof would then be placed on those opposing the lapse to show why the statute should remain on the books.

Under this scheme, the condition does not have to be the same for all provisions containing sunsets. The condition required for lapse could vary from statute to statute. As this scheme unfolds, in order for it to be successful, an information system needs to be in place at the enforcement level so that the

to sunset and points out that some serious thought needs to be given to decide which statutes would contain sunsets.

²¹² See Thomas J. Hall, *The FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation*, 11 HARV. J.L. & TECH. 797, 818 (1998).

²¹³ *Id.* at 819.

²¹⁴ *Id.*

legislatures would be able to see when and how prosecutors and law enforcements officials are using the statutes containing sunsets.

3. *Implementing an Information Database*

It is cause for alarm that our criminal law system is seriously lacking in its record keeping. Information and data regarding which crimes are being enforced by police and which statutes prosecutors are actually using to charge and prosecute are not currently available.²¹⁵ There does not appear to be any source at either the federal or the state level that tracks prosecutions by statute.²¹⁶

As mentioned above, for this sunset provision scheme to work properly, an information system that tracks prosecutions and charges by statute is necessary. Prosecutors' offices would then be able to issue reports to their legislatures about which statutes are being used and how often. In the current information age, with computer databases becoming increasingly popular, the cost to implement a simple information system that tracks the use of statutes would be quite low and the return on the investment potentially quite high. Armed with such an information system, legislatures could then make intelligent decisions as to when a statute's sunset should be opposed and when a statute should be allowed to slide gracefully off the pages of the codebooks.

C. *The Benefits of Sunset Provisions*

The most noted benefit of the sunset provision is that such a scheme does not call for, and avoids the problems associated with, active code reform.²¹⁷ No longer must a legislator affirmatively argue for the abrogation of an outdated criminal law. If those opposing the removal of a statute cannot meet their burden, no one is responsible for pushing for its removal; such a statute just quietly goes away, ideally without any major legislative debate.²¹⁸ Thus, sunset provisions allow for the abrogation of outdated and unused laws while avoiding the political repercussions that may stem from a single legislator

²¹⁵ Stuntz, *supra* note 8, at 522.

²¹⁶ *Id.* Stuntz is careful to note that *his* research has not revealed any source that tracks prosecutions by statute, thus leading him to the conclusion that the information does not exist. *Id.* He does note that at the federal level at least, prosecutions are tracked by category, but not by statute. *Id.*

²¹⁷ See *supra* Part IV.A (discussing the difficulties associated with active code reform).

²¹⁸ See Katyal, *supra* note 69, at 1240.

standing up and actively voicing his or her support for the removal of such a statute.²¹⁹

A second benefit of the sunset provision scheme is the efficiency with which legislatures could remove outdated and overlapping provisions from the books. Such a scheme allows multiple useless provisions to be wiped off the books at one time; it is no longer a case-by-case exercise. This benefit is a clear advantage over the judicial abrogation scheme.²²⁰

Lastly, this sunset provision scheme leaves all of the lawmaking power within the legislature. The legislature makes the decision as to which statutes should incorporate sunsets and which statutes will ultimately sunset. Keeping this type of decision making within the legislative branch avoids any of the separation of powers problems associated with a judicial abrogation scheme.²²¹

CONCLUSION

When a hard look is taken at the criminal codes of our states and nation, it is clear that they contain many statutes that are overlapping or in a state of desuetude. Letting these provisions lie dormant in our codes can easily give way to abusive and unjust situations. Considering the issues associated with the previously advanced solutions, a better solution must be set forth. This Comment proposed a forward-looking solution to an old and well-noted problem. Given the success of sunset provisions in other areas of the law, it is clear that the incorporation of sunset provisions significantly aid in the clean up of cluttered criminal codes and is a solution that should be given serious consideration.

MELISSA J. MITCHELL*

²¹⁹ *Id.* at 1242 (discussing the success of sunset provisions in the context of the Independent Counsel Act). If no sunset had been built into the act, it “would have been extraordinarily difficult, given the political repercussions, for members of Congress to stand up and say that they are ‘against independent investigations’ and ‘against ethics in government.’” *Id.*; see also *supra* Part II.A (discussing the difficulty in getting a legislator to propose the removal of a statute).

²²⁰ See *supra* Part IV.B.

²²¹ See discussion *supra* Part IV.B.

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