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Countermajoritarian Criminal Law

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Abstract

Criminal law pervades American society, subjecting millions to criminal enforcement, prosecution, and punishment every year. All too often, culpability is a minimal or nonexistent aspect of this phenomenon. Criminal law prohibits a wide range of common behaviors and practices, especially when one considers the various federal, state, and municipal levels of law restricting people's actions. Recent scholarship has criticized not only the scope and impact of these laws but has also critiqued these laws out to the extent that they fail to live up to supermajoritarian ideals that underlie criminal justice.

This Article adds to and amplifies this criticism by identifying "countermajoritarian laws." While some critics argue that criminal law often fails to live up to supermajoritarian ideals, this Article goes further and identifies instances in which criminal law is resistant to the will of the community. These laws end up remaining in place even where circumstances indicate that a majority of the community wishes to legalize or decriminalize the conduct these laws criminalize. Instances of countermajoritarian criminal laws include vetoes of decriminalization and legalization efforts, criminal provisions in federal and state constitutions, and local crimes enacted by officials who are voted into office by a tiny subset of the community.

Having identified the phenomenon of countermajoritarian criminal laws, this Article discusses how these laws may be addressed—and considers a range of potential reforms and their impact on countermajoritarian criminal laws. Countermajoritarian criminal laws should be a focal point in calls for criminal justice reform. Addressing these laws provides a basis for arguments regarding criminal law's larger problem of democratic illegitimacy, and helps add a level of

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criticism on top of existing critiques of criminal law's broad, discriminatory, and oppressive impacts on communities.

I. INTRODUCTION

Criminal law pervades American society. Millions of people are subjected to criminal prosecution every year.[1] Punishments include fines, court-mandated programs, probation, imprisonment, and death.[2] Collateral consequences of convictions include loss of jobs and job eligibility, loss of benefits, lost housing, deportation, and the loss of voting rights.[3] These are the penalties for those convicted—those who are not convicted still have to undergo the stress and humiliation

1. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 41 (2018) (estimating that over thirteen million misdemeanor cases were filed in the United States in 2015).

2. *See id.* at 19, 159.

3. *See id.* at 19–38.

of arrest, the cost of a lawyer, the time required to appear in court, and, in some cases, imprisonment before trial.[4]

One may think that these high stakes are justified because those who fall within the criminal justice system are to blame for their circumstances. Had they not engaged in criminal conduct, they wouldn't have suffered these consequences. Their behavior is repugnant and worthy of condemnation.

But all too often, this isn't the case. For those who are arrested, or subject to prosecution only to have their case eventually dismissed, there is no determination that their conduct was criminal at all. And yet, they were forced to endure the burdens of the criminal process all the same. Many who are innocent accept plea agreements to avoid the hassle of proving their case and the risk of a guilty verdict at trial.[5] Prosecutors encourage this practice by charging hefty "trial taxes"—increased sentences if a defendant proceeds to trial and is found guilty rather than accepting a plea.[6]

Moreover, Alice Ristroph notes that law school instruction tends to create the impression that there are two systems of criminal law, "[the] law in 'MPC states' and 'common law states.'"[7] This formulation, Ristroph argues, is deeply misleading, as "[a]ctual criminal codes are sprawling arrays of disorganized, ambiguous, and overlapping statutes, layered on top of each other and potentially applicable to a wide range of ordinary conduct."[8] Large swathes of criminal law are strict liability crimes that say nothing about the requisite level of intent.[9]

All of this casts significant doubt on the assumption that those subjected to criminal enforcement and prosecution, and even those

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4. *See* DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 1–11 (2022); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 184–91 (2018); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 235–41 (1979).

5. *See* JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE: AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM 25–31 (2021) (discussing why innocent people plead guilty).

6. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 35–48 (2021) (discussing how lawmakers and prosecutors leverage harsh prison sentences to make defendants cooperate and plead guilty).

7. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1658 (2020).

8. *Id.* at 1659.

9. *See* Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 862–66 (2020) (discussing the strict liability offenses in large urban jurisdictions and lesser-known localities).

who are ultimately convicted, have indeed acted in a manner that the community deems worthy of punishment. This is important, as criminal law and theories behind why criminal punishment is justified or warranted often assume that people have acted in a manner that their community condemns and seeks to punish.[10]

This Article builds on scholarship that calls for criminal law to be based on the supermajoritarian will of the people. This Article also contributes to scholarship and commentary criticizing criminal law's proliferation and departure from the democratic will of the communities that are ultimately subject to these laws. This Article makes both contributions by identifying "countermajoritarian criminal laws"—instances where criminal law restricts, prohibits, and punishes conduct in a manner contrary to the will of the majority of the community. These are the most flagrant examples of the proliferation of criminal law and its departure from supermajoritarian foundations and ideals. This Article highlights structural features that permit these countermajoritarian criminal laws to exist and surveys a variety of examples to demonstrate that the problem is not limited to any particular jurisdiction or state. By defining and drawing attention to this phenomenon, I identify countermajoritarian criminal laws as a worthy focal point for criminal reform efforts. These laws further serve as useful examples to illustrate the failings of the criminal justice system as a whole and can amplify critiques of criminal laws that sound in democratic legitimacy.

Part II of this Article discusses the importance of democratic legitimacy as a normative consideration in evaluating the desirability of criminal laws. It does so by reviewing arguments in favor of a system of criminal law based on the supermajoritarian will of the community. Drawing on recent scholarship by Aliza Plener Cover, this part summarizes her arguments that a supermajoritarian criminal law system is justified by historical practices—particularly the unanimity and near-unanimity requirements of criminal juries. This part also addresses Cover's argument that a supermajoritarian criminal law system is more likely to be deemed legitimate, as such a system is more likely to reflect community sentiments and expression

10. *See* Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 891–94 (2019) ("[A] primary function of the criminal law is to express--and enforce--society's normative values. Relatedly, some theorists justify punishment as serving the important function of making the community whole again after it has been harmed by a lawbreaker.").

of what behaviors are worthy of condemnation and punishment.[11] This part adds to Cover's argument by emphasizing the impact of overcriminalization and the effects of pervasive criminal enforcement, prosecution, and punishment—particularly at the level of misdemeanor and infraction offenses. This aspect of the criminal law, which affects millions of people every year and is now being subjected to long overdue scrutiny, raises the stakes of discussions over the proper scope of criminal law.[12] While there is value in Cover's work urging a supermajoritarian basis for criminal laws, the broader takeaway is the importance of democratic legitimacy as a normative consideration. All things being equal, laws that tend to align with the will of the majority of a community are more desirable than laws that are not supported by a majority—particularly criminal laws where the stakes of penalties and punishment are higher.[13]

Part III delves into countermajoritarian criminal laws themselves—illustrating three types of these laws. First, I address vetoes of bills seeking to legalize or decriminalize certain behavior and survey various examples of instances in which these vetoes resulted in countermajoritarian criminal laws. Second, I address "constitutional crimes"—instances where the federal constitution and state constitution criminalize particular behavior by describing the elements of a particular crime and, in some cases, call for a particular level of punishment for these crimes. Third, I discuss local crimes, which tend to criminalize a wide range of behavior, are often drafted in a broad and imprecise manner, and which, crucially, are frequently enacted by officials who are elected by a tiny majority of the community. All of these laws are countermajoritarian, or have the strong potential to be countermajoritarian, as they can remain in place despite the efforts of a majority of the community, or are enacted by a minority of the community.

Part IV sets forth a sketch of how countermajoritarian criminal laws fit into larger discussions of overcriminalization and criminal reform. This Part surveys various proposals for criminal justice reform and whether these proposals may feasibly address

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11. *See id.* at 892–96.

12. For examples of recent scholarship illuminating the impact of misdemeanor criminal laws, see generally NATAPOFF, *supra* note 1; KOHLER-HAUSMANN, *supra* note 4; Fissell, *supra* note 9; Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015); HESSICK, *supra* note 6.

13. *See* David Miller, *Democracy's Domain*, 37 PHIL. & PUB. AFFAIRS 201, 222 (2009) (arguing that the coercive effect of laws is justified by the ability of those governed by the laws to affect the content of those laws).

countermajoritarian criminal law. Even absent any formal reform to the system, identifying and emphasizing countermajoritarian criminal laws can prompt and support reform efforts by identifying points in the criminal law system that are hardest to justify in terms of democratic legitimacy. Emphasizing democratic representation provides a further line of criticism against governors who would seek to veto decriminalization and legalization efforts, and interest groups that seek the enactment of additional criminal laws. I also address caveats, noting that veto practices may be an effective method of curtailing overcriminalization, and addressing possible objections based on the supermajoritarian nature of constitutional crimes.

There is much to criticize in criminal law, and discussions raising these critiques are well under way. This Article adds to the discussion, identifying where criminal law is particularly weak in terms of democratic legitimacy, and suggesting how such countermajoritarian criminal laws may serve as a focal point for positive reform.

II. THE VIRTUE OF SUPERMAJORITARIAN CRIMINAL LAW

This Article does not set out to independently justify why criminal laws should be drafted and enforced in a manner that includes supermajoritarian requirements and constraints. The reason for this is simple: Aliza Plener Cover's article, *Supermajoritarian Criminal Justice* does so in great detail and depth, and a thoroughgoing defense of supermajoritarian criminal law would be duplicative.[14] The purpose of this Article is to add to the discussion, and not to repeat it.

This section summarizes Cover's arguments in favor of a system of criminal law that is founded and implemented in a manner that includes supermajoritarian constraints. I then add to Cover's arguments by addressing the impacts of criminalization and abuse of discretion—particularly in the context of the criminalization of ubiquitous conduct. Doing so clarifies the high stakes of the discussion and emphasizes the urgency for reform.

14. *See* Cover, *supra* note 10, at 920–23 (discussing why criminal laws should be drafted and enforced in a manner that includes supermajoritarian requirements and constraints).

A. Constitutional Design and Legitimacy

In her article, *Supermajoritarian Criminal Justice*, Aliza Plener Cover advances the thesis that "criminal punishment requires more than mere majority support. Rather, a healthy, democratic criminal justice system should be *supermajoritarian*."[15] Professor Cover argues for a system of criminal laws that reflects the contemporary views of a supermajority of a community in deeming particular conduct as deserving of criminal punishment.[16] In doing so, she argues for a system in which "supermajority support for criminal law policy is a *necessary but not sufficient* condition for the imposition of criminal punishment."[17] In short, if a supermajority of a particular community or jurisdiction supports criminalizing some form of conduct, this does not necessarily mean that criminalizing that form of conduct is warranted.[18] There may be other relevant considerations—most notably whether criminalizing the conduct at issue will result in a net harm to the community, or whether the conduct will disproportionately affect people of a particular sex, race, sexual orientation, or other characteristics.[19]

Professor Cover advances several arguments in favor of a supermajoritarian approach to criminal law, starting with an argument from history and constitutional structure. In particular, Cover emphasizes the institution of the jury and the inclusion of a right to a trial by jury in the Constitution as providing a clear basis for arguing that unanimous or supermajoritarian decisions ought to play into determinations of whether someone has committed a crime.[20] This "supermajoritarian structure for imposing criminal punishment" is "designed to represent the interests of the *entire* community" and "connects criminal law to the views of the community as a whole."[21]

Professor Cover also addresses the connection between supermajoritarian support for criminal laws and considerations of morality, legitimacy, and compliance.[22] Cover notes that "community intuitions about justice and morality frequently arise as a foundation

15. *Id.* at 876.
16. *See id.* at 897.
17. *Id.*
18. *See id.* at 898.
19. *See id.* at 898 (using the criminalization of same-sex intimacy in laying out her formulation).
20. *See id.* at 883–84 (citing U.S. CONST. amend. VI).
21. *Id.* at 886 (citing Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).
22. *See id.* at 891–98.

of the theoretical discussion of punishment," and that because of this, "we ought to structure our criminal justice institutions with intentionality so as to try to capture that consensus."[23] Some theorists of criminal law and punishment contend that condemnation of particular behavior by the community justifies punishment, while more acknowledge that this condemnation at least plays some role in defining punishment.[24] For punishment, in practice, to align with the community's true views on what behavior ought to be condemned, Cover argues that the viewpoint of more than fifty-one percent of the community should be considered—particularly in situations where there may be "vehement opposition [from] a large minority. . . ." [25] She concludes that "supermajoritarian decisionmaking rules in the criminal justice context are best situated to achieve the positive expressive aims of criminal punishment and to do so in a way that enhances the solidarity of society," warning that punishment of behavior by a bare majority in the face of significant opposition may deepen polarization and political dispute.[26]

It should be noted that there is disagreement among punishment theorists over the relevance and force of the expressive function of punishment.[27] Cover acknowledges this disagreement, citing H.L.A. Hart, and his position that "the harm principle, rather than community's moral intuitions, should be paramount in justifying punishment."[28] One may object to Cover's argument for supermajoritarian criminal law by arguing that if the purpose of criminal law and punishment is to prevent harm, rather than express condemnation, the law need not have the supermajoritarian support of the community. It is enough that the law is effective at preventing harm.

An immediate response is that this objection does not entirely address the justifications for supermajoritarian criminal law, which

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23. *Id.* at 891.

24. *See id.* at 892–94.

25. *Id.* at 896.

26. *Id.* at 896–97; *see also* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1175 (2014) (noting that under the Court's majority-focused approach to the Eighth Amendment, its protection of cruel and unusual punishment is, "perversely, more robust when society is predisposed *against* a particular punishment").

27. *See* Cover, *supra* note 10, at 892–93.

28. *Id.*

are based in historic practices and founding-era traditions.[29] But a further, deeper response emphasizes the overlap between preventing harm and supermajoritarian support, in that laws with supermajoritarian support are likely to result in better outcomes than laws that simply have majoritarian support.[30] John McGinnis and Michael Rappaport discuss this at length in the context of the Constitution's adoption and ratification, arguing that supermajoritarian processes such as those giving rise to the Constitution are likely to lead to good results because resulting laws are more likely to demonstrate a lack of partisan preferences, be more forward-thinking, and be based on a broad consensus that is more likely to result in better outcomes.[31] Under this line of reasoning, supporting a supermajoritarian approach to criminal law is likely to accomplish the goals of avoiding harm that motivate Hart's justification for criminal laws and punishment for many of the same reasons.

In light of all of this, laws that are not founded on supermajoritarian support may be less desirable. And laws that are outright countermajoritarian are even more concerning. But before this Article gets to those aspects of criminal law that are countermajoritarian, the next subsection adds to the argument in favor of a supermajoritarian criminal justice system. Beyond theoretical justifications, existing systems of overcriminalization and the impacts of criminal law on the community make achieving supermajoritarian ideals of utmost importance and urgency.[32]

B. In Favor of Obstacles to Criminalization: Abuse of Discretion and Impacts of Criminalization

In addition to the historical and legitimacy arguments for supermajoritarian criminal law discussed above, a supermajoritarian approach provides a check on overcriminalization. Cover does not ignore the issue of overcriminalization.[33] Indeed, she argues that a proliferation of criminal laws, including a fair number of strict liability

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29. *See id.* at 882 ("[T]he Framers of the Constitution and the Bill of Rights enshrined a supermajoritarian ethnic into the American criminal justice system . . . .").

30. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 33–35 (2013).

31. *See id.* at 35–58.

32. *See infra* Section II.B.

33. *See* Cover, *supra* note 10, at 903 ("Today, we punish an extraordinarily vast array of crimes . . . . The criminal law has expanded both in its breadth and depth.").

crimes, means that a "schism between the community's moral consensus and the code book" likely exists.[34] Cover, however, makes this point in a descriptive context—observing that this is an example of how the criminal justice system is no longer supermajoritarian and may well be quasi-majoritarian.[35]

The proliferation of criminal laws that Cover describes illustrates a further justification for a supermajoritarian criminal justice system: requiring criminal laws to be enacted through a supermajoritarian process presents an obstacle to the further proliferation of criminal laws.[36] This proliferation ought to be avoided not only because it risks the departure of criminal law from community sentiments, but because additional criminal laws create a cascade of consequences for those who fall under their scope.

Alexandra Natapoff writes about this phenomenon in the context of misdemeanor criminal law—an area of the law that often flies under the radar because "the crimes are small and the punishments relatively light in comparison to felonies . . . ."[37] Despite the lack of attention paid to these laws, their impacts are profound: they can result in jail sentences, fines, and stigma.[38] Those convicted of misdemeanors risk losing "jobs, driver's licenses, welfare benefits, child custody, immigration status, and housing."[39] Even for those who are not convicted, the cost of being placed into the misdemeanor system is substantial, as people must often miss work, pay bond to avoid pretrial incarceration, and hire counsel to assist them through the alien world of the criminal justice system.[40] These costs may add up to being higher than the fines and penalties that a guilty conviction may bring.[41] Millions of people are subjected to this process each year, with Natapoff estimating that over thirteen million misdemeanor cases were filed in 2015.[42] Even if those charged are innocent or have strong potential defenses, the costs inherent in the

34. *Id.* at 903–04.

35. *See id.* at 902–06 (discussing the shift to quasi-majoritarian).

36. *See id.* at 919–21.

37. NATAPOFF, *supra* note 1, at 2.

38. *See id.* at 20; *see also* HESSICK, *supra* note 6, at 126 (discussing the collateral consequences of a misdemeanor conviction).

39. NATAPOFF, *supra* note 1, at 20.

40. *See* FEELEY, *supra* note 4, at 235–41.

41. *See id.* at 240 ("[T]he total income lost for *all* defendants in the sample was a little over $50,000, an amount approximately *five times as great as the amount the court collected in fines*.").

42. *See* NATAPOFF, *supra* note 1, at 41.

process, including the sheer time it takes to endure a criminal prosecution, often prompts defendants to plead guilty early in the process.[43]

Even where charges are not filed, the proliferation of criminal laws—particularly those that outlaw ubiquitous conduct—create a law enforcement system in which whether someone is stopped, arrested, or charged for a crime is far more a matter of discretion than it is a matter of that person's conduct.[44] Offenses at the misdemeanor level—particularly those arising from municipal ordinances and restriction—tend to be worded in a broad manner, permitting for wide discretion in determining what, who, and whether to prosecute.[45] This, in turn, leads to a legal environment in which Black and Hispanic people are prosecuted at higher rates.[46]

The proliferation of traffic offenses illustrates the proliferation of criminal laws and their wide-ranging impact. A multitude of intricate, overlapping, and often subjective violations provide a myriad of potential justifications for police officers to conduct traffic stops.[47] As for the subjective motives of the officers—including questions of whether stops were motivated by a subjective suspicion arising from the race of the suspect—the Supreme Court has held in *Whren v. United States* that such motivations are irrelevant in determining whether a stop is permissible under the Fourth Amendment.[48] There, the Court also stated, "we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."[49]

The Court has explicitly stated that it will have nothing to do with scaling back the proliferation of criminal laws and the escalating power these laws give to law enforcement.[50] In light of this, and the

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43. *See* HESSICK, *supra* note 6, at 110.

44. *See* CARBADO, *supra* note 4, at 157–58.

45. *See id.* at 158; Fissell, *supra* note 9, at 841–42.

46. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 4–7 (2011) (discussing how the criminal justice system's dysfunction has perpetuated racial injustice); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 344–46 (1998) (analyzing evidence of racial targeting in law enforcement methods).

47. *See* CARBADO, *supra* note 4, at 82 (discussing various vehicle code violations that give police substantial discretion to find probable cause).

48. *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

49. *Id.* at 818.

50. *See id.* at 818–19.

negative impacts that proliferating criminal laws have on those who are arrested or prosecuted, there is value inherent in placing obstacles in the path of creating further criminal laws and restrictions. With an overly complex system of criminal laws—particularly at the misdemeanor and municipal level, any features of the criminal law that place supermajoritarian barriers in the way of further criminalization are generally desirable, as this keeps the problem from becoming even more pronounced.

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Before proceeding further, a brief aside. A potential response to the Article thus far may be that Cover's focus on supermajoritarian criminal law is an uncommon position to take. Criminal laws in all jurisdictions are passed through majoritarian procedures—even if those prosecuted pursuant to the crimes are entitled to a jury trial, and the unanimity or supermajoritarian rules inherent in jury trials.[51] Perhaps it is a step too far, or too soon, to claim that criminal laws must meet some supermajoritarian baseline—despite the arguments Cover makes and despite the additional points above regarding overcriminalization.

Even if one grants this argument—an argument that faces an uphill battle in today's world of heavy criminalization and strict liability offenses—the benefit of the doubt, the notion that criminal law should be based on at least majoritarian sentiments remains. It is a bold proposition to contend that criminal laws need not align with the sentiments of at least a majority of a community. All things being equal, a criminal law that aligns with the will of the community is more desirable than a law that does not.[52] To be clear, democratic support is not the only normative consideration when weighing the desirability of laws and rights—some rights-based protection against majority oppression of a minority is desirable on other grounds.[53] But democratic legitimacy is an important normative consideration, and

51. *See* Cover, *supra* note 10, at 876 ("Within our constitutional structure, the jury trial requirement serves to enforce this link to the collective by guaranteeing that criminal punishment is carried out only with the unanimous assent of a body representative of the community.").

52. *See* Miller, *supra* note 13, at 222 (arguing that the coercive effect of laws is justified by the ability of those governed by the laws to affect the content of those laws).

53. *See* Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L. REV. 577, 621–22 (2015) (describing John Hart Ely's "representation-reinforcement theory" of judicial review, which serves the function of protecting minority rights against legislation enacted by a hostile majority).

where punitive laws lack democratic support, this is a concern worth raising.

The remainder of this Article addresses criminal laws that remain in place despite the expressed or potential will of a majority of the community. Whether one ultimately believes that criminal law should reflect the will of a majority or supermajority, these laws run contrary to either ideal.

III. COUNTERMAJORITARIAN CRIMINAL LAWS

With the stakes clarified, this Article turns to several instances where laws not only fail to live up to supermajoritarian ideals but are outright countermajoritarian. Laws fitting into these categories include criminal laws, or criminal penalties, that either: (1) remain in place despite a majority seeking to remove or revise them to be less severe; or (2) that are enacted through an institution that only represents a minority of a community's electorate.

This Part of the Article describes two types of law in the first category, and one type of law in the second category. These laws are: (1) criminal laws and penalties that remain in place only as a result of a veto; (2) crimes that are codified or required by state constitutions; and (3) municipal ordinances that are enacted by local legislators who are elected by a small minority of eligible voters.[54] The bulk of this Part will focus on the first two categories of crime, as the issue of low voter turnout and skewed electoral processes is addressed, albeit in brief, in Cover's prior work on supermajoritarian criminal law and in other scholarship.[55]

One note before proceeding: this Article does not claim that these categories are the only instances of countermajoritarian criminal laws. Rather, these are several examples where countermajoritarian laws may be clearly identified.[56] Any criminal law that outlaws behavior that the majority of an electorate does not wish to criminalize is a countermajoritarian criminal law. Because it is impossible to know every criminal law that lacks support from a

54. *See* discussion *infra* Sections III.A–C.

55. *See* Cover, *supra* note 10, at 878 n.10, 904–05; *see also* Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 362–63 (2008) (arguing that countermajoritarian difficulties manifest in electoral institutions).

56. For a detailed account of general countermajoritarian tendencies in state legislatures, see generally Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

majority of the community, this Article identifies proxies that indicate that a law no longer has majority support, where laws are enacted through processes that are unrepresentative of the community, or where laws in place cannot be altered or stricken by majorities. There is a possibility that these categories of law—particularly the latter two categories—may in fact be consistent with the will of a majority. But they are still worth identifying to the extent that they set the stage for potential conflicts with the will of the community.

A. Vetoing Legalization and Decriminalization Measures

The first category of countermajoritarian laws are criminal laws and penalties that remain in place because of a veto. These circumstances arise where a legislature passes a bill legalizing certain conduct, or reducing the penalties for engaging in certain conduct, but the executive vetoes the bill, leaving the law in place despite the legislature's efforts.[57]

1. The Saga of California's Decriminalization of Jaywalking

In early 2021, news began to circulate in California regarding the Freedom to Walk Act. The bill, AB 1238, introduced in California's State Assembly, recognized that existing law prohibited pedestrians from entering roadways if they were facing yellow circles or warning signals, that existing law required pedestrians to obey any official traffic signals unless otherwise directed by police officers, and that pedestrians were prohibited from crossing streets at any place other than a crosswalk controlled by traffic signal devices.[58] The bill sought to undo these restrictions.[59] Most notably, the bill would add California Vehicle Code section 21955(a), which would state: "Notwithstanding any other law, a pedestrian shall not be subject to a fine or criminal penalty for crossing or entering a roadway when no cars are present."[60] This bill followed reforms in Virginia, Nevada, and

57. *See Veto Overrides in State Legislatures,* BALLOTPEDIA, https://ballotpedia.org/Veto_overrides_in_state_legislatures (last updated Nov. 10, 2021) (describing the veto override process among the states).

58. *See* Assemb. B. 1238, 2021-2022 Reg. Sess. (Cal. 2021).

59. *See id.*

60. *Id.*

Kansas City, Missouri, which had stricken jaywalking as criminal offenses.[61]

Advocates spoke out in favor of the bill. Some argued that jaywalking laws were enforced in an arbitrary manner—noting that almost everyone does it, but that people of color tend to bear the brunt of enforcement.[62] Other commentators noted the origins of "jaywalking" originated with "car clubs and manufacturers in the 1930s to shift the blame for accidents from drivers to pedestrians," and noted that "jaywalking is something nearly everyone does, but few are ticketed."[63] Others cited examples of jaywalking stops that led to suspects being shot or beaten, arguing that decriminalization would prevent these instances of escalation.[64]

California's legislature voted in favor of AB 1238 and sent it to Governor Gavin Newsom for his signature.[65] On October 8, 2021, Governor Newsom vetoed the bill.[66] In his veto message, he noted the problem of "[u]nequal enforcement of jaywalking laws and the use of minor offenses like it as a pretext to stop people of color, especially in under-resourced communities" and noted that this problem "must be

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61. *See* Caro Jauregui & Mike McGinn, *It's Time for California to Decriminalize Jaywalking*, BLOOMBERG (Sept. 22, 2021, 12:00 PM), https://www.bloomberg.com/news/articles/2021-09-22/why-california-needs-to-decriminalize-jaywalking.

62. *See* Press Release, Jared Sanchez, CalBike, CalBike Announces New Legislation to Eliminate Jaywalking Tickets in California (March 25, 2021), https://www.calbike.org/calbike-announces-new-legislation-to-eliminate-jaywalking-tickets-in-california/; *see also* Phil Ting, *It's Time to Get Rid of Jaywalking Tickets*, S.F. BAY TIMES (May 20, 2021), https://sfbaytimes.com/its-time-to-get-rid-of-jaywalking-tickets/.

63. Anne Stuhldreher, *California's Jaywalking Laws Need to be Walked Back*, CAL MATTERS (June 23, 2021), https://calmatters.org/commentary/overcharged/2021/06/californias-jaywalking-laws-need-to-be-walked-back/; *see also* PETER D. NORTON, FIGHTING TRAFFIC: THE DAWN OF THE MOTOR AGE IN THE AMERICAN CITY 71–78 (2008) (describing the rhetorical origins of the term, "jaywalker" and its evolution from rhetoric into law).

64. *See* Taylor Walker, *CA Bill Could Bring Freedom to Cross the Street Without Fear of Criminalization for "Jaywalking"*, WITNESS L.A. (May 13, 2021), https://witnessla.com/ca-bill-could-bring-freedom-to-cross-the-street-without-fear-of-criminalization-for-jaywalking/.

65. *See Bill That Could Legalize Jaywalking in California Headed to Gov. Newsom's Desk*, CBS SACRAMENTO (Sept. 10, 2021, 11:01 PM), https://sacramento.cbslocal.com/2021/09/10/ca-bill-legalize-jaywalking/.

66. *See* Melody Gutierrez, *Newsom Vetoes Jaywalking Bill Aimed at Easing Fines, Targeted Enforcement*, L.A. TIMES (Oct. 8, 2021, 7:58 PM), https://www.latimes.com/california/story/2021-10-08/new-california-law-will-limit-jaywalking-tickets.

addressed."[67] Despite this, Newsom noted that California had a high number of pedestrian fatalities and was "concerned that AB 1238 will unintentionally reduce pedestrian safety and potentially increase fatalities or serious injuries *caused by pedestrians* that enter our roadways at inappropriate locations."[68] California's law prohibiting jaywalking therefore remained in place.

In the wake of AB 1238 and Governor Newsom's veto, it was highly likely that California's law against jaywalking is a countermajoritarian criminal law. A majority of California's legislators had voted to decriminalize jaywalking.[69] Despite this, California's governor vetoed the measure and left the law in place.[70] The legislature did not attempt to overcome the veto with a supermajority vote, as California's legislature has a longstanding tradition of not attempting to override vetoed legislation.[71] Jaywalking therefore remained a crime in California despite a majority of both houses of the legislature voting to legalize it.

As it turned out, this countermajoritarian criminal law ended up not being long on the books. Another bill was introduced to decriminalize jaywalking the following year.[72] This time around, California's governor signed off on the legislation.[73] Nearly a year after the governor's veto rendered jaywalking a countermajoritarian criminal law, the effort to decriminalize the practice had finally succeeded.[74]

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67. Letter from Gavin Newsom, Governor of California, to California State Assembly (Oct. 8, 2021), https://www.gov.ca.gov/wp-content/uploads/2021/10/AB-1238-1082021.pdf.

68. *Id.* (emphasis added).

69. *See* Cal. Leg. Assemb. J. 2021-2022 Reg. Sess., 120th Sess. Day, at 2998 (2021) (listing the members of the assembly that voted to decriminalize jaywalking, showing that a majority did support the initiative to decriminalize jaywalking).

70. *See* Newsom, *supra* note 67.

71. *See* John Myers, *California Politics: The Governor's All-Powerful Veto*, L.A. TIMES (Oct. 15, 2021, 6:30 AM), https://www.latimes.com/california/newsletter/2021-10-15/california-politics-governor-all-powerful-veto-ca-politics.

72. Colleen Shalby, *Jaywalking is Decriminalized in California Under New Law*, L.A. TIMES (Oct. 1, 2022, 11:04 AM), https://www.latimes.com/california/story/2022-10-01/jaywalking-decriminalized-in-california-under-new-law; *see also* Assemb. B. 2147, 2021-2022 Reg. Sess. (Cal. 2022).

73. *See* Shalby, *supra* note 72.

74. *See id.*

2. Vetoes of Legalization and Decriminalization Legislation

The 2021 veto of California's bill legalizing jaywalking is just one example of governors vetoing attempts at legalizing behaviors or reducing the penalties for particular crimes. When this happens, the law takes on the status of a countermajoritarian criminal law, as a majority of lawmakers have gone on record and taken specific action to strike, change, or reduce the penalties called for by the law.

Jaywalking was not the only crime to take on countermajoritarian status in 2021. Governor Newsom also vetoed AB 122, a bill that would have permitted bicyclists to pass through stop signs as though they were yield signs.[75] As with his veto of the jaywalking bill, Governor Newsom again appealed to the safety of those subject to the criminal penalties of the law at issue, expressing concern that the bill would negatively impact cyclists' safety.[76]

Other states engage in similar countermajoritarian practices as well. While most states still ban the recreational use of marijuana, twenty-one states, the District of Columbia, and Guam have legalized the use of limited amounts of marijuana for recreational use.[77] Twenty-seven states have decriminalized the possession or use of small quantities of marijuana, meaning that the possession or use of small amounts is punishable by an infraction or civil violation.[78] Thirty-seven states permit the medical use of cannabis, or cannabis products, while ten other states permit the "use of 'low THC, high cannabidiol (CBD)' products for medical reasons in limited situations or as a legal defense."[79]

Some of the remaining restrictions on marijuana are countermajoritarian laws, as several states' governors have vetoed legislative efforts to legalize or decriminalize marijuana in some

75. *See* Soumya Karlamangla, *Why Newsom Said No to These Bills*, N.Y. TIMES (Nov. 4, 2021), https://www.nytimes.com/2021/10/20/us/newsom-legislation-vetoes.html.

76. *See* Newsom, *supra* note 67.

77. *See* Claire Hansen, et al., *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Dec. 14, 2022), https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization.

78. *See* Michael Hartman, *Cannabis Overview*, NAT'L CONF. ST. LEGISLATURES (May 31, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.

79. *State Medical Cannabis Laws*, NAT'L CONF. ST. LEGISLATURES (Nov. 11, 2022) https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

states.[80] Most recently, Delaware's legislature passed a bill that would remove all penalties for the possession of one ounce or less of marijuana for people twenty-one years of age and older.[81] Governor John Carney vetoed the bill, stating that while he supported the medical use of marijuana and prior efforts to decriminalize marijuana, he did not believe that expanding the use of recreational marijuana was "in the best interests of the State of Delaware," claiming that "[q]uestions about the long-term health and economic impacts of recreational marijuana use, as well as serious law enforcement concerns, remain unresolved."[82] While the legislature attempted to override the veto, five lawmakers changed their votes, and the bill failed.[83] Delaware's criminalization of recreational marijuana use and possession by those twenty-one and older was confirmed as a countermajoritarian law.

Other state legislatures have passed bills legalizing, decriminalizing, or otherwise mitigating the penalties various forms of marijuana use and possession, only to have the legislation run aground on vetoes. In 2017, Nevada's Governor vetoed a bill that would have permitted people previously convicted of marijuana misdemeanors to have their convictions vacated and records sealed.[84] In 2019, Iowa's governor vetoed a bill that would have permitted

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80. *See Marijuana Legality by State*, DISA, https://disa.com/maps/marijuana-legality-by-state (last updated Dec. 2022).

81. *See* Randall Chase, *Delaware Lawmakers Pass Cannabis Legalization, But Governor's Support in Doubt*, PRESS HERALD (May 16, 2022), https://www.pressherald.com/2022/05/16/delaware-lawmakers-pass-cannabis-legalization-but-governors-support-in-doubt/ (discussing the likelihood that marijuana possession will be legalized in Delaware); *see also* H.B. 371, 151st Gen. Assemb., Reg. Sess. (Del. 2022) (vetoed).

82. Letter from John Carney, Governor of Delaware, to the Members of the House of Representatives of the 151st Gen. Assembly (May 24, 2022), https://governor.delaware.gov/wp-content/uploads/sites/24/2022/05/Veto_HB-371.pdf; *see also* Meredith Newman, *Delaware Governor Vetoes Marijuana Legalization Bill, Setting Up Historic Showdown With Legislature*, DEL. ONLINE (May 25, 2022, 9:46 AM), https://www.delawareonline.com/story/news/health/2022/05/24/delaware-governor-vetoes-marijuana-bill-showdown-looms-legislature/9908695002/.

83. *See* Cris Barrish, *Marijuana Remains Illegal in Delaware As House Fails to Override Gov. Carney's Veto*, WHYY (June 7, 2022), https://whyy.org/articles/delaware-marijuana-remains-illegal-house-fails-to-override-gov-carney-veto/.

84. *See* Michelle Rindels & Riley Snyder, *Sandoval Signs Major Marijuana Bills, Adds Two More to Veto Pile*, NEV. INDEP. (June 13, 2017, 2:30 AM), https://thenevadaindependent.com/article/sandoval-signs-major-marijuana-bills-adds-two-more-to-veto-pile.

higher THC amounts to be used in legal medical marijuana, stating that the increase would permit a level of THC consumption "higher than one would typically consume even with aggressive recreational marijuana use" and that Iowa "must proceed cautiously" on any expansion of its medical CBD program.[85]

In 2015, Idaho's governor vetoed a bill that would have permitted marijuana-based treatment for epilepsy.[86] In 2021, doubling down on the countermajoritarian nature of Idaho's marijuana laws, Idaho's governor signed legislation "making it more difficult to get initiatives or referendums on ballots in what is widely seen as an attempt to stop a medical marijuana initiative and other left-leaning causes in the conservative state."[87]

Moving beyond marijuana, Governor Janet Mills of Maine has vetoed several criminal reform measures, creating a pattern of countermajoritarian criminal penalties and procedures. In May 2022, Mills vetoed LD 844, a bill that would have required any order for pretrial release for any criminal defendant to "include only the least restrictive further condition or combination of conditions" for the defendant.[88] In her veto message, Mills stated that the bill would "deprive judicial officers of important tools for protecting the public safety and ensuring the appearance of the defendant at trial."[89] In

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85. Barbara Rodriguez, *Iowa Gov. Kim Reynolds Vetoes Medical Marijuana Expansion Bill, Saying 'Iowa Must Proceed Cautiously' on Changes*, DES MOINES REGISTER (May 24, 2019, 7:09 PM), https://www.desmoinesregister.com/story/news/politics/2019/05/24/iowa-governor-kim-reynolds-rejects-medical-marijuana-expansion-bill-potency-thc-oils-capsules/3667338002/; Letter from Kim Reynolds, Governor of Iowa, to The Hon. Paul Pate, Secretary of State of Iowa (May 24, 2019), https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=hf732.

86. *See Idaho Governor Vetoes Bill Allowing Marijuana-Based Epilepsy Treatment*, BOISE ST. PUB. RADIO NEWS (Apr. 16, 2015, 6:03 PM), https://www.boisestatepublicradio.org/politics-government/2015-04-16/idaho-governor-vetoes-bill-allowing-marijuana-based-epilepsy-treatment.

87. Keith Ridler, *Idaho Governor Signs Bill Making Ballot Measures Tougher*, AP NEWS (Apr. 17, 2021), https://apnews.com/article/brad-little-medical-marijuana-legislation-referendums-marijuana-07b9ff1a14e886819176126fe3e43646.

88. Evan Popp, *Legislators Sustain Mills' Vetoes of Progressive Labor and Criminal Justice Reform Bills*, MAINE BEACON (May 9, 2022), https://mainebeacon.com/legislators-sustain-mills-vetoes-of-progressive-labor-and-criminal-justice-reform-bills/ (discussing Governor Mills' pattern of vetoing criminal reform measures); *see also* H.P. 612, Legis. Doc. 844, 130th Leg., 1st Sess. (Me. 2022).

89. Letter from Janet T. Mills, Governor of Maine, to Hon. Members of the 130th Leg. of the State of Maine (May 6, 2022),

2021, Mills vetoed HP 523, a bill that would have enacted several reforms to Maine's Criminal Code.[90] HP 523's reforms included: (1) narrowing Maine's child endangerment statute to clearly require reckless violations of duties of care (rather than the existing law, which suggests that any such violation is reckless);[91] (2) narrowing Maine's statutory rape law by adding an element that defendants be at least three years older than their victim;[92] and (3) requiring specific and explicit admonitions to those released pre-trial, including a notification that failure to appear could result in revocation of bail and other criminal penalties.[93] To the extent that Mill's veto left broader criminal laws and higher levels of discretion in the treatment of criminal defendants, these are all countermajoritarian laws.

In 2015, Governor Chris Christie vetoed a bill passed by New Jersey's legislature that "would have repealed the mandatory suspension of driver's licenses for first-time drunk drivers and instead required them to install devices that would be able to detect alcohol and stop cars from starting."[94] Christie suggested that, instead, legislators require both license suspension and the installation of the interlock devices for "all drunk-driving offenders."[95] Accordingly, in the wake of Governor Christie's veto, penalties requiring license suspension for first-time DUI offenders remained a countermajoritarian criminal penalty. This eventually changed in 2019, when New Jersey passed a law that eliminated license suspensions for most first-time offenders, with the requirement that "all motorists convicted of DWI . . . install ignition interlocks, the in-

https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/2022-05/LD%20844Veto%20Letter.pdf.

90. *See* Evan Popp, Mills Vetoes Slate of Progressive Bills, Including Measure to Close Long Creek, MAINE BEACON (June 24, 2021), https://mainebeacon.com/mills-vetoes-slate-of-progressive-bills-including-measure-to-close-long-creek/; *see also* H.P. 523, Legis. Doc. 710, 130th Leg., 1st Sess. (Me. 2021).

91. *See* Me. H.P. 523.

92. *Compare id.*, *with* ME. STAT. TIT. 17-A, § 253(1)(B)–(C) (2022) (noting that H.P. 523 proposes to amend section 253 by requiring that there be a minimum age difference between the defendant and the victim).

93. *See* H.P. 523 ("[F]ailure to appear or comply with a condition or conditions may subject the defendant to revocation of bail and additional criminal penalties.").

94. Andrew Seidman, *Christie Sends DUI Bill Back to the Legislature*, GOVERNING (March 24, 2015), https://www.governing.com/archive/tns-new-jersey-christie-dui-veto.html.

95. *Id.*

car breathalyzers that immobilize a vehicle if the driver's breath registers too much alcohol."[96]

Vetoes also result in countermajoritarian laws relating to the expungement of prior convictions. In May 2022, Vermont's Governor Phil Scott vetoed a bill that would expand the range of crimes that people could have expunged from their records.[97] Scott stated in his veto letter that the bill was "inconsistent with the State's responsibilities to keep the public safe" noting that the bill would permit the expungement of certain drug offenses and that it would permit expungement of felonies that would disqualify people form purchasing and owning guns.[98] Scott also specifically called out home improvement fraud as one of the offenses that would fall under the scope of the bill's expungement expansion.[99] In vetoing the bill, legal barriers to expunging the crimes identified in H. 534 gained confirmed status as countermajoritarian laws.[100]

In 2021, Maryland's legislature passed a bill prohibiting courts from imposing life sentences without the possibility of parole in cases involving juvenile defendants.[101] Governor Larry Hogan vetoed the bill several days later, arguing that "the measure would upend the parole system by allowing juveniles who were convicted as adults to appeal for release after serving 20 years, cause additional trauma to victims' families and potentially lead to the release of violent

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96. Richard Cowen, *NJ to Impose New Penalties for Drunken Driving Starting Dec. 1: What You Need to Know*, NORTHJERSEY.COM (Nov. 29, 2019, 12:37 PM), https://www.northjersey.com/story/news/2019/11/27/nj-new-drunk-driving-law-take-effect-dec-1-heres-what-know/4275332002/.

97. See Alan J. Keays, *Scott Vetoes 2 Criminal Justice Reform Bills, Citing Public Safety Concerns*, VTDIGGER (May 20, 2022), https://vtdigger.org/2022/05/20/scott-vetoes-two-criminal-justice-reform-bills-citing-public-safety-concerns/; *see also* H. 534, 2021-2022 Gen. Assemb., Reg Sess. (Vt. 2022).

98. Letter from Philip B. Scott, Governor of Vermont, to The Hon. Betsy Ann Wrask, Clerk of the Vermont House of Representatives (May 19, 2022), https://governor.vermont.gov/sites/scott/files/H.534%20veto%20letter.pdf (vetoing H. 534).

99. *See id.* ("[T]his bill makes home improvement fraud an expungable offense, eliminating the ability to hold offenders accountable through the registry the Legislature simultaneously said was about accountability.").

100. While these laws themselves are not criminal laws, they are relevant to this discussion as they bear on the collateral consequences of criminal convictions, and legislative avenues of expunging criminal records to mitigate these consequences.

101. *See* Press Release, Off. of the State's Att'y for Baltimore City, Maryland State Legislature Passes the Juvenile Restoration Act (April 2, 2021), https://www.stattorney.org/media-center/press-releases/2246-maryland-state-legislature-passes-the-juvenile-restoration-act.

offenders who should remain behind bars."[102] The legislature ended up overriding Governor Hogan's veto with the required three-fifths vote in the House and Senate, and the bill ended up going into effect anyway.[103] Had the legislature been unable to overturn the veto, the availability of life imprisonment without parole for juvenile offenders would have been a countermajoritarian criminal penalty.

These examples do not paint a systematic or exhaustive picture of all instances of countermajoritarian criminal laws that result from vetoes but serve to illustrate the widespread nature of the practice. These countermajoritarian criminal laws arise across the country and affect all aspects of the criminal code. Vetoed legalization and decriminalization bills are pronounced examples of countermajoritarian criminal laws because they all involve the prerequisite that a majority of legislators attempt to legalize or decriminalize a particular crime—strong evidence that a majority of the represented community no longer supports criminalizing that particular activity.

A caveat is worth mentioning here: while the legislature's passing a law is evidence of majority support for a particular bill, state governors are also elected through democratic means. Accordingly, an argument could be made that the governor represents the majority will of the people as well, and that a veto expresses the will of a majority that a crime remain in place.[104] In some cases, this apparent conflict may be resolved by reference to the number of votes. If a piece of legislation is passed with supermajoritarian support in one or more houses of government, and then vetoed, there is a stronger argument that the law that remains on the books (if the veto is not overcome) is a countermajoritarian criminal law. This was the case with the California jaywalking legalization bill—the bill passed by a margin of fifty-eight to seventeen in the Assembly (with five members

102. Ovetta Wiggins, *Hogan Vetoes Bill That Would Abolish Life Sentences Without Parole for Juveniles*, WASH. POST (Apr. 8, 2021, 8:06 PM), https://www.washingtonpost.com/local/md-politics/hogan-veto-juvenile-sentences-/2021/04/08/361e1e5e-98bd-11eb-962b-78c1d8228819_story.html.

103. *See* Steve Lash, *Md. Lawmakers Override Hogan's Veto, Ban Juvenile Life Without Parole*, DAILY REC. (Apr. 10, 2021), https://thedailyrecord.com/2021/04/10/md-lawmakers-override-hogans-veto-ban-juvenile-life-without-parole/ (noting the override of Governor Hogan's veto); *see also* MD. CONST. art. II, § 17(a) (requiring a three-fifths vote from both houses of the Maryland Legislature to overcome a veto).

104. *See* Seifter, *supra* note 56, at 1770 (arguing that gubernatorial elections are more representative than elections for state legislators).

abstaining).[105] The numbers are muddier in the State Senate, where the bill passed by a vote of twenty-two to eight, with ten abstaining.[106] Delaware's countermajoritarian law banning recreational marijuana use is in a similar—but not identical—situation, as the bill was supported by a supermajority of voters prior to the governor's veto, but due to a loss of five votes, the legislature was unable to override the veto in the end.[107] Still, the initial supermajority support for the bill provides strong support for the conclusion that the criminal law is countermajoritarian. And even in cases where bills to decriminalize or repeal do not pass by a supermajoritarian margin, their initial passage is still strong evidence that vetoes of these bills result in countermajoritarian laws, given the inertia that must be overcome to accomplish the passage of a decriminalization or legalization bill in the first place.[108]

To be clear, not all vetoes in the criminal context result in countermajoritarian criminal laws. In fact, certain veto practices may prevent the proliferation of criminal laws and offenses that tends to contribute to the countermajoritarian nature of criminal law. California's former governor, Jerry Brown, took such an approach, vetoing numerous laws that would have "created new crimes."[109] Criminal laws and reforms that Brown vetoed included laws adding weapon ban penalties to certain crimes, laws criminalizing drone use near schools and prisons, and laws increasing penalties for certain drugs and other crimes.[110] Where vetoes target the addition of crimes or the imposition of increased criminal penalties, they have the effect of making criminal law more likely to be supermajoritarian, as overcoming such a veto typically requires a supermajority vote by the legislature.[111]

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105. *See* Cal. Leg. Assemb. J. 2021-2022 Reg. Sess., 120th Sess. Day, at 2998 (2021) (listing the assembly members that voted for and against decriminalizing jaywalking).

106. *See* Cal. Leg. S. J. 2021-2022, Sess., 119th Sess. Day, at 2484 (2021) (listing the senate members that voted for and against decriminalizing jaywalking).

107. *See* Barrish, *supra* note 83.

108. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982).

109. Marisa Lagos, *Jerry Brown Will Leave Lasting Impact on Criminal Justice in California*, KQED (Dec. 29, 2018), https://www.kqed.org/news/11714104/jerry-brown-will-leave-lasting-impact-on-criminal-justice-in-california.

110. *See* Barry Krisberg, *Has Jerry Brown Changed His Views on Crime?*, CRIME REP. (Nov. 3, 2015), https://thecrimereport.org/2015/11/03/2015-11-has-jerry-brown-changed-his-views-on-crime/.

111. *See, e.g.*, MD. CONST. art. II, § 17(a) (requiring a three-fifths vote from both houses of the Maryland Legislature to overcome a veto).

It is also worth noting that while these veto examples are strong indicators of countermajoritarian criminal laws, the possibility remains that they are imperfect indicators of majority sentiment. After all, governors are also elected, and concerns about legislative gerrymandering may undermine claims that the legislature accurately represents a majority of the state's population.[112] While these concerns are worthy of consideration, the fact that state legislators are democratically elected and voted into office by narrower constituencies warrants a presumption that their actions reflect the will of a majority of the electorate. As for those states where gerrymandering or voting restrictions undermine this presumption—the possibility arises that an even larger swath of criminal laws are countermajoritarian. While this concern is worthy of further research and interrogation, it is beyond the scope of the present article.

B. Constitutional Crimes

The Constitution of the United States is noteworthy as it has endured for centuries, survived a civil war, and is (for the most part) revered across party lines.[113] It's also noteworthy for its short length: only 7,591 words.[114] By contrast, the average length of US state constitutions is approximately 39,000 words.[115] The shortest state constitution (Utah's) is 8,565 words.[116] The longest state constitution is, by far, Alabama's—with a length of over 388,000 words, it is the longest written constitution in the world.[117]

These relatively lengthy state constitutions tend to contain more detailed and specific provisions than the US Constitution. But one feature that some of these constitutions share with the US Constitution—albeit to a greater extent—is the inclusion of criminal law provisions. This subsection describes various "constitutional

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112. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 680–83 (2013) (describing gerrymandering practices by state legislatures).

113. *See generally* TOM GINSBURG, THE LIFESPAN OF WRITTEN CONSTITUTIONS (2008) (discussing the average lifespan of written constitutions).

114. *See* Brenda Erickson, *Your State's Constitution – The People's Document*, NCSL (Nov. 17, 2017), https://www.ncsl.org/blog/2017/11/17/your-states-constitution-the-peoples-document.aspx#:~:text=A%20constitution%20may%20be%20long,words%2C%20including%20the%2027%20amendments.

115. *See id.*

116. *See id.*

117. *See id.*; *see also Effort to Scrap Alabama's Constitution*, NPR (Feb. 13, 2009, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=100691170.

crimes," criminal laws that are set forth, in whole or in part, in state or federal constitutions. This subsection further demonstrates how they are another example of countermajoritarian criminal law.

1. The United States Constitutional Crime of Treason

In light of the brevity of the US Constitution, you may be wondering what criminal law provisions it contains. After all, the Constitution is generally thought of as containing either cut-and-dry provisions providing for the age of presidents, senators, and the like, or more ambiguous statements of principle, such as a ban on cruel and unusual punishment or empowering Congress to provide for the "general Welfare of the United States."[118] But Article III, section 3, clauses 1 and 2 of the Constitution provides some fairly specific points when it comes to the crime of treason:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.[119]

Courts have interpreted Article III, Section III, Clause 1's definition of treason to be the most authoritative word on the crime, and while the Constitution grants Congress the explicit power to determine how treason should be punished, the definition of treason itself cannot be "restrict[ed] or enlarge[d]."[120] Because of this, while people may be charged with a violation of the United State Code for treason, the definition of treason contained within the code is

118. *See* U.S. CONST. art. II, § 1, cl. 5 (discussing a thirty-five-year age requirement for presidents); *see also id.* art. I, § 3, cl. 3 (discussing a thirty-year age requirement for senators); *id.* amend. VIII (prohibition of cruel and unusual punishment); *id.* art. I, § 8, cl. 1 (discussing general welfare).

119. *Id.* art. III, § 3, cl. 1–2.

120. Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943).

dependent upon the Constitution.[121] Even if a majority of Americans wished to restrict the definition of treason—perhaps by removing people from its scope like those living abroad as dual citizens, or restricting the types of action that may constitute "giving aid and comfort to the enemy," in a manner more restrictive than that interpreted by the Supreme Court, this cannot be done absent a constitutional amendment.[122] This restriction becomes more pronounced when one considers that the Supreme Court's interpretation of treason and its scope is effectively built into the constitutional provision.

In *Kawakita v. United States*, the Court upheld a conviction for treason against a Tomoya Kawakita, a man who was born in California, but who left to Japan in 1939 shortly before turning eighteen and who stayed in Japan through World War II.[123] Kawakita did not join the Japanese army, but instead worked at the Oeyama Nickel Industry Co., where he worked throughout the war.[124] There, he interpreted communications between Japanese employees of the company and prisoners of war who worked in a mine and factory operated by the company.[125]

Kawakita first attempted to argue that he could not be convicted of treason because he was not an American citizen when these acts occurred, as he had renounced his citizenship.[126] The Supreme Court rejected Kawakita's argument that, as a matter of law, he was no longer a citizen—it noted that there was sufficient evidence that he maintained dual nationality, and that there was evidence that Kawakita retained his American citizenship, including his claim to be an American citizen when he applied for a passport following the war.[127]

The Court then summarized the overt acts that had formed the basis of Kawakita's conviction.[128] These acts included various

121. *See* Chandler v. United States, 171 F.2d 921, 930 (1st Cir. 1948) (noting that the First Congress outlawed treason, and that its prohibition has carried forward and is now codified at 18 U.S.C. § 2381).

122. *See* Kawakita v. United States, 343 U.S. 717, 736 (1952); *see also id.* at 741 ("The crime of treason can be taken of out the Constitution by the processes of amendment, but there is no other way to modify or alter it.").

123. *See id*. at 720.

124. *See id*.

125. *See id*. at 720–21.

126. *See id*. at 721.

127. *See id*. at 722–27.

128. *See id.* at 737–40.

allegations of violence against American prisoners of war, who worked in the mine and factory owned by the company for which Kawakita worked—a company that was producing munitions for the Japanese army during World War II.[129] It affirmed the jury's verdict that these acts "actually gave aid and comfort to the enemy," noting that they were "more than sympathy with the enemy," and that they "tended to strengthen the enemy and advance its interests," rendering prisoners subservient and allowing Japan to divert the effort necessary to control the prisoners to its war effort.[130]

Because the definition of treason is tied to the Constitution, and because the Supreme Court has interpreted the Constitution's definition of treason in *Kawakita*, there are several limits on reform that can be derived from the case.[131] First, treason cannot be limited to exclude dual citizens from its scope.[132] The Court acknowledged that there was sufficient evidence that Kawakita was a dual citizen and, by virtue of his remaining an American citizen, he could be prosecuted for treason.[133] Second, the notion of giving aid and comfort to the enemy cannot be restricted to active combat against the United States. *Kawakita* demonstrates that an attenuated version of "aid and comfort" is sufficient—it is enough to conclude that one's actions against US military personnel that, through a chain of causation, result in a hostile foreign power having greater resources to devote to war against the United States, is sufficient to constitute aid and comfort.[134]

In all likelihood, a majority of Americans do not wish to change the criminal definition of "treason." Indeed, it may be the case that a present supermajority of Americans agrees with the constitutional definition of the crime and the Court's subsequent interpretation of that provision over the years. I flag this example to illustrate the phenomenon of constitutional crimes and the precedent set by the United States Constitution. Were it the case that a majority of Americans disagreed with the Constitution's definition of treason, changing the law would require more than passing a new statute with

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129. *See id*.

130. *Id*. at 741.

131. *See id.* at 733 (discussing the interpretation of the word treason as it appears in the United States Constitution).

132. *See id.*

133. *See id.* at 723–24.

134. *See id.* at 741–42 (discussing the overt acts being sympathetic and "promot[ing] the cause of the enemy").

a majority vote. A constitutional amendment would be necessary—requiring a supermajoritarian two-thirds vote of both the House and Senate, followed by ratification of three-fourths of the states, or a constitutional convention requested by two-thirds of the states.[135] In this way, treason remains a countermajoritarian crime to the extent that a majority of Americans may want to reduce its scope.

The constitutional crime of treason is also a noteworthy example because it includes safeguards against broadening the definition of treason and relaxing the legal requirements for a conviction of treason. The Constitution requires that a conviction for treason be founded on a confession in open court or on the testimony of two witnesses to a particular overt act.[136] By the same token that treason may be a countermajoritarian crime in the event a majority of Americans wish to restrict or eliminate it, treason includes a supermajoritarian check against expanding its definition or loosening the level of proof required to demonstrate treason. In this way, treason, as a constitutional crime, includes inherent checks against the very proliferation criminal laws which has contributed to the demise of criminal law's supermajoritarian nature.[137]

2. State-Level Constitutional Crimes

Every state constitution is longer than the United States Constitution, and many include provisions criminalizing particular conduct. Some of these provisions, like the United States Constitution's treason provisions, describe conduct that is to be criminalized, and leave it to the legislature to work out a specific punishment.[138] But others include provisions that are drafted as standalone criminal laws, defining the crime and specifying the punishment. While some constitutions may be amended through majority votes alone, this subsection addresses constitutional crimes that require supermajoritarian means to narrow or repeal.

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135. *See* U.S. CONST. art. V.

136. *See id.* art. III, § 3, cl. 1.

137. *See* Cover, *supra* note 10, at 903–06 (discussing the effects of criminal law codification).

138. *See, e.g.*, U.S. CONST. art. III, § 3 (defining treason and granting power to Congress to declare punishment).

Multiple state constitutions criminalize bribery and corrupt solicitation.[139] Colorado's constitution, for example, sets forth that "[a]ny civil officer or member of the general assembly who" solicits money, rewards, or other things of value from a company, person, or corporation with the understanding that the official's behavior will be influenced by that thing of value, which serves as consideration for that influence, is deemed guilty of bribery or solicitation of bribery.[140] The constitution goes on to state that the person offering the money or thing of value to an official influence that official's performance of official duties is guilty of bribery, and also notes that corrupt solicitation of legislators or government officers shall be defined by law and punished by fine, imprisonment, or both.[141] Both of these sections provide that punishment of these crimes is to be provided by law.

Colorado's constitution also criminalizes the making of profit by any public officer from the money of the state, county, city, town, or school district money, as well as using this money for any purpose not authorized by law.[142] While the constitution provides that making such a profit is to be "punished as provided by law," it requires that such a crime "be deemed a felony . . . ."[143] As it happens, Colorado's constitution contains the definition of "felony" as well, as "any criminal offense punishable by death or imprisonment in the penitentiary, and none other"—a definition that applies to the constitution and the laws of the state.[144]

Colorado requires a two-thirds supermajority of legislators from both houses to approve any amendments proposed by legislators, which then must be approved by a majority of registered voters.[145] If the constitution is to be amended by convention, a two-thirds vote of both houses is also required to submit the question of whether convention should be held to the voters.[146] Accordingly, should a majority of legislators determine that Colorado's bribery or corrupt solicitation laws should be limited, or that any instances of making a

139. *See, e.g.*, COLO. CONST. art. XII, § 6; ALA. CONST. art. IV, §§ 79–81; IDAHO CONST. art. VII, § 10; KY. CONST. § 173; KAN. CONST. art. II, § 28; MISS. CONST. art. IV, § 50; N.M. CONST. art. IV, § 39 (criminalizing bribery).

140. COLO. CONST. art. XII, § 6.

141. *See id.* art. XII, § 7.

142. *See id.* art. X, § 13.

143. *Id.*

144. *Id.* art. XVIII, § 4.

145. *See id.* art. XVIIII, § 2.

146. *See id.* art. XVIIII, § 1.

profit from public funds should be treated as misdemeanors rather than felonies, this reform will not succeed unless a supermajority of votes in both houses is secured. These laws are therefore countermajoritarian constitutional crimes. Other states with similar measures prohibiting bribery, corrupt solicitation, and making a profit from public funds include Alabama (which requires jail time for any conviction for corrupt solicitation),[147] Idaho (which makes it a felony for an official to profit from public funds),[148] Kentucky (which makes it a felony for a public official to profit from public funds and further calls for disqualification from holding office upon a conviction for such conduct),[149] and Texas (which punishes solicitation of bribes with forfeiture of office).[150] Each of these states have amendment procedures that require a supermajority of votes from the legislature, making these all countermajoritarian constitutional crimes.[151]

So far, the constitutional crimes discussed include treason, bribery, and profiting from public funds.[152] Even for provisions that have been in place for a long while, and even if these provisions are worded or interpreted broadly, there's a strong argument that a majority of the community is fine with this behavior being criminalized. It also makes sense for these provisions to be included in state constitutions. The very legislators with power to change the laws prohibiting corrupt activity may be targeted by these laws and placing these prohibitions in state constitutions, which cannot simply be changed through an act of a majority of legislators, prevents easy revision by corrupt lawmakers. In light of the sensible nature and likely strong support behind these constitutional provisions, is all of this purely academic?

Not quite, because some state constitutional crimes have been the subject of protest and challenge since their enactment. Florida's

147. *See* ALA. CONST. art. IV, §§ 79–81.

148. *See* IDAHO CONST. art. VII, § 10.

149. *See* KY. CONST. § 173.

150. *See* TEX. CONST. art. XVI, § 14.

151. *See* ALA. CONST. art. XVIII, § 284 (explaining that if a proposed constitutional amendment does not apply to only one county or subdivision, it must be approved by three-fifths of all members of the house in which it originates, then by three-fifths of the other house); IDAHO CONST. art. XX, §§ 1, 3 (noting that either a two-thirds vote from each house is required for an amendment to be sent to people for majority approval or to propose a convention to amend the constitution); KY. CONST. § 256 (noting that three-fifths vote of each legislative house is required); TEX. CONST. art. XVII, § 1(a)–(c) (noting that two-thirds vote of both legislative houses is required to send amendment to voters for majority approval).

152. *See supra* notes 117–49 and accompanying text.

constitution includes a detailed provision prohibiting the use of gillnets for taking saltwater finfish, shellfish, or other marine animals, and prohibiting the use of nets with more than 500 square feet of mesh area in "nearshore and inshore Florida waters."[153] The provision contains its own set of definitions, defining, for example, "nearshore and inshore Florida waters" as "all Florida waters inside a line thee miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along the Atlantic Ocean."[154] The penalties are provided via a cross reference to Florida Statutes "section 370.021(2)(a), (b), (c)6. and 7., and (e)."[155] That particular statute is no longer on the books. Instead, article X, section 16's enforcement details are set out in Florida Statutes section 379.407.[156]

Article X, section 16 of the Florida Constitution took effect on July 1, 1995 and has "been the subject of almost continuous litigation since the proposal of the constitutional amendment."[157] In *Lane v. Chiles*, several commercial fishermen brought suit claiming that article X, section 16 violated their procedural and substantive due process rights.[158] The Florida Supreme Court upheld the trial court's dismissal of the plaintiffs' claims, finding that commercial fishermen were not a suspect class, that there was a rational basis for the law, and that the constitutional provision did not deprive the plaintiffs of any fundamental liberty interests.[159] In *State v. Conner*, a fisherman charged with trawling with a net larger than 500 square feet argued that article X, section 16 was unconstitutionally vague, because it did not define the term, "territorial sea base line," and that because there was no basis for distances set forth in the provision, it was impossible to know where it was permissible to fish with nets over 500 square feet.[160] The Florida Court of Appeal held that the provision was not

153. FLA. CONST. art. X, § 16(b).

154. *Id.* § 16(c)(5).

155. *Id.* § 16(e).

156. *See* FLA. STAT. § 379.2422(1), (5) (2022) (providing that it is unlawful to harvest or take marine life with any net that is not consistent with article X, section 16 of the Florida Constitution, and providing that violations of this section are punished as provided in section 379.407(3) of the Florida Statutes); *see also id.* § 379.407(3) (2022) (setting forth penalty scheme for the use of illegal nets).

157. Fla. Fish & Wildlife Conservation Comm'n. v. Wakulla Fishermen's Ass'n, 141 So.3d 723, 725 (Fla. Dist. Ct. App. 2014).

158. *See* Lane v. Chiles, 698 So.2d 260, 262 (Fla. 1997).

159. *See id.* at 263.

160. *See* State v. Conner, 717 So.2d 179, 179–80 (Fla. Dist. Ct. App. 1998).

unconstitutionally vague, highlighting the definitions contained in the constitution that referred to the coastline, and noting other regulations that defined "territorial sea base line" by reference to United States laws.[161] Article X, section 16 weathered these challenges, and others, and remains in place.[162]

The stakes are high for those who would use nets in violation of article X, section 16. Any "flagrant violation" of a statute or rule implementing this constitutional provision (that is, the use of any monofilament net or net with mesh area larger than 2,000 square feet) is a third-degree felony and punishable by up to five years of prison and a fine of up to $5,000.[163] Violations also carry heavy fines and civil penalties, including suspension of licenses, and these penalties increase in severity for those convicted of multiple offenses within a seven-year period.[164]

While the penalties for violating article X, section 16 states that punishment is to be determined by statute, it does not permit the penalties for violations to fall below the baseline of the cross-referenced penalties.[165] Section 16 does, however, permit the legislature to enact more stringent penalties for violations of its provisions.[166] Amendments to Florida's Constitution may be proposed through a joint resolution agreed to by three-fifths of the membership of each legislative house, or through ballot initiatives.[167] These proposed amendments are then placed on ballots submitted to the general electorate, where they only pass if they receive approval of sixty percent or higher.[168] Accordingly, any proposed amendments to Florida's constitutional ban on net fishing, including reducing the size of nets involved, reducing penalty baselines, and reducing the

161. *See id.* at 180–81.

162. *See Wakulla Fishermen's Ass'n*, 141 So.3d at 725–26 ("The provisions of article X, section 16, and the rules adopted to implement the provisions, have been the subject of almost continuous litigation since the proposal of the constitutional amendment.").

163. *See* FLA. STAT. § 379.407(3)(b)(1) (2022) (providing that flagrant violations are a felony of the third degree); *id.* § 775.082(6)(e) (providing that third degree felonies are punished by a term of imprisonment not exceeding five years); *id.* § 775.083(1)(c) (providing that third degree felonies are punished by fines of up to $5,000).

164. *See id.* § 379.407(3)(b)(2)(a)–(d).

165. *See* FLA. CONST. art. X, § 16(e).

166. *See id.*

167. *See id.* art. XI, §§ 1, 3.

168. *See id.* § 5(e).

areas of water in which the net ban is in effect all must be accomplished through supermajoritarian means.

While we're on the subject of Florida, the net ban is not the only constitutional provision that appears to have been lifted from a commercial statute or regulation. Florida's constitution also prohibits the "cruel and inhumane confinement of pigs" while they are pregnant—banning pigs from confinement in enclosures during pregnancy in a manner that prevents the pig from turning around freely.[169] Violation of the provision is a misdemeanor in the first degree.[170] The constitutional provision references a separate statute that notes that first degree misdemeanors are punishable by up to one year imprisonment.[171] The constitutional provision also provides for a fine of up to $5,000 and notes that violators may be sentenced with imprisonment, the fine, or both.[172] As noted above, this is a constitutional provision and therefore can only be removed, limited, or its punishment decreased by means of a supermajoritarian effort in the legislature or electorate.[173] Article X, section 21 does permit that mere legislation may permit "more stringent penalties for violations," however—meaning that the countermajoritarian nature of this constitutional crime is only effective in one direction.[174]

Some constitutional crimes appear in unexpected provisions. Return to Idaho for a moment. Article I, section 4 of the Idaho constitution seems similar to the First Amendment, at least at first.[175]

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169. *See id.* art. X, § 21(a).

170. *See id.* § 21(d).

171. *See id*. (referencing *id.* § 775.082(4)(a) (2022)).

172. *See id.* § 21(d).

173. *See id.* art. XI, §§ 1, 3, 5(e) (explaining Florida's process for constitutional revisions and amendments).

174. *See id.* art. X, § 21(d) (discussing the legal implications for violating the constitutional provision).

175. *Compare* IDAHO CONST. art I, § 4 ("The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes."), *with* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting

Section 4 guarantees the "exercise and enjoyment of religious faith and worship," but soon goes on to note that such a guarantee does not permit dispensing with oaths or the justification of "polygamous or other pernicious practices, inconsistent with morality or the peace and safety of the state."[176] It goes on, prohibiting people and organizations from aiding, abetting, or advising any person "to commit the crime of bigamy or polygamy, or any other crime."[177] Briefly, section 4 includes a sentence analogous to the First Amendment establishment clause—although more specific—prohibiting requirements that people attend particular ministries or pay tithes without consent and stating that no preference be given by law "to any religious denomination or mode of worship."[178] The last sentence contains the constitutional crime: "Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes."[179]

Idaho's state constitution isn't the only one that includes crimes related to marriage. Utah's constitution contains a similar prohibition on bigamy and polygamy.[180] This was required as a condition for Utah to obtain statehood.[181] Oklahoma's state constitution still contains a provision that the state will not recognize marriages between people of the same gender and that issuing a marriage license to a same-sex couple is a misdemeanor.[182] While this provision is unconstitutional in the wake of Obergefell v. Hodges,[183] concerns remain over whether

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the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

176. IDAHO CONST. art. I, § 4.

177. *Id.*

178. *Compare Id.* ("No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship."), *with* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

179. IDAHO CONST. art. I, § 4.

180. UTAH CONST. art. III ("[P]olygamous or plural marriages are forever prohibited.").

181. *See* Utah Enabling Act, § 3, 28 Stat. 107 (1894); Steven W. Fitschen, *Marriage Matters: A Case for a Get-the-Job-Done-Right Federal Marriage Amendment*, 83 N.D. L. REV. 1301, 1353 (2007).

182. OKLA. CONST. art. II, § 35.

183. Obergefell v. Hodges, 576 U.S. 644 (2015).

prohibitions of this sort may gain new legal effect should that opinion be overruled in the future.[184]

The foregoing examples are not meant to be an exhaustive list of constitutional crimes. But they illustrate how state constitutions may surprise those who tend to focus on the United States Constitution. Rather than containing cut-and-dry procedural requirements or broad statements of principles and powers, state constitutions contain a host of other provisions, including those that mirror what one would typically think of as a criminal law statute. Unlike the criminal code, however, many of these constitutional crimes cannot be amended—or, for some, cannot be amended to be less severe. This has the effect of creating the potential for countermajoritarian criminal laws that are part of, or are based on, state constitutional provisions.

A word on that "potential" qualifier in the last sentence: constitutional crimes are not necessarily countermajoritarian. Unlike vetoes of legalization and decriminalization efforts, they do not necessarily involve a distinct act in which a majority of the community (or the community's legislative representatives) takes an action seeking to legalize, decriminalize, or reduce the penalties for particular conduct. Moreover, because most constitutions are enacted through a supermajoritarian process or require a supermajority of votes for amendment, constitutional criminal laws may have supermajoritarian support when enacted.[185] Still, these supermajoritarian laws come at a cost to the extent that any changes—including measures to eliminate crimes or roll back punishments—must be enacted through the same supermajoritarian process. As a result, over time, constitutional crimes may no longer reflect the will of a majority—let alone a supermajority—of the community, and the countermajoritarian nature of these crimes is an obstacle to repeal or reform.

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184. *See* Mark Joseph Stern, *The Supreme Court's Next Target is Marriage Equality. It Won't Be the Last*, SLATE (June 24, 2022, 1:41 PM), https://slate.com/news-and-politics/2022/06/supreme-court-dobbs-roe-wade-obergefell-marriage-equality.html.

185. There are some noteworthy exceptions, including California's constitution, which may be amended through ballot initiatives passed by a majority of voters. *See* CAL. CONST. art. II, § 10(a).

3. Are Constitutional Crimes Truly Countermajoritarian?

Criminal laws that are passed through undemocratic means or that remain in place despite the actions of legislators are relatively simple to label as countermajoritarian. Constitutional crimes are a harder case. As discussed above, constitutional crimes are countermajoritarian to the extent that they cannot be limited or repealed by a majority of legislators.[186] But to the extent that constitutional crimes can only be enacted through the same supermajoritarian requirements, there's an argument that this may mitigate their countermajoritarian nature. A constitutional crime's supermajoritarian origins may insulate it from criticism as a countermajoritarian provision. This complicates whether, and how, constitutional crimes fit into the notions of criminal reform that countermajoritarian criminal law implicates.

This line of reasoning has merit, and critics of constitutions should keep it in mind when calling for reform of constitutional crimes. But the supermajoritarian basis for constitutional provisions does not necessarily absolve a provision of potential countermajoritarian status. To start, a provision may have been adopted far in the past, when a supermajority of voters did not represent a true supermajority of the modern electorate due to the lack of protection for African Americans' and women's voting rights.[187] As Jamal Greene notes of the United States Constitution:

The Constitution of 1787 was submitted to ratifying conventions intended to be representative of relevant members of the population, but, as we all know, those conventions were not in fact representative. Voting for delegates to the state conventions largely excluded women, Indians, blacks, and those who did not own property. The Constitution is as to those marginalized persons as the Zimbabwe Constitution is to the rest of us, and so its authority must follow not from its democratic pedigree but from some other, more inclusive account.[188]

Some state constitutions reflect their age, and the outdated views of the voters who adopted them. Alabama's constitution is a high profile example, as it still contains a ban on interracial marriage[189] and

186. *See supra* Section II.B.

187. *See* Cover, *supra* note 10, at 890–94.

188. Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518 (2011).

189. *See* ALA. CONST. art. IV, § 102.

prohibits "white and colored children" from attending the same schools.[190] While attempts have been made in the past to overturn these provisions, the last major attempt in 2004, which would have eliminated the separate school provision, would have also stricken language stating that children "were not guaranteed the right to a public education," which opponents of reform argued would lead to higher taxes.[191]

Accordingly, while the supermajoritarian nature of constitutional provisions is worth considering, it does not guarantee that constitutional crimes are not countermajoritarian criminal laws. For those constitutional crimes that are indeed outdated, or which contribute to overcriminalization, critics should cite the countermajoritarian nature of these provisions in their critiques. Doing so can amplify how particular constitutional crimes are out of touch with the present electorate and emphasize the acute need for support in order to achieve reform.

C. Local Crimes

A discussion of countermajoritarian criminal law cannot be complete without reference to local offenses—criminal laws passed by towns, cities, counties, and other municipalities—which, by volume, are a substantial part of American criminal law.[192] I am unaware of any accounting of the number of local offenses that exist, which is understandable, as there are nearly 40,000 local governments.[193]

Municipalities criminalize a wide range of behavior, and often do so through imprecise and inconsistent drafting and in a manner inconsistent with state law.[194] Wayne Logan, in the only substantial, systematic examination of substantive local criminal law, surveys local laws prohibiting:

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190. *Id.* art. XIV, § 256.

191. Aaron Blake, *Alabama Was a Final Holdout on Desegregation and Interracial Marriage. It Could Happen Again on Gay Marriage*, WASH. POST (Feb. 9, 2015, 1:00 PM), https://www.washingtonpost.com/news/the-fix/wp/2015/02/09/alabama-was-a-final-holdout-on-desegregation-and-interracial-marriage-it-could-happen-again-on-gay-marriage/.

192. *See* Fissell, *supra* note 9, at 839–40.

193. *See id.* at 840.

194. *See* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OH. ST. L.J. 1409, 1438 (2001).

> [P]ick-pocketing; disturbing the peace; shoplifting; urinating in public; disorderly conduct; disorderly assembly; unlawful restraint; obstruction of public space; harassment over the telephone; resisting arrest; obscenity; nude dancing; lewdness, public indecency, and indecent exposure; prostitution, pimping, or the operation of "bawdy" houses; gambling; graffiti and the materials associated with its inscription; littering; aggressive begging and panhandling; vandalism; trespass; automobile "cruising"; animal control; nuisances; excessive noise; sale or possession of drug paraphernalia; simple drug possession; possession of weapons other than firearms; possession of basic firearms and assault-style firearms; discharge of firearms; sleeping, lying, or camping in public places; driving under the influence of drugs or alcohol; carrying an open container of alcohol; underage drinking; and public drinking and intoxication.[195]

Many of these local crimes are drafted in a manner that Brenner Fissell describes as "*archaic*."[196] These offenses, Fissell notes, tend to be similar to "pre-Model Penal Code offense-drafting methods, in which there was 'a tradition of poor drafting' and confusing or absent culpability requirements."[197] Fissell notes a "*widespread absence* of mental elements in local criminal offenses," and provides numerous examples of strict liability offenses imposed by various municipalities.[198] These offenses include sweeping substances into subway gratings, unauthorized operation of recording devices in public places, destruction or removal of property in buildings or structures, bathing in public, possessing Silly String during Halloween, injuring public property, public urination or defecation, and allowing animals to run at large, as well as local restrictions establishing curfews, restricting firearm discharges, prohibiting the growing of ragweed or poison ivy, forbidding the attachment of posters or handbills to telephone poles, and other offenses.[199]

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195. *Id.* at 1426–28 (footnotes omitted); *see also* Fissell, *supra* note 9, at 839 (identifying Logan's study as the only "in-depth treatment" of the substantive content of local criminal laws).

196. *See* Fissell, *supra* note 9, at 840.

197. *Id*. at 840 (quoting Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 287–88 (2021)).

198. *See id*. at 862–66.

199. *See id*. at 863–66.

These offenses exemplify the proliferation of criminal laws discussed and criticized above. Making matters worse, many of these offenses are processed in municipal courts, which are locally established court systems separate from state judicial systems that frequently lack procedural safeguards observed in other judicial contexts, utilize involved judges—many of whom are not attorneys—who often have close ties with the local politicians who found and run the courts, and often are treated as a significant source of revenue for municipalities through fines imposed on defendants.[200]

Fissell also highlights several other choice ordinances, including Newport News, Virginia's ban on "the activity commonly known as 'trick or treat' or any other activity of similar character or nature under any name whatsoever" for those over twelve years of age. [201] This prohibition does not apply to an accompanying "parent, guardian or other responsible person" who has a child under twelve years of age "lawfully in his custody"—although the accompanying parent or guardian is prohibited from wearing "a mask of any type."[202] Any person, regardless of age, who "engage[s] in playing 'trick or treat' or any other activity of similar character or nature under any name" is forbidden from doing so after 8:00 p.m.[203] Violating any of these provisions is a Class 4 misdemeanor, with a penalty of a fine of up to $250.[204]

While we're visiting the ordinances of Newport News, Virginia, other activities it criminalizes include "abusive language" (cursing or verbally abusing a person or their relatives),[205] using "obscene, vulgar, profane, lewd, lascivious or indecent language" over the telephone,[206] adultery,[207] fornication with any person whom someone "is forbidden by law to marry,"[208] "lewd and lascivious" cohabitation by people who

200. *See* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 974, 979, 1000, 1012–13, 1025–28 (2021).

201. Fissell, *supra* note 9, at 860 n.124 (citing NEWPORT NEWS, VA., CODE § 28-5(a) (2022)).

202. NEWPORT NEWS, VA., CODE § 28-5(a) (2022).

203. *Id.* § 28-5(b) (2022).

204. *See id.* § 28-5(a)-(b) (2022) (providing that violation of this section is a Class 4 misdemeanor); VA. CODE § 18.2-11(d) (2022) (providing that punishment for a Class 4 misdemeanor is a fine of not more than $250).

205. NEWPORT NEWS, VA., CODE § 28-10 (2022).

206. *Id.* § 28-13 (2022).

207. *Id.* § 28-14 (2022).

208. *Id.* § 28-15 (2022). For some perspective on who these forbidden marriages may involve, see generally Loving v. Virginia, 388 U.S. 1 (1967).

are not married to each other,[209] playing loud music in one's home or car,[210] abandoning refrigerators without first removing their doors,[211] and selling stink bombs or itch powder, "or bomb of whatever kind."[212]

What about a far different jurisdiction—say, Los Angeles? Any violation of Los Angeles's municipal code is a misdemeanor, unless explicitly noted otherwise.[213] Accordingly, Los Angeles's municipal code makes it a misdemeanor to allow any animal other than a cat that is not in heat to run at large,[214] possessing more than three dogs or five cats over four months of age in any dwelling unit,[215] letting dogs off leash,[216] feeding coyotes, foxes, possums, raccoons, or skunks,[217] holding bull fights,[218] feeding pigeons in specified areas,[219] killing a

209. NEWPORT NEWS, VA., CODE § 28-16 (2022).

210. *See id*. § 28-36(c)(1)–(2).

211. *See id*. § 28-37.

212. *Id*. § 28-39(a); *cf*. IOWA CITY, IOWA, MUN. CODE § 6-5-3 (1978) (prohibiting "Nuclear Weapons Work" which includes "the development, production, deployment, launching, maintenance or storage of nuclear weapons or components of nuclear weapons").

213. *See* L.A., CAL., MUN. CODE ch. I, art. 1, § 11.00(m) (2022) ("Every violation of this Code is punishable as a misdemeanor unless provision is otherwise made.").

214. *See id.* ch. V, art. 3, § 53.06.

215. *See id.* § 53.06.1(a)–(b).

216. *See id.* § 53.06.2.

217. *See id.* § 53.06.5(a). Violation of this particular section is a misdemeanor punishable by a fine of up to $1,000 and/or by imprisonment in jail for up to six months. *See id.* § 53.06.5(c).

218. *See id.* § 53.40.

219. *See id.* § 53.43. Fortunately, this ordinance provides clear and helpful guidance as to where feeding pigeons is forbidden:

> Beginning at the intersection of the center line of First Street with the center line of Los Angeles Street; thence southwesterly along the center line of Los Angeles Street to the center line of Eighth Street; thence northwesterly along the center line of Eighth Street to the center line of Main Street; thence southwesterly along the center line of Main Street to the center line of Ninth Street; thence northwesterly along the center line of Ninth Street to the center line of Olive Street; thence northeasterly along the center line of Olive Street to the center line of Eighth Street; thence northwesterly along the center line of Eighth Street to the center line of Flower Street; thence southwesterly along the center line of Flower Street to the center line of Ninth Street; thence northwesterly along the center line of Ninth Street to the center line of Figueroa Street; thence northeasterly along the center line of Figueroa Street to the center line of Sixth Street; thence southeasterly along the center line of Sixth Street to the center line of Olive Street; thence northeasterly along the center line of Olive

song bird,[220] failing to clean up dog feces,[221] sacrificing animals,[222] possessing more than one rooster,[223] declawing cats,[224] operating sprinklers so they spray onto sidewalks,[225] skateboarding "on Hermano Drive between its northern boundary at Reseda Boulevard and its southern terminus, which is a cul-de-sac,"[226] and playing ball in the street.[227] Los Angeles's municipal code also prohibits following within one block of a fire truck or other vehicle responding to an emergency call,[228] driving between vehicles in a funeral procession,[229] riding a bicycle without a seat,[230] clinging to a moving vehicle while on a bicycle or roller skates,[231] operating a horse-drawn vehicle in the Central Traffic District between 4:30 and 6:00 p.m.,[232] operating vehicles on private property held open for public use at a speed "greater than is reasonable and prudent. . . ."[233] All of these offenses are misdemeanors, punishable by a fine of $50 or up to five days in jail for a first offense, a fine of $100 and/or up to ten days in jail for a second offense within one year, and a fine of up to $500 and/or up to six months in jail for a third or subsequent offense within one year.[234]

These examples demonstrate the proliferation of crimes that are of uncertain and often overbroad scope. Those unlucky enough to find themselves subject to arrest or prosecution for such crimes may find themselves in a corner of the criminal justice system where procedural safeguards are minimal or absent. All of this is worth

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> Street to the center line of First Street; thence southeasterly along the center line of First Street to the point of beginning.

See id.

220. *See id.* § 53.48.

221. *See id.* § 53.49.

222. *See id.* § 53.67(a)–(c). There are exceptions, however, for animals kept for ritual slaughter for food purposes. *See id.* § 53.67(d).

223. *See id.* 53.71. More than one rooster is permitted for filming purposes, though. *See id.* § 53.71(b).

224. *See id.* § 53.72.

225. *See id.* § 56.10.

226. *Id.* § 56.15.2(a). Violating this provision is an infraction, punishable by a fine of $50 for a first offense, and $100 for subsequent offenses. *See id.* § 56.15.2(b).

227. *See id.* § 56.16.

228. *See id.* ch. VIII, div. F, § 80.25.

229. *See id.* § 80.26.

230. *See id.* § 80.27.

231. *See id.* § 80.28.

232. *See id.* § 80.30.2.

233. *Id.* § 80.31.

234. *See id.* div. 0, § 80.76 (providing penalties for "do[ing] any act forbidden or fail[ing] to perform any act required").

criticizing. But the nature of the local elections that put the officials in place who create these laws to begin with add a further, countermajoritarian dimension to this system.

Local elections are plagued by low turnout. In 2016, reports based on data collected by Portland State University noted that "15 of the 30 most populous cities in the U.S." had voter turnout of "less than 20 percent" in their mayoral elections.[235] Those who vote in local elections tend to be more affluent and older than the average voter.[236] A 2002 report based on a survey of 350 questionnaire responses from California city clerks indicated that while voter turnout for city council elections in California was forty-eight percent of registered voters (and forty-four percent in mayoral races) the percentage of the voting-age population that participated in these elections was thirty-two percent for city council elections and twenty-eight percent for mayoral elections.[237] One of this study's coauthors noted in 2018 that this low turnout in local elections is a national problem, as "only 27 percent of eligible voters vote in the typical municipal election."[238] North Carolina's State Board of Elections (the NCSBE) reported that, in 2021, the percentage turnout in two local elections—one on October 5, 2021, and the other on November 2, 2021, was nine percent and sixteen percent, respectively.[239] The NCSBE compared the 2021 numbers to municipal elections in 2019, 2017 and 2015—for 2019, turnout percentages ranged from thirteen to sixteen percent, for 2017: eight to seventeen percent, and for 2015: eight to fourteen percent.[240]

The upshot of all of this is apparent. The myriad of local crimes are passed by local officials, and if turnout in local elections is low, these laws are not based on the will of a majority of the community. Indeed, the actual voters who elect local representatives may skew

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235. Kriston Capps, *In the U.S., Almost No One Votes in Local Elections*, BLOOMBERG (Nov. 1, 2016, 2:25 PM), https://www.bloomberg.com/news/articles/2016-11-01/almost-no-one-votes-in-mayoral-elections-in-the-u-s.

236. *See* Jan Brennan, *Increasing Voter Turnout in Local Elections*, 109 NAT'L CIVIC REV. 16, 17 (2020).

237. *See* ZOLTAN L. HAJNAL ET AL., PUB. POL'Y INST. CAL., MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING, AND COMPETITION vi (2002).

238. Zoltan L. Hajnal, *Why Does No One Vote in Local Elections?*, N.Y. TIMES (Oct. 22, 2018), https://www.nytimes.com/2018/10/22/opinion/why-does-no-one-vote-in-local-elections.html.

239. *See 2021 Municipal Election Turnout*, N.C. ST. BD. ELECTIONS, https://www.ncsbe.gov/results-data/voter-turnout/2021-municipal-election-turnout (last visited Dec. 29, 2022).

240. *See id.*

certain directions, should trends of older, affluent voter overrepresentation be widespread. Criminal laws that are drafted and enacted by representatives who are elected by a tiny subset of the community are therefore likely to be countermajoritarian criminal laws.

There may be some pushback to this assertion. First, one may argue that because processes are in place for the democratic election of local officials, the laws these officials enact are representative because the community has the capacity to vote, but a majority simply choose not to. This response leaves much to be desired. It assumes that low turnout is due to a choice, rather than a lack of knowledge about impending elections or the candidates, or barriers in place that lower turnout.[241] Additionally, even if some voters choose not to vote, it is a leap to infer that whatever officials are ultimately elected by a minority of the electorate are therefore representative of abstaining voters' views. Someone who does not vote for a candidate does not necessarily support that candidate's positions—indeed, one may abstain from voting because one finds all candidates undesirable.

Another potential objection is that local crimes are not necessarily countermajoritarian. Even if they are enacted by officials elected by a tiny percentage of the community, the criminal laws they enact may be in line with the sentiments of a majority, or even supermajority, of the community. To an extent, this objection may be correct. Unlike vetoes of bills that decriminalize or legalize certain conduct, there is no event that evidences that a majority of legislators believes that a particular criminal law should be repealed or reformed. Still, the absence of such evidence does not eliminate the possibility, or probability, that local crimes are countermajoritarian. And this probability increases dramatically in cases of particular laws that are obscure and outdated. Consider, for example, the Newport News, Virginia ordinances prohibiting adultery and intimate relations between people who are "forbidden" from marrying.[242] There is a high likelihood that outdated, rarely enforced laws like these are not in keeping with the opinions of a majority of the community.[243] Even

241. For an extensive discussion of such barriers, see generally CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018).

242. *See* NEWPORT NEWS, VA., CODE § 28-14 (2022); *id.* § 28-15 (2005).

243. *See generally* JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127 (2014) (describing the history of laws against adultery and fornication, and the decrease in prosecution under these laws).

if these laws are unconstitutional or rarely enforced, their continued existence on the books may still be used as a basis for arrests and prosecutions.[244]

While local crimes may not necessarily be countermajoritarian, low turnout for local elections, and the role of these crimes in the proliferation of criminal laws in general warrant further scrutiny. As will be discussed in further detail in the next section, ongoing evaluation of criminal laws and their potential countermajoritarian status is crucial, as laws which may have once been supported by a majority of the community may fall out of favor.[245]

IV. THE IMPLICATIONS OF COUNTERMAJORITARIAN CRIMINAL LAWS

In light of the examples of countermajoritarian, or potentially countermajoritarian, criminal laws set forth above, this final section discusses the relevance of these laws to criminal law theory and to discussions over how to reform the criminal justice system. While instances of countermajoritarian criminal law are frequently the subject of criticism, amplifying their countermajoritarian nature and the relevance of democratic representation may bolster this criticism and provide new avenues for advocating positive reforms.

The proliferation of criminal laws presents a number of problems. Being subject to the criminal justice system—even if one's involvement is limited to a stop, detention, or arrest without an eventual prosecution or conviction—can be a time-consuming and harrowing experience.[246] Undergoing prosecution and pretrial proceedings adds to the burden.[247] And a conviction for a crime, even a misdemeanor, can result in extensive consequences—ranging from an immediate fine and jail time, to long term consequences including the loss of jobs, housing, and benefits.[248]

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244. *See id.* at 170–71 (noting that judicial challenges to abortion and fornication laws are unlikely due to a lack of standing and warning that people may still be prosecuted under these laws).

245. *See* Cover, *supra* note 10, at 923 (The problem of the "time lag between contemporary community values and outdated yet still binding criminal legislation" and that solving such a time lag through mandatory sunset clauses may "bolster the *supermajoritarian* bona fides of the criminal law.").

246. *See* CARBADO, *supra* note 4, at 1–11; *see also* KOHLER-HAUSMANN, *supra* note 4, at 184–91.

247. *See* FEELEY, *supra* note 4, at 235–41.

248. *See* NATAPOFF, *supra* note 1, at 20.

These consequences show what is at stake in discussions of criminalization and in governments' decisions to criminalize particular behavior. Every additional crime that a government enacts or permits to remain on the books is a potential avenue for people in that particular jurisdiction to be drawn into the criminal justice system. Misdemeanors and infractions, in particular, tend towards proliferation and expansion. While these crimes have long gone under-analyzed, promising recent scholarship delves into the nature of these crimes, the scope of behavior they permit, and the consequences they have on communities at large.[249]

Countermajoritarian criminal laws are pronounced examples of the proliferation of criminal laws and how this phenomenon undermines the role of democratic government. Countermajoritarian criminal laws remain on the books, even if they are a product of a majority that has long since died or dissolved.[250] Countermajoritarian criminal laws resist reformation, either by way of constitutional safeguards or through vetoes. As a result, people remain subject to a set of criminal laws that a majority of a particular community does not, in fact, wish to criminalize. This, in turn, undermines any expressive justification for prosecuting and punishing people under these laws and threatens to undermine society by permitting the prosecution of people based on the inclinations of a political minority.[251]

Communities should investigate whether they are subject to countermajoritarian criminal laws. Those criminal laws that remain on the books without support should be repealed or amended on democratic grounds. Those seeking reform of criminal laws should target countermajoritarian criminal laws as prime targets for reform or elimination. The fact that such laws lack the support of a majority of a particular community make them particularly susceptible to reform or elimination. Those laws that are sufficiently contrary to modern sentiments—for example, outdated laws that are likely

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249. For examples of recent scholarship illuminating the impact of misdemeanor criminal laws, see generally *id.*; KOHLER-HAUSMANN, *supra* note 4; HESSICK, *supra* note 6; Fissell, *supra* note 9; Woods, *supra* note 12.

250. *See* Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1345 (2008) ("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.").

251. *See* Cover, *supra* note 10, at 892–94, 896.

unconstitutional[252]—may be a source of support, enthusiasm, and momentum for reforming countermajoritarian criminal laws.

These arguments should also be used to counter attempts at enacting new criminal laws. The notion that politicians should be "tough on crime," has already faltered in the face of "[t]he staggering costs of mass incarceration."[253] The undemocratic nature of countermajoritarian criminal laws is another basis to warn legislators from enacting crimes based on passing fads or concerns. Criminal laws that are flagrantly countermajoritarian should not only be the subject of reform efforts but should also be collected as examples that warn against further criminalization.

Similarly, vetoes of criminal justice reforms should be overruled, if possible, and the vetoing of bills designed to roll back criminal penalties or legalize certain behavior should be criticized as anti-democratic contributions to overcriminalization. Unlike constitutional crimes and local offenses, vetoed legalization and decriminalization measures necessarily involve an instance of a legislative majority taking explicit action to strike or limit an aspect of criminal law. This is a clear signal that a majority of constituents want to see the law overturned or reformed. Those seeking this reform should emphasize the undemocratic nature of the veto, and that a veto of a decriminalization effort seeks to maintain the criminalization of behavior that a majority of the population no longer wishes to criminalize. By connecting veto practices with the arguments for a majoritarian—even supermajoritarian—system of criminal law, legislators have a stronger political posture for ensuring that their reforms are ultimately passed.

Vetoes, however, should not be universally condemned. Veto practices that prohibit increased criminal penalties or additional crimes should be welcomed by those seeking criminal justice reform. As discussed above, California's former governor, Jerry Brown, took such an approach to several bills during his final tenure in office by refusing to pass bills that added crimes or increased criminal penalties to California's already lengthy penal code.[254]

Structural changes proposed elsewhere in the literature may also be of particular relevance to counteracting and preventing further

252. *See, e.g.*, NEWPORT NEWS, VA., CODE §§ 28-14, 28-15 (2022) (prohibiting adultery and intimate relations with those whom one is "forbidden" to marry).

253. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1374 (2012).

254. *See* Lagos, *supra* note 109 (comparing the stark differences in legislation between former Governor Brown's first and second terms as governor).

countermajoritarian laws. Richard Myers proposes one such example, arguing for a criminal sunset amendment to the United States Constitution that would prohibit criminal laws from remaining in effect for more than twenty-five years after their passage.[255] Myers notes that such a law would test society's commitments to criminal laws, as there is limited time for legislatures to consider and pass bills, and they would need to be more careful in choosing what laws to enact if they are required to reenact these prohibitions every twenty-five years.[256]

While Myers' proposal for an amendment to the United States Constitution may be politically unfeasible, his suggestion is still informative. States may consider adding such a sunset amendment to their constitutions, an effort that would still require strong political support, but would not require the intense nationwide support necessary for amending the United States Constitution. Alternatively, state legislatures may take Myers' arguments to heart and amend existing legislation to include such sunset provisions or require additional laws to incorporate sunset provisions.

Joel Johnson, citing Alexander Bickel, notes several potential critiques of sunset provisions on criminal laws as creating too much work for the legislature or "'ensur[ing] paralysis'" and would include laws that are "inherently immoral, such as murder."[257] If the first part of this objection is correct, however, and a sunset provision of twenty-five years would lead to legislative paralysis, this proves critics' point that criminal laws are too extensive. As for the risk that crimes like murder and other intentional bad acts will be swept up with the myriad of other crimes, one would expect that these would be among the laws the legislature deems worthy of keeping. A sunset provision is a dramatic remedy, but such remedies are needed in the face of a severe problem. And as Bickel himself acknowledges, "greater strength must be mobilized to repeal a statute than to resist its enactment."[258] This structural feature enables countermajoritarian to

255. *See* Myers, *supra* note 250, at 1361–62 ("Under the proposed law, approximately four percent of the criminal laws would be subject to sunset each year, on a rolling basis."); *see also* Cover, *supra* note 10, at 923 (noting that a sunset provision requirement would make it more likely that laws reflect supermajoritarian support).

256. Myers, *supra* note 250, at 1363–64.

257. Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 129–30 (2022) (quoting Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961)).

258. Bickel, *supra* note 257, at 63.

exist and may be overcome by a sunset provision. Additionally, these critiques apply to a blanket sunset provision governing all criminal laws in a jurisdiction—they do not apply to the notion of adding sunset provisions in a piecemeal fashion to existing legislation or requiring them for new criminal laws.

Johnson suggests another approach to combating overcriminalization that is worth considering as well: the notion that judges combat overcriminalization through a modern version of desuetude—the principle that judges should "abrogate crimes following a long period of non-enforcement in the face of open disregard."[259] Johnson notes that this approach may help excise long-unenforced "dead laws" from the criminal law, and is therefore relevant to the extent that many of these outdated, unenforced laws are countermajoritarian.[260] Johnson's proposed modern desuetude approach consists of two steps: (1) a defendant must make "prima facie showing" that for some material period of time there has been no "meaningful enforcement [of the law] in the face of open disregard"; and (2) that, upon such a showing, the government must demonstrate that the law survives intermediate scrutiny—that is, the law advances a substantial government interest and that the interest is directly advanced by the criminal law.[261] Notably, for the purposes of the first step of the test, "meaningful enforcement" does not include instances where a law has been used as a pretext "to justify searches and seizures."[262]

Johnson contemplates avoiding objections that this approach violates the separation of powers by enacting legislation confirming the desuetude approach, or incorporating a basis for the approach into state constitutions, but rejects these approaches as vulnerable to appeal (in the case of legislation) and unlikely to be enacted (in the case of legislation and particularly in the case of state constitutional amendments).[263] Instead, Johnson proposes applying the desuetude approach through existing constitutional law at the state and federal level, arguing that doing so via "federal due process" is the ideal

259. Johnson, *supra* note 257, at 98.

260. *See id.*

261. *See id.* at 131–33 (explaining Johnson's modernized two-step approach to combating overcriminalization).

262. *Id.* at 132.

263. *See id.* at 135–36 (proposing mechanisms to implement desuetude approaches in the American legal system).

approach.[264] Johnson argues that a due process argument is feasible because of the desuetude principle's relationship to vagueness doctrine, and notes that both the desuetude principle and vagueness doctrine share the goal of preventing surprise prosecutions.[265] Johnson suggests that such an approach would "solve the separation-of-powers objection" that prevents courts from adopting the doctrine on non-constitutional grounds.[266]

Johnson's desuetude approach is notable but faces significant obstacles. First, it is unclear how even an approach grounded in due process would avoid separation of powers concerns. Were courts to overturn numerous criminal laws on the basis of due process provisions—which say nothing explicit about voiding criminal laws after periods of disuse—this would likely incite separation-of-powers criticism sounding in concerns over judicial review run amok. Second, at least at the Supreme Court level, whether the Court would expand substantive due process in a manner that would permit the desuetude approach is, at best, unknown, and, at worst, highly unlikely. The Court's recent decision in *Dobbs v. Jackson Women's Health Organization* took a restrictive approach to substantive due process, holding that any right implicitly protected by the Fourteenth Amendment's Due Process Clause must be "deeply rooted" in the Nation's "history and tradition" and "implicit in the concept of ordered liberty."[267] The Court applied this approach to conclude that there was no such deeply rooted right to abortion protected by the Due Process Clause.[268] With a Court's hardline approach to substantive due process in the case of implicit rights, it is a stretch to argue that Due Process may serve as an avenue to implementing the desuetude approach. Third, Johnson's formulation of the first step of the desuetude approach precludes instances of enforcement in which laws are only enforced as a pretext to stop people to investigate whether they have violated other crimes.[269] Given the Court's refusal to give significant effect to pretextual stops in its Fourth Amendment

264. *Id.* at 136.

265. *See id* at 136–37 (outlining the reasons why a desuetude due process principle would complement the Vagueness Doctrine).

266. *Id.* at 136.

267. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg 521 U.S. 702, 721 (1997)).

268. *See id.* at 2261.

269. *See* Johnson, *supra* note 257, at 132.

jurisprudence, it is unlikely that pretextual enforcement will be given strength in the context of desuetude.[270]

This doesn't mean that the desuetude approach should be counted out. Implementing a desuetude doctrine through legislation is still an option, as is implementing the approach through due process provisions in state constitutions. This latter approach, in particular, may give state courts a way to ground the desuetude approach in constitutional law without running aground on the Supreme Court's restrictive interpretation of federal substantive due process doctrine.[271] Additionally, while legislation or amendments that would permit a desuetude approach may face pushback or objections, emphasizing countermajoritarian criminal laws in the manner proposed above may gain support for these reforms. Under this framing, desuetude is not an abstract notion that empowers judges to overturn legislatures—it is a crucial tool to ensure that criminal laws remain responsive to the democratic will of the community.

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The reforms addressed above are all possibilities, but one must acknowledge the practical limits of reforms pronounced in the pages of a law review article. Myers proposed his sunset provision in 2008, yet overcriminalization continues. Desuetude is rare—available as a defense only in West Virginia.[272] Political barriers to legalization and decriminalization exist, resulting to an extent from concern over appearing weak on crime, but also as a result of inertia.[273] There are a lot of criminal laws out there, and likely many that remain in place contrary to the desires of political majorities.

But when it comes to reforming criminal law and combatting overcriminalization, the simple act of *identifying* the phenomenon of countermajoritarian criminal laws, pointing out examples, and including them in discussions of criminal reform and the democratic legitimacy of criminal laws is a crucial step. This act of identification is the primary aim of this article.

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270. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (holding that the constitutional reasonableness of a traffic stop does depend on the actual motivations of the individual officers).

271. *See* Johnson, *supra* note 257, at 139–40 (suggesting that states adopt due process desuetude doctrines even if Federal courts do not yet recognize them).

272. *See id.* at 128.

273. *See* CALABRESI, *supra* note 108, at 164.

Once countermajoritarian criminal laws become part of the vocabulary, they become one additional reason for sunset provisions, one additional reason to consider a revived and enhanced doctrine of desuetude, and one additional reason for legislators to consider criminal law provisions on the book with an eye to whether they are worth maintaining. The primary purpose of identifying countermajoritarian criminal laws is to inspire, guide, and provide an argumentative basis for individual reform efforts directed at particular countermajoritarian prohibitions and punishments. Through a series of reform efforts aimed at individual state and municipal laws, change is possible.

V. CONCLUSION

Those who argue for a supermajoritarian criminal justice system are onto something. Historic support for supermajoritarian institutions like the criminal jury, and theoretical justifications for supermajoritarian criminal laws are compelling reasons to support efforts that push federal, state, and local criminal laws to become more representative of the will of the overwhelming majority of the community. The pervasive, negative impacts of overcriminalization—particularly with respect to misdemeanor and municipal crimes—warrants efforts to scale back the scope of the criminal law and caution in criminalizing additional behavior.

In the push to make the criminal law more responsive to the will of the communities subject to that law, countermajoritarian criminal laws should be part of the conversation. They represent instances where the supermajoritarian and majoritarian ideals of criminal law and punishment are at their weakest. They are also laws that may be prioritized in pushing back against trends of overcriminalization. As points where the will of the community to criminalize behavior is at its weakest, laws may be more vulnerable to change and reform. Repeal or reform of these laws may, in turn, build momentum, serve as success stories, and prompt further change.