This article considers the results on our system of a constitutional amendment that would meet Jefferson’s concerns and create a 25-year limitation on the effect of all criminal legislation. It recounts several claims that have arisen in the literature: First, that criminal law is different in kind than civil law, and can and should be treated differently. Second, that there is an excess of criminal law. And third, that that excess has costs that are both obvious and non-obvious. It then explores the effect on each of these claims of the use of mandatory sunsets as a way to ration, and therefore rationalize, the criminal law.

It suggests that the results would be mixed, and would result in a very different system than the one we have today. On the plus side of the ledger, it would permit each generation to choose for itself the behavior it believes worthy of moral condemnation. It would force regular legislative oversight of the status of the criminal code in each of the several states and the nation. It would reset the checks and balances bar in favor of liberty when any criminal legislation is proposed, either newly or for reenactment. Additionally, it would redistribute power between the branches by reducing the incentives under the current system to turn to the courts to create new conceptions of substantive due process or constitutional law to redress perceived process failures. Political debates would be reinvigorated as the key actors in each generation were asked to decide where the nation or the state should stand on issues.