

DESUETUDE

Like the cicadae that will from time to time descend upon the Finger Lakes region of upstate New York,¹ desuetude is a concept that occasionally appears in the criminal law literature but usually remains dormant.² This Note represents the latest reemergence of that brood. In twenty-one pages, the doctrine surfaces from its own period of neglect and sings a new song, with this refrain: criminal law calls for the self-correction mechanism that desuetude provides. In this iteration of the cicadic rhythm, it is hoped that desuetude will burst through the husk of formalistic and erroneous analysis that has, to this point, constrained the doctrine's proper growth.

Desuetude, the obscure doctrine by which a legislative enactment is judicially abrogated following a long period of nonenforcement, currently enjoys recognition in the courts of West Virginia and nowhere else.³ This Note joins a chorus of scholars from the past century who hold out desuetude as a sensible doctrine that should be incorporated into American law.⁴ The best argument in favor of desuetude might

¹ This collection of insects is known in the entomological community as Brood VII and is comprised of cicadae of the species *Magicicada septendecim*. Once every seventeen years, these insects emerge from the ground, molt, and then engage in a short period of courtship that results in the laying of a new batch of eggs. The parents perish shortly thereafter. See P. Collinson, *Some Observations on the Cicada of North America*, in 54 PHILOSOPHICAL TRANSACTIONS, GIVING SOME ACCOUNT OF THE PRESENT UNDERTAKINGS, STUDIES, AND LABOURS, OF THE INGENIOUS IN MANY CONSIDERABLE PARTS OF THE WORLD 65, 65–68 (London, Royal Society 1764); Wikipedia, *Magicicada*, <http://en.wikipedia.org/wiki/Magicicada> (last visited Apr. 9, 2006).

² The timing of desuetude scholarship is admittedly less reliable than a cicada brood's cyclical emergence; it has been twenty-four years since the last truly insightful discussion of the concept. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 17–30 (1982). *But cf. infra* notes 4, 6 (citing post-1982 sources). Of course, this is not to suggest that the present work approaches Judge Calabresi's in terms of scope or ability.

³ See *State v. Donley*, 607 S.E.2d 474, 479–80 (W. Va. 2004) (applying the doctrine of desuetude in a case involving felony concealment of a minor child). A Connecticut appellate court discussed desuetude doctrine in dicta but passed on the question because it had not been raised by the defendant in the court below. See *State v. Linares*, 630 A.2d 1340, 1346 n.11 (Conn. App. Ct. 1993).

⁴ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 143–56 (1962); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 96 (1990); CALABRESI, *supra* note 2, at 17–30; Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 58–64 (1961); Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 591–94, 597–98 (2001) [hereinafter Stuntz, *Pathological Politics*]; William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 34–38 (1996) [hereinafter Stuntz, *Civil-Criminal Line*]; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 67–68 (1997) [hereinafter Stuntz, *Uneasy Relationship*]; Mark Peter Henriques, Note, *Desuetude and Declara-*

also be the simplest. In the words of one commentator, “it is part of the intelligent cooperation the courts owe the legislature to relieve it from the burden of seeking out and repealing statutes that clearly serve no modern purpose.”⁵ But the judicial abrogation of obsolete statutes raises constitutional questions that outpace such pragmatic argumentation and demand for their resolution a more theoretical approach. On both sides of the issue,⁶ the arguments that have slowly unfolded over the past century leave much to be desired. This Note attempts to remedy the deficiency.⁷

I. DESUETUDE: ABRIGATION BY NONENFORCEMENT

A. *Desuetude Doctrine in the Courts*

As pleasing as it is to the ear, the word “desuetude” — meaning “the condition or state into which anything falls when one ceases to use or practise it”⁸ — is one that rarely appears in everyday speech. Use of the term is hardly more frequent in English-language discussions of the law. When employed in the latter context, desuetude describes the doctrine by which a legislative enactment is judicially abrogated following a long period of intentional nonenforcement and notorious disregard.⁹

tory Judgment: A New Challenge to Obsolete Laws, 76 VA. L. REV. 1057 (1990); Note, *Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 HARV. L. REV. 1181 (1951).

⁵ Note, *supra* note 4, at 1184.

⁶ Arrayed against the pro-desuetude offerings, *see supra* note 4, one finds an equally intervallic anti-desuetude literature. *See, e.g.*, CARLETON KEMP ALLEN, *LAW IN THE MAKING* 270–73 (1927); JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 189 (Roland Gray ed., 2d ed. 1921); 2 NORMAN J. SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 34:6 (6th ed. 2001); Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81–83 (1976); Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449; *Enforcement of Obsolete Laws*, 67 CENT. L.J. 141 (1908); Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLAMETTE L. REV. 1 (1999); Appleton Morgan, *American Law and the Desuetudo*, 50 AM. L. REV. 815 (1916); J.R. Philip, *Some Reflections on Desuetude*, 43 JURID. REV. 260 (1931); Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1 (1966); Legislation, *The Elimination of Obsolete Statutes*, 43 HARV. L. REV. 1302 (1930); *see also, e.g.*, Poe v. Ullman, 367 U.S. 497, 511 (1961) (Douglas, J., dissenting) (asserting desuetude to be “contrary to every principle of American or English common law”).

⁷ It is hoped that the theoretical contribution offered in this Note will find favor with as broad an audience as possible. Accordingly, the analysis is conducted in very general terms that could apply in either state or federal judicial systems.

⁸ 4 THE OXFORD ENGLISH DICTIONARY 540 (2d ed. 1989).

⁹ But as one student commentator notes, “[t]he definition of desuetude depends to some extent upon the author of the treatise or opinion.” Henriques, *supra* note 4, at 1068. For a sample of the mildly varying definitions, see BLACK’S LAW DICTIONARY 479 (8th ed. 2004); 1A NORMAN J. SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 23:26 (6th ed. 2002); Bonfield, *supra* note 4, at 395–96; and Philip, *supra* note 6, at 260–61. For reasons that become

The legal foundation of desuetude begins with the Roman jurist Julian, who wrote that “statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.”¹⁰ From these Roman-law roots, desuetude found its way into several legal traditions.¹¹ Of particular interest is the argument of the German Historical School (chiefly Savigny) recognizing the legitimacy of desuetude. On this view, desuetude is an affirmative creation of quasi-law, stemming from the *Volksgeist*, or the “historically developed legal consciousness of a particular people.”¹² However, the argument from the civil law tradition is of little use in this country, relying as it does on a conception of customary lawmaking that is foreign to the common law tradition.¹³

What of those American jurisdictions that have accepted the doctrine? Little effort is needed to canvass the relevant case law, given that West Virginia alone recognizes desuetude as a valid defense. In *Committee on Legal Ethics v. Printz*,¹⁴ the Supreme Court of Appeals of West Virginia described a three-part inquiry for determining whether to abrogate a desuete penal statute: the crime in question must be *malum prohibitum*; there must be “open, notorious, and pervasive violation of the statute for a long period”; and there must be a conspicuous policy of nonenforcement.¹⁵ Earlier decisions in other state courts recognizing the doctrine have been overturned,¹⁶ leaving West Virginia as an outlier in this field.

clear in Part II, this Note follows prior courts and commentators in referring to desuetude doctrine as it relates to criminal statutes.

¹⁰ DIGEST 3.32.1, *quoted in* Bonfield, *supra* note 4, at 395. In the Roman tradition, custom was as valid a means of making law as was a legislative enactment. Not surprisingly, then, the gradual development of a custom against enforcement of or obedience to a certain law was sufficient to rob the initial enactment of legal validity, the custom having been established as the later-in-time statement of law. *See* Bonfield, *supra* note 4, at 395–96.

¹¹ The most notable tradition is Scotland’s. *See, e.g.*, J. ERSKINE, PRINCIPLES OF THE LAW OF SCOTLAND 7 (21st ed. 1911). For a comparative study of desuetude doctrine, see generally Note, *Judicial Abrogation*, *supra* note 4. *See also* Bonfield, *supra* note 4, at 395–409.

¹² Bonfield, *supra* note 4, at 398; *cf.* RUDOLPH SOHM, INSTITUTIONEN GESCHICHTE UND SYSTEM DES RÖMISCHEN PRIVATRECHTS 23 n.4 (1949) (“[N]icht die Willkür des Gesetzgebers, sondern die geschichtliche Entwicklung des ‘Volksgeistes’ bestimmt den Inhalt des Rechts.” [“It is not lawmakers’ arbitrariness, but rather the historical development of the ‘Volksgeist,’ that determines the law’s content.”]).

¹³ *See, e.g.*, 1A SINGER, *supra* note 9, § 32A:16.

¹⁴ 416 S.E.2d 720 (W. Va. 1992).

¹⁵ *Id.* at 726. The court explained: “These criteria allow only those statutes whose enforcement would violate due process to die a desuetudinal death.” *Id.*

¹⁶ *See, e.g.*, Hill v. Smith, Morris 70 (Iowa 1840), 1840 WL 2834 at *7 (Iowa Terr.) (“[W]e pronounce it contrary to the spirit of that Anglo-Saxon liberty which we inherit, to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force.”), *overruled by* Pearson v. Int’l Distillery, 34 N.W. 1, 5–6 (Iowa 1887).

In *United States v. Elliott*,¹⁷ the principal discussion of desuetude by a federal court, a judge in the Southern District of New York suggested that desuetude might be a winning defense if framed in terms of a due process or equal protection challenge to an obsolete law.¹⁸ But, since the discourse in *Elliott*, no federal court has invalidated a desuete criminal statute on such grounds. Professor Cass Sunstein, among others, suggests that desuetude was in play in *Lawrence v. Texas*,¹⁹ in which the Supreme Court invalidated a homosexual sodomy statute that had never before been enforced against consenting adults acting in private.²⁰ The unexpected revival of a dead-letter law certainly gives rise to a feeling of injustice; but this sense of unease was at most a background factor in *Lawrence*, a heuristic that helped lead the majority to a “fair” result. Realizing as much, Professor Sunstein goes only so far as to say that protection of morality loses its force as a legitimate government interest under rational basis due process review as a result of desuetude, since the statute’s obsolescence is indicative of a shift in public morality.²¹ This is a clever argument, but it is something short of a true desuetude doctrine defense. Hence Professor Sunstein’s television-nostalgic label for his argument, which he calls “Desuetude, American style.”²² Traditional application of the doctrine is an abrogation not of the rational basis offered to satisfy minimal substantive due process scrutiny, but of the statute itself. This is the difference between “Desuetude, American style” and “Desuetude, *desuetude* style.” So when someone responds to the prompt of “desuetude” by asking, “Oh, like in *Lawrence*?”, the proper response is, “Not really.”

As the preceding discussion demonstrates, there has not been a concerted effort in the American judicial system to craft a doctrinal approach to desuete statutes that can be broadly and easily applied. As a result, incorporating desuetude raises significant problems of administrability, judicial competence, and potential for prosecutorial

¹⁷ 266 F. Supp. 318 (S.D.N.Y. 1967).

¹⁸ See *id.* at 325–26. There have been other federal court discussions of desuetude. See *Cent. Nat’l Bank of Mattoon v. U.S. Dep’t of Treasury*, 912 F.2d 897, 906 (7th Cir. 1990) (Posner, J.) (leaving open the propriety of a desuetude defense while ruling against the litigant on the issue); *United States v. Jones*, 347 F. Supp. 2d 626, 628–29 (E.D. Wis. 2004) (assuming validity of desuetude doctrine but denying its applicability to the case at hand); *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1083 (D. Colo. 1999) (discussing the doctrinal requirements of the defense); see also *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (implying that a Connecticut birth control statute had been reduced by nonuse to “dead words of . . . written text”).

¹⁹ 539 U.S. 558 (2003).

²⁰ See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 30 (2003).

²¹ See *id.*

²² *Id.*

subversion.²³ This Note brackets these concerns for future scholars or, better still, for judges applying the doctrine, and focuses instead on the more abstract arguments for and against judicial abrogation of unenforced statutes.

B. *The Anti-Desuetude Argument*

What accounts for the courts' chilly reception of desuetude doctrine? A single thread of argument runs through the anti-desuetude pronouncements of the past century. Consider this statement from the editors of the now-defunct *Central Law Journal*:

[Judicial abrogation of dead-letter statutes] is absolutely violative and destructive of our three-fold scheme of government. If the executive and judicial departments of government can thus combine to nullify the work of the legislative department the latter arm of the government becomes instantly powerless and atrophied by the severe restraint thus imposed upon it.²⁴

Herein lies the principal objection to the defense of desuetude: the legislature alone has the power to make criminal laws, and it is for that same²⁵ legislature to decide whether to repeal a statute that has come to be viewed as obsolete. Because the judicial branch is not the legislative branch, courts cannot abrogate an unambiguous statute on grounds of obsolescence.²⁶ *Q.E.D.!*

Consider also the following statements from various commentators, all of which indicate that the reluctance to embrace desuetude stems from a countervailing adherence to separation of powers.²⁷ According to a leading treatise on statutory construction, “[t]he doctrine of separation of powers stands in the way of holding that a legislative enactment which complies with constitutional requirements can be rendered ineffective by nonuse or obsolescence or repealed by failure

²³ See 1A SINGER, *supra* note 9, § 32A:16; Stuntz, *Uneasy Relationship*, *supra* note 4, at 73; Legislation, *supra* note 6, at 1304 & n.25. Future efforts to construct a useable doctrine might begin with the opinions of the West Virginian and Scottish courts that have addressed the issue.

²⁴ *Enforcement of Obsolete Laws*, *supra* note 6, at 141–42.

²⁵ “Same” is used in the institutional sense of the word, not the transtemporal sense. See generally William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 COLUM. L. REV. 1902 (1993).

²⁶ At least one commentator accuses the executive of violating the separation of powers norm in cases of desuetude. See *infra* note 32 and accompanying text. Apprehension as to the power-grabbing tendencies of the executive and judicial branches seems to be a relatively recent innovation. Cf. THE FEDERALIST NO. 48, at 309 (James Madison) (Isaac Kramnick ed., 1987) (“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” (emphasis added)).

²⁷ Or, more accurately, an adherence to a *formalistic* understanding of separation of powers. See *infra* note 90.

of those entrusted with its administration to enforce it.”²⁸ This sentiment echoes throughout academic commentary on the issue. In 1930, one commentator suggested that “the dangers are patent in allowing a judge, on the evidence before him, to decide that custom has abrogated a statute; such action would seem to have no place in a polity organized with a legislature theoretically responsive to public opinion.”²⁹ In 1931, a clever Scotsman noted that desuetude shifts error-prone obsolescence inquiries from Parliament to the courts, concluding that “the doctrine of desuetude is calculated to occasion more ‘sad debates’ than it obviates.”³⁰ In 1966, two professors argued that “repeal of desuetudinal statutes and the prevention of latent abuses to which they are subject is primarily a legislative matter.”³¹ In 1977, another professor explained, “[t]he basis of this consistent rejection of desuetude by the courts is a respect for the doctrine of separation of powers. . . . [T]he rejection of desuetude is only superficially a limitation on the judiciary. Its essence is a limitation on the executive.”³² And in 1999, this pronouncement: “Desuetude strikes at the core of the legislature’s power to make and repeal statutes, on the basis of political consensus. As such, desuetude permits the judiciary to encroach on powers reserved by the state constitution to the legislature.”³³

Lurking in the background of this anti-desuetude position is the countermajoritarian critique that is often leveled against judicial review.³⁴ In simplified form, the argument runs as follows: The judiciary is not a politically accountable branch,³⁵ and so judges are unqualified to pick and choose which laws to uphold and which to strike

²⁸ 1A SINGER, *supra* note 9, § 23:26 (citing *Standard Oil Co. v. Fitzgerald*, 86 F.2d 799 (6th Cir. 1936); *Int’l Tel. & Tel. Corp. v. United States*, 536 F.2d 1361 (Ct. Cl. 1976)); *Pac. Shrimp Co. v. U.S. Dep’t of Transp.*, 375 F. Supp. 1036 (W.D. Wash. 1974); *see also* 2 SINGER, *supra* note 6, § 34.6 (citing *United States v. Will*, 449 U.S. 200 (1980); *Int’l Tel.*, 536 F.2d 1361 (“[C]ourts generally insist that abrogation on these grounds is exclusively within the province of the legislature, exercisable by enactment of repealing legislation, and not a judicial function.”)).

²⁹ Legislation, *supra* note 6, at 1304–05 (footnote omitted) (citing Henry Wolf Bicklè, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1929)). For the implications of a legislature that is only “theoretically responsive,” see the discussion of Professor Alexander Bickel’s argument, *infra* p. 2217.

³⁰ Philip, *supra* note 6, at 267.

³¹ Rodgers & Rodgers, *supra* note 6, at 2.

³² Allen, *supra* note 6, at 82–83 (footnote omitted). As an archetypal example of the separation of powers argument, Professor Ronald Allen cites *Snowden v. Snowden*, 1 Bland 550, 556 (Md. 1829), which states: “No judge or court, either of the first or last resort, can have any right to *legislate*; and there can be no difference between the power to declare an act of Assembly obsolete and the power to enact a new law.”

³³ Misner, *supra* note 6, at 13.

³⁴ *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

³⁵ Of course, this is not true in many state court systems.

down. Such picking and choosing should be left to the legislature — the better to reflect the will of the people.

This particularly brittle version of the separation of powers argument fails in the context of desuetude for two reasons. First, the defense of desuetude depends on the nonenforcement of statutes by democratically elected executive officials spanning numerous elections and administrations; a court cannot consider abrogation on desuetude grounds without the repeated assent of a politically accountable branch.³⁶ Second, the scope of judicial meddling is significantly limited by the case or controversy requirement,³⁷ which cabins the courts' abrogation power to those instances in which a politically accountable prosecutor has placed before the court a dead-letter law and asked that it be enforced.³⁸

So the anti-desuetude position relies on the separation of powers norm that Professor Laurence Tribe rather zealously describes as a “Colossus [that] commands and pervades American constitutional law.”³⁹ Despite its simplicity, or perhaps because of it, the argument has been an overwhelming success in terms of its impact on the courts.⁴⁰ Can anyone stop this devastating giant of a legal argument?

C. Three (Failed) Pro-Desuetude Arguments

The argument from the *Volksgeist*, upon which the civil law tradition relies, is inappropriate in this country because custom alone is not a sufficient means of creating law in our system. Commentators therefore have tried, mostly in vain, to proffer a convincing explanation of why American courts should incorporate desuetude, apart from the conceptual foundation upon which the doctrine was built in Roman law.⁴¹ Three major arguments emerge from the literature.

1. *Constitutional Arguments from Liberty and Equality.* — The most common attack on the anti-desuetude position relies on a constitutional challenge arising out of the Due Process and Equal Protection

³⁶ This assumes that electoral accountability forces the executive branch to carry out the laws in a manner that reflects community values and beliefs about the validity of the substantive criminal law. See Bickel, *supra* note 4, at 60, 63.

³⁷ U.S. CONST. art. III, § 2.

³⁸ Note that this second limitation would prevent an “activist” judge from striking down a morally symbolic law, such as a law against fornication or adultery, unless a prosecutor first attempted to enforce such a law. See *infra* note 75.

³⁹ 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-3, at 124 (3d ed. 2000) (footnote omitted).

⁴⁰ See, e.g., 1A SINGER, *supra* note 9, § 23:26 n.4 (citing numerous opinions rejecting desuetude doctrine on separation of powers grounds).

⁴¹ That is, an understanding premised on the idea that unenforced laws should be struck down because a lack of enforcement implies abrogation by “the tacit consent of all.” See *supra* note 10 and accompanying text.

Clauses.⁴² “Fair notice” is a key component of this line of reasoning, the idea being that the citizenry cannot be expected to distinguish legal from illegal conduct if the criminal statute demarcating that boundary is never enforced.⁴³ This, in turn, depends on the assumption that “[t]he average non-reader of the statutebook knows of the law what he knows of ethics and custom, and for the rest, what he knows of prosecutions — hardly more.”⁴⁴ In short, the constitutional argument for desuetude doctrine sees in the Constitution a means of protecting an individual against being plucked from a sea of conspicuous offenders and charged with committing a crime, the impropriety of which he could not have ascertained.

2. *The Deliberation-Forcing Argument.* — Those commentators who advocate the constitutional challenges often miss the point of Professor Alexander Bickel’s important contribution to the desuetude conversation. For Professor Bickel, desuetude was one of several “device[s] to turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system.”⁴⁵ Put another way, desuetude was a tool with which the judiciary could force the legislature to reconsider an obsolescent, constitutionally problematic statute. Judge Guido Calabresi picked up this theme and expanded upon it in his broader attempt to address the harmful consequences of “statutorification” in American law.⁴⁶ Together, these scholars have laid out an elaborate, deliberation-forcing plan for dealing with trou-

⁴² For a recent example of such rhetoric, see generally Chivers, *supra* note 6, which offers a compromised argument that courts should strip desuete statutes of their remedies but leave them on the books.

⁴³ Of course, *ignorantia juris neminem excusat* — ignorance of the law excuses no one. Thus, not surprisingly, the fair notice point has not always found favor with the Supreme Court. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (“We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.” (footnote omitted) (citing Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960))); cf. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 569–74 (1978) (noting the vagueness of void-for-vagueness arguments and discussing the seemingly contradictory idea that the definition of a crime cannot be vague but the definition of a justification defense can be).

⁴⁴ Bickel, *supra* note 4, at 63–64. This assumption is problematic for at least two reasons: First, it would be surprising to discover that the non-reader of statute books is an avid reader of case law. Second, even if the public were to stay abreast of criminal prosecutions, plea bargaining makes such public prosecutions very rare.

⁴⁵ *Id.* at 61.

⁴⁶ See CALABRESI, *supra* note 2, at 17–30.

bling legislative enactments: when possible, the judiciary should send nettlesome laws back to the legislature for a second look.⁴⁷

3. *The Separation of Powers Counterargument.* — Professor Bickel adds another important pro-desuetude argument by disputing one of the premises of the separation of powers line — the assumption that laws retain the authority vested in them despite long neglect.⁴⁸ In short, Professor Bickel asserts that a desuete statute no longer carries the authority initially bestowed by the legislature, because of its failure to reflect current political-process reality. Follow the steps: Normally, it is thought that the legislature can be relied upon to adjust the content of substantive criminal law according to the will of the people, from whom sovereignty is drawn.⁴⁹ But a statute that is never enforced cannot be cleared away through the political process because such a law is not salient enough to mobilize sufficient opposition.⁵⁰ Using this insight, Professor Bickel harnesses Professor John Chipman Gray's observation of an inverse relationship between the ease of obtaining new legislation and the propriety of desuetude.⁵¹ So when a prosecutor "resurrects" a desuete statute to bring an individual before a court, the executive essentially legislates through the reanimation of dead-letter laws.⁵² Professor Bickel drives home his separation of powers counterargument with this oblique statement:

When the court declares the statute void for vagueness, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision. It does not hold that the legislature may not *do* whatever it is that is complained of, but rather asks that the *legislature* do it, if it is to be done at all. Herein, chiefly, lies the kinship with the idea of desuetude.⁵³

The essence of Professor Bickel's ingenious separation of powers counterargument is that desuetude presents a "damned if you do, damned if you don't" scenario. The government violates the separation of powers norm if it applies the doctrine, because a court must commandeer some portion of the legislative power to abrogate a dead-

⁴⁷ Query whether this strategy will be at all helpful in the context of substantive criminal law. If legislative efforts in that field are characterized by a constant expansion in criminalized conduct, it is possible that the second look will produce even worse results than the first.

⁴⁸ See Bickel, *supra* note 4, at 62–64.

⁴⁹ *Id.* at 63 ("[N]ormal law enforcement indicates the continuity of [legislative, and by implication, popular] will . . .").

⁵⁰ *Id.* ("When the law is consistently not enforced, the chance of mustering opposition sufficient to move the legislature is reduced to the vanishing point." (footnote omitted) (citing Joseph Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 587 n.95 (1960))).

⁵¹ See GRAY, *supra* note 6, at 192–93.

⁵² Bickel, *supra* note 4, at 63.

⁵³ *Id.* This method of justifying desuetude — that is, by reference to vagueness doctrine — may have caused the aforementioned confusion as to the true nature of his analysis.

letter law. But it also violates the norm if it refuses to apply the doctrine, because a prosecutor must encroach upon the legislative function in order to wield a desuete statute against an individual.

D. Taking Stock of the Desuetude Discussion

With a century's worth of commentary on the table, it is now possible to survey the theoretical landscape of desuetude doctrine with a critical eye. Reflecting on what has already been said, the reader will observe that, despite brave attempts by Professor Bickel, Judge Calabresi, and others,⁵⁴ the pro-desuetude camp has met with little success. In every circuit and in every state except West Virginia, the separation of powers position against desuetude has stood firm against an assortment of pro-desuetude arguments.

The constitutional argument from the Due Process and Equal Protection Clauses is possessed of enough intuitive appeal to have at least prompted discussion in many of the cases addressing dead-letter laws.⁵⁵ But no court outside of West Virginia actually accepts the doctrine, which suggests that the constitutional argument is either unpersuasive or else *too* persuasive. Judges who cringe at the thought of due process's expanding penumbra — conservatives, if you like — are unlikely to line up in support of a desuetude argument clothed in “fairness” rhetoric. When their more liberal brethren and sostren respond with arguments in support of equal protection and due process rights, the result is that desuetude gets lost in a bigger fight about how best to protect individual rights. A trio of casebook favorites illustrates the pattern, in which the better protection is consistently trumped by less good ones. Connecticut's rarely enforced prohibition on birth control presented the ideal conditions for invalidation of a desuete statute. Discussing *Poe v. Ullman*⁵⁶ in his seminal Foreword for this *Review*, Professor Bickel expressed optimism that desuetude would soon be introduced into the jurisprudential mainstream.⁵⁷ But *Griswold v. Connecticut*⁵⁸ dashed these hopes, invalidating the contraception statute on the basis of a newly minted “right to privacy” de-

⁵⁴ See *supra* note 4.

⁵⁵ See, e.g., *United States v. Jones*, 347 F. Supp. 2d 626, 628–29 (E.D. Wis. 2004); *United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967); *State v. Linares*, 630 A.2d 1340, 1346 n.11 (Conn. App. Ct. 1993); *Hill v. Smith, Morris* 70, at *7 (Iowa 1840), 1840 WL 2834 (Iowa Terr.); *State v. Donley*, 607 S.E.2d 474, 480 (W. Va. 2004); *Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720, 724–25 (W. Va. 1992).

⁵⁶ 367 U.S. 497 (1961).

⁵⁷ See Bickel, *supra* note 4, at 58–64 (using a discussion of the *Poe v. Ullman* case from the previous Term to argue for desuetude's “naturalization in American law”).

⁵⁸ 381 U.S. 479 (1965).

rived from the Due Process Clause.⁵⁹ In *Lawrence v. Texas*, the Court considered a Texas anti-sodomy law that “[did] not seem to have been enforced against consenting adults acting in private.”⁶⁰ Instead of disposing of the Texas statute on desuetude grounds,⁶¹ the Court delivered a substantive due process opinion that has occasioned much confusion among observers.⁶² A similar point might also be made about San Francisco’s prohibition against operating laundries in certain wood-framed buildings, which the Court invalidated on equal protection grounds in *Yick Wo v. Hopkins*.⁶³ Even when presented to a sympathetic judge, it appears, the pro-desuetude argument that highlights questions of due process or equal protection risks being upstaged by its supporting cast.

For all the skill with which they were crafted, the desuetude components of the second-look proposals by Professor Bickel and Judge Calabresi have garnered little in the way of a response from the courts⁶⁴ or anti-desuetude commentators.⁶⁵ Perhaps this is because, in the case of each of these authors, desuetude was only a small piece of a much more ambitious theoretical construct. When a scholar takes on *The Least Dangerous Branch* or *A Common Law for the Age of Stat-*

⁵⁹ See *id.* at 481–86; see also Chivers, *supra* note 6, at 459 (arguing that *Griswold* casts doubt upon Professor Bickel’s interpretation of *Poe*).

⁶⁰ 539 U.S. 558, 569 (2003).

⁶¹ At least one amicus filing raised the issue. See Motion for Leave To File Amicus Brief and Amicus Brief of the Center for Marriage Law in Support of Respondent at *27, *Lawrence*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 367565 (“If the object of this case were really to invalidate the Texas sodomy law an argument based on desuetude would seem more fitting than a constitutional argument.”).

⁶² The partial title of Professor Sunstein’s article is illustrative of the point: *What Did Lawrence Hold?* See Sunstein, *supra* note 20.

⁶³ 118 U.S. 356, 374 (1886) (invalidating a municipal laundry regulation that was only enforced as against Chinese immigrants). Had city authorities not arrested the Chinese laundry owners just a few years after passing the laundry ordinance at issue, the law would otherwise have fallen into complete desuetude with the passage of time; aside from its unconstitutional application against the Chinese, the statute does not seem to have been used at all. See *id.*

⁶⁴ But see *Quill v. Vacco*, 80 F.3d 716, 735, 738–43 (2d Cir. 1996) (Calabresi, J., concurring in the result) (applying insights from CALABRESI, *supra* note 2, to a discussion of a desuete New York statute prohibiting assisted suicide); *United States v. Elliott*, 266 F. Supp. 318, 325 (S.D.N.Y. 1967) (citing BICKEL, *supra* note 4, at 143–56, but ultimately rejecting the desuetude argument); *Franklin v. Hill*, 444 S.E.2d 778, 781–83 (Ga. 1994) (Sears-Collins, J., concurring) (citing CALABRESI, *supra* note 2, in arguing for the application of desuetude doctrine to a statute outlawing seduction of a female child); *Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720, 725 n.2 (W. Va. 1992) (citing CALABRESI, *supra* note 2, in support of a pro-desuetude holding).

⁶⁵ This is hardly to say that the works by Professor Bickel and Judge Calabresi have had little impact on the academy, but rather that few scholars have expressed skepticism specifically targeting the desuetude angle of the authors’ “deliberation-forcing” arguments. But see, e.g., Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 83 & nn.149–51 (2005) (criticizing Professor Bickel for using desuetude as a means of foisting moral and political views upon the legislature).

utes, she will usually wrestle with the entire judicial philosophy of the judicial-legislative colloquy, not just its small desuetude component.

Things become more confrontational when it comes to the separation of powers issue, with each camp accusing the other of violating that norm. The fact that the anti-desuetude side has consistently prevailed in the courts could mean one of three things: judges simply agree with the anti-desuetude camp's formalist approach to separation of powers; judges disagree with the anti-desuetude argument but fear "making waves" and risking reversal on appeal; or, disconnected from the world of academic commentary, judges refuse to apply desuetude doctrine on grounds unrelated to separation of powers.

Regardless of the reason, one thing is certain: in the debate on desuetude, desuetude's opponents are winning. Their position, which relies on the separation of powers norm to explain why judges cannot abrogate obsolete statutes, is simple and effective: the legislature has a monopoly on the creation of criminal statutes, so only the legislature can repeal them.

The anti-desuetude position has long prevailed in an overwhelming majority of American courts. But the standard argument against desuetude doctrine suffers from two problems. Both as to the process of law *creation*, examined in Part II of this Note, and as to the process of law *correction*, examined in Part III, the argument fails to describe accurately the system in which substantive criminal law is made. For both processes, actual practice belies the most common descriptive claims by commentators regarding what the legislature does.⁶⁶

II. LAW CREATION AND THE DELEGATION OF SUBSTANTIVE CRIMINAL LAW-MAKING AUTHORITY

As a descriptive matter, the claim that the legislature has a monopoly on the creation of criminal law is wrong. To be sure, the criminalization of conduct still begins with the passage of a penal statute; but the role of the legislator in the creation of substantive criminal law has changed significantly since the genesis of the anti-desuetude argument. In today's system of "workable government,"⁶⁷ the legislative branch

⁶⁶ Cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). In this instance, of course, what matters is the behavior of all three branches of government, not just the judiciary.

⁶⁷ In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson wrote: The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a *workable government*. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

delegates a great deal of its criminal law-making authority to agents of the executive branch.⁶⁸ Shades of such delegation have long been present in the criminal law literature,⁶⁹ but recent work has done much to explain the interbranch dynamic that accounts for how and why the legislature cedes its monopoly power over defining criminal conduct.⁷⁰ Recognition of the delegation norm has become widespread enough to engender disagreement with regard to its purpose and scope;⁷¹ yet the principle seems not to have infiltrated the discussion of desuetude, that concept having lain dormant for some time.

A. Overcriminalization: What the Legislative Branch Does

The story of delegation begins with a piece of “old news”: the range of conduct made illegal by criminal statutes is large and getting larger.⁷² That Judge Calabresi’s “orgy of statute making”⁷³ has spilled

Id. at 635 (Jackson, J., concurring) (emphasis added).

⁶⁸ This Note takes no position on whether delegation of substantive criminal law-making authority is desirable as a normative matter. Supreme Court precedent suggests that such delegation is not constitutionally problematic in the criminal context. *See, e.g.,* *Touby v. United States*, 500 U.S. 160, 167–68 (1991) (holding that Congress’s delegation of power to the Attorney General to add drugs to controlled substance schedules is constitutional); *United States v. Grimaud*, 220 U.S. 506, 522 (1911) (holding that Congress’s delegation to the Secretary of Agriculture of the authority to make policy judgments regarding criminal punishment for grazing is not an unconstitutional delegation of legislative power); *see also* *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989) (holding that Congress’s delegation of power to an independent sentencing commission to promulgate sentencing guidelines is constitutional). As one commentator notes, “nondelegation doctrine has fallen into desuetude and may be a dead letter.” *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 309 n.57 (1994).

⁶⁹ *See, e.g.,* Frank J. Remington & Victor G. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 483 (“[T]he issue is not which branch of government ought to assume responsibility for major policy decisions, but rather the issue is the relative functions which the legislature, the judiciary, and the administrative agency ought to play.”).

⁷⁰ This Part relies heavily on a pair of articles by Professor Bill Stuntz. *See* Stuntz, *Civil-Criminal Line*, *supra* note 4; Stuntz, *Pathological Politics*, *supra* note 4. The reader will be much better served by reading those articles than by relying on this clumsy summary, which is offered only as a convenience for those in need of an aide-mémoire.

⁷¹ *See generally* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (arguing that Congress delegates criminal law-making authority to federal courts and suggesting that such authority ought to be diverted to the Department of Justice); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999) (challenging the extent to which Congress delegates authority to prosecutors).

⁷² Stuntz, *Pathological Politics*, *supra* note 4, at 507 (“Of course, criminal law’s breadth is old news. . . . Yet the implications of this piece of old news are not well understood.”). For clever social commentary on this topic, see L.M. Hussey, *Twenty-Four Hours of a Lawbreaker*, HARPER’S MAG., Mar. 1930, at 436, in which the author describes a day in the life of an everyman who runs afoul of numerous statutes and then calculates the penalties accrued in the course of such innocuous illegality, and Christopher Hitchens, *I Fought the Law*, VANITY FAIR, Feb. 2004, at 70, in which the author embarks on a quest to break many of New York City’s most trivial laws.

⁷³ CALABRESI, *supra* note 2, at 1 (quoting GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977)).

over into the criminal context has not gone unnoticed by the academy.⁷⁴ A few explanations for this phenomenon appear consistently in the literature: the need for legislators to appear “tough on crime”; the desire to satisfy morality interests by criminalizing certain nondetrimental conduct;⁷⁵ and the vague notion that criminal law-making is a one-way street leading only toward expansion.⁷⁶ But to explain fully this phenomenon, one must look to the behavior of the executive branch.

B. Prosecutorial Discretion: What the Executive Branch Does

Prosecutorial discretion is an apparent feature of American criminal procedure.⁷⁷ Recent scholarship explains how this permissive pattern of executive practice results in the phenomenon of overcriminalization.⁷⁸ In brief, the legislature relies on a kind of principal-agent relationship with the executive branch, whereby the latter uses its discretion not to prosecute as a means of mitigating potential backlash against over- or underinclusive criminalization of deleterious conduct.⁷⁹ And the executive branch can be counted on to hedge the risk of political backlash in a predictable manner, it being a politically ac-

⁷⁴ See, e.g., Stuntz, *Pathological Politics*, *supra* note 4, at 507 n.2 (collecting canonical sources from Professors John Coffee, Henry Hart, Sanford Kadish, and Herbert Packer); Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

⁷⁵ THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 160 (1935) (“Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.”). Whatever the status or desirability of such morality-based laws, *cf.* Recent Case, 119 HARV. L. REV. 2276 (2006), it should be noted that desuetude doctrine would leave unmolested such enactments. If we take Professor Arnold at his word and assume that the (seemingly absurd) *raison d’être* of a morally symbolic law is merely to exist, then desuetude will not interfere so long as prosecutors honor the intent of the legislature in promulgating a law that is never supposed to be enforced. The case or controversy requirement would prevent an “activist judiciary” from unilaterally taking aim at morally symbolic laws.

⁷⁶ See James T. Adams, *Hoover and Law Observance*, in *SELECTED ARTICLES ON LAW ENFORCEMENT* 334, 340 (Julia E. Johnsen ed., 1930) (“[F]or some obscure reason in the American character, laws are rarely repealed; they are allowed simply to lapse in observance.”); Bickel, *supra* note 4, at 61; Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 170 (1967).

⁷⁷ See, e.g., *Wayte v. United States*, 470 U.S. 598, 608–09 (1985) (holding that a prosecutor is free to adopt a “passive enforcement policy,” whereby Selective Service nonregistrants are charged only with failure to register for the draft if they write a letter to the authorities explaining their ideological reasons for refusing to register); see also *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (refusing to compel the prosecution of prison guards following a riot in which prisoners had been beaten and killed).

⁷⁸ See Stuntz, *Pathological Politics*, *supra* note 4.

⁷⁹ See *id.* at 547–49; *cf.* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1090 (1993) (“Executive discretion . . . operates as an important shock-absorber that protects legislatures from hostile reaction to law enforcement operations.”).

countable branch whose electoral success depends on public satisfaction with the administration of criminal justice.⁸⁰

C. *The Fruits of Delegation: Prosecutorial Legislation*

The argument from “deeper politics”⁸¹ shows why the legislature would want to delegate substantive criminal law-making authority and explains how it accomplishes this end. Legislators can secure political gain at low cost by sending a prosecutor to do a statute-writer’s job. The result is the pervasive practice of prosecutorial legislation in criminal law generally:

When the state retains crimes that go largely unenforced, and gives prosecutors . . . the power to decide which violators (if any) to charge . . . , *prosecutors . . . become legislators*; they have the practical power of crime definition. The essence of the problem of overcriminalization, then, is the delegation to executive officials of the power to define crimes.⁸²

This leads to the type of overly broad “XYZ” legislation that Professor Bill Stuntz first identified in *Civil-Criminal Line*⁸³ — and lots of it.⁸⁴ At least as a matter of legislative expediency, the system is quite successful.⁸⁵

Convenient, yes — but at what price dispatch? Legislative reliance on the executive branch’s discretion-utilizing “shock-absorber”⁸⁶ yields statutes that, *prima facie*, are not responsive to the will of the electorate.⁸⁷ Popular acceptance of overbroad criminal statutes and the sys-

⁸⁰ Clearly, the level of political accountability varies depending on the jurisdiction. In a state in which prosecutors are locally elected, the executive and legislative interests in securing reelection will tend toward congruence; at the federal level, the link is more attenuated because the prosecutors are not directly accountable to the people, but instead report to the President. At both levels, however, the coincidence of electoral accountability allows the legislative and executive branches to “gang up” on the judicial branch. See Stuntz, *Pathological Politics*, *supra* note 4, at 534–35.

⁸¹ *Id.* at 510.

⁸² Stuntz, *Civil-Criminal Line*, *supra* note 4, at 24 (emphases added).

⁸³ See *id.* at 14–15 (describing a process by which a legislature, in an effort to deter a certain behavior characterized by elements X, Y, and Z, will criminalize only the first two elements and rely on the prosecutor to limit her use of that statute to those instances in which the third element is also present).

⁸⁴ See Stuntz, *Pathological Politics*, *supra* note 4, at 508 (“American criminal law’s historical development has borne no relation to any plausible normative theory — unless ‘more’ counts as a normative theory.”).

⁸⁵ Cf. Kahan, *supra* note 71, at 472–79 (describing how Congress transfers the institutional costs of complicated issue resolution, particularly those costs relating to controversial issues, to other branches). But note that the Framers built into the Constitution a certain amount of structural inefficiency, for the purpose of protecting individual rights.

⁸⁶ Dripps, *supra* note 79, at 1090.

⁸⁷ Consider two criticisms of delegation, both of which take issue with the legislature’s practice of passing the buck. Judge Calabresi argues: “What legislatures may not do, in other words, is to delegate in ways that diminish their ultimate responsibility to the people for the enactment of constitutionally dubious laws.” CALABRESI, *supra* note 2, at 115 (footnote omitted). Professor

tem of delegation in which they are produced flows from the inverse of President Grant's proclamation: "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."⁸⁸ So overbroad criminalization "hold[s] the threat of prosecution over the heads of people whom [lawmakers] have no intent to punish."⁸⁹ When the law finally is brought to bear on some hapless individual — perhaps because his conduct is morally blameworthy, or perhaps because of his race or social class — it is too late for the individual defendant to protest the law and too much to ask of the general public that it really care.

Another theoretical consequence of substantive criminal law delegation is the realization that the formalistic understanding of the separation of powers norm⁹⁰ — the understanding upon which the current anti-desuetude argument is built — is inapposite in the criminal context. Separation of powers arguments on both sides of the desuetude debate tend toward advocacy of "a hermetic division among the Branches."⁹¹ The structural peculiarities of substantive criminal law—

Michael Klarman states: "A credible political process theory must not only superintend the legislative process for systemic biases, but also ensure that legislatures retain responsibility for making important policy choices that govern society. In constitutional lingo, political process theory supports a strong nondelegation doctrine." Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 765 (1991) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131–34 (1980)).

⁸⁸ Ulysses S. Grant, Inaugural Address (Mar. 4, 1869), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 359 (Elizabeth Knowles ed., 6th ed. 2004). Professor Bonfield noted the relevance of this statement as well. *See* Bonfield, *supra* note 4, at 390 n.6.

⁸⁹ Kadish, *supra* note 76, at 160 (quoting MODEL PENAL CODE § 207.11 cmt. at 111 (Tentative Draft No. 9, 1959)).

⁹⁰ Professor Rebecca Brown offers this explanation of the formalism/functionalist distinction:

Those who espouse the formalist view of separated powers seek judicial legitimacy by insisting upon a firm textual basis in the Constitution for any governmental act. . . . The formalist approach is committed to strong substantive separations between the branches of government, finding support in the traditional expositions of the theme of "pure" separated powers, such as the maxim that "the legislature makes, the executive executes, and the judiciary construes the law."

. . . .
In contrast, advocates of the "functionalist" approach urge the Court to ask a different question: whether an action of one branch interferes with one of the core functions of another. The sharing of powers, in itself, is not repugnant to the functionalists, nor is the formation of alliances among the branches repugnant, as long as the basic principles of separated powers are not impaired. The functionalist view follows a different strand of separation-of-powers tradition from that of the formalists: the American variant that stresses not the independence, but the interdependence of the branches.

Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–24, 1527–28 (1991) (footnotes omitted) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825)).

⁹¹ *Mistretta v. United States*, 488 U.S. 361, 381 (1989). It is important to note the manner in which the line between legislative and executive power is traversed. As the word "delegation" suggests, the legislature is affirmatively *giving* the power to define criminal conduct to the executive branch. This is quite different from the misappropriation of legislative power discussed in

making that Professors Frank Remington and Victor Rosenblum predicted,⁹² and Professor Stuntz carefully described, strongly suggest that whatever role separation of powers formalism once played in the creation of criminal law, it is now entirely unfit for service in that realm. The anti-desuetude camp clings to a formalistic understanding of separation of powers, but the very branch whose power they purport to protect has, in practice, long since left that understanding behind.

III. THE MISSING SELF-CORRECTION MECHANISM

The anti-desuetude position is also mistaken in asserting that only the legislature can repeal criminal statutes. In reality, that list is over-inclusive, with a margin of error of one. Well-intentioned exercises in code modernization such as the Model Penal Code notwithstanding, actual practice shows that the modern legislature is unable to rein in the criminal statutes it creates.

A. Self-Correction Mechanisms: An Exceedingly Brief Chronology

Substantive criminal law-making did not always look the way it does today. In the past, the process of criminalizing certain conduct included self-correction mechanisms that checked the expansion of substantive criminal law and ensured its rough congruence with popular sentiment. The history of substantive criminal law tells a story of the disappearance of these mechanisms over time.

In a system of common law crime definition, judges are responsible for creating substantive criminal law through a slow accretion of precedent; accordingly, these judges can also remove obsolete prohibitions from the sweep of criminal law.⁹³ Such a system does not obtain in this country,⁹⁴ but our inherited Anglo-American legal tradition was largely built on an understanding of the criminal law forged in a common law system. At some point in the American legal system's incremental metamorphosis into Judge Calabresi's "age of statutes," the common law mechanism of self-correction was lost. Other historically recognized self-correction traditions have also disappeared. Consider,

the context of the pro- and anti-desuetude arguments explored in Part I, which involved the *taking* of legislative power.

⁹² Writing almost fifty years ago, these authors asserted that "idealism or naiveté or both must be present in king-size doses in order to sustain the position that the legislature can or should play an exclusive role in the molding of criminal-law policy." Remington & Rosenblum, *supra* note 69, at 481 n.2.

⁹³ See Stuntz, *Civil-Criminal Line*, *supra* note 4, at 38 ("The common-law process itself tends to weed out obsolete prohibitions, at least if the prohibitions are invoked in any kind of court proceeding.")

⁹⁴ Stuntz, *Pathological Politics*, *supra* note 4, at 576.

for example, the alleged demise of the rule of lenity, the interpretive canon that directs a judge to construe statutory ambiguities in penal laws in the defendant's favor.⁹⁵

The disappearance of self-correction mechanisms from the criminal law was perfected with the rise of the prosecutors. Only gradually did prosecution of crimes become the bailiwick of a state-run prosecutorial bar — today's system of exclusive state prosecution of crimes is a departure from an earlier system in which private parties prosecuted criminal claims.⁹⁶ This change, combined with the corresponding decrease in the power of the jury as a result of plea bargaining,⁹⁷ radically reconfigured the interbranch distribution of power in the criminal law context. The executive branch became a player, the legislature found a willing recipient upon whom to offload an onerous responsibility, and the courts were reduced to a much smaller role in the definition and enforcement of substantive criminal law. Executive branch prosecution of crimes gave rise to prosecutorial discretion, which gave rise to official nonenforcement, which in turn created the “vanishing point” that prevents legislatures from organizing winning coalitions around the repeal of obsolete laws.⁹⁸

B. The Perils of a Criminal Law System Without Self-Correction Mechanisms

For the reasons just discussed, and perhaps others, modern substantive criminal law lacks important mechanisms for self-correction. Especially in the realm of the desuete penal statute, legislatures are unable to engage in necessary corrective measures; the criminal statute, once loosed on society and allowed to lapse into disuse, is a Kraken not easily subdued.⁹⁹ The costs of this deficiency, which are not accounted for in the anti-desuetude argument, are manifold.

First, a lawmaking system without a self-correction mechanism is unlikely to reach equilibrium and will instead grow to increasingly grotesque proportions. As discussed in section II.A, the U.S. system of

⁹⁵ For a more thorough treatment of the rule of lenity, see Note, *The New Rule of Lenity*, 119 HARV. L. REV. (forthcoming June 2006).

⁹⁶ See generally JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 106–77 (2003) (discussing “The Prosecutorial Origins of Defense Counsel”).

⁹⁷ At one time, the function of reflecting community norms was performed by the jury, that supremely democratic institution that once sat in judgment of all three branches of government. Cf. Henry P. Monaghan, Book Review, 94 HARV. L. REV. 296, 309 n.47 (1980) (noting that juries played a more important role in checking legislative impositions of sanctions before “[t]he growth of federal equity jurisdiction and the explosion of administrative law”). Of course, this was before “jury nullification” had a pejorative connotation and before “plea bargaining” meant anything at all.

⁹⁸ See *supra* note 50 and accompanying text.

⁹⁹ See, e.g., *CLASH OF THE TITANS* (MGM 1981) (“Release the Kraken!”).

substantive criminal law-making demonstrates such results. The overcriminalization phenomenon is explained, in part, by the failure to complete the transformation of criminal law-making from a formalist to a functionalist model.¹⁰⁰ Criminal law *creation* exemplifies the functionalist approach to governance, with the three branches sharing responsibilities in an interrelated fashion calculated to maximize efficiency and expediency. Meanwhile, criminal law *correction* remains mired in the formalist mindset, wherein governmental activity is intentionally retarded for the purpose of protecting individual liberty from dominance by one branch of government.¹⁰¹ Viewed this way, overcriminalization is a matter of elementary physics: drawn by functionalism in the upward direction (creation) and resisted by formalism in the downward direction (correction), where is substantive criminal law to go but up?

Second, consider the potentially harmful implications of such a bloated system, in which large swaths of seemingly innocent conduct are criminal.¹⁰² Overcriminalization gives rise to the oft-mentioned problem of pretextual prosecution. Academic commentary decries the practice, whereby a prosecutor chooses from a large “menu” of criminalized conduct in order to punish the targeted individual for something other than the trivial illegality in question (in many cases, race).¹⁰³ Desuetude would remove from the prosecutor’s menu the

¹⁰⁰ See *supra* note 90.

¹⁰¹ Consider the untenable position that the anti-desuetude advocate is now forced to take: courts *cannot* abrogate criminal statutes because repeal of obsolete statutes is a legislative task that must unequivocally be reserved to the branch charged with such power; but executive agents *can* engage in prosecutorial legislation because it would otherwise be too expensive and politically risky to create substantive criminal law.

The problem with this position is that it is not consistent with regard to the lines it draws in attempting to separate the coequal branches from one another. The line between the legislative and judicial branches — that is, the crucial line justifying the anti-desuetude position — must be sharp and can admit of no overstepping. Yet the line between the executive and legislative branches must be fuzzily demarcated to allow plenty of interplay between parties on both sides.

¹⁰² As a general matter, America would seem an odd place to discover such intrusive state oversight of its citizens’ innocuous activities — land of the free, indeed.

¹⁰³ See ARNOLD, *supra* note 75, at 160 (“Such persons are trying to apprehend individuals who at the time happen to be considered dangerous to society, and the wider the selection of laws which they have, the more chance there is of conviction. Of course this power in the prosecutor to dig up obsolete laws, or to use laws passed for one purpose . . . to accomplish an entirely different result may be viewed with alarm.”); Bonfield, *supra* note 4, at 391 & n.13 (noting famous instances of pretextual prosecution, including harassment suits against Martin Luther King, Jr.); see also 3 DAVID HUME, THE HISTORY OF ENGLAND 342–43, 362 (London, Oxford 1826) (noting a historical episode, following the reign of Henry VII, in which two agents, Empson and Dudley, were executed for complicity in the King’s scheme of extracting subjects’ wealth through pretextual prosecution); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 836–39 (2006) (discussing potential solutions to the problem of strategic, pretextual use of criminal laws, none of which involves the execution of prosecutors).

most easily abused options: statutes that have not been regularly enforced over a long period of time.

Third, the lack of a self-correction mechanism divorces substantive criminal law from the will of the people.¹⁰⁴ If Justice Holmes, in his lecture on the criminal law, was correct in asserting that “[t]he first requirement of a sound body of law is[] that it should correspond with the actual feelings and demands of the community, whether right or wrong,”¹⁰⁵ then the severity of this problem cannot be overstated.¹⁰⁶ In a democratic society, the unimpeachable maxim of *nullum crimen sine lege* reflects a commitment to harmonizing the content of the substantive criminal law and the will of the governed. Without self-correction measures such as desuetude doctrine, this is an unachievable goal.¹⁰⁷

IV. CONCLUSION: MODERNIZING SUBSTANTIVE CRIMINAL LAW-MAKING WITH AN OLD DOCTRINE

Let us return to the century of commentary on desuetude; when last observed, the debate was being dominated by the separation of powers argument against desuetude.¹⁰⁸ Parts II and III identify two problems with that argument, both having to do with the powers, duties, and impotencies of the three branches of government. At bottom, these criticisms come to this: in the context of substantive criminal law, all of the branches are involved in law creation but none is involved in law correction. This asymmetry leads to overcriminalization, injustice, and a failure of democracy.

If we accept the ideas that formalism is dead in the criminal context and that all branches of government contribute to the process of

¹⁰⁴ As Professor Bickel points out, the will of the people is also apparent in a politically accountable prosecutor’s decision *not* to enforce an obsolete or asinine statute. Bickel, *supra* note 4, at 63 (“[N]ormal law enforcement indicates the continuity of [legislative, and by implication, popular] will . . .”). But surely the legislative branch, being the closest to the people, should have an independent and even stronger interest in reflecting community desires.

¹⁰⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 36 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

¹⁰⁶ See Kadish, *supra* note 76, at 160 (noting that criminalization of trivial misconduct “tends to breed a cynicism and an indifference to the criminal-law processes which augment tendencies toward disrespect for those who make and enforce the law”).

¹⁰⁷ A lawmaking system with law creation power but no law correction power would satisfy popular will only in the rare society that had an insatiable appetite for criminal prohibitions. To test whether ours is a society susceptible to such an extreme interpretation of the “tough on crime” ethos, query whether any legislature in the United States, given a criminal law tabula rasa and limitless time, would pass anew every criminal law currently on its books. Though not susceptible to real-world analysis, this hypothetical inquiry would almost certainly be answered in the negative.

¹⁰⁸ See *supra* section I.D, pp. 2218–20.

law creation,¹⁰⁹ then we must focus our efforts on remedying the absence of law correction. In so doing, we ought not feel constrained by the formalist analysis that motivates the traditional anti-desuetude position — in law correction, as in law creation, every branch of government has a role to play.

The desuetude defense should be integrated into American criminal law because it deploys modern functionalist analysis to achieve the necessary ends of law correction. Though limited in scope,¹¹⁰ the doctrine provides a workable self-correction mechanism with which to perfect the content of substantive criminal law. Echoing once again an argument from the pages of this *Review*, “justification . . . might be found in the view that it is part of the intelligent cooperation the courts owe the legislature to relieve it from the burden of seeking out and repealing statutes that clearly serve no modern purpose.”¹¹¹

By paring down the underbrush in criminal codes in a way that cannot be achieved through other means,¹¹² desuetude regulates the content of substantive criminal law with a hand that is, as the cliché goes, gentle but firm. Adoption of the doctrine mitigates overcriminalization, promotes fairness, satisfies the will of the people, and prevents judges from resorting to constitutional chicanery to produce desired results. For these reasons, the desuetude defense in criminal law should emerge permanently from its own state of desuetude.

¹⁰⁹ Supreme Court precedent indicates that the Court has accepted the idea. *See supra* note 68.

¹¹⁰ *Cf.* CALABRESI, *supra* note 2, at 21–22 (criticizing desuetude doctrine as being “too limited to deal with [legal petrification]”). Constitutional structure and the composition of the doctrine itself limit the reach of desuetude for several reasons. First, the case or controversy requirement greatly restricts the courts’ ability to serve as a roving commission to update stupid statutes. Second, a court’s utilization of desuetude doctrine depends on action by a coordinate branch. Before a court can overturn a statute as desuete, there must have been a pattern of prosecutors ignoring the law. Third, and related, use of the doctrine requires a great deal of transtemporal homogeneity with regard to the preferences of the people. That is, numerous politically accountable executives must have held the position and allowed the statute to lapse into obsolence.

To recapture fully the self-correction mechanisms discussed in this Note would require revitalization of the criminal jury, or some equally substantial shift in criminal law. Such proposals are beyond the scope of this Note.

¹¹¹ Note, *supra* note 4, at 1184.

¹¹² *Cf.* Stuntz, *Pathological Politics*, *supra* note 4, at 584.