Dealing with Dead Crimes

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INTRODUCTION

Our criminal codes are replete with "dead crimes"—crimes that are openly violated, have long gone unenforced, and no longer reflect majoritarian views. At common law, judges could eliminate these crimes as they refined substantive criminal law through the development of precedent. As our criminal justice system entered the statutory age, however, that mechanism was lost. And federal, state, and local legislatures have continuously added crimes to the books while rarely clearing outdated ones.[1]

Many dead crimes result from changes in moral sensibilities. Various states, for example, continue to criminalize conduct as commonplace as engaging in certain innocuous behavior on Sunday,[2] swearing,[3] and spitting on the street.[4] In some jurisdictions, moreover, it is still a crime to provide massage services for "a person of the opposite sex."[5] And while the "dominant view" (endorsed by the Model Penal Code) is now that sexual chastity and marital fidelity are issues of

1. *See infra* Part II. While non-criminal laws can also fall into disuse, they are less prone to do so. Even non-criminal laws that are "anachronistic" tend to remain vital because civil "litigants find them advantageous in their own specific situations." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17–30 (1982); *see also* Newman F. Baker, *Legislative Crimes*, 23 MINN. L. REV. 135, 137 (1939) (noting that updates to social legislation, particularly penal codes, are less prevalent than updates to other types of legislation, such as business codes).

2. *See, e.g.*, ME. REV. STAT. ANN. tit. 17, § 3203 (prohibiting buying and selling motor vehicles on Sunday); MASS. GEN. LAWS ANN. ch. 136, §§ 2–4 (prohibiting unlicensed dancing, sports, games, and entertainment on Sunday); *id.* §§ 5–6 (prohibiting conducting certain business activities on Sunday); *see also* Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 750 & n.5 (2005) (describing the history of such laws in more detail).

3. *See, e.g.*, MISS. CODE ANN. § 97-29-47 (prohibiting profane swearing or cursing, or use of vulgar or indecent language, in any public place in the presence of two or more persons); MICH. COMP. LAWS ANN. § 750.103 (prohibiting cursing "by the name of God, Jesus Christ or the Holy Ghost"); OKLA. STAT. ANN. tit. 21, §§ 901–05 (forbidding profanity and blasphemy); 11 R.I. GEN. LAWS § 11-11-5 (prohibiting swearing and cursing); *see also* Beale, *supra* note 2, at 750 n.6 (describing such statutes in more detail).

4. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 270, § 14 (prohibiting spitting on public sidewalk); N.H. REV. STAT. ANN. § 147:18 (same); VA. CODE ANN. § 18.2-322 (same); *see also* Beale, *supra* note 2, at 751 n.7 (describing such statutes in more detail).

5. CAMDEN, N.J., CODE § 496-2, https://ecode360.com/28305328.

private morality,[6] not criminal law, many states still have laws criminalizing fornication, cohabitation, and adultery.[7]

Other dead crimes have resulted from changes in technology that have led to open disregard and nonenforcement. For example, the New York City Administrative Code bars using a recording device in a place of public performance.[8] Tourists using smart phones to record street performers in Central Park and Times Square almost certainly violate that offense, without consequence, hundreds of times a day.

There are also borderline dead crimes that are either on the cusp of becoming outdated or have recently reached that status already. Low-level marijuana crimes fall into this category. Although an increasing number of states have legalized recreational marijuana use or reduced associated criminal penalties,[9] it remains an offense subject to some penalty in most states and under federal law.[10] But across the country, recreational marijuana use is prevalent, if not ubiquitous,[11] with the result that the low-level marijuana laws that do remain on the books are openly disregarded and are disfavored by a majority of Americans.[12]

As a crime falls out of favor, a window for legislative repeal may open, as illustrated by the repeal of low-level marijuana laws in some jurisdictions.[13] But by the time dead crime status is achieved, the prospect of repeal is usually slim.[14] The ancient doctrine of desuetude offers a potential solution. Under that doctrine,

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6. Beale, *supra* note 2, at 751–52.

7. Fornication remains a crime in many states. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/11-40; MISS. CODE ANN. § 97-29-1; N.C. GEN. STAT. § 14-184; N.D. CENT. CODE § 12.1-20-08; S.C. CODE ANN. § 16-15-60. Cohabitation remains a crime in a handful of states. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.335; MISS. CODE ANN. § 97-29-1; N.C. GEN. STAT. § 14-184. And adultery remains a crime in a number of states. *See, e.g.*, ALA. CODE § 13A-13-2; ARIZ. REV. STAT. ANN. § 13-1408; FLA. STAT. § 798.01; 720 ILL. COMP. STAT. ANN. 5/11-35; KAN. STAT. ANN. § 21-5511; MICH. COMP. LAWS ANN. § 750.30; MINN. STAT. § 609.36; MISS. CODE ANN. § 97-29-1; N.Y. PENAL LAW § 255.17; N.C. GEN. STAT. § 14-184; N.D. CENT. CODE § 12.1-20-09; OKLA. STAT. ANN. tit. 21, § 871; 11 R.I. GEN. LAWS § 11-6-2; S.C. CODE ANN. § 16-15-60; VA. CODE ANN. § 18.2-365; WIS. STAT. ANN. § 944.16; *see also* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 18 (2008) (describing these laws in more detail); Beale, *supra* note 2, at 752 & nn.11–12 (same).

8. N.Y.C., N.Y., ADMIN. CODE § 10-702.

9. ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 3 & fig.1.1 (2017).

10. Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGISLATURES (July 6, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/TS29-JSU4].

11. MIKOS, *supra* note 9, at 4 (noting that nearly half of Americans over the age of twelve have tried marijuana at some point during their lives).

12. *See* Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/ [https://perma.cc/AZ22-MSP8] (finding that fifty-nine percent of Americans "favor legalizing marijuana for medical *and* recreational use" (emphasis added)); Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018), https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx [https://perma.cc/ER6A-FXV6] (reporting that sixty-six percent of Americans support legalizing marijuana as of 2018, compared to only twelve percent in 1969).

13. *See infra* text accompanying notes 217–21.

14. *See infra* Part II.

judges could abrogate crimes following a long period of nonenforcement in the face of open disregard.[15] But nearly all American courts have long rejected the doctrine, citing separation-of-powers concerns.[16] That has deprived our criminal justice system of an essential mechanism for clearing dead crimes.

If dead crimes are, by definition, unenforced, why does it matter if they remain on the books? It matters because these crimes are not *really* dead.[17] Their continued existence undermines the rule of law by enabling abuses at several stages in the criminal justice system and produces broader pernicious effects as well.[18]

Most obviously, dead crimes undermine the rule of law when they are unexpectedly brought back to life through arbitrary—and sometimes discriminatory—prosecutions.[19] In the late 1990s, for example, an Idaho prosecutor charged eight pregnant high school girls and their boyfriends with criminal fornication.[20] Most of the girls were arrested after applying for public assistance,[21] and the prosecutor described one of them as "a disgruntled, irresponsible teenager who [brings] something into the world that is going to cost taxpayers a lot of money."[22] And in 2004, a Virginia man was convicted under a previously unenforced state adultery statute after his jilted lover told police about their affair.[23]

Even when charges under dead crimes are never brought, their continued existence enables police to rely on them, if only as a pretext, to justify arrests

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15. *See infra* Section I.A.

16. *See infra* Section I.B.

17. For this reason, the term "zombie crimes" would arguably be more precise than "dead crimes." But the term "zombie" has recently been used "to describe legislation rendered unenforceable by a constitutional decision or other laws but that nevertheless 'remain[s] on the books.'" Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063, 1065 (quoting Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047, 1050–51 (2022)); *see also* Jordan Carr Peterson, *The Walking Dead: How the Criminal Regulation of Sodomy Survived* Lawrence v. Texas, 86 MO. L. REV. 857, 860–61 (2021) (observing that, in many jurisdictions, sodomy bans have survived *Lawrence v. Texas*, 539 U.S. 558 (2003), and are still enforced to some degree). To avoid confusion, this Article uses the term "dead crimes" to describe crimes that are openly violated, have long gone unenforced, and no longer reflect majoritarian views. Zombie crimes—as defined by Brady, Wasserman, and others—can be understood as a subset of dead crimes.

When substantive constitutional rights are rolled back, *see, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022) (overruling precedent recognizing the fundamental right to abortion), opportunities for desuetude challenges to zombie laws may emerge. *See, e.g.*, Women's Health Ctr. of W. Va. v. Miller, No. 22-C-556, slip op. at 16, 23 (W. Va. Cir. Ct. July 20, 2022) (enjoining enforcement of a more than 150-year-old abortion ban on desuetude and implied-repeal grounds); Complaint at 18, Kaul v. Kapenga, No. 2022-CV-001594 (Wis. Cir. Ct. June 28, 2022) (challenging a more than 160-year-old abortion ban on a desuetude ground).

18. *See infra* Part II.

19. *See infra* Section II.A.1.

20. Heidi Meinzer, *Idaho's Throwback to Elizabethan England: Criminalizing a Civil Proceeding*, 34 FAM. L.Q. 165, 165 (2000).

21. *Id.* at 166.

22. Quentin Hardy, *Idaho County Tests a New Way to Curb Teen Sex: Prosecute*, WALL ST. J., July 8, 1996, at A1 (alteration in original) (quoting Gem County prosecutor Douglas Varie).

23. *See* Deborah L. Rhode, *Op-Ed: Why Is Adultery Still a Crime?*, L.A. TIMES (May 2, 2016, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-rhode-decriminalize-adultery-20160429-story.html; Beale, *supra* note 2, at 757 n.37 (referencing 1990 article that quotes expert on Virginia family law who could not recall a single prosecution for adultery in Virginia).

accompanied by searches that turn up evidence of more serious crimes. In 2018, for example, a New Jersey officer used a century-old, pre-automobile-era state law requiring bells on bicycles to pull over a Black cyclist who seemed to be acting "suspiciously."[24] That example illustrates how dead crimes can function as an expedient for officers to indulge their bare suspicions by proxy.[25] The use of low-level marijuana laws in this way is especially pernicious, with arrests for simple marijuana possession outnumbering total arrests for all violent crimes combined.[26]

Dead crimes thus undermine the rule of law in much the same way as unconstitutionally vague laws, which are so broad and indefinite that they "do[] not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions" of government officials.[27] A crime ceases to be a crime in any meaningful sense when the community is no longer prepared to enforce it as such in the face of open violations. Yet precisely because dead crimes are openly violated, their continued existence creates a serious danger for unfair surprise. So long as dead crimes remain on the books, government officials have vast discretion to bring any one of them back to life in a particular investigative or prosecutorial context, regardless of how illegitimate or idiosyncratic the official's reasons for doing so might be.[28] Dead crimes thus "lack[] . . . the kind of generality and predictability on which the rule of law depends."[29] Unlike with

24. Michael Waters, *Hundreds of Wacky, Obsolete Laws Still Exist. Why Don't More States Remove Them?*, VOX (Dec. 6, 2019, 11:27 AM), https://www.vox.com/the-highlight/2019/11/18/20963411/weird-old-laws-historical-obsolete-laws [https://perma.cc/QJL6-5K3C].

25. *See infra* Section II.A.2.

26. *See* Emily Earlenbaugh, *More People Were Arrested for Cannabis Last Year Than for All Violent Crimes Put Together, According to FBI Data*, FORBES (Oct. 6, 2020, 4:03 PM), https://www.forbes.com/sites/emilyearlenbaugh/2020/10/06/more-people-were-arrested-for-cannabis-last-year-than-for-all-violent-crimes-put-together-according-to-fbi-data (reporting that FBI data showed that, in 2019, there were 500,395 arrests for marijuana possession compared to 495,871 arrests for violent crimes).

27. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965).

28. When the government has expressly adopted nonenforcement policies or assurances, reliance on those promises may give rise to a due process defense. *See* Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 964–86 (2017) (arguing for reliance-based due process defense).

29. Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 50; *see* RONALD A. CASS, THE RULE OF LAW IN AMERICA 17 (2001) (explaining that the rule of law ensures "that the processes of government, rather than the predilections of the individual decision maker, govern"); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 86 (1968) (observing that the rule of law prevents "unfair surprise"); Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008) (noting that the central premise of the rule of law is that "people in positions of authority" should not be left to act upon "their own preferences, their own ideology, or their own individual sense of right and wrong"); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985) (explaining "[t]he rule of law signifies the constraint of arbitrariness in the exercise of government power" by guiding officials with precise rules, to the extent possible, for the sake of "regularity and evenhandedness in the administration of justice and accountability in the use of government power"); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 668 (1984) ("[T]he rule of law is said to limit officials' discretion and thereby to curb their potential arbitrariness. The rule of law reduces the danger that officials may indulge their self-interest or give vent in their decisions to personal animosities or prejudices.").

vague crimes, however, no well-established constitutional doctrine protects the rule of law by enabling a court to deem dead crimes void.[30]

Dead crimes also have broader collateral effects. For instance, dead crimes exacerbate racial biases already present in policing practices by granting officers additional discretion to enforce low-level, order maintenance crimes disparately along racial lines.[31] Dead crimes can also significantly affect the rights of individuals in other areas of law. Courts have relied on violations of fornication and cohabitation laws to deny a parent's custody of a child, dependency exemptions on tax returns, insurance coverage, and protection under antidiscrimination housing laws.[32] In addition, the continued existence of dead crimes can perpetuate the social stigma surrounding covered behavior longer than is warranted.[33]

After canvassing the wide-ranging and pernicious effects of dead crimes, this Article argues that American law should address them by embracing a new version of the desuetude principle. Such a principle should be informed by the historical formulation of the doctrine, but it need not precisely track that formulation, which was rooted in customary law.[34] Rather, a modern American version of the desuetude principle should be fashioned for our statutory age. To that end, the Article proposes a new conception of the desuetude principle that draws from a broader theory of criminalization. That conception is more capacious than the historical formulation of the doctrine in the sense that it potentially covers a broader range of crimes by asking not just whether a crime has been enforced, but whether it has been meaningfully enforced for a non-pretextual reason. But the new conception is more restrictive in the sense that it constrains a judge's analysis of a potentially dead crime to a means–ends assessment under the familiar

30. *See infra* Section II.A. Throughout this Article, I use terms like "void" and "invalidate" to describe how a court would prevent a law from taking effect. The technical precision of such terms has recently been questioned. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part) (describing the judicial power as "that of ascertaining and declaring the law applicable to the controversy" (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923))); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) (arguing that the judicial power is limited to "declin[ing] to enforce a statute in a particular case or controversy" such that "[a] statute continues to exist, even after a court opines that it violates the Constitution"). That issue is beyond the scope of this Article. I use the terms "void" and "invalidate" merely as a useful shorthand. Readers who take issue with those terms on technical grounds should feel free to substitute "apply the negative power to disregard as an unconstitutional enactment" each time one of the terms appears. *Cf. Mellon*, 262 U.S. at 488. That is a mouthful for my purposes.

31. *See infra* Section II.B.1

32. *See infra* Section II.B.2.

33. *See infra* Section II.B.3.

34. The common law was understood, in its most basic sense, "to be a kind of customary law—the law of 'custom' and 'long usage.'" John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 561 (2014). "The basic idea was that a practice that enjoyed long usage throughout the jurisdiction obtained the force of law . . . ." *Id.*; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *64 (describing the common law as custom that enjoys "long and immemorial usage" and "universal reception throughout the kingdom"); EDWARD COKE, THE COMPLEAT COPYHOLDER § 33 (1630) ("Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised."), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 563, 563 (Steve Sheppard ed., 2003).

intermediate scrutiny tier of judicial review. It thus may alleviate some of the concerns that have kept American courts from adopting the doctrine of desuetude.[35]

With that conception in mind, the Article considers three mechanisms for implementing the desuetude principle into American law—the Federal Due Process Clause, state due process analogues, and the Fourth Amendment. Implementing desuetude as a federal due process principle is the most natural solution, and it would nicely complement the vagueness doctrine by reaching certain rule-of-law abuses that lie beyond that doctrine's scope. But even if the Supreme Court is not ultimately inclined to adopt such an approach, state courts of last resort should do so under their own constitutions. Finally, a Fourth Amendment doctrine banning the pretextual use of dead crimes may also be needed to address investigative abuses of dead crimes.[36]

The Article proceeds in four parts. Part I traces the history of the judicial doctrine of desuetude and shows how it has failed to gain traction in American law, despite repeated calls by commentators for courts to embrace it. Part II catalogues the wide-ranging effects of not having a mechanism for clearing dead crimes from criminal codes. Part III argues that American law should embrace a new understanding of the desuetude principle to address those effects and proposes a normative conception of the principle rooted in a theory of criminalization. Part IV considers three mechanisms for implementing that conception into American law.

I. THE LOST DOCTRINE OF DESUETUDE

A. HISTORICAL ROOTS

The doctrine of desuetude goes back at least as far as Roman law. The Roman jurist Julian wrote that "statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all."[37] Justinian likewise stated that "the laws which each state makes for itself are frequently changed, either by tacit consent of the people or by later statute."[38] And the Corpus Juris of statutes repeatedly described statutes that had been abrogated by desuetude.[39]

The Roman doctrine of desuetude was grounded in two general principles. First, for the Romans, a new law could be made by custom just as well as it could be made by legislation.[40] Within that framework, it was not surprising that an emerging custom of nonenforcement of a written law could strip it of legal validity.[41]

35. *See infra* Part III.

36. *See infra* Part IV.

37. DIG. 1.3.32 (Julian, Digest 84), *quoted in* Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 395 (1964).

38. J. INST. 1.2.11, *quoted in* Bonfield, *supra* note 37.

39. *See* H.F. JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 31 (1957).

40. A. Arthur Schiller, *Custom in Classical Roman Law*, 24 VA. L. REV. 268, 270 (1938).

41. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2211 n.10 (2006); Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 453.

Second, the Romans assumed that a long period of nonenforcement sometimes implied the emperor's tacit consent to the law's nullification. That assumption depended on the Roman concept of sovereignty—namely, that the people were sovereign but had delegated the entirety of their authority to the state.[42]

Yet, under Roman law, a long period of nonenforcement was not enough to establish tacit consent. It was understood that nonenforcement alone could have simply resulted from few, if any, breaches of the law.[43] And even if the law were occasionally breached, rare offenders could have gone unpunished as a result of the Emperor's "show[ing] indulgence" to them "on the ground of [their] merits."[44] Under Roman law, therefore, "[a] statute would fall into desuetude only if the long failure to enforce it was in the face of a public disregard so prevalent and long established that one could deduce a custom of its nonobservance."[45]

The Roman doctrine of desuetude persisted during the early part of the Middle Ages.[46] But as legislation took its place above customary law, the doctrine fell out of favor.[47] The dominant view during the late Middle Ages seemed to be that a custom of nonenforcement could never abrogate a statute absent the King's express repeal of the statute.[48] That view aligned with a broader shift toward absolute monarchism, which treated the King as sovereign. The notion that the King's written commands could be invalidated by mere custom was flatly inconsistent with that commitment.[49]

As the absolutism of the late and post-Middle Ages faded, however, the doctrine of desuetude reemerged in some continental civil legal systems,[50] most prominently in Germany.[51] The German Historical School of the nineteenth century conceived of both written and customary law as emanating from the *Volksgeist*, "the historically developed legal consciousness of a particular people."[52] Deeming both types of law to be equally valid, they agreed with the Romans that a long period of

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42. Bonfield, *supra* note 37, at 396–97.

43. *Id.* at 396.

44. DIG. 1.4.1 (Ulpian, Institutes 1) (Charles Henry Monro trans., 1904).

45. Bonfield, *supra* note 37, at 396. Note, however, that the Constitution of Constantine stated that "the authority of custom and long continuing usage is not to be taken lightly, but *it is not to prevail to the extent of overcoming either reason or statute*." CODE JUST. 8.52.2 (Constantine 319) (emphasis added), *quoted in* Bonfield, *supra* note 37, at 396. That could be read to be inconsistent with the doctrine of desuetude inasmuch as "custom" referred to custom generally. But the better reading appears to be that "custom" referred instead to provincial custom—and thus the principle means only that local customary law cannot abrogate a national law. *See* Bonfield, *supra* note 37, at 396–97, 397 n.41.

46. Bonfield, *supra* note 37, at 397.

47. *Id.*

48. *See* WALTER ULLMANN, THE MEDIEVAL IDEA OF LAW AS REPRESENTED BY LUCAS DE PENNA 64 (1946); Bonfield, *supra* note 37, at 397.

49. Stinneford, *supra* note 34, at 571; Bonfield, *supra* note 37, at 398.

50. Other civil law traditions—such as the French, Spanish, Dutch, and Italian traditions—have rejected the doctrine of desuetude. *See* Bonfield, *supra* note 37, at 399–400.

51. *See id.* at 398–400. The Norwegian legal system has also recognized the doctrine of desuetude. *See id.* at 401.

52. *Id.* at 398; *see also* Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q. REV. 326, 332 (1937).

nonenforcement could abrogate a statute.[53] Yet they made clear that, where "no case had occurred" during a long period for the "application of a written law," abrogation by desuetude was illegitimate, because "no generation of [customary] law ha[d] disclosed itself."[54] Abrogation by desuetude could occur only when the prohibition had in fact been disregarded and the statute still had not been enforced; only then had a new custom displaced an older statute.[55] And because a judge was thought to apprehend the *Volksgeist* better than the legislator, it was the judge's duty to determine when a particular statute had fallen into desuetude.[56]

Scotland, too, has at times recognized the doctrine of desuetude.[57] The rationale for the doctrine there, as in Germany, was a product of treating written law and customary law as equally valid.[58] And as in Germany, simple nonenforcement was not sufficient to support an inference of desuetude; open and widespread violation of the statute was also necessary.[59]

In England, early cases and commentators seemed to support a doctrine of desuetude.[60] For example, after Henry VII famously filled his treasury by bringing several successful prosecutions under statutes which "had become forgotten and wholly disregarded,"[61] the magistrates who helped him execute that plan unsuccessfully attempted to defend their actions on the ground that a judge had no right to disregard a statute on the basis of nonenforcement; they were convicted of aiding the King's enforcement of statutes that had long gone unenforced and been widely disregarded.[62]

Consistent with that result, Pulton's 1608 classification of statutes listed an "OB" after every statute that was "obsoletum, that is, worne out of use."[63] About

53. Bonfield, *supra* note 37, at 398.

54. 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 157 (William Holloway trans., Madras, J. Higginbotham 1867).

55. Bonfield, *supra* note 37, at 399. Some commentators "would also insist that the people must have been aware of the unenforced statute which their inconsistent and established practice contravened." *Id.*

56. Bonfield, *supra* note 37, at 400.

57. *See* 1 AN INSTITUTE OF THE LAWS OF SCOTLAND IN CIVIL RIGHTS 24–25 (The Stair Soc'y 1993) (1751) (noting that Scottish statutes had "run in desuetude, a contrary usage for a long course of time acquiesced to by the lawgivers being a tacit abrogation of them"); *Report of the Lords of Council and Session in Scotland (Feb. 27, 1810)*, *in* THE ACTS OF SEDERUNT OF THE LORDS OF COUNCIL AND SESSION, FROM THE 11TH JULY 1800, TO 7TH MARCH 1810, at 53 (Edinburgh, Manners & Miller 1815) ("[A]cts of Parliament before the Union were held to lose their force by disuse, without any express repeal, or to go into desuetude, as it was termed . . . ." (emphasis omitted)).

58. *See* Bonfield, *supra* note 37, at 403–05.

59. *Id.*, at 404.

60. *Id.* at 405–06. Littleton stated that "it seemeth to some . . . that no action can be brought upon [a] statute, insomuch as it was never seene or heard, that any action was brought . . . ." 1 EDWARDO COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 108, at 81.a (Philadelphia, Robert H. Small 1st Am. ed. 1853) (1628).

61. Hill v. Smith, 1 Morris 70, 78 (Iowa 1840).

62. *Id.*

63. FARDINANDO PULTON, A KALENDER, OR TABLE, COMPREHENDING THE EFFECT OF ALL THE STATUTES THAT HAVE BEENE MADE AND PUT IN PRINT, at xvi (London, Co. of Stationers 1608); *see also* DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES 45 (London, J. Nichols 5th ed. 1796) (1766) (noting that multiple editions of an English statutory compilation had labeled a 1229 ordinance "obsolete").

a century later, an English court refused to apply a seven-year-old statute because of its nonuse.[64] And in 1795, another court declined to apply a statute that had not been enforced in ninety years.[65]

At the same time, however, a separate strand of English authority rejected the doctrine of desuetude[66]—at least in its full form. For Lord Coke, custom could not generally be "prescribe[d] . . . against a statute."[67] Blackstone was more emphatic, stating that "no custom can prevail against an express act of parliament."[68]

Modern English cases "unanimously" reject the doctrine.[69] Just as the Roman, German, and Scottish attitudes toward desuetude reflect more general views on the nature and sources of law, so too does the modern English resistance to the desuetude doctrine. The strong Austinian bent of English jurisprudence is hostile to it.[70] For Austin, "[e]very law . . . is a command,"[71] and "it retains that [imperative] quality" even if it is "disobeyed or left unenforced."[72] That theory of law leaves no room for the judicial abrogation of a dormant statute, no matter how long the period of nonenforcement or however openly a statutory command has been disregarded.[73]

B. AMERICAN APPROACH

The American attitude toward desuetude would largely come to resemble England's modern hostility to the doctrine, though for different reasons. Yet, as in England, early signs suggested that the doctrine might gain traction in American law.

Hill v. Smith,[74] an 1840 decision from the Iowa Supreme Court, was the strongest early endorsement of the doctrine of desuetude. That case concerned a note given to secure private improvements on public lands, the validity of which

64. *See* Bewdley Corp. (1712) 24 Eng. Rep. 357, 362; 1 P. Wms. 207, 223 (Parker, C.J.) (reasoning that "the constant practice, ever since the making of the act, having been otherwise . . . to make a contrary resolution in this case, would be, in some measure, to overturn the justice of the nation for several years past").

65. County of Cumberland (1795) 101 Eng. Rep. 507, 508–09 (Kenyon, C.J.).

66. *See* Bonfield, *supra* note 37, at 407 (discussing fifteenth-century cases).

67. COKE, *supra* note 60, at § 170, 115a. But Coke recognized two exceptions—first, that the long failure to apply an enactment to an inconsistent practice could be used as proof that an ambiguous statute should be construed not to cover that practice and, second, that a statute that was simply declaratory in nature (that is, one that declared a common law principle) could be abrogated by a long period of nonenforcement. *See id.*; Bonfield, *supra* note 37, at 406; Stinneford, *supra* note 34, at 573–74.

68. BLACKSTONE, *supra* note 34, at *76–77.

69. Bonfield, *supra* note 37, at 408.

70. Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 3 (1966); Bonfield, *supra* note 37, at 409.

71. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 13 (Isaiah Berlin et al. eds., Noonday Press 1954) (1832) (emphasis omitted).

72. LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 108 (temp. ed. 1949).

73. While some early English cases and commentators seemed to support a doctrine of desuetude, *see* Bonfield, *supra* note 37, at 405–06, modern cases "unanimously" reject the doctrine, *id.* at 408; *see also* Stinneford, *supra* note 34, at 573–74.

74. 1 Morris 70 (Iowa 1840).

depended on whether a three-decades-old criminal statute had fallen into desuetude. The statute prohibited any settlement on state lands, but it "had lain unexerted" and been openly disregarded since enactment.[75] The court declined to enforce the statute because doing so would have risked imprisoning many settlers in Iowa for violating a previously unenforced statute of which they were unaware. The court reasoned that "the broad and beaten path of custom" had led "directly across" the statute, "obliterat[ing] every apparent vestige of its existence."[76] It would be "contrary to the spirit of . . . Anglo-Saxon liberty," the court explained, "to revive, without notice, an obsolete statute, one in relation to which long disuse . . . had induced a reasonable belief that it was no longer in force."[77] The court thus embraced the principle that, "[i]f custom can make laws, it can, when long acquiesced in, recognized and countenanced by the sovereign power, also repeal them."[78]

Not long after *Hill*, the South Carolina Supreme Court abrogated two criminal statutes prohibiting drunkenness after a long period of nonenforcement.[79] And in 1858, the Pennsylvania Supreme Court also seemed to endorse the doctrine of desuetude, citing with approval earlier cases recognizing the doctrine and deeming contrary English cases to be unreliable.[80]

Notably, the cases recognizing the judicial abrogation of criminal statutes did not involve criminal prosecutions; rather, each involved collateral questions of civil litigation contingent on the validity of the criminal statutes that had long gone unenforced and openly disregarded.[81] Perhaps for that reason—or because of some other shift in the mid- to late-nineteenth century[82]—the state courts that had endorsed the doctrine reversed course a few decades later.[83]

A clear American rule soon emerged: courts may not abrogate legislative enactments based on desuetude. Legislation "remains in force until repealed by necessary implication or directly, or until it has expired by its own limitation."[84] Indeed, with the exception of West Virginia, the only American jurisdiction now

75. *Id.* at 77.
76. *Id.*
77. *Id.* at 79.
78. *Id.*
79. O'Hanlon v. Myers, 44 S.C.L. (10 Rich.) 128, 130–31 (1856).
80. Porter's Appeals, 30 Pa. 496, 498–99 (1858).
81. *See Hill*, 1 Morris at 76–78; *O'Hanlon*, 44 S.C.L. at 128–32.
82. This period saw a broader shift away from common law tools that allowed judges to limit the application of penal statutes. In the late nineteenth century, for example, many state legislatures passed statutes preventing state courts from applying the common law rule of strict construction. *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 752–53 (1935).
83. *See, e.g.*, Pearson v. Int'l Distillery, 34 N.W. 1, 5–6 (Iowa 1887); Homer & Son v. Commonwealth, 106 Pa. 221, 226 (1884).
84. District of Columbia v. Robinson, 30 App. D.C. 283, 285 (D.C. Cir. 1908).

recognizing desuetude as a valid defense,[85] American courts have adhered to this principle even "in the face of disquieting" and "shocking" consequences.[86]

The years that followed brought many unexpected prosecutions.[87] Unsuspecting Philadelphia fireworks vendors were punished under a 163-year-old statute prohibiting the sale of fireworks, despite open disregard of the statute and its characterization as obsolete in a digest of statutes.[88] A pharmacist who filled prescriptions for liquor was convicted for selling liquor without a license, even though that practice had long been allowed by local authorities.[89] And a surprise adultery prosecution of a Massachusetts woman was upheld despite rare enforcement and frequent noncompliance.[90] Equally surprising prosecutions under other seemingly dead crimes succeeded against grocers[91] and bookies.[92]

The Supreme Court seemed to embrace the American rule in *District of Columbia v. John R. Thompson Co.*[93] That 1953 case concerned a defendant prosecuted for refusing to serve Black patrons in its restaurant under two Reconstruction Era statutes that had not been enforced for over seventy-five years.[94] Although one of the court of appeals judges had deemed the federal statutes to have been abrogated by desuetude,[95] the Supreme Court rejected that view.[96] Justice Douglas, writing for the Court, acknowledged the "hardship" caused when "criminal laws so long in disuse as to be no longer known to exist are enforced against innocent parties."[97] But he was emphatic that such considerations "d[id] not bear on the continuing validity of the law."[98]

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85. *See* State v. Blake, 584 S.E.2d 512, 516–17 (W. Va. 2003); Robert Leider, *The Modern Common Law of Crime*, 111 J. CRIM. L. & CRIMINOLOGY 407, 438 (2021); Note, *supra* note 41, at 2218. Outside the context of criminal litigation, however, desuetude rationales have sometimes gained traction in other state courts. *See, e.g.*, Fort v. Fort, 425 N.E.2d 754, 759 (Mass. App. Ct. 1981) (holding that parents' violations of criminal statutes prohibiting fornication and lascivious cohabitation were "immaterial" to a child-custody determination because, "in terms of practical effect, a criminal statute which is wholly ignored is the same as no statute at all"); Alice D. v. William M., 450 N.Y.S.2d 350, 355 (Civ. Ct. 1982) (refusing to apply the unclean hands doctrine to bar a plaintiff's tort claim against a man who had been in an adulterous relationship with her on the ground that the adultery statute had rarely been enforced).

86. Rodgers & Rodgers, *supra* note 70.

87. *See, e.g.*, Pac. Shrimp Co. v. U.S. Dep't of Transp., 375 F. Supp. 1036, 1042 (W.D. Wash. 1974) (vessel inspection laws); United States v. Elliott, 266 F. Supp. 318, 325–26 (S.D.N.Y. 1967) (law prohibiting destruction of property in foreign countries); Dep't of Pub. Safety v. Freeman Ready-Mix Co., 295 So. 2d 242, 247 (Ala. 1974) (truck weight statute); State v. Egan, 287 So. 2d 1, 3–4 (Fla. 1973) (statute prohibiting nonfeasance).

88. *See* Homer & Son, 106 Pa. at 226–27.

89. State v. Mellor, 117 A. 875, 878–79 (Md. 1922).

90. Commonwealth v. Stowell, 449 N.E.2d 357, 360–61 (Mass. 1983).

91. State v. Cranston, 85 P.2d 682, 683–85 (Idaho 1938).

92. Everhart v. People, 130 P. 1076, 1081 (Colo. 1913).

93. 346 U.S. 100 (1953).

94. *Id.* at 102–03, 115.

95. *See id.* at 113.

96. *Id.* at 113–14.

97. *Id.* at 117.

98. *Id.*

Ten years later, however, the Supreme Court relied on a desuetude-like rationale in *Poe v. Ullman* to dismiss a declaratory judgment action as nonjusticiable.[99] The plaintiffs in *Poe* sought a judicial declaration that a Connecticut law prohibiting the use of contraceptives was unconstitutional. The Court dismissed the case, with a plurality of the Court concluding that the case was nonjusticiable because prosecutions under the statute were very unlikely given that it had been enforced only once in the seventy-five years since it had been enacted.[100] Justice Douglas dissented, rejecting the plurality's desuetude-like rationale as "contrary to every principle of American or English common law."[101]

At first glance, *Thompson* and *Poe* may seem to stand for a lopsided set of propositions. Under *Thompson*, desuetude is not a valid defense to a criminal prosecution for conduct under a statute that has long gone unenforced. Yet under *Poe*, desuetude can preclude a party seeking to engage in proscribed conduct from seeking a declaratory judgment that the statute proscribing the conduct is unconstitutional.

Upon closer inspection, however, the cases can be reconciled. In *Poe*, the Court pointed to lack of prosecution as a reason not to entertain a plaintiff's request to address the constitutionality of a state statute on substantive due process grounds.[102] In *Thompson*, by contrast, the Court was addressing federal statutes that had rarely been used and concluded only that, as a matter of federal common law, the statutes had not been repealed through disuse.[103] The *Thompson* Court did not opine on whether there might be a constitutional desuetude principle.

That limitation on *Thompson* reveals why American courts have generally been unwilling to abrogate an otherwise valid statute based on desuetude. In our system, courts normally do not abrogate legislative enactments absent enforcement that results in a constitutional violation.[104] There is a strong impulse, rooted in the separation of powers, that only the legislature—not the executive or the judiciary—has the authority to invalidate statutory law.[105]

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99. 367 U.S. 497, 508–09 (1961) (plurality opinion).

100. *Id.* at 501–02, 508–09. Of course, that assessment proved wrong: prosecutions under the same Connecticut law famously led to the Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

101. *Poe*, 367 U.S. at 511 (Douglas, J., dissenting).

102. *See id.* at 501–02, 508–09 (plurality opinion).

103. *See* 346 U.S. at 113 (concluding that the federal statutes were not "abandoned or repealed as a result of non-use").

104. Chivers, *supra* note 41, at 449.

105. As a leading statutory-construction treatise states, "[t]he doctrine of separation of powers prevents holding that a legislative enactment which complies with constitutional requirements is ineffective by nonuse or obsolescence or repealed by failure of those entrusted with its administration to enforce it." 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 23:26, at 533 (7th ed. 2009); *see also* 2 SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 34:6, at 42 (8th ed. 2022) (observing that "the American judiciary normally rejects the principle of desuetude" on the ground that "the legislature is the place . . . to go" in the event that a law "is unwise, antiquated, unenforced or unenforceable (all non-judicial questions)" (quoting State v. Cranston, 85 P.2d 682, 684 (Idaho 1938))).

Courts[106] and some commentators[107] have long defended the American rule precisely on that ground.

C. PAST ARGUMENTS FOR EMBRACING THE DOCTRINE

Nevertheless, in the face of the well-settled American rule, commentators ranging from Guido Calabresi to Robert Bork have called for courts to embrace some form of the doctrine of desuetude.[108] They have advanced two primary types of arguments.

1. Deliberation-Forcing Argument

Alexander Bickel,[109] and later Guido Calabresi,[110] laid out a normative argument in favor of the doctrine of desuetude: in their view, the doctrine is an essential deliberation-forcing mechanism by which courts can cause legislatures to reconsider outdated legislation. Although a law may well have had majoritarian support at the time of enactment, that is often no longer true many years later. Yet a "burden of inertia"[111] strongly impedes repeal. As Bickel explained, when a law is "consistently not enforced," repeal is not politically salient because "the chance of mustering opposition sufficient to move the legislature is reduced to the

106. *See, e.g.*, Snowden v. Snowden, 1 Bland 550, 556 (Md. High Ct. Ch. 1829) ("No judge or court . . . 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. The power to repeal and to enact are of the same nature."); State v. Egan, 287 So. 2d 1, 7 (Fla. 1973) ("[T]he general rule is that a statute is not repealed by nonuse. The argument . . . may be a cogent one when addressed to the legislature, yet courts of justice cannot and do not recognize such a policy as a basis for their decision."); s*ee also* SINGER & SINGER, *supra* note 105, § 23:26, at 533 n.4 (mislabeled in original source as n.5) (citing opinions rejecting desuetude doctrine on separation-of-powers grounds).

107. *See, e.g.*, Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLAMETTE L. REV. 1, 13 (1999); Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 82–83 (1976); Rodgers & Rodgers, *supra* note 70, at 2; Legislation, *The Elimination of Obsolete Statutes*, 43 HARV. L. REV. 1302, 1304–05 (1930).

108. *See* CALABRESI, *supra* note 1; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 96 (1st Touchstone ed. 1991) (1990); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 143–56 (1962); Price, *supra* note 28, at 1015–20; D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 WM. & MARY L. REV. 1545, 1564–75 (2019); 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*]; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 67–68 (1997); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 58–64 (1961); Bonfield, *supra* note 37, at 439–40; Note, *supra* note 41, at 2228–29; Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1059 (1990); Legislation, *supra* note 107.

109. According to 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 . . . ." Bickel, *supra* note 108, at 61.

110. CALABRESI, *supra* note 1.

111. *Id.* at 164.

vanishing point."[112] In such circumstances, the legislature does not reliably adjust the content of statutory law to reflect the current will of the people.

Bickel thought the doctrine of desuetude offered a way forward. He even thought that applying the doctrine to dead crime prosecutions would promote, rather than undermine, the separation of powers as a functional matter. In his view, when a prosecutor "resurrect[s]" a dead crime to prosecute an individual, the executive is effectively *legislating* by breathing new life into a law that has long lacked the will of the people.[113] In such circumstances, Bickel believed, it was appropriate for a court to step in—not to "hold that the legislature may not *do* whatever it is that is complained of, but rather . . . that the *legislature* do it, if it is to be done at all."[114] The court should simply "withhold[] adjudication of the substantive issue in order to set in motion the process of legislative decision."[115]

Bickel used *Poe* to illustrate the counter-majoritarian problem that dead crimes cause and to show how a desuetude doctrine might solve it.[116] In Bickel's estimation, the consistent lack of enforcement of the Connecticut birth control statute highlighted by the *Poe* plurality both suggested that the law no longer had current majoritarian support[117] and explained why the pro-birth-control political forces had been unable to garner the political support necessary for repeal.[118] Bickel viewed the *Poe* plurality opinion—which relied on a desuetude-like rationale to conclude that the plaintiffs lacked standing to challenge the birth control statute—as a roadmap for how courts could employ the doctrine of desuetude to force the legislature to reconsider outdated laws. In his view, under the *Poe* rationale, if individuals were prosecuted under the birth control statutes (as opposed to seeking a declaratory judgment as in *Poe*), then the prosecution "would fail on the ground of desuetude,"[119] forcing the legislature to reconsider whether the law had majority support.

History proved otherwise. Not long after *Poe*, in *Griswold v. Connecticut*,[120] the state in fact prosecuted individuals under the same birth control statute. Instead of concluding that the prosecutions were invalid because the statute had fallen into desuetude, the Supreme Court in *Griswold* famously held that the statute was unconstitutional because it violated a "penumbral" "right of privacy."[121] That was not the result Bickel had sought. And the Court has not expressly endorsed the doctrine of desuetude in subsequent cases.

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112. Bickel, *supra* note 108, at 63.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 59–64.
117. *Id.* at 60 ("The influences that favor the objective of the statute cannot summon sufficient political strength—or perhaps they have not the desire—to cause it to be enforced; assuming that the consistent enforcement of a law is as much a function of the political process as is enactment of it." (footnote omitted)).
118. *Id.* at 60–61.
119. *Id.* at 64.
120. 381 U.S. 479 (1965).
121. *Id.* at 485–86.

Nearly two decades later, then-Professor Calabresi elaborated on Bickel's argument for vindicating current majorities through his own version of the desuetude doctrine. By that time, in Calabresi's view, America was "choking on obsolete statutes"[122] because of societal and legal change—particularly the development of the regulatory state—that had led to an "orgy of statute making."[123] Unlike the common law, statutory law has no inherent mechanism for courts to update the law to reflect societal change. And legislatures suffer from a "retentionist bias" impeding repeal even when majoritarian support has disappeared.[124] "[B]ecause a statute is hard to revise once it is passed," he explained, "laws are governing us that would not and could not be enacted today."[125] And "some of these laws not only could not be reenacted but also do not fit . . . our whole legal landscape."[126] Calabresi proposed that courts aggressively review statutes, just as they reviewed common law precedent, to decide "when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it."[127]

Calabresi thus conceived of a muscular judiciary that abrogates statutes whenever they do not (in the judgment of a court) comport with the rest of the legal topography. Bickel, by contrast, focused on the lack of enforcement of a particular statute without regard to whether it coheres with more recent statutory law. Nonetheless, both theories are ultimately deliberation-forcing. That is, they envision the doctrine of desuetude not as precluding the legislature from proscribing particular conduct, but as forcing a *current* legislature to reconsider that policy judgment before allowing the executive to prosecute individuals under outdated and unenforced statutory law.

Importantly, however, to the extent the deliberation-forcing argument conceives of the doctrine of desuetude as sub-constitutional—a form of common law or statutory lawmaking—it remains subject to the separation-of-powers concerns that have caused virtually all American courts to reject the doctrine.

2. Constitutional Arguments

A straightforward way to avoid the separation-of-powers complication is to root the doctrine of desuetude in constitutional law. If the doctrine were so rooted, a court abrogating a dead crime would be exercising judicial review no different from any other instance in which a court determines that statutory law violates the Constitution. The second set of pro-desuetude arguments has taken this approach.

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122. CALABRESI, *supra* note 1, at 169.
123. *Id.* at 1 (quoting GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977)).
124. *Id.* at 149, 164.
125. *Id.* at 2.
126. *Id.* (emphasis omitted).
127. *Id.* at 164.

Commentators, such as Arthur Bonfield and William Stuntz, have argued that the "fair warning" promised by the Due Process Clause should be understood to preclude prosecutions under statutes that have fallen into desuetude.[128] At times, Bickel also seemed to frame his desuetude argument in these terms,[129] noting that desuetude's "strongest claim" to "naturalization in American law is consanguinity" with the constitutional doctrine that "statutes may be declared void for vagueness."[130] Bickel suggested that a prosecution under a statute that had fallen into desuetude, like a prosecution under a vague statute, denied a defendant fair warning and risked arbitrary enforcement.[131]

On occasion, judges have suggested that a desuetude argument could be understood in terms of "fundamental fairness owed to the particular defendant that is the heart of due process."[132] Indeed, this is the basis on which West Virginia adopted the desuetude doctrine.[133] But in general, the constitutional argument has not gained any more traction in American courts than other arguments for desuetude.

It is not that courts have expressly rejected the constitutional desuetude argument; rather, at least at the Supreme Court, the argument has been lost in larger constitutional debates. As one commentator has put it, judges skeptical of recognizing new individual constitutional rights "are unlikely to line up in support of a desuetude argument clothed in 'fairness' rhetoric."[134] And when the argument is presented to judges who might be "sympathetic" to recognizing such rights, constitutional desuetude can be "upstaged" by more robust constitutional rights.[135] As already noted, for example, the Court's recognition of a "right of privacy" in *Griswold* prevented it from considering a more modest desuetude argument.[136] Likewise, in *Lawrence v. Texas*, instead of using a desuetude principle to dispose of a Texas anti-sodomy law that had long gone unenforced, the Court invalidated the statute on substantive due process grounds.[137]

Nevertheless, Cass Sunstein has suggested that cases like *Griswold* and *Lawrence* can be understood in quasi-desuetudinal terms. Sunstein observed that

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128. *See* Bonfield, *supra* note 37, at 409–21; Stuntz, *Civil–Criminal*, *supra* note 108; *see also* Chivers, *supra* note 41, at 464–84.

129. *See* BICKEL, *supra* note 108, at 148–56.

130. *Id.* at 149.

131. *See id.* at 148–56. Ultimately, however, it seems that Bickel preferred a non-constitutional version of the doctrine of desuetude. For him, the doctrine had potential as one of several techniques he called "passive virtues," which could be used to avoid decisions of constitutionality. Bickel's primary goal was constitutional avoidance rather than enforcing due process rights. *See id.* at 248–54; Bickel, *supra* note 108, at 40–42, 79.

132. United States v. Elliott, 266 F. Supp. 318, 326 (S.D.N.Y. 1967); *see, e.g.*, People v. Lynch, 301 N.W.2d 796, 802–03 (Mich. 1981) (Levin, J., concurring).

133. State v. Blake, 584 S.E.2d 512, 516–17 (W. Va. 2003).

134. Note, *supra* note 41, at 2218.

135. *Id.* at 2219.

136. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965). Yet, as already noted, see discussion *supra* note 17, when substantive constitutional rights are rolled back, opportunities for desuetude challenges to zombie laws may emerge.

137. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

the contraceptive ban in *Griswold* "could rarely if ever be invoked as a basis for actual prosecutions," because "[t]he public would not accept a situation in which married people were actually convicted of [a] crime" that "had become hopelessly out of touch with existing convictions."[138] Similarly, the outdated sodomy ban in *Lawrence* had long been used "not for frequent arrests or convictions, but for rare and unpredictable harassment by the police."[139] With that in mind, Sunstein proposed a narrower reading of *Lawrence*, which he labeled "desuetude, American style."[140] In his view, the sodomy ban was unconstitutional at least in part "because it intrude[d] on private sexual conduct without having significant moral grounding in existing public commitments."[141] And that result reflected a more general principle that, "[w]ithout a strong justification, the state cannot bring the criminal law to bear on consensual sexual behavior if enforcement of the relevant law can no longer claim to have significant moral support in the enforcing state or the nation as a whole."[142]

Sunstein's argument is clever. But to the extent a quasi-desuetudinal rationale was in play in *Lawrence*, the Court did not expressly say so. The sense of unfairness sparked by the revival of an outdated sodomy ban was at best a background factor.[143] In any event, the Court has in no way endorsed that reading of *Lawrence* in subsequent cases.[144]

Even so, cases such as *Griswold* and *Lawrence* illustrate how the absence of a judicial tool that directly deals with dead crimes renders those crimes generative of constitutional law. Indeed, in a world without a doctrine of desuetude, American courts have used individual rights doctrines to pick up the slack.[145] In our system, then, dead crimes have functioned as progenitors of constitutional law—and not just any constitutional law, but hotly contested substantive due process jurisprudence. Indeed, *Griswold* and *Lawrence* are two of the most significant constitutional law decisions of the last sixty years. The way in which the

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138. Sunstein, *supra* note 29 (citing BICKEL, *supra* note 108, at 155).

139. *Id.* For a detailed account of pre-*Lawrence* enforcement of the Texas anti-sodomy law, see generally DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012).

140. Sunstein, *supra* note 29, at 30 (emphasis omitted).

141. *Id.* (emphasis omitted).

142. *Id.* (emphasis omitted).

143. *See* Lawrence v. Texas, 539 U.S. 558, 569–70 (2003) (noting absence of prosecution for sodomy violations).

144. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 667 (2015) (characterizing *Lawrence* as "confirm[ing] a dimension of freedom that allows individuals to engage in intimate association without criminal liability"); United States v. Windsor, 570 U.S. 744, 769 (2013) (citing *Lawrence* for the proposition that "[p]rivate, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State").

145. In *Griswold* and *Lawrence*, the Court struck down outdated contraceptive and sodomy bans not because they had fallen into desuetude, but because they violated substantive due process. *See Lawrence*, 539 U.S. at 578; Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The outdated nature of the crimes might have motivated the Court to invalidate them. But as a doctrinal matter, the Court relied on a more sweeping constitutional doctrine to accomplish the task. At least one state court of last resort has applied the same rationale to strike down a dead crime prohibiting fornication. *See* Martin v. Ziherl, 607 S.E.2d 367, 370–71 (Va. 2005) (applying *Lawrence*).

Supreme Court has dealt with dead crimes in the absence of a doctrine of desuetude has indelibly shaped our constitutional history.

II. PERNICIOUS EFFECTS OF DEAD CRIMES

Whatever their merits, the pro-desuetude arguments have not succeeded. As a result, virtually all Americans live in a world without the doctrine. That has deprived our criminal justice system of an essential mechanism for dispensing with dead crimes. The persistence of those crimes undermines the rule of law by enabling abuses at several stages of the criminal justice system. Dead crimes also produce broader, collateral effects—including the exacerbation of racial bias in police practices, the stripping of rights under civil law, and the unwarranted entrenchment of social stigma surrounding covered behavior.

In the common law system of an earlier era, judges created and refined substantive criminal law over time "through a slow accretion of precedent."[146] That enabled judges to "weed out" offenses that had become obsolete.[147] As our criminal justice system entered the statutory age, however, "the common law mechanism of self-correction was lost."[148] And as commentators have long noted, when it comes to criminal legislation in particular, legislatures have continuously added crimes to the books while rarely clearing outdated ones.[149] To observe this expansive trend, one need only compare the number of offenses on the books a century and a half ago to the dramatically larger number of offenses in the twenty-first century.[150]

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146. *See* Note, *supra* note 41, at 2225.

147. Stuntz, *Civil–Criminal*, *supra* note 108, at 38.

148. Note, *supra* note 41, at 2225.

149. Stuntz, *Pathological Politics*, *supra* note 108, at 507; *see* James Truslow Adams, *Hoover and Law Observance*, 82 FORUM 1, 5 (1929) ("[F]or some obscure reason in the American character, laws are rarely repealed; they are allowed simply to lapse in observance."), *reprinted in* SELECTED ARTICLES ON LAW ENFORCEMENT 334, 340 (Julia E. Johnsen ed., 1930); HUSAK, *supra* note 7, at 34 (calling legislatures "offense factories" that "churn out new statutes each week"); Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1052 (2014) ("Substantive criminal law has steadily expanded; more conduct is criminalized each year, and decriminalizations are few in comparison."). For the classic treatments, see generally John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); PACKER, *supra* note 29, at 250–366; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 170 (1967). *But see* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 233 (2007) (observing that, although "[t]he growth in raw numbers of offenses on the books is undeniable," state criminal codes have "contracted in important respects" (emphasis omitted)).

150. Stuntz, *Pathological Politics*, *supra* note 108, at 513–15. At the beginning of this century, Stuntz found that the number of separate offenses in the Illinois criminal code, for example, had increased from 131 to 421, and that the number of offenses in the Virginia criminal code had grown from 170 to 495. *Id.* at 513–14. Other state criminal codes have expanded in a similar fashion. *See id.* at 514. The federal criminal law has also expanded: while there were 183 separate offenses in the 1873 version of the Revised Statutes, by the year 2000, criminal conduct was defined in 643 separate sections of Title 18. *Id.* And from 2000 through 2007, Congress created more than 450 new crimes. *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 725 (2013). In total, Congress has created more than 4,500 criminal statutes, found in fifty-one titles of the U.S. Code. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 703 (2017).

Political incentives are largely to blame for the dramatic increase in criminal legislation.[151] Our system of government allocates power among the three branches so that each may check the others: legislators make laws; prosecutors enforce them; and judges interpret them.[152] But that is not how things play out in practice. As Stuntz put it, "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes," as well as the "growing marginalization of judges."[153]

That dynamic does not arise from "the partisan tilt of the relevant actors," but from "the incentives of the various actors in the system."[154] The "potential for alliance" between prosecutors and legislatures is strong, regardless of party, as each group reaps political benefits when the criminal law covers more conduct.[155] By enacting more crimes, legislatures enter into a principal–agent relationship with prosecutors: legislatures can simply pass many broad crimes and rely on prosecutors to use their discretion *not to enforce* those crimes when doing so would lead to political backlash.[156] That gives legislatures a political gain—the appearance of fixing problems through legislation—at low cost, because it leaves the difficult task of defining the actual bounds of the criminal law to prosecutors.[157]

But when "the state retains crimes that go largely unenforced" and empowers prosecutors "to decide which violators (if any) to charge," prosecutors effectively "become legislators," wielding "the practical power of crime definition."[158] Judges, meanwhile, lack a mechanism to disrupt the cooperation between legislatures and prosecutors. The result of that breakdown in the separation of powers is federal, state, and local criminal codes of immense breadth and depth.[159] A number of these crimes are dead crimes that have long outlasted their purpose and no longer reflect majoritarian views.[160]

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151. Stuntz, *Pathological Politics*, *supra* note 108, at 510.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *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) (observing that "[e]xecutive discretion . . . operates as an important shock-absorber that protects legislatures from hostile reaction to law enforcement operations").

157. Stuntz, *Civil–Criminal*, *supra* note 108, at 16–17.

158. *Id.* at 24; *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

159. *See* Stuntz, *Pathological Politics*, *supra* note 108, at 512–23; Larkin, Jr., *supra* note 150, at 727; Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 839 (2020) (describing the immense number of local governments with criminal codes covering a wide range of conduct).

160. *See* Beale, *supra* note 2, at 750–51.

Yet the prospect of a legislature repealing dead crimes is slim, because there is usually no political impetus for doing so.[161] In the case of morals legislation in particular, legislatures may also worry that "the public may conflate their support of decriminalization" of vice crimes "with support for the conduct in question"; for example, no politician wants a vote to repeal an adultery statute misconstrued as an endorsement of adultery itself.[162] As commentators have long understood, most of these dead crimes "are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[163]

As a result, nonenforcement is easier to achieve than is legislative repeal.[164] Once nonenforcement is achieved, however, "the chance of mustering opposition sufficient to move the legislature is reduced to the vanishing point."[165] Over time, the unenforced law fades from society's view, imposing a significant discovery cost further impeding repeal: as time goes on, fewer and fewer people are even aware that the dead crime remains on the books.

That is a problem because dead crimes undermine the rule of law by enabling abuses at several stages of the criminal justice system. They also produce broader, collateral effects—namely, the exacerbation of racial bias in police practices, the stripping of rights under civil law, and the unwarranted entrenchment of social stigma surrounding covered behavior.

A. UNDERMINING THE RULE OF LAW

The rule of law—or, the principle of legality[166]—ensures fair notice of what the law requires so people can plan their lives accordingly[167] and limits abuses of

161. CALABRESI, *supra* note 1, at 164; Bickel, *supra* note 108, at 63; HUSAK, *supra* note 7, at 10; *see, e.g.*, Daniel B. Rice, *Nonenforcement by Accretion: The Logan Act and the Take Care Clause*, 55 HARV. J. ON LEGIS. 443, 473–74 (2018) (describing the Justice Department's failed effort to lobby for repeal of the long unenforced Logan Act). And "[a]lthough every state has at least one designated official who edits laws, only nine states maintain a full law revision commission"—"only about half" of which "are empowered to recommend the removal of laws." Waters, *supra* note 24 (emphasis omitted). The few commissions that do exist "have often seen their budgets cut and their scopes narrowed." *Id.*

162. Beale, *supra* note 2, at 773–74. Indeed, the Alabama legislature has essentially said as much: the commentary to the provision of the penal code outlawing adultery states that, while there was "strong sentiment that adultery should not be regulated by criminal sanction, the [legislative] committee was of the opinion that the political success of a proposal formally to abolish this crime would . . . be doubtful." ALA. CODE § 13A-13-2 cmt. "[T]he reluctance of public officials to enforce the law," the legislature further noted, "is resulting in an informal abolition of any criminal stigma." *Id.*

163. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1935); *see also* BORK, *supra* note 108 (noting that "legislators, who would be aghast at any enforcement effort" as to certain outdated laws "nevertheless often refuse to repeal them"); Chivers, *supra* note 41, at 474 (noting that "the legislature may allow an obsolete statute to stay on the books for the sole purpose of making a statement of a moral ideal, fully expecting that it will not be enforced").

164. Bonfield, *supra* note 37, at 390. Even with some political will to repeal an obsolete crime, "an active minority can easily prevent" that outcome. *Id.* (quoting Clarence S. Darrow, *Ordeal of Prohibition*, 2 Am. Mercury 5, 25 *reprinted in* SELECTED ARTICLES ON LAW ENFORCEMENT, *supra* note 149, at 323).

165. Bickel, *supra* note 108, at 63.

166. Here, I use the terms "legality" and "rule of law" interchangeably, even though there may be technical differences in their meanings. As Josh Bowers has observed, "the common convention is to conflate" the two terms. Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 136 n.25 (2017); *see, e.g.*,

official discretion. As John Jeffries has put it, "[t]he rule of law signifies the constraint of arbitrariness in the exercise of government power" by guiding officials with precise rules, to the extent possible, for the sake of "regularity and even-handedness in the administration of justice and accountability in the use of government power."[168] The central premise of the rule of law is that "people in positions of authority" should not be left to act upon "their own preferences, their own ideology, or their own individual sense of right and wrong."[169] It thus prevents "unfair surprise"[170] by "assur[ing] that the processes of government, rather than the predilections of the individual decision maker, govern."[171]

The constitutional void-for-vagueness doctrine plays a significant role in guarding these rule-of-law values. That doctrine, as articulated by the Supreme Court, ensures that a criminal law is defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[172] Yet, as judges[173] and commentators[174] have long noted, that articulation of the standard does little to determine whether a statute is in fact impermissibly vague. As Peter Low and I have explained, the application of the vagueness doctrine in actual

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Waldron, *supra* note 29, at 10 (noting that "[s]ome theorists use the term *legality* or *principles of legality*" instead of "*the Rule of Law*"); Jeffries, Jr., *supra* note 29 (linking the two concepts).

167. *See* PACKER, *supra* note 29, at 84–85; *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 180–83 (2d ed. 2008) (explaining how a properly designed criminal law regime allows individuals "to predict and plan the future course of [their] lives within the coercive framework of the law" and "to foresee the times of the law's interference"); JOSEPH RAZ, *The Rule of Law and Its Virtue* ("[T]he law must be capable of being obeyed. . . . [I]t must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it." (emphasis omitted)), *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213–14 (photo. reprt. 2011) (1979).

168. Jeffries, Jr., *supra* note 29; *see also* PACKER, *supra* note 29, at 88–90 (describing how the principle of legality limits arbitrary state action).

169. Waldron, *supra* note 29.

170. PACKER, *supra* note 29, at 86–90; *see also* Jeffries, Jr., *supra* note 29, at 216; RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW 81 (3d ed. 2010) (observing that the legality principle provides a "prophylaxis against the arbitrary and abusive exercise of discretion in the enforcement of the penal law").

171. CASS, *supra* note 29; *see also* Dan-Cohen, *supra* note 29 ("[T]he rule of law is said to limit officials' discretion and thereby to curb their potential arbitrariness. The rule of law reduces the danger that officials may indulge their self-interest or give vent in their decisions to personal animosities or prejudices.").

172. Kolender v. Lawson, 461 U.S. 352, 357 (1983); *see also* City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (Stevens, J., concurring); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Connally v. Gen. Constr. Co., 269 U.S. 385, 392–93 (1926).

173. Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (noting that unconstitutional indefiniteness "is itself an indefinite concept"); *see also* Johnson v. United States, 135 S. Ct. 2551, 2572 (2015) (Thomas, J., concurring in judgment).

174. *See, e.g.*, Jeffries, Jr., *supra* note 29, at 196, 218 (observing that the articulated standard furnishes "no yardstick of impermissible indeterminacy"); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 74 (1960) (observing that the articulated standard "does not provide a full and rational explanation of the case development in which it appears so prominently").

cases is instead best understood as protecting two independent constitutional principles of criminal law: that "all crime must be based on conduct," and that "there must be a defensible and predictable correlation between the established meaning of a criminal prohibition and the conduct to which it is applied."[175] The second principle, "the correlation requirement," is an anti-delegation principle that prevents courts from defining criminal conduct after the fact and prevents legislatures from delegating to police the power to define crimes.[176]

That principle promotes the rule of law by preventing "unfair surprise."[177] It requires the definition of a crime to be correlated to the factual situations to which it is applied, such that a particular application of the elements of the crime was predictable and defensible, ex ante, in light of the law's text and any legal sources relevant to interpreting that text.[178] And the correlation requirement constrains the police by preventing "[l]aw by cop" through on-the-street invention and enforcement of new crimes.[179] The correlation requirement thus precludes laws so broad and indefinite that they "do[] not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions" of officials.[180]

The vagueness doctrine prevents these affronts to the rule of law when caused by excessively indefinite laws.[181] But dead crimes lie beyond the doctrine's reach,[182] even though they pose many of the same rule-of-law concerns. A crime cannot be meaningfully called a crime when the community is no longer "prepared to enforce" it as such in the face of open violations.[183] Yet, precisely

175. Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2053 (2015). The Supreme Court has explicated both of these constitutional principles outside the context of the vagueness doctrine—the conduct requirement in *Robinson v. California*, 370 U.S. 660, 666–67 (1962), and the correlation requirement in *Bouie v. City of Columbia*, 378 U.S. 347, 352–54 (1964).

176. Low & Johnson, *supra* note 175, at 2053–54.

177. *See* PACKER, *supra* note 29.

178. Low & Johnson, *supra* note 175, at 2064–79; *see, e.g.*, *Bouie*, 378 U.S. at 354.

179. Low & Johnson, *supra* note 175, at 2074, 2077–79; *see, e.g.*, Shuttlesworth v. City of Birmingham, 382 U.S. 87, 88–90 (1965). Unlike courts, police do not interpret and apply law in an authoritative manner; they enforce the law as written, in accordance with constitutional constraints such as the Fourth Amendment requirement for individualized suspicion that a suspect is guilty of a particular previously defined crime. That limitation would collapse if police were permitted to observe conduct, craft a crime that covers it, and then make an arrest based on probable cause that the arrestee committed the newly invented crime. Low & Johnson, *supra* note 175, at 2075.

180. *Shuttlesworth*, 382 U.S. at 90–91 (quoting Cox v. Louisiana, 379 U.S. 536, 579 (1965) (opinion of Black, J.)).

181. That is not to say that "the vagueness doctrine [i]s an offspring of the more general concept of legality." Jeffries, Jr., *supra* note 29, at 195. In fact, as John Jeffries has observed, "[a]cademic celebration of the legality ideal seems to have flowered after, not before, judicial crafting of the modern vagueness doctrine." *Id.* It is therefore "likely . . . that the contemporary insistence on the principle of legality . . . may have sprung in part from the desire to establish a secure intellectual foundation for modern vagueness review." *Id.*

182. Unless, of course, a crime is *both* vague and dead.

183. Hart, Jr., *supra* note 149, at 403; *see also* Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 18 (1957) ("The influence of penal law results not from men's learning criminal law as amateur lawyers, but from the significance of the public condemnation of . . . certain . . . acts."); *see, e.g.*, Rice, *supra*

because dead crimes are openly violated, their continued existence creates a serious danger for unfair surprise. As long as dead crimes remain on the books, government officials have vast discretion to resurrect any one of them in a particular investigative or prosecutorial context, irrespective of the official's reasons for doing so.[184] Dead crimes thus "lack[] . . . the kind of generality and predictability on which the rule of law depends."[185]

Unlike with vague crimes, however, there is no well-established constitutional doctrine that protects the rule of law by enabling a court to deem a dead crime void.[186] The risk for abuse in prosecutions and investigations is therefore significant.

1. Prosecutorial Abuses

The most obvious rule-of-law abuses occur when prosecutors unexpectedly bring dead crimes back to life, charging individuals under them after years of dormancy and frequent violation.[187] Such enforcement is inescapably arbitrary or selective and often results from some ulterior motive.

Consider the fornication and adultery crimes described earlier. While most states have not seen any prosecutions under these statutes for decades, there is always a possibility that individual prosecutors will resuscitate such laws.[188] In the late 1990s, for example, a prosecutor in Idaho charged eight pregnant high school girls and their boyfriends with criminal fornication.[189] Around the same time, criminal charges for adultery were brought against women in Connecticut and Wisconsin, with the Wisconsin woman being the first person charged under the statute in roughly a century.[190] And in 2004, a Virginia man was convicted under a previously unenforced state adultery statute after his jilted lover went to

note 161, at 446 (noting that the Logan Act is "[b]y and large . . . no longer regarded as a duly enacted law of the United States" because "[n]oncompliance with the statute carries" no real threat of criminal prosecution).

184. Bonfield, *supra* note 37, at 391.

185. Sunstein, *supra* note 29 (describing the dead sodomy crime at issue in *Lawrence*).

186. *See* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1138 (2016) (observing that, although "courts have enforced the prohibition against vague statutes, they have neglected to take the principles underlying vagueness seriously in other criminal justice contexts").

187. For a number of examples, see *supra* text accompanying notes 87–92.

188. *See* Beale, *supra* note 2, at 756–57, 757 n.37 (referencing 1990 article that quotes expert on Virginia family law who could not recall a single prosecution for adultery in Virginia). There is, however, a very strong argument that the holding of *Lawrence*—that states cannot criminalize sodomy—extends to general fornication statutes. Indeed, as already noted, the Virginia Supreme Court has taken this approach. *See* Martin v. Ziherl, 607 S.E.2d 367, 370–71 (Va. 2005).

189. Meinzer, *supra* note 20. This prosecution appears to have emboldened other prosecutors in Idaho to prosecute other minors for fornication as well. *See Counties Still Prosecuting 'Fornication*,' SPOKESMAN-REV. (Dec. 7, 2004), https://www.spokesman.com/stories/2004/dec/07/counties-still-prosecuting-fornication/ [https://perma.cc/6LQX-UN6L]. It could be argued that this series of prosecutions under the previously unenforced statute caused the statute to come *out* of desuetude and back into use. But that suggestion only underscores the serious risk of arbitrary enforcement posed by dead crimes; they empower prosecutors—not the legislature, nor the people—to determine what the actual, enforced law is.

190. Beale, *supra* note 2, at 757.

the police.[191] Unexpected prosecutions such as these illustrate how dead crimes "give prosecutors the extraordinary ability to single out and punish one defendant, or perhaps a handful of defendants, for conduct that is widespread."[192]

Prosecutors might resuscitate such statutes to pursue a wide range of goals, which may have nothing to do with the substance of the crime and may sometimes be illegitimate. The Idaho prosecutor, for example, seems to have been "concerned with the public fisc":[193] most of the girls prosecuted were arrested after applying for public assistance,[194] and the prosecutor described one of them as "a disgruntled, irresponsible teenager who [brings] something into the world that is going to cost taxpayers a lot of money."[195] To take a more historically prominent example, Martin Luther King, Jr., was the first person ever charged under an Alabama income tax perjury statute—a tactic that was part of the Governor's broader resistance to the Civil Rights Movement.[196] Dead crimes thus "invite prosecutorial conduct that is at best arbitrary and at worst discriminatory."[197]

Dead crimes can also be used for pretextual prosecutions. Charges for fornication or similar sexual crimes, for example, have been brought as backups in rape or sexual assault cases when evidence of force or lack of consent may be missing.[198] And in instances in which the defendant argues as a defense to rape that intercourse occurred but was consensual, the defendant thereby admits to the lesser offense of fornication.[199]

Even if such a rape or sexual assault case never goes to trial, the lesser charge for the dead sex crime gives prosecutors a valuable bargaining chip during plea bargaining that may increase the odds of obtaining a guilty plea.[200] Yet, in terms of social stigma, "[t]he public will likely see the plea-bargained case as 'really' a sexual assault case."[201] The continued existence of the dead crime thus enables

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191. *See* Rhode, *supra* note 23.

192. Beale, *supra* note 2, at 757–58.

193. *Id*. at 758.

194. Meinzer, *supra* note 20, at 166.

195. Hardy, *supra* note 22.

196. Leonard S. Rubinowitz, *Martin Luther King Jr.'s Perjury Trial: A Potential Turning Point and a Footnote to History*, 5 IND. J.L. & SOC. EQUAL. 237, 251–52 (2017) (explaining how King was charged with tax perjury, a felony, rather than the lesser but more commonly enforced offense of tax evasion, a misdemeanor).

197. Beale, *supra* note 2, at 759.

198. *Id*. at 759 & n.51; *see, e.g*., State v. Smith, 766 So. 2d 501, 504 (La. 2000) (defendant found not guilty of rape but guilty of a crime against nature, which was easier to prove); State v. Houston, 9 P.3d 188, 189 (Utah Ct. App. 2000) (defendant acquitted of rape, forcible sodomy, and burglary, but convicted of the lesser-included offenses of fornication, sodomy, and trespass); *see also* Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1662 & nn.13–14 (1991) (providing examples of using fornication statutes to prosecute suspected rapists and prostitutes). The strategy of using a fornication charge as a pretext in rape cases "works equally well whether the case is submitted to a jury or the defendant pleads guilty to the lesser offense." Beale, *supra* note 2, at 759 (footnote omitted).

199. Beale, *supra* note 2, at 759.

200. Stuntz, *Pathological Politics*, *supra* note 108, at 519–20; Stuntz, *Civil–Criminal*, *supra* note 108, at 27.

201. Stuntz, *Civil–Criminal*, *supra* note 108, at 27.

the prosecutor to get at least part of what could be obtained with a rape or sexual assault conviction—without having to put on evidence for the harder-to-prove crime.

But such prosecutorial uses of a crime may suggest that the crime is not in fact dead. After all, if prosecutors are bringing charges under fornication statutes—even if only for pretextual purposes—that would seem to be proof that the statutes are still being enforced. A conception of the desuetude principle broader than the historical doctrine is therefore needed to address this type of prosecutorial abuse.[202]

2. Investigative Abuses

Even when prosecutions under dead crimes are never brought, the continued existence of those crimes empowers law enforcement—particularly in the Fourth Amendment context, where the authority of police officers "expands and contracts along with the list of crimes on the books."[203] Because each additional criminal offense "gives [police] another legally valid reason to search [and seize],"[204] legislatures have "ultimate control over the scope of police authority."[205] Legislatures "define the list of crimes" that "answers the Fourth Amendment's most important question: probable cause to believe what?"[206] The more crimes there are—prosecuted or not—the more power police have to engage in searches and seizures that might turn up evidence of more serious crimes that are actually of interest to law enforcement. This relationship between substantive criminal law and criminal procedure gives rise to another abuse of dead crimes: even when such crimes are not enforced by prosecutors, police can rely on them, if only as a pretext,[207] to justify arrests[208] accompanied by searches[209] that turn up evidence of more serious crimes.

To see how this investigative maneuver works, consider the facts of *People v. Kail*.[210] An officer arrested Susan Kail for riding a bicycle without a bell, a criminal violation of a city ordinance. The officer admitted that Kail would never have been stopped but for the officer having "suspected" her "to be a prostitute."[211] After a search incident to arrest revealed drugs, Kail was prosecuted for the drug charge.[212] The violation of the bicycle-bell ordinance ultimately went unprosecuted. But note how the ordinance gave police immense investigatory power: its

202. *See infra* Part III (proposing a new conception of the desuetude principle).

203. Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 VA. L. REV. 347, 360 (2021).

204. William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 854 (2001); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001) (holding that the Fourth Amendment permits warrantless arrests even for minor offenses).

205. Stuntz, *supra* note 204.

206. *Id.*

207. *See* Whren v. United States, 517 U.S. 806, 813–15 (1996).

208. *See Atwater*, 532 U.S. at 323.

209. Chimel v. California, 395 U.S. 752, 753 (1969).

210. 501 N.E.2d 979 (Ill. App. Ct. 1986).

211. *Id.* at 981.

212. *Id.* at 980–81.

existence enabled the officer to arrest and search someone suspected of being a prostitute, despite the probable cause requirement barring arrests for acts of prostitution based on mere suspicion.[213]

Using this tactic, officers can indulge their bare suspicions by proxy.[214] They can justify searches and seizures using the full panoply of unenforced dead crimes, limited only by the number of dead crimes that can be remembered. Indeed, under a recent Fourth Amendment precedent, an officer need not even interpret these dead crimes correctly so long as his mistaken interpretation is "reasonable."[215] And because different dead crimes can be used as proxies on different occasions—a bicycle-bell ordinance for a suspected prostitute, a no-spitting-on-the-street ordinance for a suspected drug dealer, etc.—this investigative tactic can be used without ever generating enough concern to mobilize the political masses to demand repeal of these outdated laws.

Marijuana laws deserve special mention. Even though many states have legalized recreational marijuana use, it remains an offense subject to some penalty in most states and under federal law.[216] But across the country, recreational marijuana use has become prevalent,[217] with the result that the marijuana-use laws remaining on the books are openly disregarded and disfavored by most Americans.[218] In many jurisdictions where it remains an offense, moreover, criminal penalties have been removed or reduced.[219] It thus seems that, in at least some of the holdout jurisdictions, marijuana laws are already or will someday become dead crimes.[220] Yet marijuana crimes are routinely used by officers as a

213. *See* Stuntz, *Civil–Criminal*, *supra* note 108, at 10. Ultimately, however, the investigatory maneuver was unsuccessful in *Kail*. Rather unusually, the police department had an official and explicit policy of strictly enforcing all laws against suspected prostitutes. *Kail*, 501 N.E.2d at 981. An Illinois appellate court held that the policy constituted an equal protection violation because it bore no rational relation to bicycle safety. *Id.* at 981–82. But "in some sense," *Kail* "stands for its opposite," as similar equal protection claims are "almost always rejected" under rational basis review. Stuntz, *Civil–Criminal*, *supra* note 108, at 10–11 (citing as counterexample People v. Mantel, 388 N.Y.S.2d 565 (Crim. Ct. 1976)). Even in *Kail* itself, the government likely would have prevailed with just "a bit more subtlety." *Id.* at 11.

214. *See* Piotr Bystranowski & Murat C. Mungan, *Proxy Crimes*, 59 AM. CRIM. L. REV. 1, 4 (2022) (defining "proxy crimes" as "offenses that criminalize conduct . . . that is only marginally, if at all, wrongful" but is "assumed to be either related to, or correlated with, some other wrongdoing"); *see also* Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 159–60 (2005) (introducing notion that proxy crimes criminalize behavior that, "while not inherently risking harm, stands in for behavior that does risk harm").

215. Heien v. North Carolina, 574 U.S. 54, 57 (2014).

216. MIKOS, *supra* note 9, at 3; Hartman, *supra* note 10.

217. MIKOS, *supra* note 9, at 4 (noting that nearly half of Americans over the age of twelve have tried marijuana at some point during their lives); *see also* McCarthy, *supra* note 12 (reporting that sixty-six percent of Americans support legalizing marijuana as of 2018, compared to only twelve percent in 1969).

218. Daniller, *supra* note 12.

219. Hartman, *supra* note 10.

220. *See, e.g.*, Mary A. Celeste & Melia Thompson-Dudiak, *Has the Marijuana Classification Under the Controlled Substances Act Outlived Its Definition?*, 20 CONN. PUB. INT. L.J. 18, 48–51, 55–58 (2020) (suggesting that the federal classification of marijuana as a Schedule I drug under the Controlled Substances Act might be void on desuetude grounds).

basis for searches and seizures[221]—if for no other reason than marijuana's strong odor—that turn up evidence of more serious crimes. Indeed, a 2019 FBI study found that more people were arrested that year for simple marijuana possession than for all violent crimes combined.[222]

Borderline dead marijuana crimes thus illustrate just how significant dead crimes can be in empowering officers to engage in proxy investigations.[223] The investigative use of marijuana crimes also reveals a particularly perverse phenomenon: as a category of crime falls into desuetude, public disregard of the criminal prohibition becomes increasingly widespread; yet, as this occurs, police do not lose investigative power but *gain* it, because the increase in public disregard of the law creates more opportunities for proxy investigations.[224]

The upshot of all this is that, without a meaningful limit on dead crimes, the promise of the Fourth Amendment's procedural protections is significantly diminished.

B. COLLATERAL EFFECTS

Not only do dead crimes undermine the rule of law in prosecutions and investigations, but their continued existence also causes collateral effects that extend well beyond those contexts. Dead crimes exacerbate racial biases in policing practices, significantly diminish the rights of individuals in other areas of the law, and entrench the social stigma surrounding covered behavior longer than is warranted.

1. Exacerbating Racial Biases

Insofar as dead crimes increase the investigative power and discretion of arresting officers, they are likely to exacerbate racial biases already present in policing practices.

Arresting officers generally tend to use their broad discretion to enforce low-level, order maintenance crimes "disparately along lines of race, class, ethnicity . . . or some other arbitrary classification."[225] While Black Americans account for

221. For example, "the New York City Police Department . . . has processed hundreds of thousands of full-custody marijuana arrests, often on noncriminal charges that, upon conviction, prescribed only penalties akin to . . . traffic ticket[s]." Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 993 (2014) (internal quotation marks and citation omitted); *see also* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1064 (2013) (describing practice of "making a full custodial arrest for marijuana possession").

222. *See* Earlenbaugh, *supra* note 26 (reporting that FBI data showed that, in 2019, there were 500,395 arrests for simple marijuana possession compared to 495,871 arrests for violent crimes).

223. *See* Douglas Husak, *Drug Proscriptions as Proxy Crimes*, 36 LAW & PHIL. 345, 346 (2017) (characterizing drug offenses as proxy crimes).

224. *See, e.g.*, Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 591 (2010) ("Although possession of small quantities of marijuana has been decriminalized in New York State since the late 1970s, arrests for marijuana possession in New York City have increased more than tenfold since the mid-1990s, and remain high more than 10 years later.").

225. Bowers, *supra* note 221, at 1037–38 (describing arresting officers' disparate enforcement of order maintenance crimes more generally).

13.6% of the population,[226] for example, they comprise approximately 27% of all those shot and killed by police.[227]

To be sure, the Equal Protection Clause generally prohibits purposeful discrimination against protected classes.[228] But as Josh Bowers has observed, "plenty of room for mischief (unconscious or otherwise) remains between . . . the requirement that an arresting officer possess probable cause and the requirement that an arrest have a nondiscriminatory purpose."[229] Any additional discretion that dead crimes afford officers is likely to be abused in a similar manner.

Consider a twist on the facts of *Kail*, the bicycle-bell case discussed earlier.[230] Suppose the officer's real (albeit unproven) reason for stopping the woman was not suspected prostitution, but rather because she was Black.[231] That unproven motivation would not affect the legality of the officer's actions: the bicycle-bell ordinance would still provide the officer with a race-neutral basis for probable cause to stop the woman, search her, and ultimately find drugs.

This hypothetical is rooted in reality. New Jersey police officers have allegedly used a century-old bicycle-bell law as an excuse to stop Black cyclists; in one 2018 case, they used that dead crime to stop a Black cyclist who they believed was acting "suspiciously."[232] In that way, dead crimes provide officers with additional facially race-neutral laws on which they can justify investigative behavior that is infected with racial bias.

Even when particular officers are not racially motivated, moreover, the increased discretion that dead crimes give them can still exacerbate systemic

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226. *QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/K6T9-322J] (last visited Sept. 2, 2022).

227. *Fatal Force*, WASH. POST (Sept. 29, 2022), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/. An analysis of recent police–civilian encounters showed that officers aimed or shot a gun at Black individuals at eight times the rate of white individuals, and threatened force against Black individuals at four times the rate of white individuals. ERIKA HARRELL & ELIZABETH DAVIS, BUREAU OF JUST. STAT., OFF. JUST. PROGRAMS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES, at 7 tbl.5 (2020), https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf [https://perma.cc/E458-FJ53]; *see also* Radley Balko, Opinion, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof.*, WASH. POST. (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ (collecting evidence on racial disparities in police shootings and use-of-force incidents). These racial disparities are likely even higher when accounting for "selection bias" in the initial decisions to stop individuals. *See generally* Dean Knox, Will Lowe & Jonathan Mummolo, *Administrative Records Mask Racially Biased Policing*, 114 AM. POL. SCI. REV. 619 (2020).

228. McCleskey v. Kemp, 481 U.S. 279, 292 (1987).

229. Bowers, *supra* note 221, at 1037; *see, e.g.*, Chavez v. Ill. State Police, 251 F.3d 612, 645 (7th Cir. 2001) (finding no discriminatory purpose despite statistical showing of racial disparities in traffic stops).

230. People v. Kail, 501 N.E.2d 979 (Ill. App. Ct. 1986); *supra* text accompanying notes 210–13.

231. Nothing in *Kail* suggests that the defendant was Black.

232. Waters, *supra* note 24. More broadly, evidence suggests that police stop Black cyclists at a significantly higher rate than white cyclists. *See, e.g.*, GREG RIDGEWAY, OJMARRH MITCHELL, SHEILA GUNDERMAN, CEDRIC ALEXANDER & JAMES LETTEN, AN EXAMINATION OF RACIAL DISPARITIES IN BICYCLE STOPS AND CITATIONS MADE BY THE TAMPA POLICE DEPARTMENT 1–2 (2016), https://cops.usdoj.gov/RIC/Publications/cops-w0801-pub.pdf [https://perma.cc/XH92-SQK6] (finding that Tampa police stopped Black cyclists on nearly three times as many occasions as white cyclists).

racial basis. Order maintenance arrests are "often localized" to poor urban areas "because disorder correlates with urban poverty."[233] And because "urban poverty correlates with race," arrests tend to "pool in economically distressed and historically disadvantaged communities."[234] As a result, more power to arrest means more arrests of disadvantaged groups.

Consider yet another twist on *Kail*. This time the arresting officer is not racially motivated but has been instructed to focus attention on a poor, urban area that just so happens to be mostly Black. Using the bicycle-bell ordinance to arrest a Black woman in that area would thus nonetheless exacerbate broader systemic racial bias in policing practices.

2. Stripping Rights and Privileges

The continued existence of dead crimes can also significantly affect the rights and privileges of individuals in other areas of the law.

These effects are especially apparent with respect to vice crimes "caught between shifting moral sentiments"[235]—when society no longer thinks of the prohibited conduct as criminal but continues to view it as immoral. Suppose, for example, that a couple fornicates in a state where that act remains criminal, despite current moral sentiment. If one participant contracts a sexually transmitted disease and sues the other under tort law, a court could bar the tort claim under the "clean hands" doctrine on the ground that the plaintiff had violated the dead fornication crime.[236]

Similarly, courts in states criminalizing fornication and cohabitation have revoked a parent's custody of children because of the parent's ongoing cohabitation with a paramour.[237] Dependency exemptions on federal income tax returns

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233. Bowers, *supra* note 221, at 1038; *see also* Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 97–98 (2007) (discussing localized order maintenance policing).

234. *Bowers*, *supra* note 221, at 1038; *see also* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1699 (2010) ("[T]he most persuasive explanation for why authorities target poor and minority communities for order maintenance policing is that disorder is disproportionately found there, and resources being finite, enforcement dollars are best spent on geographically targeted policing."); William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820–22 (1998) ("Looking in poor neighborhoods tends to be both successful and cheap. . . . Street cops can go forward with little or no advance investigation. . . . [T]he stops themselves consume little time, so the police have no strong incentive to ration them carefully.").

235. Hillary Greene, Note, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 169 (1997); *see also id.* at 174–78 (collecting cases).

236. *See, e.g.*, Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990). The last reported conviction for fornication in Virginia was in 1849. *See* Commonwealth v. Lafferty, 47 Va. (6 Gratt.) 672 (1849).

237. *See, e.g.*, Jarrett v. Jarrett, 400 N.E.2d 421, 426 (Ill. 1979). The last recorded successful prosecution for fornication in Illinois was in 1916, *see* People v. Green, 114 N.E. 518 (Ill. 1916), and there appears to have been only one unsuccessful prosecution since, *see* People v. Garcia, 185 N.E.2d 1 (Ill. App. Ct. 1962). The City of Chicago Commission on Human Relations has cited that history of lack of prosecution as a reason for "discount[ing]" the statute's significance. *See* Jasniowski v. Rushing, 678 N.E.2d 743, 753 (Ill. App. Ct. 1997).

The parent who lost custody in *Jarrett* sought Supreme Court review of the Illinois Supreme Court's decision. The Supreme Court denied review. But Justice Brennan argued in dissent that the Illinois Supreme Court's presumption of the mother's lack of fitness based on her "ostensible violation" of the fornication statute likely violated due process, because the presumption was not rationally based given

have been denied to couples whose living arrangements violate their state's criminal law.[238] Courts have approved the denial of insurance coverage for injuries occurring during violations of outdated laws under criminal acts exclusions.[239] And unmarried cohabiters have been denied protection under antidiscrimination housing laws because of unenforced criminal prohibitions on such a living arrangement.[240] Indeed, dead crime violations have even kept individuals from sitting on a jury[241] and have restricted their travel.[242]

The federal ban on marijuana likewise has a number of civil-law implications, despite the federal government's express policy against criminal enforcement of marijuana users who comply with state medical marijuana laws.[243] For example, public housing agencies are required to deny new housing benefits to marijuana users and are permitted to evict current occupants upon discovery of marijuana use.[244] Medical marijuana dispensaries that operate legally under state law could be held civilly liable under the Racketeer Influenced and Corrupt Organizations (RICO) statute.[245] And federal preemption principles can prevent those

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the state's failure to enforce the criminal statute. *See* Jarrett v. Jarrett, 449 U.S. 927, 928–30 (1980) (Brennan, J., dissenting from denial of certiorari).

238. *See, e.g.*, Turnipseed v. Comm'r, 27 T.C. 758, 760 (1957); Ensminger v. Comm'r, 610 F.2d 189, 191–94 (4th Cir. 1979).

239. *See* Allstate Ins. Co. v. Holt, No. 90-1473, 1991 WL 65204, at *1–2 & n.2 (6th Cir. Apr. 25, 1991) (per curiam) (upholding denial of insurance coverage to man whose damages resulted from his "intentional or criminal acts," and observing that he had "committ[ed] a felony" by engaging in adultery).

240. *See, e.g.*, McFadden v. Elma Country Club, 613 P.2d 146, 150 (Wash. Ct. App. 1980); *see also* Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1089–90 (1992) (discussing *McFadden*).

241. United States v. Nichols, 937 F.2d 1257, 1263–64 (7th Cir. 1991) (noting that the government defended the use of a peremptory challenge to strike potential jurors who had violated a cohabitation statute on the ground that it was permissible to "look[] for people who abide by the law," regardless of whether the law had been enforced).

242. Rice, *supra* 161, at 453–54 (noting that "perceived violations" of the Logan Act "have served as a basis for . . . restricting Americans' travel").

243. Since 2014, Congress has inserted riders in annual appropriations statutes stating that "[n]one of the funds made available under [the statute] to the Department of Justice may be used . . . to prevent" specified states "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. B, § 531, 136 Stat. 49, 150–51; *accord* United States v. Trevino, 7 F.4th 414, 419–20 (6th Cir. 2021) (discussing similar riders in earlier annual appropriations statutes), *cert. denied*, 142 S. Ct. 1161 (2022); *see* Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 10–14 (2020) [hereinafter Mikos, *Evolving Federal Response*]; Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 633–34 (2011) [hereinafter Mikos, *Critical Appraisal*]. Nevertheless, because Congress has not removed marijuana from Schedule I of the Controlled Substances Act, "federal law still flatly forbids the . . . possession, cultivation, or distribution of marijuana," subject only to a narrow exception for research. Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2237 (2021) (Thomas, J., respecting the denial of certiorari).

244. 42 U.S.C. § 13661; 24 C.F.R. §§ 5.854(b), 5.858 (2022); *see* Mikos, *Critical Appraisal*, *supra* note 243, at 647.

245. *See* 18 U.S.C. § 1961(1) (defining "dealing in a controlled substance" as racketeering activity); *id.* § 1964(c) (providing civil liability for racketeering activity); Mikos, *Critical Appraisal*, *supra* note 243, at 649–54 (explaining that "a typical dispensary almost certainly commits a substantive RICO

complying with state medical marijuana laws from receiving various benefits to which they would otherwise be entitled under state law.[246] The continuing existence of the federal ban has also made banks reluctant to deal with marijuana suppliers abiding by state laws, depriving those suppliers of basic banking services.[247] Compared to most businesses, moreover, state-licensed marijuana suppliers are subject to a higher effective federal tax rate because the federal marijuana ban prevents them from deducting their usual operating expenses from their revenues.[248]

These various secondary effects of dead crimes are troubling. The fact that the criminal laws at issue are unenforced in the face of open disregard implies a long-held policy judgment by the state that a current majority would no longer deem the prohibited conduct criminal (even if a majority might still deem the conduct immoral).[249] Yet because legislatures have little political incentive to repeal,[250] the laws remain on the books alongside all other crimes. And courts hostile to a judicial doctrine of desuetude view that formal classification, vestigial though it may be, as sufficient to deny individuals a wide assortment of rights and privileges to which they would otherwise be entitled.

3. Entrenching Social Stigmatization

The continued existence of dead crimes can also unduly entrench the social stigma surrounding covered behavior.

Criminal law helps to construct and reify social norms about which behaviors are undesirable and unwelcome by formalizing their prohibition.[251] Even when a criminal prohibition goes unenforced for a long period of time, its continued

violation" that has caused injury to private parties, such as pharmaceutical companies); *see also* Mikos, *Evolving Federal Response*, *supra* note 243, at 13–14 (noting that "plaintiffs have already filed several prominent," albeit unsuccessful, "civil RICO lawsuits against state-licensed marijuana suppliers, seeking large damages").

246. *See, e.g.*, Musta v. Mendota Heights Dental Ctr., 965 N.W.2d 312, 325–27 (Minn. 2021) (denying reimbursement under a state workers' compensation plan to an employee who used medical marijuana in compliance with state law to treat chronic pain, on the ground that the federal ban on marijuana preempted the state scheme), *cert. denied*, 142 S. Ct. 2834 (2022) (mem).

247. Mikos, *Evolving Federal Response*, *supra* note 243, at 12.

248. *Id.* at 12–13; *see* I.R.C. § 280E ("No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business . . . consists of trafficking in controlled substances . . . which is prohibited by Federal law . . . .").

249. *See* Bickel, *supra* note 108, at 61–63.

250. *See supra* text accompanying notes 151–65. Indeed, in recent years, Congress has failed to enact various proposed bills that would have repealed or significantly softened the federal ban on marijuana. *See, e.g.*, Marijuana 1-to-3 Act of 2021, H.R. 365, 117th Cong. (2021); Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020); Marijuana Freedom and Opportunity Act, S. 1552, 116th Cong. (2019); Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. (2017).

251. *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 81–156 (10th ed. 2017) (describing how criminal law can shape social norms); Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. (forthcoming 2022) (manuscript at 42–43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4040302 [https://perma.cc/74BP-LU6Q] (same).

existence conveys, to some degree, a social message that any violations of the unenforced law are *bad*.[252]

In some circumstances, that may be warranted. Indeed, a lack of murder prosecutions in a jurisdiction should not lessen the stigma associated with murder, a *malum in se*[253] offense. But in other contexts—namely, *malum prohibitum*[254] offenses—the continuing formal classification of unenforced laws can inculcate unwarranted social stigmatization. As Justin Murray has noted, "whether they are enforced or not, criminal statutes express ideas about which behaviors are prosocial and which are out of bounds and about which groups of people are deserving and which, by contrast, should be stigmatized."[255]

For example, as Jordan Carr Peterson has noted, the continued existence of unenforced sodomy bans in some jurisdictions—even long after the Supreme Court's decision in *Lawrence*[256]—perpetuates the "stigmatization of all individuals who engage in same-sex intimacy."[257] As the Supreme Court put it in *Lawrence*, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[258]

III. A NEW CONCEPTION OF DESUETUDE FOR AMERICAN LAW

The last Part described how the continued existence of dead crimes enables abuses at several stages of the criminal justice system and produces broader pernicious effects. This Part argues that American law should embrace a desuetude principle to address those problems. That principle should be informed by the historical conception of the desuetude doctrine. But it need not precisely track that doctrine, which was rooted in customary law. Rather, a modern American conception of the desuetude principle should be fashioned for our statutory age. This Part explores some possibilities and offers a normative vision of desuetude rooted in a theory of criminalization.

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252. *See* Murray, *supra* note 251 (manuscript at 43); *see also* Bert I. Huang, *Law and Moral Dilemmas*, 130 HARV. L. REV. 659, 698 (2016) (reviewing F.M. KAMM, THE TROLLEY PROBLEM MYSTERIES (2015)) (presenting results of a study that found that moral intuitions about morally ambiguous conduct are influenced by whether the law criminally prohibits that conduct even if the criminal prohibition is not enforced).

253. "A crime or an act that is inherently immoral." *Malum in se*, BLACK'S LAW DICTIONARY (11th ed. 2019).

254. "An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Malum prohibitum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

255. Murray, *supra* note 251 (manuscript at 43).

256. *See supra* text accompanying notes 137–43 (discussing *Lawrence*). As already noted, these post-*Lawrence* sodomy bans are a type of zombie laws—a subset of dead crimes. *See* discussion *supra* note 17.

257. Peterson, *supra* note 17, at 896; *see also* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 112–13 (2000) (describing how unenforced sodomy bans stigmatize gay men and lesbians).

258. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

A. RESTRICTIVE HISTORICAL CONCEPTION

Historically, courts recognizing the doctrine of desuetude deemed a law void following a long period of nonenforcement "in the face of a public disregard so prevalent and long established" that a "custom of its nonobservance" had been established.[259] As already described, that rule emerged from the Roman tradition that an emerging custom of nonenforcement could also strip a law of its validity.[260]

An early American court embracing desuetude elaborated on that principle, explaining that a law fell into desuetude when the "broad and beaten path of custom" had led "directly across" it, "obliterat[ing] every apparent vestige of its existence" and establishing "a reasonable belief that it was no longer in force."[261] More recently, the West Virginia Supreme Court (the only state court of last resort now recognizing the doctrine) put a gloss on that rule, treating "[p]enal statutes" as "void under the doctrine of desuetude" if "(1) [t]he statute proscribes only acts that are *malum prohibitum* and not *malum in se*; (2) [t]here has been open, notorious and pervasive violation of the statute for a long period; and (3) [t]here has been a conspicuous policy of nonenforcement of the statute."[262]

These formulations from American courts are not only based in common law notions of custom and non-usage; they also evoke concepts of property law. Indeed, the references to a "path" of custom leading "across" a statute,[263] "open, notorious and pervasive" violations,[264] and "conspicuous" policies of nonenforcement[265] evoke the doctrines of prescriptive easement and adverse possession.[266] That is not surprising given that American courts were formulating and refining those common law property law doctrines around the time they were articulating the doctrine of desuetude. And to their credit, the analogy to adverse possession does help elucidate exactly what is occurring, as a descriptive matter, when a law falls into desuetude—an unlawful trespass is transformed into lawful activity.[267]

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259. Bonfield, *supra* note 37, at 396; *see supra* text accompanying notes 37–45.

260. *See supra* text accompanying notes 37–45.

261. Hill v. Smith, 1 Morris 70, 77, 79 (Iowa 1840).

262. State v. Blake, 584 S.E.2d 512, 516 (W. Va. 2003).

263. *Hill*, 1 Morris at 77, 79.

264. *Blake*, 584 S.E.2d at 516.

265. *Id.*

266. *See* JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, PROPERTY LAW: RULES, POLICES, AND PRACTICES 309 (8th ed. 2022) (explaining that adverse possession occurs when "one possesses another's land in a manner that is exclusive, visible ('open and notorious'), continuous, and without the owner's permission ('adverse or hostile') for a period defined by state statute"); *id.* at 339 (explaining that the "elements for establishing a prescriptive easement are the same as those for adverse possession except that the claimant must show adverse 'use' rather than adverse 'possession'"); *see also* Brady, *supra* note 17, at 1092 & n.188 (noting that "[d]esuetude bears a close relationship to the equitable doctrines of abandonment and waiver," which "animate . . . adverse possession and the law of covenants"); Scott Andrew Shepard, *Adverse Possession, Private-Zoning Waiver & Desuetude: Abandonment & Recapture of Property and Liberty Interests*, 44 U. MICH. J.L. REFORM 557, 612–23 (2011) (arguing that adverse possession principles provide a foundation for a desuetude doctrine in American law).

267. SINGER ET AL., *supra* note 266 ("[A]dverse possession doctrine transforms trespassers into owners.").

But tying the concept of desuetude to principles of customary Roman law and early American property law concepts is also restrictive. After all, customary law takes a long time to develop. And adverse possession rarely occurs. In addition, those old ways of thinking about dead crimes are not tailored to the statutory age in which we live. Rather, the language of those conceptions—and the ways in which they are implemented—are better suited for a common law system in which the law was shaped through the development of custom.

In American courts, the restrictive historical conception likely reflected the same separation-of-powers concerns motivating the general resistance to the judicial doctrine altogether[268]—that is, courts were willing to invalidate dead crimes only in rare instances for fear of acting like a legislature. But depending on how the desuetude principle is implemented, those concerns may be assuaged.[269]

It is thus worth considering whether a different conception of the desuetude principle is possible and preferable in the statutory age. A policy judgment is ultimately needed to define the contours of the principle.

B. BRIGHT-LINE ALTERNATIVE

Perhaps the most radical alternative to the traditional conception of desuetude would be a bright-line rule voiding all criminal laws after a certain period. Richard Myers advocates for something along these lines, proposing a "Criminal Sunset Amendment" to the Federal Constitution that would void any federal or state criminal law remaining in effect for more than twenty-five years.[270] As Myers points out, a bright-line rule of this sort would be in line with Thomas Jefferson's famous suggestion that "every law" should "naturally expire[] at the end of 19 years."[271] Myers is correct that his proposal is a useful "thought experiment" for "reconsider[ing]" the "time lag" problems in the criminal justice system.[272] But as an actual proposal, it is misguided for at least two reasons.

First, as a practical matter, a bright-line sunset rule would impose an unbearable burden on the legislature. As Bickel recognized long ago, "[i]t would be foolish . . . to expect continual expression of the legislative will through continual reconsideration of the statutebook."[273] Indeed, such a requirement "would ensure paralysis"[274] and lead to significant opportunity costs that would effectively prevent the passage of new and needed legislation.[275]

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268. *See supra* Section I.B.

269. *See infra* Part IV.

270. 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, 1362 (2008).

271. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 12 THE PAPERS OF JAMES MADISON 382, 385 (Charles F. Hobson et al. eds., Univ. Press of Va. 1979); *see* Myers, *supra* note 270, at 1328, 1331–32, 1362.

272. Myers, *supra* note 270, at 1331.

273. *See* Bickel, *supra* note 108, at 63.

274. *Id.*

275. Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 401 (1998) ("The legislative process is not costless; time and man-hours devoted to one piece of legislation are not available for others; by expending political capital on one law,

Second, a bright-line sunset rule would be overinclusive. It would capture not only *malum prohibitum* crimes, but also *malum in se* crimes that should remain on the books because they cover acts that are inherently immoral, such as murder.[276] Myers suggests that such a limitation is "ultimately circular," because it depends on a value judgment as to what is truly immoral.[277] But when assessing the optimal desuetude rule for American law, value judgments are essential. And to the extent Myers is worried that a *malum prohibitum* limitation would give judges too much discretion to make their own value judgments,[278] that concern would be better addressed by providing more criteria—not fewer—that must be considered before a crime is deemed void for having fallen into desuetude.

C. TYING THE PRINCIPLE TO A THEORY OF CRIMINALIZATION

To determine what those criteria should be, a normative theory of criminalization is needed.

Although a desuetude principle is consistent with many theories of criminalization, philosopher Douglas Husak's theory is especially attractive because it is particularly aimed at "combat[ing] the problem of overcriminalization."[279] In other words, it has an eye toward *getting rid* of crimes already on the books—precisely what a desuetude principle would do. To that end, Husak proposes a number of constraints on substantive criminal law, three of which are especially useful here.[280] The first is what he calls "the nontrivial harm or evil constraint," under which conduct may be legitimately criminalized only if the prohibition aims to minimize a nontrivial harm or evil.[281]

Husak's second and third constraints are closely related and are inspired by the constitutional law tier of judicial review known as "intermediate scrutiny."[282] The second constraint requires the state to have a "substantial interest" in minimizing the nontrivial harm or evil at which a criminal prohibition is aimed.[283] The third constraint is that, if the state has a substantial interest, it must be

a legislator has less to expend on others; even routine legislation can absorb significant amounts of legislative time, energy, and decisionmaking capacity." (citing JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 43–84 (1st ed. 1962))).

276. West Virginia apparently shares this view, limiting desuetude to *malum prohibitum* crimes. *See* State v. Blake, 584 S.E.2d 512, 516 (W. Va. 2003).

277. Myers, *supra* note 270, at 1369–70.

278. *See id*. at 1370.

279. HUSAK, *supra* note 7, at 91.

280. Husak proposes a number of constraining principles and divides them into two groups—those that are "internal" to the criminal law and those that are "external" to it. *Id*. at 55. But that distinction and several of the principles themselves are beyond the scope of this Article.

281. *Id*. at 55, 65 (emphasis omitted).

282. *Id*. at 125–27, 137, 145; *see* Craig v. Boren, 429 U.S. 190, 197–99 (1976) (applying intermediate scrutiny to sex-based classifications). In Husak's view, because criminal laws are punitive, they should *always* be required to satisfy at least intermediate scrutiny—rather than rational-basis review. HUSAK, *supra* note 7, at 125–27.

283. HUSAK, *supra* note 7, at 132–44.

"directly advanced" by the criminal prohibition—that is, there must be affirmative proof that "the legislative purpose will actually be served."[284]

For present purposes, it is unnecessary to accept Husak's theory in full or even to opine on whether these three principles should *always* be applied to substantive criminal law. It suffices here to conclude that Husak's principles are an attractive normative basis for developing a desuetude principle for a statutory age.

The first constraint's focus on triviality usefully describes dead crimes: open disregard of a criminal prohibition that has long gone unenforced strongly suggests that society now views the prohibited conduct as trivial. Indeed, the historical concept of nonenforcement in the face of open disregard can be understood as a rough test for determining triviality. Yet, unlike the historical test for desuetude, a focus on triviality does not depend on a common law notion that a custom of non-usage can override legislation. It instead interrogates the substantive legitimacy of the criminal prohibition and is thus better suited for reviewing statutory law.

The combination of the second and third constraints are also attractive in a statutory age because they lend themselves to a form of judicial review of statutes with which courts are already familiar—intermediate scrutiny. That type of judicial review is more principled than a free-floating determination about whether a particular statute has fallen out of favor. It thus may alleviate some of the concerns that have prevented American courts from adopting the doctrine of desuetude. And unlike with a bright-line criminal sunset rule, *malum in se* crimes would easily survive the means–end assessment required by intermediate scrutiny.

1. A Two-Step Test for Desuetude

Drawing on Husak's three constraints, I propose a two-step test for determining whether a criminal prohibition has become a dead crime. At the first step, a defendant challenging a criminal prohibition on desuetude grounds must make a 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. This step accords with Husak's nontrivial-harm-or-evil constraint: lack of meaningful enforcement in the face of open disregard is taken as initial proof that the harm or evil the criminal prohibition was designed to address is (or has become[285]) trivial.

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284. *Id*. at 145–53 (emphasis omitted).

285. It may be, for example, that the factual basis for enacting the criminal prohibition was sound in the eyes of society at the time of enactment, but that it has since eroded—and perhaps even become repugnant to modern sensibilities. *Cf*. Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 MICH. L. REV. (forthcoming 2023) (manuscript at 2) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3920497 [https://perma.cc/LQ7G-ULPS]) (describing how Supreme Court precedents can "linger long after their ethical foundations have crumbled"). Or, more subtly, the societal *significance* of the factual basis on which the law was based may have changed over time. *Cf*. Charles L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655, 674 (2018) (observing that Justice Souter embraced a constitutional methodology that took into account that "the significance of old facts may have changed in the changing world" (quoting Justice David H. Souter, Commencement Address at

Although this step uses some of the same language as the historical doctrine of desuetude, it would not be as rigorous as that doctrine. Only *meaningful* enforcement would preclude a prima facie showing at step one. And meaningful enforcement would not encompass the use of dead crimes merely as a predicate crime to justify searches and seizures.[286] Nor would it encompass the prosecutorial use of dead crimes merely as backup charges in prosecutions aimed at more serious offenses.[287] Only non-pretextual prosecutions under the dead crime itself would constitute meaningful enforcement.

In addition, unlike the historical doctrine of desuetude, the defendant would not always need to show that the period of meaningful nonenforcement and open disregard has lasted *a very long time*; a short period may qualify in circumstances in which custom has rapidly changed, at least for purposes of the prima facie showing at step one. That showing simply triggers more rigorous judicial review.

Put another way, the prima facie showing establishes that the criminal prohibition is suspect and should be subjected to heightened scrutiny. The criminal prohibition is suspect not because it implicates a fundamental right—as in the case of fundamental-rights substantive due process review—but rather because it appears substantively deficient insofar as it covers trivial conduct. Given that apparent deficiency, substantive review more exacting than traditional rational-basis review is warranted.

Accordingly, at the second step of the two-step test, the court would apply intermediate scrutiny to the criminal prohibition at issue. Intermediate scrutiny—rather than strict scrutiny—is appropriate in my view because it gives the state a real opportunity to defend the substance of the law.[288] The burden would shift to the state to show that it continues to have a "substantial interest" in minimizing the harm or evil which the criminal prohibition was designed to address and that the interest is "directly advanced" by the continued existence of the criminal prohibition.

At this step, the state would need to identify a legitimate substantial interest justifying the criminal prohibition.[289] And to show that the statute directly advances that interest, the state would need affirmative proof that the "the legislative purpose" it has identified is in fact served by the continuing existence of the criminal prohibition.[290] The state might also introduce evidence rebutting the defendant's prima facie showing of meaningful nonenforcement and open disregard—for example, by pointing to recent non-pretextual criminal prosecutions under the

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Harvard University (May 27, 2010) (transcript available at https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ [https://perma.cc/4KSM-7B8H])).

286. *See supra* Section II.A.2.

287. *See supra* Section II.A.1.

288. Strict scrutiny has long been characterized as "strict in theory, but fatal in fact." Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment). In the context of substantive review of dead crimes, that test is too harsh because there are instances in which the long-unenforced criminal prohibition should not be invalidated. *See, e.g.*, *infra* text accompanying notes 292–95.

289. HUSAK, *supra* note 7, at 132–44.

290. *Id.* at 145–53.

statute. Such evidence may indirectly show that the state still has a substantial interest in minimizing the harm or evil at which the criminal prohibition is aimed and that the continued existence of the statute directly advances that interest.

Thus, the two-step test would be both more capacious and more restrictive than the historical conception of desuetude. It would be more capacious in the sense that a broader range of crimes would be subject to heightened judicial review. But once heightened review is triggered, it would be stricter in the sense that it would constrain a judge's analysis to a means–end assessment within the familiar intermediate scrutiny tier of judicial review.[291]

2. Applications

To see how the two-step test might work in practice, consider a few applications.

First, consider a challenge to a fornication statute. Under the two-step test, the challenger would first need to make a prima facie showing that, for some material period of time, fornication has been prevalent in the state and violators have not been subject to non-pretextual prosecutions. If that showing were made—and it very likely would be—then the burden would shift to the state to show that it still has a substantial interest in minimizing fornication and that the continuing existence of the criminal prohibition directly advances that interest. Given modern social norms toward sex, a state would have some difficultly identifying a substantial interest in minimizing fornication; but perhaps an interest in reducing the spread of sexually transmitted diseases would suffice. If so, however, the state likely would not be able to show, with affirmative proof, that the *criminal* prohibition on fornication directly advances that interest—particularly when there are less burdensome means of advancing the interest, such as promoting sexual health education and testing services.

Importantly, moreover, the state's possible routine inclusion of fornication charges as a backup to charges for rape or sexual assault would not bear on the analysis. Those pretextual prosecutions would not count as "meaningful enforcement" at the first step. Nor would they help to show that the criminal prohibition directly advances the state's substantial interest in reducing the spread of sexually transmitted diseases. And if the state instead tried to argue that its substantial interest in the fornication law is to minimize rape and sexual assault, it would not be able to show that the fornication law—as opposed to rape and sexual assault laws themselves—directly advanced that interest.

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291. Reliance on the historical desuetude principle at step one—nonenforcement in the face of open disregard—imports a line-drawing problem inherent to the historical desuetude inquiry: how does a court know when exactly there has been sufficient nonenforcement or open disregard? But the two-step test helps to mitigate that problem by cabining the historical principle to only the first step. That step should be more capacious than the historical test precisely because it is not the end of the analysis. For example, in a case in which it is not clear whether there is "enough" nonenforcement, the first step should be applied in a manner that errs toward concluding that a prima facie case has been made. Then, at step two, the state can point to a substantial interest and evidence of how the continued existence of the law directly advances that interest, including the handful of prosecutions that may exist.

Second, consider the federal statutes at issue in the Supreme Court's 1953 decision in *District of Columbia v. John R. Thompson Co.*[292] Recall that those statutes prohibited restaurant owners in the District of Columbia from refusing to serve Black patrons but had not been enforced for over seventy-five years.[293] Yet the Court rejected a desuetude argument.[294] The two-step test helps to explain why that was the correct result. At the first step, the defendant clearly could show meaningful nonenforcement and, given the racial tensions of the time, probably could have made a prima facie showing of open disregard. But the desuetude challenge would fail at step two. The government would easily be able to identify a substantial interest—minimizing racial discrimination—and would be able to show that a law banning a specific type of racial discrimination, even if rarely enforced, directly advanced that interest by sending a clear message to restaurant owners and by dignifying the right of racial minorities to live in an be equal world.

The *Thompson* example thus illustrates how the two-step test is an improvement on the historical concept of desuetude inasmuch as it expressly accounts for whether the state continues to have a substantive interest in the criminal prohibition, despite a period of nonenforcement in the face of open disregard.[295]

Third, consider a borderline case—a low-level marijuana law.[296] A desuetude challenger may be able to make a prima facie showing that, for some material period of time, recreational marijuana use had been prevalent in the jurisdiction and that violators had not been meaningfully prosecuted. Although many arrests and searches may be based on the law, those uses (absent actual prosecutions) would not qualify as *meaningful* enforcement and thus would not preclude the prima facie showing. And given the rapid increase in the prevalence of recreational marijuana use in most jurisdictions—indeed, roughly half of Americans over the age of twelve have tried marijuana at some point during their lives[297]—the challenger likely would not need to show a long period of nonenforcement. Even a few years would likely be sufficiently material for a prima facie showing that the marijuana law had become trivial in the eyes of society.

At step two, the state could probably point to some substantial interest in regulating recreational marijuana use—for example, preventing minors from engaging in such conduct. But the state may have more difficulty proving with affirmative evidence that retaining a general criminal prohibition—rather than adopting some other means of regulation—directly advances that interest. And it could not successfully argue that the mere pretextual use of the marijuana prohibition directly advances that stated interest. That said, this would be a more

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292. 346 U.S. 100 (1953). For a more detailed discussion of *Thompson*, see *supra* text accompanying notes 93–103.

293. *Thompson*, 346 U.S. at 102–03, 115.

294. *Id.* at 113–18.

295. *See, e.g.*, Rice, *supra* note 161, at 457–58 (describing how the long unenforced Logan Act "is not a statute whose policy presuppositions are entirely alien to modern sensibilities").

296. *See supra* text accompanying notes 216–22.

297. MIKOS, *supra* note 9, at 4.

difficult case than the prior two examples, and the outcome would depend on the specifics of the jurisdiction and the evidence.

IV. MECHANISMS FOR IMPLEMENTATION

Even if my proposal for a new conception of the desuetude principle is accepted, a question remains as to how it would be implemented in American law. The best mechanisms for avoiding the separation-of-powers objection that has long kept courts from embracing the historical doctrine of desuetude would be a legislative solution or a constitutionalized version of the desuetude principle.

A legislative solution that affirmatively empowers judges to invalidate prosecutions and investigations based on dead crimes would be the cleanest route. State legislative action would be most important because, as the examples in this Article have illustrated, the most pernicious dead crimes are those found in state and local codes.

Some commentators have proposed a statutory fix.[298] But because that approach would not elevate the desuetude principle to constitutional status, it would be vulnerable to repeal and ever-changing political sentiment. A statutory approach may also be inadequate to address any subsequently enacted criminal prohibitions.[299]

More importantly, a statutory approach would not effectively address dead crimes contained in thousands of local codes.[300] About half of states have constitutionalized an "imperio" home rule regime,[301] under which local governments have "permanent substantive lawmaking authority,"[302] such that "local power" to define crimes "is insulated from state legislative curtailment so long as it touches only local (and not statewide) matters."[303] In those states, a state desuetude statute often could not reach dead crimes contained in local codes.

A state-constitutional-amendment approach would more effectively stamp out dead crimes in a broader number of state and local codes. But the likelihood of desuetude amendments at the state level is low. Because the prospect of legislatures repealing individual dead crimes is slim,[304] sufficient political will to pass constitutional amendments to address dead crimes seems highly unlikely.

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298. For example, shortly after the Model Penal Code was published, a set of scholars proposed adding a provision recognizing desuetude as a criminal defense. Rodgers & Rodgers, *supra* note 70, at 27–28; *see id.* at 25 (recognizing that, in light of the separation of powers, "the defense of desuetude needs legislative sanction and articulation"); *see also* Fissell, *supra* note 159, at 845–46 (describing origins of the Model Penal Code).

299. In general, later and more specific enactments prevail over earlier and more general enactments. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000); Pac. Lumber Co. v. State Water Res. Control Bd., 126 P.3d 1040, 1053–54 (Cal. 2006).

300. *See* Fissell, *supra* note 159, at 840 (observing that there are nearly 40,000 local governments).

301. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338–39, 1339 n.12 (2009).

302. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007).

303. Fissell, *supra* note 159, at 855.

304. *See supra* text accompanying notes 161–63.

In light of those impediments to an effective legislative solution, courts should incorporate the desuetude principle into constitutional law. This Part identifies three potential means of implementation—the Federal Due Process Clause, state due process analogues, and the Fourth Amendment. Implementing desuetude as a federal due process principle is the most natural solution. But even if the Supreme Court is not inclined to adopt that approach, state courts of last resort should do so. Finally, a Fourth Amendment solution may also be needed to address the pretextual uses of dead crimes in investigative contexts.

A. FEDERAL DUE PROCESS

The most natural way to incorporate the desuetude principle into American law is through federal due process. As already noted, commentators have argued for some form of desuetude as a due process principle on either "fair warning" or "fundamental fairness" grounds.[305]

The strongest claim a desuetude principle has to due process is its close connection to the vagueness doctrine.[306] Like that doctrine, a desuetude principle would promote the rule of law by preventing unfair surprise and arbitrary enforcement. Where the vagueness doctrine addresses those harms as they arise from excessively indefinite statutes, a desuetude doctrine would address them in the context of unexpected prosecutions under dead crimes. Such crimes undermine the rule of law in much the same way as unconstitutionally vague laws, giving vast discretion to government officials to bring them back to life through an unexpected prosecution or investigation, regardless of how illegitimate or idiosyncratic the official's reasons for doing so might be. A due process desuetude principle would therefore nicely complement the vagueness doctrine by addressing rule-of-law abuses that lie beyond that doctrine's reach.[307]

1. Promoting the Separation of Powers

Elevating desuetude to a constitutional doctrine would also solve the separation-of-powers objection that has prevented courts from adopting a sub-constitutional desuetude doctrine. A court abrogating a dead crime on a due process ground would be exercising judicial review no different from any other instance in which a court determines that statutory law violates constitutional law—particularly if the court engaged in intermediate scrutiny review along the lines I have suggested.

In fact, a constitutional desuetude principle would arguably promote the separation of powers as a functional matter. Recall that prosecutorial and investigative abuses of dead crimes themselves reflect a breakdown in the separation of powers. As already explained, political incentives are largely to blame for the

305. *See supra* text accompanying notes 128–33.

306. *See* BICKEL, *supra* note 108, at 149 (noting that the "strongest claim that the idea of desuetude has to naturalization in American law is consanguinity" with the "due process" doctrine that "statutes may be declared void for vagueness"); Comm. on Legal Ethics v. Printz, 416 S.E.2d 720, 724–26 (W. Va. 1992) (recognizing due process desuetude doctrine based on similarities to vagueness doctrine).

307. *See supra* text accompanying notes 181–86.

dramatic increase in criminal legislation and the legislative failure to repeal dead crimes.[308] By enacting more and more broad crimes, legislatures leave the task of defining the actual bounds of substantive criminal law to prosecutors, who use their discretion *not to enforce* those crimes to avoid political backlash.[309] But when "the state retains crimes that go largely unenforced" and empowers prosecutors "to decide which violators (if any) to charge," prosecutors effectively "become legislators," wielding "the practical power of crime definition."[310]

Once meaningful nonenforcement is achieved, moreover, "the chance of mustering opposition sufficient to move the legislature is reduced to the vanishing point."[311] And as time passes, fewer and fewer people are even aware that the dead crime remains on the books. At that point, as Bickel observed, when a prosecutor "resurrect[s]" a dead crime to prosecute an individual, the executive is effectively *legislating* by breathing new life into a law that has long lacked the will of the people.[312]

In such circumstances, there is a separation-of-powers basis for a court to intervene on desuetude grounds—not to "hold that the legislature may not *do* whatever it is that is complained of, but rather . . . that the *legislature* do it, if it is to be done at all."[313] In this way, a due process desuetude principle would share another affinity with the vagueness doctrine, which prevents the legislature from using vague laws to "hand responsibility for defining crimes" to someone else, thereby "eroding the people's ability to oversee the creation of the laws they are expected to abide."[314]

2. Combating Overcriminalization

In addition, a due process solution would help combat overcriminalization. It would do so directly by creating a judicial mechanism for abrogating dead crimes. But it would also address these concerns through an indirect means. Because desuetude would be a constitutional principle, it would play a role in the context of interpreting broadly worded statutes. Even when those statutes could not categorically be characterized as dead crimes, particular applications of the statutes could pose constitutional concerns when viewed through the lens of a due process desuetude doctrine. Given that risk, the constitutional avoidance

308. *See supra* text accompanying notes 151–65.

309. Stuntz, *Pathological Politics*, *supra* note 108, at 547–49; Stuntz, *Civil–Criminal*, *supra* note 108, at 16–17.

310. Stuntz, *Civil–Criminal*, *supra* note 108, at 24; *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.")

311. Bickel, *supra* note 108, at 63.

312. *Id.*; *cf.* Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1251–56 (2019) (arguing that the Constitution requires some measure of synchronicity for each type of federal lawmaking).

313. Bickel, *supra* note 108, at 63.

314. United States v. Davis, 139 S. Ct. 2319, 2325 (2019); *see* Low & Johnson, *supra* note 175, at 2053–54 (identifying an "antidelegation" principle in the Court's vagueness decisions).

canon of statutory interpretation would counsel in favor of a narrowing interpretation of the broadly worded statute that avoids any concerns about desuetude.[315]

The vagueness doctrine again serves as useful analogy. When the Supreme Court is asked to interpret an excessively indeterminate federal criminal law that raises vagueness concerns, the Court typically adopts a narrow interpretation of that law that avoids those concerns.[316] In *Skilling v. United States*,[317] for example, the Supreme Court narrowly construed the federal mail and wire fraud honest-services statute by limiting its application to bribes and kickbacks in order to avoid vagueness concerns.[318] More recently, in *Van Buren v. United States*,[319] the Supreme Court narrowly construed a provision of the Computer Fraud and Abuse Act, noting that the narrow construction avoided "attach[ing] criminal penalties to a breathtaking amount of commonplace computer activity."[320]

Courts would follow essentially the same approach when construing statutes in light of constitutional desuetude concerns. When faced with a broadly worded statute appearing to cover both a core of conduct that poses no desuetude concerns and an outer periphery of conduct that does pose those concerns, courts could invoke the canon of constitutional avoidance to interpret the statute narrowly, limiting the statute's application to core conduct.

Consider, for example, the New York City ban on recording public performances described earlier. That ordinance criminalizes the "unauthorized operation of a recording device in a place of public performance."[321] Assume the ordinance was enacted long ago to protect artists by ensuring that pirated analog versions of their live performances would not be sold on the black market. That was no doubt

315. *Davis*, 139 S. Ct. at 2332 ("[T]his Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly.").

316. Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. CHI. L. REV. (forthcoming 2023) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4178731 [https://perma.cc/9CUF-ZN37])("In the vast majority of federal-law cases, the [Supreme] Court . . . narrowly constru[es] the federal law to avoid constitutional vagueness concerns.").

317. 561 U.S. 358 (2010).

318. *Id.* at 404; *see also* Low & Johnson, *supra* note 175, at 2087–92 (describing the *Skilling* rationale in more detail).

319. 141 S. Ct. 1648 (2021).

320. *Id.* at 1661. The Court in *Van Buren* expressly stated that its decision did not rest on "constitutional avoidance," because "the text, context, and structure" of the Act supported the narrowing construction. *Id.* But constitutional avoidance likely helped to drive the result. *See* Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 520–21 (2019) (describing how the current Supreme Court tends to construe statutes narrowly to avoid constitutional issues without openly admitting that it is doing so). Indeed, petitioner and multiple amici curiae argued that the statute should be construed narrowly to avoid vagueness concerns. *See* Brief for Petitioner at 36–40, Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783); Brief of Professor Orin S. Kerr as Amicus Curiae in Support of Petitioner at 8–9, 22, Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783); Brief for the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Petitioner at 6–18, Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783). And during oral argument, petitioner highlighted the "vagueness problem," and Justice Sotomayor characterized the statute as "dangerously vague." Transcript of Oral Argument at 23, 48, Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783).

321. N.Y.C., N.Y., ADMIN. CODE § 10-702.

a legitimate purpose. But in a world in which smart phones routinely capture digital video recordings of events and share them on social media, violations of the recording device ordinance have become ubiquitous.[322] Suppose an officer (perhaps motivated by a discriminatory purpose) unexpectedly arrests someone for using a smart phone to record a street performer, and the individual is charged under the recording device ordinance. Even if a court views that prosecution as arbitrary and unfair, the court may be hesitant to strike down the ordinance, which it may view as continuing to cover legitimate core conduct—for example, using a sophisticated audio recording device to record a pop star's surprise concert in Central Park.[323] The constitutional avoidance canon would give the court a way to raise desuetude concerns and then construe the statute narrowly so as not to capture everyday recordings. That would not only prevent the prosecuted individual from being punished, but it would also significantly diminish the reach of the ordinance in future cases.

B. STATE DUE PROCESS

State courts need not wait for federal courts to recognize a constitutional desuetude doctrine. They should follow West Virginia's lead and adopt a due process desuetude doctrine themselves.[324] Activity in state courts may force the federal due process issue, because state courts would likely analyze dead crimes as both a matter of state and federal due process. If a split emerged on the federal question, that would tee up the issue for Supreme Court review.

But even if the Supreme Court ultimately rejected the federal due process argument, state due process protections would go a long way in addressing the problems posed by dead crimes because most dead crimes—particularly morals legislation—are found in state and local codes. A state-law solution would have an added benefit unique to its form: it would promote federalism by providing a state-law avenue for invalidating dead crimes that is independent from the federal constitution.[325]

That is significant because individual rights protected by state constitutions tend to occupy a "second-tier status"[326] relative to those protected by the Federal Constitution. Indeed, both federal and state courts rarely rest their individual

322. There may still be prosecutions for unlawful *distributing* of digital video recordings. But that is distinct from the bare act of recording.

323. *See, e.g.*, Marianne Garvey, *Taylor Swift Announces Central Park Performance*, CNN: ENT. (July 31, 2019, 9:14 AM), https://www.cnn.com/2019/07/31/entertainment/taylor-swift-central-park-concert/index.html [https://perma.cc/7YUH-9BAB].

324. It is not entirely clear whether the West Virginia doctrine is grounded in federal due process or the state analogue. *See* State v. Blake, 584 S.E.2d 512, 516 (W. Va. 2003).

325. *See* Michigan v. Long, 463 U.S. 1032, 1038–44 (1983) (holding that a federal court should decline to decide federal question if state court's judgment rested on adequate and independent state ground).

326. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 9 (2018); *see also* Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 U. HAW. L. REV. 63, 106 (2016) (observing that "[s]tate constitutional law is generally considered second-tier to federal constitutional law").

rights decisions on state constitutional grounds,[327] preferring instead the federal constitution.[328] The result, as Erwin Chemerinsky has observed, is that "many states do not have a tradition of using their state constitutions to provide rights greater" than those in the Federal Constitution.[329] In fact, many state courts engage in "lockstepping"—the tendency to "interpret[]" state constitutions "in reflexive imitation of the federal courts' interpretation of the Federal Constitution."[330] As Judge Jeffrey Sutton has explained, "[t]he issue arises when the Federal Constitution and a state constitution contain an identical or similarly worded guarantee and a litigant invokes both of them."[331] State courts typically "handle such cases by considering the federal constitutional claim first, after which they summarily announce that the state provision means the same thing."[332]

But lockstepping cannot occur when a state constitution protects a right that lacks a federal analogue.[333] And that would be so in a world in which the Supreme Court has rejected the federal due process desuetude doctrine. In those circumstances, a state due process doctrine of desuetude would provide an independent state-law basis for invalidating dead crimes.

C. FOURTH AMENDMENT

Even if courts embraced desuetude as a due process doctrine, that would not fully address all of the abuses caused by dead crimes. In particular, it would not

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327. *See* Daniel Gordon, *Superconstitutions Saving the Shunned: The State Constitutions Masquerading as Weaklings*, 67 TEMPLE L. REV. 965, 965 (1994) ("Litigators have so infrequently tapped state constitutions as a source of protection for individual rights that more than once during the last dozen or so years legal commentators and courts have published basic 'how to' instructions on the use of state constitutions."); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780 (1992) (noting that "[o]ne of the most striking aspects of state constitutional decisions is their relative infrequency").

328. *See* SUTTON, *supra* note 326, at 7–10 (describing how litigants in federal court rarely press individual rights arguments under state constitutions); Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 288 (1998) ("In addition to the relative infrequency of state constitutional decisions, state supreme court opinions reflect a general avoidance of analysis of the state constitution altogether." (footnote omitted)).

329. Erwin Chemerinsky, Essay, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1700 (2010).

330. SUTTON, *supra* note 326, at 174; *see* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 (2011) (noting that "most state courts adopt federal constitutional law as their own" and "tend to follow whatever doctrinal vocabulary is used by the United States Supreme Court, discussed in the law reviews, and taught in the law schools" (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186 (1984))).

331. SUTTON, *supra* note 326, at 174.

332. *Id.*

333. *Id.* at 19 (noting that that, "[i]n some settings, the only way a lawyer can win is through the state constitution"); *see, e.g.*, OHIO CONST. art. II, § 15(D) ("No bill shall contain more than one subject, which shall be clearly expressed in its title."); *id.* art. I, § 16 ("[E]very person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."); CAL. CONST. art. IV, § 16(a) ("All laws of a general nature have uniform operation."); ALASKA CONST. art. VIII, § 15 (forbidding the creation of any "exclusive right or special privilege of fishery" within the Alaskan waters, subject to certain exceptions).

address instances in which police abuse dead crimes by using them merely as a pretext to justify searches and seizures.[334] Indeed, if there were only a due process solution, most dead crimes that are *never prosecuted* but are used in this pretextual manner would be effectively insulated from judicial review.[335] To address that abuse head-on, a Fourth Amendment solution is needed.

Admittedly, this is a tall order. It would require adoption of a limit on the substantive crimes that may be used to justify a search or seizure. That is not something the Supreme Court has generally been willing to do. In *Atwater v. City of Lago Vista*,[336] for example, the Court declined to preclude police from relying on nonviolent misdemeanors to justify searches and seizures.[337] The general understanding since *Atwater* has been that any criminal prohibition can serve as a predicate for a search or seizure.

But the Court has recently acknowledged, albeit indirectly, one limit on the Fourth Amendment's reasonableness requirement that relates to the scope of predicate substantive crimes. In *Heien v. North Carolina*,[338] the Supreme Court held that an officer's interpretation of a law on which a search or seizure is based may be a mistaken interpretation of a predicate crime so long as the interpretation is objectively reasonable.[339] In reaching that conclusion, the Court explained that the individualized suspicion[340] needed for a search or seizure "arises from the combination of an officer's understanding of the facts and his understanding of the relevant law," and that he "may be reasonably mistaken on either ground."[341] A mistaken interpretation of law is "objectively reasonable," the Court explained, if something in the text of law or relevant sources affirmatively supports the officer's interpretation[342]—that is, if "a reasonable judge could [have] agree[d] with the officer's view" in light of the relevant sources.[343] It follows that a mistaken interpretation is *unreasonable*—and therefore a Fourth Amendment violation—when no reasonable judge could have adopted it.

The reasonable-mistake-of-law limit is substantive in the sense that it is not focused on the facts on the ground available to the officer at the time of the

334. *See supra* text accompanying notes 203–24.

335. *Cf.* Johnson, *supra* note 203, at 365–71 (explaining how many low-level vague laws used only for investigative purposes are effectively insulated from judicial review). Because most dead crimes of concern are state laws, "the prospect of injunctive or declaratory relief in federal court does not solve the problem." *Id.* at 367; *see id.* (explaining that "someone cannot ask a federal court to enjoin enforcement of a state criminal law" absent "a genuine threat" of prosecution and a risk of "irreparable injury," and noting that "if someone were to obtain a declaratory judgment from a lower federal court . . . it is far from guaranteed that state officials and courts would honor it").

336. 532 U.S. 318 (2001).

337. *Id.* at 327, 340.

338. 574 U.S. 54 (2014).

339. *Id.* at 61–68.

340. The Court focused on reasonable mistakes of law in the context of a reasonable-suspicion determination because that was the issue before it. *See id.* at 60. There is little reason to think that the result would have been any different if a probable-cause determination had been at issue.

341. *Id.* at 61.

342. *See id.* at 67–68.

343. *Id.* at 70 (Kagan, J., concurring).

investigation; rather, it is a "purely legal framework for assessing" the reasonableness of "an officer's interpretation of the law" that "concerns the coverage of the substantive criminal law on which searches and seizures are premised."[344]

The Court's attention to the limits of substantive predicate crimes in *Heien* may open the door to additional reasonableness challenges based on substantive law. I have argued elsewhere, for example, that "*Heien* creates the conditions necessary" for vagueness challenges to crimes on which searches or seizures are based.[345] The *Heien* framework may also suggest that the Fourth Amendment could encompass a desuetude principle.

The idea would be that it is objectively unreasonable under the Fourth Amendment for an officer to conduct a search or seizure premised on a law that constitutes a dead crime, based on the available legal materials—including the relevant history of non-pretextual enforcement (or lack thereof).

The analysis would still follow my proposed two-step test. A defendant challenging a search or seizure would need to make a prima facie showing that the predicate crime has not been meaningfully enforced in the face of open disregard. That showing would shift the burden to the state to show that it still has a substantial interest in minimizing the harm or evil which the criminal prohibition was designed to address and that the continued existence of the criminal prohibition directly advances that interest.

Crucially, the fact that the state might routinely use the law as a predicate crime to justify pretextual searches and seizures would not preclude a prima facie showing, because those pretextual uses would not constitute "meaningful enforcement." And although a state may be able to identify a substantial interest, it could not argue that the mere pretextual use of the crime at issue *directly* advances that interest.

Suppose, for example, a New Jersey officer pulls over a cyclist acting "suspiciously" pursuant to the state's century-old bicycle-bell law.[346] And suppose that leads to a search that reveals evidence of a more serious crime. If the defendant could move to suppress the evidence on the ground that the initial seizure was unreasonably predicated on a dead crime, he could likely make a prima facie showing that, for a material period of time, the law has not been meaningfully enforced in the face of open disregard. Because the pre-automobile-era enactment of that law appears to have been motivated by "'animosity' between bicyclists and pedestrians,"[347] the state would not likely be able to identify a substantial interest—let alone show that the bicycle-bell criminal prohibition serves that interest. The defendant thus would be able to show a Fourth Amendment violation based on a desuetude rationale.

In that way, a Fourth Amendment desuetude principle would guard against the pretextual use of dead crimes in the context of investigations. Litigants and courts

344. Johnson, *supra* note 203, at 381–22, 385.
345. *Id.* at 385.
346. Waters, *supra* note 24.
347. *Id.*

alike should embrace such a principle along with a due process solution that addresses prosecutorial abuses.

CONCLUSION

American law has lacked a tool for dealing with dead crimes long enough. The continued existence of these crimes in our criminal codes undermines the rule of law by enabling arbitrary prosecutions and investigative practices. These abuses are similar to those caused by unconstitutionally vague laws. But unlike with vague laws, no well-established doctrine protects the rule of law by enabling a court to deem dead crimes void.

Dead crimes also produce broader collateral effects—exacerbating racial biases in policing, significantly affecting the rights of individuals in other areas of the law, and perpetuating unwarranted social stigmatization.

A modern American conception of the desuetude principle fit for the statutory age is needed. This Article has proposed a normative vision of the principle rooted in a theory of criminalization. That conception is more capacious than the historical formulation in the sense that it potentially covers a broader range of crimes, but it is more restrictive in the sense that it constrains a judge's analysis of a potentially dead crime to a means–end assessment under the familiar intermediate scrutiny tier of judicial review. With that conception in mind, the Article has suggested three mechanisms for implementing the desuetude principle—federal due process, state due process, and the Fourth Amendment.

Regardless of the particulars of these proposals—both in substance and in form—the Article's ultimate goal is to draw attention to the need to deal with dead crimes and to spark further discussion about the best means of doing so.