FINDING ROOM IN THE CRIMINAL LAW FOR THE DESUETUDE PRINCIPLE

*Paul J. Larkin, Jr.**

A problem facing the criminal justice system today is the phenomenon known as "overcriminalization," the neologism given to the overuse and misuse of the criminal law.[1] Numerous members of the academy,[2] former senior Justice Department officials,[3] and the American Bar Association[4] have been vocal

* Senior Legal Research Fellow, The Heritage Foundation; M.P.P. 2010 The George Washington University; J.D. 1980 Stanford Law School; B.A. 1977 Washington & Lee University. The views also are the author's own and should not be construed as representing any official position of The Heritage Foundation.

1. "Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes." Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 657 (2011).

2. *See, e.g.*, Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. OF CRIM. L. 407 (2008); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM U. L. REV. 747 (2005); Darryl K. Brown, *Can Criminal Law be Controlled?*, 108 MICH. L. REV. 971 (2010); John C. Coffey, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579 (2005); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005); DOUGLAS HUSAK. OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2007); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions to Enforce Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Erik Luna, *Overextending the Criminal Law, in* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783 (2005); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM U. L. REV. 541 (2005); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. OF CRIM. L. & CRIMINOLOGY 537 (2012); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); John F. Stinneford, *Punishment Without Culpability*, 102 J. OF CRIM. L. & CRIMINOLOGY 653 (2012).

3. *See, e.g.*, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1 (1997); Edwin Meese III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIRCUIT REV. 505 (2012); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1281 (2007); Larry D. Thompson, *The Reality of Overcriminalization*, 7 J.L. ECON. & POL'Y 577 (2011).

critics of this phenomenon.[5] Private organizations that occupy very different points across the political spectrum—the Heritage Foundation and the ACLU, the Manhattan Institute and National Association of Criminal Defense Lawyers, the Texas Public Policy Foundation and Families Against Mandatory Minimums—oppose overcriminalization.[6] The Judiciary Committees in the House of Representatives and the Senate also have shown interest in the issue.[7] This widespread concern, voiced by important figures in the policymaking process representing very different viewpoints, justifies the belief that the problem is a

4. *See* ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) [hereinafter ABA TASK FORCE].

5. Analytically distinct but closely related as a policy matter is the concern regarding the overfederalization of the criminal law. *See, e.g*., John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH L. REV. 457 (2012); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995).

6. *See, e.g.*, Zach Dillon, *Symposium on Overcriminalization: Foreword*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2013) ("The Heritage Foundation and the American Civil Liberties Union joined forces to cosponsor our live Symposium and send the unified message that whether you are liberal, moderate, or conservative, overcriminalization is an issue that can no longer be ignored.").

7. The House Judiciary Committee has held hearings on overcriminalization. *See, e.g*., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009); *see also, e.g*., *Principles for Revising the Criminal Code, Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong.* (2011) (statement of Hon. Edwin Meese III, Chairman, Center for Legal & Judicial Studies, Heritage Foundation) *available at* http://www.heritage.org/research/testimony/2011/12/principles-for-revising-the-criminal-code; *Criminal Code Modernization and Simplification Act of 2011: Hearing on H.R. 1823, Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Hon. Dick Thornburgh, Counsel, K & L Gates), *available at* http://judiciary.house.gov/_files/hearings/pdf/Thornburgh%2012132011.pdf; *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions, Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary* (2010) (statement of Brian W. Walsh, Senior Legal Research Fellow, Center for Legal & Judicial Studies, Heritage Foundation), *available at* http://www.heritage.org/research/testimony/reining-in-overcriminalization-assessing-the-problems-proposing-solutions. That Committee also has chartered a task force to examine this matter. *See* Press Release, House Judiciary Comm., House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization (May 5, 2013), *available at* http://judiciary.house.gov/index.cfm/2013/5/housejudiciarycommitteecreatesbipartisantaskforceonovercriminalization. The Senate Judiciary Committee recently approved a bill that would, among other things, require the federal government to identify every federal criminal law. *See* PAUL J. LARKIN, JR., SUPPLYING THE INFORMATION REQUIRED BY LAW: DIRECTING THE FEDERAL GOVERNMENT TO IDENTIFY ALL FEDERAL CRIMINAL LAWS, HERITAGE FOUND., ISSUE BRIEF NO. 4143 (2014), *available at* http://www.heritage.org/research/reports/2014/02/overcriminalization-and-the-identification-of-all-federal-criminal-laws.

serious one.

This paper proposes one remedy to that problem: reliance on "the desuetude principle" in statutory interpretation. Put simply, courts should narrowly read little used criminal statutes in order to avoid giving them broad, unanticipated applications.

I. NOTICE AND OBSCURE CRIMINAL LAWS

An elementary principle of criminal and constitutional law is that the government must identify particular conduct as criminal so that the average person, without resort to legal advice, can comply with the law.[8] Three complementary doctrines reinforce that principle. The first one is the rule of lenity, which demands that the courts interpret ambiguities in a criminal statute in favor of the defendant.[9] The second one is the void-for-vagueness doctrine, which provides that an insolubly ambiguous or indecipherable statute, one that a person "of ordinary intelligence" cannot understand, cannot form the basis for a criminal charge.[10] The last doctrine does not have a particular name, but it prohibits the courts from construing a criminal statute in a manner that makes an unforeseeable expansion of what that law defines as a crime.[11] Together, those principles ensure that no one can be punished without receiving fair warning where the

8. *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 459 (2001) (identifying "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct" (emphasis deleted)); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (citations omitted)).

9. *See, e.g.*, Burrage v. United States, 134 S. Ct. 881, 892 (2014) ("Is it sufficient that use of a drug made the victim's death 50 percent more likely? Fifteen percent? Five? Who knows. Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend."); United States v. Santos, 553 U.S. 507, 514 (2008); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 769-70 (2013).

10. *See, e.g.*, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012); United States v. Harriss, 347 U.S. 612, 617 (1954) (holding that a criminal statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute"); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (footnote omitted)); *see generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

11. *See* Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("[A] deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."); *see also, e.g.*, Metrish v. Lancaster, 133 S. Ct. 1781 (2013); *Rogers*, 532 U.S. at 458-62; Marks v. United States, 430 U.S. 188, 192 (1977); Douglas v. Buder, 412 U.S. 430 (1973); Rabe v. Washington, 405 U.S. 313 (1972).

line falls between legal and illegal conduct.[12]

Ambiguity, vagueness, and unforeseeability, however, are not the only threats to adequate notice. The prosecution of an individual for the alleged violation of an obscure criminal law poses different but still serious questions regarding the adequacy of the notice that due process requires. The criminal law draws its moral force from the assumption that everyone knows the law[13] and can take steps to avoid breaking it.[14] Obscure criminal statutes share an affinity with the laws of the infamous Roman Emperor Caligula, which were published in an unreadable site.[15] Just as a secret criminal law provides no more notice than a law that is publicly available but incomprehensible, a law whose obscurity renders it, as a practical matter, unknown to the public is little better than an unrecorded statute.[16] That is particularly true when the law does not reflect the prevailing moral code and is not limited to conduct that is inherently immoral or dangerous—circumstances in which the conduct itself might put someone on alert that the law may regulate his or her actions.[17]

One remedy for this problem could be to seek assistance from the desuetude doctrine.[18] That little known precept is that courts may decline to enforce a

12. The doctrines share a kinship. The rule of lenity has been described as a "junior version of the vagueness doctrine." HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 95 (1977). The first "unforeseeability" decision, *Bouie v. City of Columbia*, relied on the Court's void-for-vagueness precedents. *See* 378 U.S. at 352.

13. *See, e.g.*, Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. of Crim. L. & Criminology 725, 726-27 & nn.10-15 (2012) (collecting authorities stating the proposition that ignorance of the law is no excuse).

14. *See, e.g.*, PACKER, *supra* note 12, at 68-69 ("People ought in general to be able to plan their conduct with some assurance that they can avoid entanglement with the criminal law; by the same token the enforcers and appliers of the law should not waste their time lurking in the bushes ready to trap the offender who is unaware that he is offending. It is precisely the fact that in its normal and characteristic operation the criminal law provides this opportunity and this protection to people in their everyday lives that makes it a tolerable institution in a free society. Take this away, and the criminal law ceases to be a guide to the well-intentioned and a restriction on the restraining power of the state. Take it away is precisely what you do, however, when you abandon culpability as the basis for imposing punishment."); *cf.* Hart, *Legal Responsibility and Excuses*, in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28-53 (arguing that the need to allow people to avoid the criminal law is a rationale for recognizing excuses to crimes).

15. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (noting that Caligula "wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people"); Screws v. United States, 325 U.S. 91, 96 (1945) (plurality opinion).

16. *See* Livingston Hall & Selig J. Seligman, *Mistake of Law and* Mens Rea, 8 U. CHI. L. REV. 641, 650 n.39 (1940) ("[W]here the law was not available to the community, the principle of 'nulla poena sine lege' comes into play.").

17. *See, e.g.*, United States v. Freed, 401 U.S. 601, 609 (1971) ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act."); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) ("[W]here, as here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

18. For a discussion of the desuetude doctrine, see, for example, Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81

statute if the public has openly and notoriously disregarded it, and the government has acquiesced in that practice.[19] "Desuetude plays the same role for the criminal law that spring cleaning does for garages, basements, and attics: It enables items to be discarded that perhaps once were thought valuable but have not been used recently."[20] The desuetude doctrine, however, is an unsatisfactory solution. As discussed below, application of the desuetude doctrine by the federal courts would violate separation of powers principles because it is tantamount to allowing the courts to exercise a veto power over legislation.

The desuetude doctrine is useful, however, for a different reason. At the heart of the doctrine is the simple truth that the public likely is unaware of moth-eaten criminal laws, especially when the conduct they forbid is widely performed. That reality can play a useful role when crafting rules for the interpretation of criminal statutes, particularly when the government seeks to apply old laws to new scenarios wholly unanticipated when the law went into effect. The courts should consider the principle animating the desuetude doctrine when construing criminal statutes. That principle complements and reinforces the three rules of statutory construction and constitutional law stated above.

II. OLD AND OUTDATED LAWS LINGER

Some criminal statutes afford little notice of their scope because they do not address blameworthy conduct and are used so infrequently—if they ever have been used at all—that their boundaries are indistinct at best. On occasion, however, there may be a statute that has been forgotten, perhaps because it addressed a problem that was resolved long ago. Some ancient vice laws are an example of that problem. In the last third of the nineteenth century and the first third of the twentieth century, Congress enacted a variety of laws directed at "vice" crimes, such as prohibitions against lotteries, an enterprise that no longer troubles most Americans.[21] Yet, because some of those laws are still on the

(1976); Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006).

19. *See, e.g.*, Larkin, *supra* note 9, at 782 ("Desuetude is an ancient and unconventional legal doctrine that empowers courts to suspend the operation of a statute after a long period of intentional governmental nonenforcement and notorious public disregard for it."). The government's acquiescence is relevant because the Supreme Court has ruled that the government cannot prosecute someone if it has previously stated that the conduct at issue is permissible. *See, e.g.*, United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973); Cox v. Louisiana, 379 U.S. 559, 569-71 (1965); Raley v. Ohio, 360 U.S. 423, 437-40 (1959). The desuetude doctrine goes the next step and deems the government's longstanding acquiescence in law-breaking as tantamount to an affirmative statement.

20. Larkin, *supra* note 9, at 782.

21. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 158–59 (2011). For example, at one time states and the federal government condemned lotteries as predatory. *See, e.g.*, Champion v. Ames (Lottery Case), 188 U.S. 321, 355-56 (1903); Stone v. Mississippi, 101 U.S. 814, 818 (1880); Phalen v. Virginia, 49 U.S. (8 How.) 163, 168 (1850); JOHN SAMUEL EZELL, FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA 1-59 (1960); A. Spofford, *Lotteries in American History*, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 173-95 (1893). Today, many states sponsor lotteries to raise funds. *See* United States v. Edge Broadcasting Co., 509 U.S. 418, 421-22 (1993).

books, they could form the basis for a criminal charge today.

Despite this danger, Congress does not routinely prune the federal criminal code of unnecessary offenses. Indeed, the Constitution's bicameralism and presentment requirements, along with everyday politics, make repeal of a statute just as difficult as its initial enactment.[22] Laws on the books therefore tend to remain there long after the reason for their passage has disappeared or they have served their purpose.[23]

Sometimes, the government seeks to stretch an old statute in order to prosecute conduct that does not violate a specific, contemporary act of Congress. The classic example of such behavior is the government's reliance on the federal fraud statutes[24] to charge state and local government officials with conduct deemed corrupt—conduct termed the "theft of honest services"—even if that conduct was not a traditional form of fraud.[25] Similarly, in the 1970s, before Congress enacted the series of modern-day environmental laws now on the statute books,[26] the federal government charged polluters with violating Section 13 of the Rivers and Harbors Appropriations Act of 1899, also known as the Refuse Act,[27] even though it had been designed as a means of protecting navigation and commerce.[28]

The use of old statutes in unforeseen ways, like the use of old, forgotten laws, poses a serious notice problem for the average person and encourages courts to expand the reach of criminal laws beyond the breaking point in order to ensure that a "bad guy" does not get away unpunished.[29] The application of

22. *See* Clinton v. City of New York, 524 U.S. 417, 438-39 (1998).

23. In fact, there are even provisions in the Constitution that address eighteenth century problems that have not arisen since then. The Third Amendment is a classic example. *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

24. *See* 18 U.S.C. § 1341 (2006) (mail fraud); § 1343 (2006) (wire fraud). Section 1346 of Title 18 defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud laws to include a "scheme or artifice to deprive another of the intangible right of honest services."

25. *See, e.g.*, Skilling v. United States, 130 S. Ct. 2896, 2926–29 (2010) (discussing the history of the "intangible rights" doctrine); David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371 (2008) (same).

26. *See, e.g.*, DANIEL M. STEINWAY ET AL., THE ENVIRONMENTAL LAW HANDBOOK (Thomas F. P. Sullivan ed., 2011) (collecting contemporary environmental laws).

27. 33 U.S.C. § 407 (2006). *See, e.g.*, United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973); United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974).

28. *See* United States v. Standard Oil Co., 384 U.S. 224, 229–30 (1966); United States v. Republic Steel Corp., 362 U.S. 482, 489–92 (1960).

29. The last day of the Supreme Court's October 2012 Term offered another example of that phenomenon, Sekhar v. United States, 133 S. Ct. 2722 (2013). *Sekhar* involved the Hobbs Act, a federal criminal statute prohibiting extortion—*i.e.*, "obtaining property from another" via the use or threat of force or harm. Sekhar threatened a lawyer for a state pension-fund regulatory agency with disclosing an alleged affair unless the lawyer made a favorable recommendation to his superior regarding funds managed by petitioner's investment company. The question was whether such conduct amounted to extortion. The Supreme Court unanimously rejected the government's attempt to stretch the Hobbs Act in order to include Sekhar's conduct within its scope.

"the rule of lenity"—which posits that, when construing an ambiguous criminal statute, the court should resolve the ambiguity in favor of the defendants—is one way to avoid those problems, but there may be another option as well.

Some commentators have argued that courts should refuse to enforce forgotten or ignored statutes by relying on the desuetude doctrine. They argue that courts should ignore a statute that the government has refused to enforce for a long period and that the public appears to disregard at will.[30] Whatever the merits of that argument in a world in which courts, not legislatures, define all crimes,[31] the desuetude doctrine has not garnered much support in America's legal system. Anglo–American law has rejected it for ages,[32] and only one state appears to give it any weight today.[33]

That principle is a sensible one. A statutory desuetude doctrine would violate separation-of-powers principles by allowing a court to excise from the criminal code a validly enacted statute that offends no specific provision of the Constitution. With only one exception—namely, appropriations for the army cannot last for more than two years[34]—Article I does not impose any expiration date on any act of Congress. The Supreme Court has made short shrift of the claim that an old or unused federal statute can fall into desuetude and be rendered unenforceable. As the Court explained sixty years ago in *District of Columbia v. John R. Thompson, Co.*,[35] "[t]he failure of the executive branch to enforce a law does not result in its modification or repeal. . . . The repeal of laws is as much a legislative function as their enactment,"[36] and the modification or repeal of a law must comply with the same Article I Bicameralism and Pre-

30. For a discussion of the desuetude doctrine, see, for example, Allen, *supra* note 18, at 81; Note, *Desuetude*, *supra* note 18.

31. From 1660 to 1860, the English courts claimed the power to outlaw conduct that they deemed *contra bonos mores*. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165, 178 (1937). In our federal system, however, only Congress can create a federal crime. *See* United States v. Hudson & Goodwin, 11 U.S. (1 Cranch) 32 (1812).

32. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 337–38 (5th ed. 1956) ("On the continent there was some speculation during the middle ages as to whether a law could become inoperative through long-continued desuetude. In England, however, the idea of prescription and the acquisition or loss of rights merely by the lapse of a particular length of time found little favour. Moreover, statutes were definitely pronouncements of the Crown, and the royal prerogative included the maxim that 'time does not run against the King.' There was consequently no room for any theory that statutes might become obsolete."); *see also, e.g.*, Allen, *supra* note 18, at 81–85 & nn.97–109; *see generally Desuetude*, *supra* note 18, at 2210 n.6 (collecting authorities).

33. Only West Virginia seems to allow desuetude to serve as a criminal defense. *See Desuetude*, *supra* note 18, at 2211–12.

34. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 12 (appropriations for "Armies" may not exceed two years).

35. 346 U.S. 100 (1953).

36. *Id*. at 113–14 (citations omitted); *cf. Ex parte* United States, 242 U.S. 27, 42 (1916) ("[T]he possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments, and hence leave no law to be enforced.").

sentment requirements necessary for it to have been enacted in the first place.[37] The desuetude doctrine would allow courts to usurp the role of Congress and the President by nullifying validly passed statutes without identifying any provision in the Constitution that the law violates. That is tantamount to exercising a veto power, which the Constitution gives to the President, not to the courts.[38] Congress always can add an expiration date to a statute if it so chooses, and on occasion Congress has done just that.[39] But unless Congress includes an express expiration date in a bill, an act of Congress signed into law by the President does not expire. Once it becomes law, it remains the law until Congress repeals or revises it, or the courts hold it unconstitutional.

The desuetude doctrine also would leave judges untethered to the constitutional text when deciding whether to invalidate a law. The Constitution supplies no standard for the courts to use when deciding how old a statute must be or how little it has been used before it becomes unenforceable. Consider some of the questions that would confound the courts: Must the government prosecute someone for a violation of the statute or would it be sufficient if the statute merely served as authority for the issuance of a search warrant? If a prosecution is necessary, how often and over what period must the government bring a prosecution in order to avoid having a statute self-destruct? One hundred times each decade? Ten? Once? And how should the courts treat plea bargaining? Is it sufficient for the government to charge a statutory violation in an indictment or information, even if the government later dismisses that charge pursuant to a plea agreement? Or must the government secure a conviction whether by a plea or verdict? The doctrine invites the courts to engage in a subjective line-drawing exercise as they struggle to decide how often and over what period of time a statute must be used in order to retain vitality. Granting the courts such a power invites entirely unprincipled decisionmaking.

III. A NEW ROLE FOR THE PRINCIPLE UNDERLYING THE DESUETUDE DOCTRINE: BOLSTERING THE RULE OF LENITY

But there is a kernel of wisdom in the desuetude doctrine, one that has a role to play in cases of statutory interpretation. It is unlikely that a statute that has lain dormant for generations is a necessary tool for law enforcement today. After all, as new problems and new crimes outdistance or replace old ones, Congress generally responds by enacting new legislation to give federal law enforcement agencies whatever new tools they deem necessary.[40] Consider the

37. *See* Clinton v. City of New York, 524 U.S. 417, 438-39 (1998).

38. *See, e.g.*, U.S. CONST. art. I, § 7, cls. 2-3.

39. For example, Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978), required the Attorney General to appoint a special prosecutor in certain circumstances. Section 601(a) provided that the special prosecutor provisions of that act would expire after five years unless Congress reauthorized them.

40. *See, e.g.*, ABA TASK FORCE, *supra* note 4, at 7 (1998) (concluding that forty percent of the federal criminal laws enacted since the Civil War have been adopted since 1970); Larkin, *supra* note 9, at 724-29.

use of computers to commit crime. "In the days before specific computer crime legislation came on stream, prosecutors could have charged offenders with burglary, trespass, or theft for computer crimes and sought to persuade the courts to expand those common law crimes to reach modern-day misdeeds."[41] Instead, legislatures, including Congress, passed new statutes focusing on this specific development, such as the Computer Fraud and Abuse Act,[42] in order to address cybercrime.[43]

A lesson to be drawn from this practice is that the courts should not try to force new crimes into old statutes, particularly ones that have fallen by the wayside. Courts should be reluctant to apply such laws to reach conduct that, at best, lies at the periphery of a broad interpretation of its literal text. The rule of lenity already counsels judges against going down that path. The desuetude principle could serve as an adjunct to that rule.

Statutes are not dissertations on abstract points of law; they are efforts to adopt practical solutions for contemporary problems. That a criminal statute has not been used at all, or for a considerable period of time, is strong evidence that the particular problem that prompted its passage no longer exists. Stretching that statute's terms to fit a new problem not present when the statute was adopted mistakenly pursues a common law–like approach to statutory interpretation. The English courts followed that approach centuries ago before criminal lawmaking became a prerogative of Parliament, but in this nation the federal courts have never possessed the authority to define or enlarge crimes; that is Congress's job.[44] Reading a statute in light of the purpose Congress hoped to achieve at the time of its enactment without bending it to serve some new, unintended goal pays respect to the legislative process and limits the judicial process to interpreting the criminal law, not making it.

That principle may be an especially important one for the courts to follow today. Over the past two decades, the Supreme Court has emphasized the importance of starting—and sometimes ending—the process of statutory construction by focusing on the text of a statute and giving its terms, unless otherwise defined, their standard dictionary meaning.[45] That approach is a generally reasonable one because it gives words the meaning that legislators and average parties ascribe to them.[46] At the same time, as Judge Learned Hand once wrote, "it is one of the surest indexes of a mature and developed jurisprudence not to

41. Paul J. Larkin, Jr., United States v. Nosal: *Rebooting the Computer Fraud and Abuse Act*, 8 SETON HALL CIRCUIT REV. 257, 259 (2012).

42. 18 U.S.C. § 1030 (2006).

43. *See* Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561 (2010) (describing the birth of the CFAA).

44. *See supra* note 31.

45. *See, e.g.*, McNeill v. United States, 131 S. Ct. 2218, 2221 (2011); Fowler v. United States, 131 S. Ct. 2045, 2051 (2011); Pasquantino v. United States, 544 U.S. 349, 355–56 (2005); Larkin, *supra* note 9, at 771.

46. *See* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

make a fortress out of the dictionary."[47] Courts ought not to treat dictionary definitions of terms as if they are living organisms that can change and grow over time.

Reading a statute in complete reliance on the dictionary meaning of its terms without regard to the problem that motivated Congress to intervene and resolve through legislation can prove troublesome. Just as Congress understands words to have their ordinary meaning, Congress uses statutes to solve particular problems. Therefore, it always is important to keep those problems in mind when reading the words that Congress chose as their solution.

The likely response is two-fold: The courts should not interpret statutes in a manner that would jeopardize an important government interest, and marrying the desuetude and lenity doctrines unreasonably multiplies the force of the latter, which already plays only a limited role in statutory construction. The first and most important rule of statutory construction is to begin with the text of a law and give the statute's terms their ordinary dictionary meaning.[48] If that text reasonably can be read to reach new conduct, the courts must follow through and so apply the statute, whatever their views may be about the wisdom of doing so.

The response to such a claim is also two-fold: Courts should not be in the business of expanding the reach of a criminal statute under the guise of construing its terms, and the so-called marriage of the desuetude principle and rule-of-lenity doctrines does not, like a mathematical formula, increase the value of the latter. Courts should not take literally the job of statutory "construction"—that is, the creation of a new structure from old building blocks. Nor should courts be in the business of twisting or massaging the language of statutes, particularly older ones, to force into a statute conduct that does not readily fit within it and may not have even been envisioned at the time the law was enacted.[49] The function of clarifying or expanding existing laws is for Congress, not the courts, and Congress has shown no reluctance about enacting new criminal laws over the past four generations.[50]

CONCLUSION

Any case where the government has to stretch the terms of an old statute to

47. Cabel v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

48. *See supra* note 45.

49. The classic example is *McBoyle v. United States*, 283 U.S. 25 (1931). The question in *McBoyle* was whether an aircraft was a "vehicle" for purposes of the National Motor Vehicle Theft Act, Act of Oct. 29, 1919, ch. 89, 41 Stat. 324. In an opinion for a unanimous Court, Justice Holmes answered that question with an emphatic "no." As he explained, "[t]he question is the meaning of the word 'vehicle' in the phrase 'any other self-propelled vehicle not designed for running on rails.' No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e. g., land and air, water being separately provided for, in the Tariff Act, September 21, 1922, c. 356, s 401(b), 42 Stat. 858, 948 (19 U.S.C. § 231(b)). But in everyday speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle*, 283 U.S. at 26

50. *See supra* note 40.

reach a new problem is a case where the rule of lenity should apply. Even an old or rarely used statute should be read as its text naturally permits, but the courts should never engage in the plastic surgery necessary to reshape that text just to avoid permitting a "bad guy" to escape "justice." Once federal courts consider themselves free to use that approach as their lodestar for statutory interpretation, the clarity and precision that due process requires of the criminal law will degenerate into an idiosyncratic analysis of the morality of particular defendants by different federal courts. It is never possible to achieve that result in just one or two cases of truly unjustifiable conduct. The likely and entirely fortuitous consequence would leave no one with reasonable notice of where the line has been drawn between lawful and illegal conduct. Nobody would benefit from that outcome.