Florida Law Review

Volume 19 | Issue 1 Article 2

June 1966

Spirits of the Past--Coping with Old Laws

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SPIRITS OF THE PAST – COPING WITH OLD LAWS

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Legislatures neglect to keep all laws current. Their concern is primarily with the most pressing matters of state. It is also true that, once a law is on the books, special interests may prevail upon a legislature to prevent a fair and timely reconsideration of this law.[1] The result is that statutes enacted many decades ago, and not amended or repealed, are often unresponsive to current social conditions.[2]

As to some of these laws, there is an open understanding they will not be enforced.[3] If so, problems with these statutes are not critical. As to others, however, there is a period of relative nonenforcement, attended by a growing noncompliance with the provisions of the statutes, that is then followed by a reinstitution of sanctions. When old laws are hauled back into use, society through its courts must grapple with them. How these old laws should be evaluated and how they can be handled by the courts are the considerations of this article.

What follows is an examination of the total impact of an old law. Discussed is the law's current social utility, or lack thereof. In this evaluation, it is suggested that three factors are of major importance:

(1) there is the degree of noncompliance with the statute, involving an assessment of the reflections noncompliance throws on the mood of society vis-á-vis the neglected prescription;

(2) there is the element of a position taken by the state that is inconsistent with the old law, evidenced either by overt action it takes contrary to the law's dictates or by nonaction that rises to the level of substantial nonenforcement and thus perhaps implicit condonation of noncompliance;

(3) there is the examination of the net purposes of the questioned law, which involves a comparison between the conceivable purposes a law might have and the actual purposes it has in terms of produced results.

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1. See generally JOHNSEN, LAW ENFORCEMENT 323 (1930).

2. "[F]or some obscure reason in the American character, laws are rarely repealed; they are allowed simply to lapse in observance. It is far more difficult to get any legislature, including Congress, to take an interest and initiative in repealing a law than it is to enact one." *Id.* at 340. See Bonfield, *The Abrogation of Penal Statutes of Nonenforcement*, 49 IOWA L. REV. 389 (1964) for an extensive discussion of several old laws that remain unrepealed.

3. A list of statutes in disuse in England but not repealed, and the consequences that flow therefrom, can be found in ALLEN, LAW IN THE MAKING 479-81 (7th ed. 1964). The American experience would be quite similar.

Since some of these factors are prominent in the case of certain laws and others are not, the discussion will proceed on the basis of examining laws that are illustrative of different combinations of the above factors. The conclusions reached as to any given law, therefore, must be restricted to laws having similar congealing ingredients.

NONCOMPLIANCE AND INCONSISTENT STATE ACTION

Prohibition in Mississippi

In the past few years, Mississippi has been the only state that has still prohibited entirely the sale or possession of alcoholic beverages.[4] At the same time, it has been a state where bootlegging is widespread and whiskey sold openly by the drink and by the bottle. The state has fostered and engaged in this noncompliance not only by failing to enforce its law but also by collecting tax revenue from liquor sales and by licensing liquor dealers. The populace has joined wholeheartedly in this spree of illegality, buying annually an estimated thirty-six million dollars of illegal liquor.[5] A clearer example of the law saying one thing and a society and its government doing another would be hard to find.

In April 1966, following a highly publicized raid in which an assistant manager of a country club was charged with illegal possession of liquor, a county court judge quashed the charges and declared that it was not unlawful to possess liquor in Mississippi. "To rule otherwise, this court would have to bury its head in the hypocritical sands of the past . . . . The state of Mississippi desires to permit the operation of the liquor industry in the state and to derive the revenue from it and, at the same time, to have prohibition. These positions to the average and even uneducated eye are irreconcilable."[6] The

4. Oklahoma was the last state, besides Mississippi, to have state-wide prohibition. This was repealed in 1959 by a special vote of the electorate. See Okla. Laws 1959, §1, at 141. Mississippi has had its prohibition law since 1908. The version until May 1966 (see note 17 *infra*) was MISS. CODE ANN. §2613 (1942). It provided that a person "cannot sell or barter, or give away, or have in possession . . . ." any alcoholic beverage.

5. This is the lowest of several estimated figures. Other estimates have ranged from $46 million (N.Y. Times, May 22, 1966, p. 64, col. 1) to $50 million (N.Y. Times, Feb. 6, 1966, p. 1, col. 3, p. 59). In an article reporting a speech by Governor Johnson of Mississippi, calling for an end to prohibition in Mississippi, it was noted that in 1965 there were known sales of 459,385 cases of whiskey and 128,036 cases of wine. This means an average consumption of over 19,385 gallons of liquor per year in every county in Mississippi. See N.Y. Times, Feb. 6, 1966, p. 1, col. 3, p. 59.

6. The actual report of this case has been unavailable. The above quotation from the judge's decision appeared in the Chicago Tribune, April 9, 1966, §2, p. 7.

court ruled that the Mississippi prohibition law had, in effect, been repealed through the state's inconsistent action of collection of tax revenues.

From the evidence available, it would seem the Mississippi judge acted in the most forthright manner open to him. The total impact of the prohibition law was that it was derogatory of all proper concepts of what a law should be and what it should do. It failed to accomplish its announced purposes. It existed in a form to be beneficial to certain interest groups but potentially detrimental to individuals engaging in noncompliance under the mistaken belief that no sanctions would be imposed. It strayed from what society, by its actions, seemed to feel was the proper course of action. Evidence of all this was available. It could not honestly be ignored by the court.

There was first society's noncompliance with the statute. Liquor was easily obtainable, and a substantial part of society responded by purchasing thirty-six million dollars of illegal liquor per year. There appeared to be few qualms that what was being done was illegal.[7] This by itself would be insufficient to dictate the action taken by the Mississippi court. Not all laws are fully obeyed, and yet this certainly does not mean that any law witnessing even substantial noncompliance should be invalidated. Noncompliance is only a first ingredient. It points to what a certain part of society is doing and what another part of society is seemingly willing to tolerate. To deal with it in a legal context, it is then necessary to evaluate it along with the corresponding actions taken by the state.

In the Mississippi example, the actions of the state were mainly inconsistent with what the law purported to accomplish. This took the form of both overt action and nonaction. Obviously, the overt action was the more striking, and it was upon this that the court mainly relied in reaching its decision.

The judge noted there were 1,700 licensed retail liquor dealers and eighteen wholesalers in Mississippi in 1965. These were licensed with the state having full knowledge of their business, and they operated in fifty-nine of the state's eighty-two counties.[8] Coupled with this was the total revenue realized by the state from liquor sales, which was noted by the court to be 4½ million dollars for 1965 alone.[9]

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7. "In a dozen or more counties, bootleggers are as respected as the corner grocer." N. Y. Times, Feb. 6, 1966, p. 1, col. 3, p. 59. Judge Barber, the county court judge quashing the illegal possession charges, noted: "[M]ultitudes of conventions, including those of law enforcement officers, openly serve liquor without fear of prosecution." N.Y. Times, April 9, 1966, p. 32, col. 6.

8. Chicago Tribune, *op. cit. supra* note 6. To do business in Mississippi, state tax commission officials have testified that an illegal liquor operator must file a $10,000 bond with the commission. See N.Y. Times, April 9, 1966, p. 32, col. 6.

9. The manner in which the tax revenues have been assessed in Mississippi

Added to the overt state actions was the nonaction that in effect condoned noncompliance through nonenforcement. There was not a total lack of enforcement, but what there was was directed only at the most notorious forms of unlicensed bootlegging. As to reputable bootleggers and as to consumers, the law was not enforced.[10]

Finally, and this must be considered as part of the inconsistent state posture, it is possible to identify the forces that were combining to retain prohibition. These were church groups and bootleggers in the main.[11] These two powerful groups, for diametrically opposite reasons, prevented the legislature from giving the matter a full and fair hearing. Legislative entanglement therefore contributed to negating any idea that the matter could be heard on the merits. This is a situation somewhat similar to that which prompted the United States Supreme Court to render its decisions in the reapportionment

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is fascinating. Basically, it involves a systematic arrangement for the payment of taxes based on invoices that come from the Louisiana State Revenue Service. From 85 to 95% of the liquor sold in Mississippi comes into that state from Louisiana because it collects no taxes on liquor exports. The mechanics for collecting the taxes have been explained as follows: "Twenty-seven Louisiana wholesalers close to Mississippi's playground Gulf Coast supply 85% of Mississippi's liquor. Louisiana knocks off its liquor tax for its black-market neighbor. The Mississippi Tax Commission has arranged for out-of-state suppliers to mail copies of their invoices to Jackson. The Jackson office then bills Mississippi dealers for the sovereign's cut, and stamps the 'prohibited' merchandise with 'The Great Seal of the State of Mississippi.'" Vinson, *Prohibition's Last Stand*, The New Republic, Oct. 16, 1965, p. 10. The illegal liquor is subject to at least two taxes. One is a 10% "import" tax; the other is a 9% "sales" tax on articles, "the sale of which is prohibited" as defined by Mississippi law. Several towns have "gotten" into the act by requiring local licenses and fees for these to be paid directly to the town. See *id.* at 11; see also N.Y. Times, April 9, 1966, p. 32, col.6.

10. Governor Johnson noted: "[A] 15-year-old child can take a $5 bill and buy whiskey in practically any county in this state." N.Y. Times, Feb. 3, 1966, p. 1, col. 3. According to one account, there was a gambling raid a few years ago in which, as a sidelight, National Guardsmen carted off $10,000 worth of liquor. The owner of the raided establishment made a hurried call to the then Governor, and the troops soon returned with the liquor being replaced on the shelves. N.Y. Times, Feb. 6, 1966, p. 1, col. 3. However, if a bottle of whiskey does not have a state tax stamp on it, enforcement would be likely. Vinson, *op. cit. supra* note 9, at 11. Moreover, there has been a range of enforcement that has carried connotations of selective and discriminatory treatment. As explained in Vinson, *op. cit. supra* note 9, at 10, those drinking in the home have usually been safe, a few people take flasks to restaurants, fraternities at the university and country clubs generally go undisturbed, and Negroes are allowed a few beers and occasionally hard liquor. However, noncountry club drinkers and Negro bootleggers have a harder time, and use is made of the liquor laws against union organizers, "uppity niggers," and civil rights workers. See Vinson, *op. cit. supra* note 9, at 11 for a particularly devastating use of the law against a Negro who had let civil rights workers stay at his home.

11. Vinson, *Prohibition's Last Stand*, The New Republic, Oct. 16, 1965, p. 10.

cases[12] and to strike down the Connecticut birth control law.[13] In these situations, the redefining of the law was and still is primarily a legislative function, but the legislatures often do not or cannot act. Some impetus has to be given to goad a legislature into action, and the courts are the only effective instrumentalities to see that this is done in a timely fashion. In the reapportionment cases, the remedy of positive action was necessary, the ordering of redistricting.[14] The Connecticut birth control law dragged through the courts, with the United States Supreme Court at first unwilling to grant standing to the parties because of lack of enforcement of the law against them or against anyone.[15] Finally, with enforcement at last being invoked, the Supreme Court moved into the void created by legislative inaction and invalidated the law, much to the relief, so it is said, of the Connecticut legislators who were unwilling to risk political disfavor by voting for repeal of the law.[16] As with these two situations, Mississippi prohibition was so inimical to proper legal processes that a Mississippi court found it necessary to suspend the validity of the prohibition law and to give society and its legislature the choice of whether they wanted matters to rest there or whether at long last they would undertake action that would make their law consistent and orderly.[17]

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12. Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962). The 1964 Reapportionment Cases: Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964); Romen v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland v. Tawes, 377 U.S. 656 (1964); WMAC, Inc. v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

13. Griswold v. Connecticut, 381 U.S. 479 (1965).

14. "This is what the Court did in the reapportionment cases. A 'policy decision' was inevitable. The social problem was such that hope of any solution coming from another source had all but evaporated. The Court had to decide whether or not to close off the last avenue of relief. . . . The Court was concerned with a *judicial* rule of law. . . .

The Court is not to take the place of other branches of government, but it must see that those other branches are fulfilling their role in our democratic structure; more importantly in the context of the immediate problem, that they *are* what they purport to be. This has always been the Court's business and will continue to be as long as the present Court structure lasts." Baldwin & Laughlin, *The Reapportionment Cases: A Study in the Constitutional Adjudication Process*, 17 U. FLA. L. REV. 301, 348-49 (1964).

15. Poe v. Ullman, 367 U.S. 497 (1961).

16. "There is some evidence that, at least when the case was in its final stages before the Supreme Court, many Connecticut legislators preferred to have the Court, rather than themselves, make the decision to eliminate the statute." Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH L. REV. 219 n.2 (1965).

17. In May 1966, one month after the county court decision, Governor Johnson did sign into law a bill that allows individual counties to hold elections to determine whether the sale of liquor will be legalized in their county. If the vote is negative or if no election is held, then prohibition will continue. At the

It devolved upon the judiciary, specifically the one county court judge, to sever the knots of legislative action and nonaction (totaling at they did a clear inconsistent state position) and to put the issue in a form calculated to reach a fair reconsideration. Either the matter would die after the judicial determination,[18] thus indicating that the end of prohibition was accepted by society and its government, or it would move the state into a reconsideration that might retain prohibition but would do so only under the knowledge that it must clear up the inconsistencies.[19]

By the examination of the dimensions of noncompliance and the inconsistent state position, the law was shown to be little more than a facade, remaining on the statute books for the mollification of one group, the religious sects and other "dry" forces, and the economic interests of another group, the liquor lobby. Beyond that, the total impact revealed that this law was in fact a prescription of declared duties that neither received nor attempted enforcement or compliance.

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time of the signing of the bill, it was expected that only 20 to 30 of the state's 82 counties would hold elections in the near future. See N.Y. Times, May 22, 1966, p. 64, col.1. The Governor had wanted a state-wide referendum, even though two previous popular votes, in 1934 and 1952, had favored the retention of prohibition. After his call in February 1966, for an end to prohibition, the legislature had responded with the bill eventually signed into law. The Governor let this lie on his desk until it appeared his preferences would not be heeded and until after the county court action in April. Thus, while the exact reasons for the Governor signing the bill when he did are not known, it is possible that, in fact, the court action and the possible consequences it might cause were partially responsible for the action later taken.

18. In the Mississippi situation, the county attorney did announce he would appeal the decision of the county court. N.Y. Times, April 9, 1966, p. 32, col. 6. And it cannot be said with any certainty that the appellate court would uphold the county court decision. However, in light of the action taken by the Mississippi Legislature and Governor Johnson, see note 17 *supra*, the county court decision may still have obtained its desired effect, even if it is later overruled, and it could well be that the appeal will never be consummated because of the subsequent legislative and executive actions.

19. This article presses for the view that a court *refusing* to enforce an old law is the best way to set the stage for renewed legislative consideration. Opposing this theory would be those that press for full enforcement and the resulting public outcry that would demand repeal rather than be faced with renewed enforcement. Governor Johnson of Mississippi seemingly would have preferred this path, had all attempts at change in the law failed. In his speech to the legislature, he said, if legalization efforts failed, he would ask for laws that would "dry this state up like the Sahara Desert." N.Y. Times, Feb. 3, 1966, p. 1, col. 3. For substantiation of the merits of this approach, see Williams, *Turning a Blind Eye*, 1954 CRIM. L. REV. (Eng.) 271, 273. The main difficulties with this approach are that it can inflict great hardship on those individuals prosecuted under the renewed enforcement efforts and it is taking the chance that something might occur to defeat repeal, even though all indices showed that the law was repugnant to current societal sentiments and needs.

By this type of judicial action, several points were accomplished. First, protection was given the individual citizens involved from being singled out for prosecution, particularly when these individuals were really only a by-product of the larger struggle being renewed between the prohibition and anti-prohibition forces. Second, it pointed vividly and condemningly to the anomalous prerogatives that a state may accord itself, in complete disregard of considerations other than its own financial interests. Third, it recognized the true state of circumstances — namely, that noncompliance with the statute so prevailed over compliance that it should gain legal preference, at least pending renewed legislative or popular deliberation. Finally, by its negation of the statute, the court insured that the renewed deliberation would be done under sufficient pressure to increase the chances that the law would not be pro forma retained by the legislature without an attempt to resolve the debilitating inconsistencies that had developed over the years.

The Mississippi court's action seems to raise implications of desuetude, the judicial negation of laws through obsolescence.[20] However, desuetude remains largely unaccepted in this country,[21] and it would be regrettable to try to fit this type of action into the limiting confines of such a doctrine. Even if desuetude were used, one of its essential elements seems to be total nonenforcement for an extended period of time. As in the Mississippi situation, there are many laws that cannot quite meet this test, and yet there is clearly a prevailing mood of noncompliance and inconsistent state action arguing against their invocation and their validity. Total nonenforcement should not be imposed as an absolute criterion of invalidity. The criteria should depend upon a combination of factors that give range and depth to appreciating just what a law is doing or failing to do, what harm it is causing, what interests it is defeating, and whether or not it can be justified in terms of current societal sentiments and needs.

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20. A detailed discussion of desuetude and its applications and definitions will be found in Bonfield, note 2 *supra*. In those countries that have the doctrine of desuetude, particularly under the civil law: "[A] statute would fall into desuetude only if the long failure to enforce it was in face of a public disregard so prevalent and long established that one could deduce a custom of its non-observance." Bonfield, *supra* note 2, at 396.

21. Although addressed to English law, the following is largely also applicable to the United States: "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." PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 301 (2d ed. 1936).

NONCOMPLIANCE AND NONACTION BY A STATE

Adultery in New York

A key proposition in the Mississippi situation was *overt* state action inconsistent with the provisions of the prohibition law. The state was directly taxing an illegal business and realizing the revenue therefrom, and was expressly regulating the illegal activity through licensing of liquor dealers. Such positive actions will rarely occur. It is much more likely with old laws that the inconsistent action will simply take the form of nonaction, such as nonenforcement of a statute and failure to reconsider old laws even in the face of substantial noncompliance and nonenforcement. Can this lesser form of inconsistent action be used to argue against a law's propriety or its validity? Consider, for example, the problem with the adultery laws, specifically as they have applied in New York.

Adultery was not a crime at common law, and, while it was sanctioned generally under the canon law, the range of enforcement was always quite limited.[22] The current propensity for adultery laws arises mainly from the aftermath of the Reformation and the insurgence of a Calvinist philosophy that substantially influenced many of our criminal laws.[23] Today, forty-five of our fifty states make adultery a crime, although what constitutes adultery and what penalties are prescribed vary greatly.[24]

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22. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT (1961). For accounts of some very early attempts to punish adultery by secular institutions, particularly in Anglo-Saxon times and continuing through the reign of William the Conqueror, see Murray, *Ancient Adultery Laws — A Synopsis*, 1 FAMILY L.J. 89, 97-100 (1961). It can be said, however, that the increasing jurisdiction of the canon law in England after 1100 included an almost exclusive province over the area of private morality. Thus, it was the canon law, not the common law, that generally proscribed such things as adultery.

23. See, *e.g.*, SMITH, THE DEVELOPMENT OF LEGAL INSTITUTIONS 437 (1965) in which the following description is given of legal processes in early Massachusetts: "That the address is no mere decoration and represents earnest belief is apparent, particularly in the body of the laws themselves, many of which are directly derived from the Bible. In Massachusetts Bay the Body of Liberties (1641), the first code of that colony follows the pattern. In the 'Capitall Laws' all the sections except that re treason and conspiring sedition have Biblical citations appended, *e.g.*, 'If any person committeth Adultery with a married or espoused wife the Adulterer and Adulteress shall surely be put to death. Lev. 20. 19 and 18, 20. Deut. 22. 23, 24.' . . . In 1642, the Massachusetts magistrates, troubled about attempted homicides, adulteries and sodomies and 'frequencie in ye same,' wrote to Plymouth for light as to proper punishments. Three ministers returned Biblical briefs."

24. Arkansas, Louisiana, Nevada, New Mexico, and Tennessee do not have adultery statutes. DRUMMOND, THE SEX PARADOX 239 (1953). For a thorough

In 1965, a New York law revision commission recommended substantial changes in that state's criminal code. Included among these recommendations was one calling for the abolition of the crime of adultery. The New York Legislature balked on only this recommendation and on one calling for the abolition of the crime of homosexuality between consenting adults. By separate bills, these two crimes were specifically retained, and adultery remains a crime in New York.[25]

In assessing the results that flow from this circumstance, it is necessary to review the background of the operation of the adultery law in New York. It can be done most graphically in terms of noncompliance and an inconsistent state position. Available statistics point to the great incidence of extra-marital intercourse within our society today. The Kinsey report estimated that between thirty and forty-five per cent of the total male population in the United States has extra-marital intercourse at least once.[26] There is no reason to believe New York presents any exception to these statistics.[27] This does not mean, however, that thirty to forty-five per cent of the male population throughout the United States is guilty of adultery. Many states require some sort of openness to the illicit relationship so as to border on a public nuisance.[28] Others require a continuous incidence

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discussion of the wide variety of definitions of adultery and the penalties prescribed therefor, see Moore, *Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1963).

25. The 1965 New York adultery enactment will be found in N.Y. Sess. Laws 1965, ch. 1037. For accounts of the battle in the New York Legislature that resulted in passage of the separate bills retaining adultery and homosexuality as crimes, see the following: N.Y. Times, June 10, 1965, p. 43, col. 4 (senate approves code revision); N.Y. Times, June 25, 1965, p. 19, col. 1 (summary of the legislative action); N.Y. Times, July 23, 1965, p. 1, col. 7 (Governor Rockefeller signs new criminal code, including separate bills that retain adultery and homosexuality as crimes).

26. KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 392 (1948).

27. In view of the extremely large urban population in New York State, the contrary would be the ordinary conclusion — *i.e.*, that New York would equal or exceed the Kinsey figures. Kinsey notes a definitely higher rate of extra-marital intercourse among urban than among rural males. *Id.* at 588-89.

28. See, *e.g.*, State v. Chandler, 132 Mo. 155, 164, 33 S.W. 797, 799 (1896). "It is not the object of the statute to establish a censorship over the morals of the people, nor to forbid the violation of the seventh commandment. Its prohibitions do not extent to stolen waters nor to bread eaten in secret. Its evident object was not to forbid and punish furtive illicit interviews between the sexes, however frequent and habitual their occurrence, but only to make such acts punishable as it plainly designates — acts which necessarily tend by their openness and notoriety, or by their publicity, to debase and lower the standard of public morals." The Missouri statute interpreted in *Chandler* was MO. REV. STAT. §3798 (1889), which provided: "Every person who shall live in a state of open and no-

of the relationship culminating in several acts of illicit intercourse.[29] New York does not seem to have any such limiting factors, and one instance of intercourse, done in private, will suffice.[30] Under these conditions, even allowing for overestimation in the Kinsey figures, it must be accepted that there is a profusion of adultery in the state of New York. The fact that noncompliance is widespread does not mean that society regards adultery as acceptable practice; but, combined with the degree of nonenforcement of the adultery statutes, it does reflect on whether society, through its government, is prepared to accept that in fact adultery should not be subject to criminal sanction.

Nonenforcement is the prevailing condition of the adultery laws in New York. One authority has noted, for example, that in New York City from July 1, 1959, to June 30, 1960, he could find no record of a single arrest for adultery.[31] Other authorities have reached similar findings for other time periods.[32] Nonenforcement by itself is no phenomenon. Our laws are replete with examples where no serious attempt is made to fulfill various laws' mandates.[33] Part of the difficulty is that some laws touch on relationships that are extremely

torious adultery . . . ." shall be guilty of adultery. The Missouri statute today is the same — see MO. REV. STAT. §563.150 (1959).

29. See, *e.g.*, TEXAS PEN. CODE art. 499 (1948): "Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman when either is lawfully married to some other person." The case of Hafley v. State, 88 Tex. Crim. 51, 224 S.W. 1099 (1920) went into great detail as to what was enough to constitute "habitual sexual intercourse." The best it could conclude was that "sporadic cases of intercourse will not suffice to prove habitual carnal intercourse" required by the statute. Thus, in citing earlier cases, it noted that once a month for three months, five times in a month, six times two weeks apart and other similar incidents were all insufficient to sustain a conviction under the Texas statute.

30. The New York law is as follows: "A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse." N.Y. Sess. Laws 1965, ch. 1037. The same chapter gives an affirmative defense to adultery if the defendant had reasonable belief that both he and the other person were unmarried at the time they had sexual intercourse. The forerunner of this statute was interpreted in People v. Reed, 246 App. Div. 895, 287 N.Y. Supp. 509 (4th Dep't 1936) to hold that a single act of intercourse was sufficient for conviction. See PLOSCOWE, SEX AND THE LAW 149 (1st ed. 1951).

31. PLOSCOWE, SEX AND THE LAW, 147-49 (2d ed. 1962).

32. ROEBURT, SEX-LIFE AND THE CRIMINAL LAW 9-10 (1963); DRUMMOND, *op. cit. supra* note 24, at 239, citing New York City, Report of the Mayor's Committee for the Study of Sex Offenses (1930-1940).

33. The list is almost endless. The major laws, fed upon by organized crime, that go substantially unenforced would probably be gambling, narcotics, and abortion. See Martin, *Abortion,* Saturday Evening Post, May 20, 1961, p. 19. For an account of the numerous unrepealed laws that the average citizen violates every day, see Hussey, *24 Hours of a Lawbreaker,* 160 HARPER'S MAGAZINE 436 (1930).

difficult to enforce. Evidence is hard to obtain. Accordingly, so the argument goes, enforcement can proceed only insofar as the means for arrest and conviction exist. One peculiar twist in New York adultery cases, however, renders this argument untenable. Until April of 1966, adultery was the only grounds for divorce in New York.[34] In the same time period mentioned above, in which there was no record of a single arrest for adultery, 1,700 divorces were granted in New York City alone.[35]

Admittedly, this inconsistency cannot be taken wholly at face value. There is evidence that many divorces in New York have been based on an "arranged" adultery, where one of the marriage partners agrees to be "discovered" with a third party of the opposite sex.[36] This dichotomy, therefore, is a telling reflection on divorce as well as adultery laws in New York. Even so, the courts have maintained the position that evidence of such collusion would nullify the divorce. In addition, it cannot be said that all divorces, or even a majority, have been the results of collusion. The means of enforcement of the adultery statutes have existed in New York, at least to an extent far in excess of the efforts actually made by enforcement officials. It is clear that the state has taken the position in New York that it will not enforce the adultery statutes in any uniform manner, even when it has the means to do so.

While this may not constitute overt state action, it is hard to find any qualitative difference, in this instance, between inconsistent action and inconsistent nonaction. The same problems are present: (1) an individual who is by chance prosecuted will be subjected to punishment while a vast number of other individuals committing the same act are not; (2) the state will have accorded to itself the prerogative to enforce or not to enforce on the basis of a decisional process, which the statute does not admit; (3) the true state of circumstances is

34. The divorce laws have been changed in New York as of April 1966, when the 179-year-old law was finally expanded to include other grounds for divorce than adultery. N.Y. Times, April 28, 1966, p. 1, col. 1. As with other laws discussed in this article, the major reason for the divorce law remaining unchanged for that length of time resulted from the influence of a special interest group that opposed any expansion of the grounds for divorce. In this particular case, it was Catholic opposition. Indeed, only a change of circumstances probably created a climate for the recent New York legislative action. "Almost every politician here agrees that the reform could never have taken place if the Roman Catholic clergy and laity had not been in a state of ferment, in which old dogmas were undergoing an agonizing reexamination." As one assemblyman put it: "What really got this divorce bill off the ground was a man named John, Pope John." N.Y. Times, April 28, 1966, p. 36, col. 1.

35. PLOSCOWE, *op. cit. supra* note 31.

36. For an account of this practice, see chapter on "Adultery" in KLING, SEXUAL BEHAVIOR AND THE LAW (1965).

that noncompliance outweighs the interests demanding compliance; (4) the legislature has failed to resolve the inconsistencies that have developed over the years.

These are precisely the problems that existed with the Mississippi prohibition law. The total impact of the adultery law is therefore much the same as that of the prohibition law. The adultery statutes are laws that exist mainly to mollify those groups that would interpret the abolition of adultery as a condonation of it in a moral sense.[37] In addition, however, these laws pose a threat to some few individuals who, because of particular circumstances, are singled out for prosecution.

Suppose someone is now arrested for adultery in New York. How should a court respond? Should it refuse to enforce the statute? The situation is complicated by the fact that the legislature has in 1965 reaffirmed its declaration that adultery is a crime. Can a court ignore this recent mandate? It is suggested a court should refuse to enforce unless it can be shown that there is now to be a legitimate effort to renew enforcement of the adultery laws to as full an extent as possible. It may be difficult for a court to assess whether this is to occur, but there are relevant factors that can come within its cognizance. First, it can determine whether there has been any comprehensive enforcement of the law in the year since the legislative reenactment. Second, it can evaluate the circumstances surrounding the particular prosecution coming before it. Was the defendant arrested simply because he was in the wrong place at the wrong time? For example, did he happen to have a spouse that would press the complaint, while most others would not, or was the accused's arrest in connection with a broad-based effort at enforcement? Unless it is this latter, and this can be shown, the court should decide that the 1965 legislative action was of no effect and that the total impact of the adultery law remains unchanged. Since that impact is solely a negative one and is overshadowed by noncompliance and nonenforcement, the court should refuse to enforce until there is in fact a good faith effort to resolve the inconsistencies that continue to exist.

37. The reenactment of the adultery statute in New York in 1965 has been attributed largely to the influence of church groups, that felt the removal of the crime from the statute books would be passive approval of these actions. N.Y. Times, July 23, 1965, p. 1, col. 7. "There is a telescoping of divergent ideas, a confusion of issues whenever consideration is directed toward changes in laws bearing on sex. The single question of whether certain laws under consideration are effective means of suppressing or controlling sexual wrongs at once develops into a controversy over morality and immorality." DRUMMOND, *op. cit. supra* note 24, at 238. "Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1935).

Involved here is a question of equal protection for the few persons singled out for prosecution. But unless there is a recognizable shift in constitutional doctrine, an equal protection argument will be largely unavailing. One who is prosecuted cannot use as a defense the fact that other people engage in a similar activity but are not prosecuted.[38] Only if there is some showing that this selectivity is because of arbitrary and unreasonable discrimination might equal protection apply.[39] This is extremely difficult to prove, and, as it might pertain to situations such as those here discussed, it would apply only in an insignificant number of situations. Equal protection has generally been held to require a showing of unconstitutional discrimination in the sense of it being directed against some group of people, such as a particular racial group.[40] A sporadic selection of people against whom enforcement is inveighed, without any group connotation underlying such selection, is insufficient to successfully raise an equal

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38. For a comprehensive list of a citation of cases enunciating this principle, see Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1106 n.12 (1961) and Note, *Discriminatory Law Enforcement and Equal Protection From the Law*, 59 YALE L.J. 354 n.3 (1950).

39. The word "might" is used because only about half of the appellate courts that have considered the question have admitted that *any* equal protection argument is available. Comment, *supra* note 38, at 1106 n.12. As to the courts that reject an equal protection argument being available, their rationale "seems to be the assumption that the equal protection clause forbids only the discriminatory deprivation of pre-existing rights, but does not create an independent right to non-discriminatory penal enforcement, since there is no pre-existing right to commit a crime." *Id.* at 1107.

In those jurisdictions where an equal protection argument is at least theoretically available, there is wide variation as to what constitutes unreasonable discrimination. As one authority notes: "Some courts require only that the criminal justice administrator refrain from making classifications impermissible to the legislature, such as those bearing unequally on persons similarly situated with respect to the subject matter of the law, and those which do not have some rational relation to the legislative purpose. Those courts would hold only that classifications based upon 'race, religion, color, or the like' violate the constitutional guarantee. It has also been said the defendant must show 'that he alone is the only person who has been prosecuted under the statute.' Other courts have held that the defendant must show not only that he was improperly selected but also that he would be in a better position if other persons were also subjected to prosecution." LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 162-63 (1965) (footnotes omitted from quotation).

40. This argument was successful in People v. Harris, 182 Cal. App. 2d 837 (Super. Ct. App. Div.), 5 Cal. Rptr. 852 (1960). Defendants were prosecuted for violations of state and municipal gambling laws. They offered to prove there was a policy by the police of enforcing these laws against Negroes but generally not against whites. The appellate court sent the cause back to trial on the basis that a showing of this would arise a valid equal protection argument. See also State v. Jourdain, 225 La. 1030, 74 So. 2d 203 (1954).

protection argument.[41] Until that philosophy is broadened, equal protection will remain largely unavailing as a remedy for this particular problem.[42]

This creates a great dilemma. A court may feel it cannot apply equal protection because the situation does not fit within guidelines established by earlier decisions. But if the court does enforce a statute with the total impact of the adultery laws, it becomes in effect a party to sporadic enforcement of a law that is completely removed from that which it originally professed to accomplish. The court will be enforcing a law that has in application become riddled by special interests and that does not reflect a balance that, from all demonstrable evidence, society would effectuate if allowed to do so in an objective and unobstructed atmosphere. To avoid becoming a party to such aberrational processes and to provide a modicum of equal protection, even if a full-fledged equal protection argument is unavailable, a court should consider the full range of a law's impact. Where inconsistencies exist and where the legislature fails to correct these, a court should accord to itself a discretion simply to refuse to participate. It should wash its hands of the matter.

NONCOMPLIANCE, NONACTION, AND NET PURPOSES

The Sunday Closing Laws

There is a third dimension that at times arises in coping with old laws. This is the delineation of a statute's purposes. Noncompliance and an inconsistent state position suggest that the operation of a statute often varies greatly from its seeming intent. Of what import is this variation? It is surely revelatory of what a statute is actually doing and, in fact, may be an accurate revelation of what the statute was actually meant to accomplish in the first place. An examination of this variation may act to strip away the superficial purposes that a statute could be found to have and to exhibit in full light its net purposes in terms of produced results. A look at the Sunday closing laws illustrates this consequence.

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41. An outstanding example of sporadic enforcement with no equal protection argument being available was Taylor v. City of Pine Bluff, 226 Ark. 309, 289 S.W.2d 679, *cert. denied*, 352 U.S. 894 (1956). This case involved a Sunday closing law, comprehensive in scope, that was enforced only against grocery stores. Since the legislature could have passed Sunday closing legislation solely prohibiting grocery stores from opening, the court reasoned that the police in their enforcement could make the same classification.

42. As Professor LaFave concludes, *op. cit. supra* note 39, at 163: "[I]t is evident that the equal protection clause does not constitute an adequate basis for a court to consider the propriety or impropriety of the exercise of police discretion."

The Sunday closing laws are remote in origin, being evident in one form or other since Biblical times.[43] A reception of these laws from England was effectuated after American independence, until every state at one time or other had some type of restriction pertaining to commercial activities on Sunday.[44] Many of these statutes remained unchanged through the years and, as a consequence, contained many provisions that were obviously obsolete.[45] It is unclear how fully these controls were heeded in general, but probably they met with satisfactory compliance until well into this century.[46]

43. There is, of course, the Biblical command: "Ye shall keep the Sabbath therefore; for it is holy unto you: every one that defileth it shall surely be put to death. . . ." Exodus 31:14. Of a later time, it is said: "The pagan religion of Rome had many holidays, on which partial or complete cessation of business and labor were demanded." LEWIS, CRITICAL HISTORY OF SUNDAY LEGISLATION 8 (1902). As to Constantine, the first Christian Caesar, his edicts for religious holidays at first were for the sun-god. But in A.D. 313 he issued an edict extraordinarily favorable to the Christians. *Id.* at 10-11, citing UHLHORN, THE CONFLICT OF CHRISTIANITY AND HEATHENISM 427 (1879). Finally, in A.D. 321, Constantine required all work to cease on Sunday, thus establishing that day by law as the Christian Sabbath. JOHNSON & YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 219-20 (1948).

44. Until 1900, Arizona had no Sunday law. Later, it acted to prohibit boxing and barbering on Sunday. In a recent report, it was noted that, as of that time, only Nevada was without any Sunday law. Minor restrictions were imposed in Arizona, as noted, California (boxing), Montana and Oregon (barbering), and Idaho and Wyoming (any prohibitions in existence being solely on local option basis). See Comment, 61 YALE L.J. 427 (1952). For general information on the historical development of Sunday laws, see Johnson, *Sunday Legislation*, 23 KY. L.J. 131 (1934).

45. For example, still appearing on the statute books well into this century have been exemptions from the Sunday laws for people conducting services that have long since ceased. Such was an exception for stagecoaches, ALA. CODE tit. 14, §420 (1940) and for ferrymen, IND. ANN. STAT. §10-4301 (1956).

46. This is not to suggest an absence of concern over the deplorable state of observance of the Sunday laws that many people felt existed in the last century. For example, a New York Sabbath Committee investigated inroads into the Sabbath in that state over a five-year period between 1857 and 1862. The committee proceeded under the following rationale: "The fact and the form of the organization had mature consideration. Thoughtful men were alarmed at the rapid drift toward popular neglect and profanation of the sacred day . . . . Demoralizing influences had fearfully multiplied, with no adequate counteraction or restraint . . . . The Sabbath became in many quarters, and among large classes of the city, the gala-day of the godless; the harvest-day of avarice; the high day of vice and crime." NEW YORK SABBATH COMMITTEE, FIVE YEARS OF THE SABBATH REFORM 1857-1862 1 (1862). It is clear inroads were being made, but during the nineteenth century they were met by powerful forces seeking to maintain the Sabbath. It is in this century that neglect of the Sunday laws became pronounced. A pattern was established wherein noncompliance with the laws would become predominant in different localities at different times. In these various places, pressures would eventually increase until reenforcement was undertaken. These efforts date back at least forty years. Bellows Falls, Vermont had "blue laws"

Eventually, however, compliance with many of the provisions fell into disarray.

Certain aspects of the Sunday closing laws were continuously enforced and obeyed. For example, the restrictions on the sale of liquor on Sunday were heeded. On the other hand, other commercial enterprises were engaging more and more in weekend business. Grocery stores, coin-operated laundries, highway stands catering to Sunday tourists and small stores selling various retail items flourished. Many would attribute this result to a changing society.[47] Sunday was becoming a day of activity, when people desired either to attend to household business or to seek out recreation. If this was true for a large part of society, it meant that another part, engaged in providing services for these people, would find it highly profitable to operate on Sunday. Thus, there was a large economic motive for noncompliance. There was also a religious motive. Members of some religious sects wished to open on Sunday because their religious faith celebrated the Sabbath on some other day. They preferred to close on their Sabbath and to make up for it by remaining open on Sunday.[48]

It is important to note that the scope of noncompliance was not limited solely to the owners of commercial establishments that opened on Sunday. Its dimensions must also include the scores of people who utilized these services, and it should include the people violating restrictions in some states that went beyond commercial activities and purported to curtail individual actions as well.[49] A person could not

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resurrected in 1930, closing down movies and almost every other activity. N.Y. Times, Dec. 8, 1930, p. 23, col. 7. Mattoon, Illinois decided it would allow Sunday movies, as long as they were opened with a prayer. N.Y. Times, Dec. 5, 1930, p. 3, col. 5. Huntsville, Alabama had Sunday laws enforced for the first time in many years in 1939. N.Y. Times, Oct. 31, 1939, p. 13, col. 1. The state of Delaware, two years later, renewed enforcement only when efforts for legislative repeal of the Sunday laws failed. N.Y. Times, March 3, 1941, p. 1, col. 4. From these and other examples, it can be determined that noncompliance and nonenforcement became predominating factors in substantial areas of the country, at least for a time. These were then challenged by pressures calling for renewed enforcement.

47. See PACKARD, THE HIDDEN PERSUADERS 177 (1957), where it was noted that many people now made their customary Sunday drive a shopping trip as well. In response, many merchants, because of the locations they had chosen for their stores as well as other considerations, had come to rely quite heavily on Sunday business. See Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 RUTGERS L. REV. 505, 509 (1958).

48. In a majority of the states having general Sunday regulations, there have been provisions allowing people, who closed on some day other than Sunday because of their religious convictions, to remain open on Sunday. It was noted that 21 of the 34 states have exemptions of this kind. Braunfeld v. Brown, 366 U.S. 599, 614 (1961) (dissenting opinion).

49. See generally LEWIS, *op. cit. supra* note 43, at 209-73. Many of the personal restrictions, as opposed to commercial, that are reflected in his descriptions of

mow his lawn. He could not paint his house. And yet he did, in profuse abundance.

This noncompliance was challenged by a series of pressures brought on enforcement officials and their resulting response in the form of renewed arrests and prosecutions.[50] As a defense, some of those arrested challenged the validity of the laws invoked against them. Several cases reached the various state supreme courts, and four cases eventually came before the United States Supreme Court.[51]

The cases before the Supreme Court were all different on their facts, and the statutes from the four states varied somewhat in their provisions.[52] Accordingly, this presented the opportunity to examine and question Sunday closing laws on a variety of grounds.[53] Even so, despite various constitutional questions being raised, the statutes in all four cases were upheld. One basic thesis propounded by the

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various state laws were still retained on the statute books as of the middle of this century. The epitome for modern day restrictions that go beyond commercial controls is perhaps reached in Ocean Grove, New Jersey. Every Sunday the streets are closed and no cars can be driven or even parked on the streets. Businesses close, and no one is allowed on the beaches. No work or recreation, except walking, is permitted. Evidently, these restrictions are enforced. See N.Y. Times, Aug. 28, 1960, §6 (Magazine), p. 44.

50. See N.Y. Times, note 46 *supra*.

51. Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

52. *McGowan*, note 51 *supra*, challenged the validity of a Maryland statute that exempted certain commodities from Sunday restrictions, such as tobacco, gasoline, hospital supplies. In addition, only certain vendors could operate on Sunday, such as operators of bathing beaches and amusement parks. *Gallagher*, note 51 *supra*, was concerned with a Massachusetts statute in which the exemptions were much more complex than in Maryland. A few examples would be that it allowed wholesale trade in perishable foods on Sunday but did not allow retail, and professional sports could run for longer periods of time on Sunday than amateur sports. *Two Guys From Harrison*, note 51 *supra*, involved a Pennsylvania law that imposed more stringent penalties for certain violations of the Sunday laws than for others, getting so specific as to increase penalties if certain commodities were sold, while not doing so as to other commercial transactions. *Braunfeld*, note 51 *supra*, also concerned the Pennsylvania law. Its added feature was that the party against whom enforcement had been invoked was an Orthodox Jew who closed his store on Saturday for religious reasons and wished to remain open on Sunday.

53. There were four grounds considered in the cases: (1) that the Sunday closing laws denied defendants equal protection of the laws; (2) that they were void because of unconstitutional vagueness; (3) that they were laws respecting an establishment of religion; and (4) that they prohibited the free exercise of religion. The third and fourth points were considered separately by the Court since, under the facts of *McGowan*, note 51 *supra*, and *Two Guys*, note 51 *supra*, at least, there was no serious contention that the statutes in question interfered in any manner with the defendants' exercise of religion.

majority of the Court ran throughout the decisions. The Court maintained that the statutes reasonably could find their basis in an attempt to create a day of rest, something beneficient to society and protective of employees who might otherwise be forced to work through this seventh day of the week. The Court rejected the idea, therefore, that the laws had to be predicated on the basis whether or not they impeded the free exercise of religion or tended toward the establishment of religion. It stressed the secular considerations and downplayed the religious.[54]

The Court took these old statutes, passed originally when religious temperaments and influences were great, and reworked them by stating that a shift in purposes had taken place over the years. The Court was unwilling to overthrow the statutes unless it could be shown that some other way must be taken to accomplish these societal concerns. It would seem, however, the Court was actually talking about the societal concerns of the late 1800's — long workweeks, "sweat shops," powerful employers, overworked employees. Either that, or it was speaking of attempts by the legislature simply to create a uniform day of rest for as many people as possible, but one in which the legislative results were, at best, incomplete, sporadic, and unsatisfactory.[55] In the process, the Court discarded the overriding stamp

54. "In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States . . . . The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of paricular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." McGowan v. Maryland, 366 U.S. 420, 444-45 (1961). The Court considered the various exemptions in the Maryland statute. It pointed out that they were not merely exemptions for "works of charity or necessity" which might signify a religious basis for exemption. Instead, the exemptions were "clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion." *Id.* at 448.

55. See, *e.g.*, PFEFFER, CHURCH, STATE AND FREEDOM 231-35 (1953) and his description of the New York Sunday statute in effect at that time. He noted such puzzling provisions as those of bread, milk, and eggs being allowed for sale, but not meat or fish; beer, "yes"; but butter, "no"; real property, "yes"; but personal property, "no." The only plausible explanation for this, he says, is "one that does not reflect much credit on the legislature. Originally the law prohibited all form of labor, trade, and commerce. Its history since its first enactment, however, has been a succession of amendments creating exceptions, and amendments based not on the necessity or desirability of the exempted trade, but on the lobbying power of the pressure group seeking the particular amendment. How else can one explain, for instance, the 1941 amendment [to the New York law] that

these statutes had carried, namely to etch more deeply into society the Christian Sabbath, and constructed instead a wholly secular purpose. It took no cognizance of the identification of the forces that were contending for the reinstatement and continued maintainance of these laws, religious groups in the main,[56] and it did not examine, in any legal context, the import of years of disregard of these statutes.[57]

The Court was obviously unwilling to challenge the legislative prerogative of acting for the public welfare.[58] If it could be construed that the public welfare was involved, then the fact that the legislation coincidentally enhanced certain religious interests and had detrimental effects on others was insufficient to deny the validity of the legislation.[59]

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permitted the retail sale of beer before three o'clock in the morning and after one o'clock in the afternoon?" *Id.* at 233-34.

56. Religious groups have not been the only forces seeking continuation of the Sunday closing laws. Another source has been businessmen who were fearful that competitors would have great advantages in remaining open on Sunday. Generally, the competitors would be those located near main traffic arteries and thus would be convenient for Sunday shoppers out for a Sunday drive. For examples of where the fights over Sunday closing laws have been mainly economically motivated, see Note, *supra* note 47, at 509. Even so, the major responsibility for the continuation of Sunday laws does lie with religious groups. One of the most active over the years has been the Lord's Day Alliance. When it came to a showdown in the New York Legislature over a Fair Sabbath bill in 1958 that would allow members of religious sects who closed on Saturdays to remain open on Sundays, the vote was by religious blocs. "Why do the New York legislative bodies pay attention to the leading religious voice in regard to Sunday legislation? Is it not simply that this is a religious issue? If the dilemma were secular, such as right-to-work laws, interstate commerce, and so on, then perhaps the voices of traditional religion would not be heeded. But the Sunday issue at hand is a basic, if not the most basic, element in contemporary American Christianity. So it is impossible to discuss the issue in a legislature made up of churchmen, or individuals who respect the voices or the votes of churchmen, without viewing it as a religious issue." WARD, SPACE-AGE SUNDAY 36 (1960).

57. In many of these cases, it would be hard to say there was *total* nonenforcement, but there was clear evidence of *substantial* noncompliance and nonenforcement. The incidences of these occurrences in each individual case could be weighed by the courts and set against the background of the general pattern of compliance with the Sunday closing laws. "The Sunday laws are probably the most frequently violated and least often enforced statutes in the law books." PFEFFER, *op cit. supra* note 55, at 234.

58. "To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." McGowan v. Maryland, 366 U.S. 420, 445 (1961).

59. "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only

The process by which the Court's conclusion was reached in these particular cases points to a questionable obeisance to this presumption as to the public welfare. It shows the extreme lengths to which courts will go in drawing out purposes that will save legislation. In the case of old laws, where noncompliance is substantial, it would be appropriate for a court to require a showing that law's purposes are clear, still viable, and directed specifically to some orderly approach to solving the proposed problem. To do otherwise is to uphold laws for the law's sake, disregarding clear evidence that the laws have fallen into general if not complete disuse, that they were tainted with the attempt to impose preferences that suggest the possibility of constitutional deprivations for certain groups, even if such cannot be clearly shown, and that there is significant opposition to reinstating enforcement of these laws. The Court might have inquired more thoroughly into how directly the various statutes actually attacked the supposed problems giving rise to their being and whether the noncompliance and nonenforcement that had resulted were more indicative of the true state of those statutes' applicability than the purposes the Court could conceivably construe these statutes to have. If the statutes' purposes were unresponsive to today's problems, and if noncompliance and sporadic enforcement were persuasive ingredients, the statutes could be said to have been rendered unenforceable, at least pending renewed legislative consideration and action.[60]

A cursory glance at the many varieties of Sunday closing laws suggests that a court might well reach different conclusions depending on the precise statute brought before it. Some Sunday closing laws have been much more cognizant of various interests than others. Some have incurred wholesale noncompliance — others have not. Some have seemed obviously to favor certain religious or economic interests — others have been a more broad-based effort to set aside a day of rest in a manner that does a minimum of harm to conflicting

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indirect. But if the State regulated conduct enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

60. This has been done in a few isolated cases not previously mentioned. Specifically as to a Sunday law, one judge said it was a dead letter and that it was "not the business of the police to revive them." People v. Hesterberg, 43 Misc. 510, 513 (N.Y. Supreme Ct. 1904). Although not precisely on the grounds of net purposes, noncompliance and nonenforcement, other courts have said that a statute can be disregarded if the conditions and circumstances indicate that enforcement would not advance the statute's original purpose. See Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955); Rathjen v. Reorganized School Dist., 365 Mo. 518, 284 S.W.2d 516 (1955); Gangemi v. Berry, 25 N.J. 1, 134 A.2d 1 (1957); Broadwater v. Kendig, 80 Mont. 515, 261 Pac. 264 (1927).

interests within society. I will not attempt here to delineate these varieties, but I would suggest that the same factors apply here as with other types of old laws incurring substantial noncompliance. It is hard to say, with many of these laws, that they are specifically violative of equal protection, due process, freedom of religion, or right to privacy. And yet there is noncompliance, inconsistent state action, inconsistent nonaction, and dubious purposes. A court would better serve society by refusing to enforce a statute, if these elements so predominate that a conclusion can rightly be reached that the statute in question fails to respond to society's needs. The court should continue to refuse enforcement until the legislature undertakes a fair and full reassessment of these laws.

CONCLUSION

A full examination of the means by which a court can obtain the necessary data to proceed in a manner that simply refuses enforcement of old laws has not been attempted in this article. There has been attempted only a partial identification and explanation of the basic factors that are of importance and that should be evaluated, hopefully opening the door to wider inquiry. A full examination of all that is behind that door must await later treatment.[61]

Even so, certain tentative conclusions can be offered. First, at the heart of this problem is some idea as to what is meant by a law having current vitality. A definition of this depends on the situation involved, but a clue to this lies in an assessment of the factors that would detract from its vitality. These factors — such as noncompliance and nonenforcement — have received the main focus of this article. Second, there is great need to have more than one instrumentality that can evaluate how well a law functions under a variety of societal stresses and concerns. If society, for example, is made to depend solely on legislative action, the results can be regrettable. Special interests are notorious for blocking or promoting certain action and thereby gaining special advantages. Third, and finally, the courts are appropriate vehicles for correcting this imbalance. Enforcement ultimately depends upon their cooperation. Before giving this, they should demand that the statute to be enforced is in good order and is not prejudicially tainted by such derogatory elements as noncompliance, state inconsistencies, and unresponsive net purposes.

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61. For better or for worse, a comprehensive study of laws incurring noncompliance (and the groups and individuals most prominently involved) is currently being made and hopefully will be ready for publication in the near future.