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Desuetude v. North Dakota Gambling

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DESUETUDE v. NORTH DAKOTA GAMBLING

Today, our legislatures are turning out an ever increasing number of statutes to cope with the needs of our society. Many of our legislatures' earlier endeavors have fallen into disuse, and the statutes no longer serve the purpose they were intended to serve. What happens in a society that permits its laws to become obsolescent? This will be the central question and thesis of this article.

INTRODUCTION

The process of desuetude to most is an unfamiliar procedure. In theory, desuetude appears to operate primarily as a possible method by which a society may deal with obsolete statutes. To acquire a better understanding of the doctrine, one must examine its acceptance and non-acceptance into various systems of law.

The early Romans, who ascribed to the perfection of a universal law of all mankind — *jus gentium* — regarded custom, when practiced by a majority as being equal to statutory law.[1] Custom could therefore, be capable of superseding a previous statute.[2] This Roman notion is best stated in a passage found in Justinian's Digest:

> Long continued custom is not improperly regarded as equivalent to a statute, and what is . . . established by usage is law . . . Wherefore very rightly this also is held, that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.[3]

In line with Roman thinking were the nineteenth century German jurists of the Historical School. Their leader, Savigny, demonstrated that the written law and the law of the people were products of the Volksgeist.[4] Both, therefore, were given equal

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1. W. BUCKLAND, A TEXT BOOK OF ROMAN LAW, 52 (1921).
2. W. HAMMOND, THE SANDARS' INSTITUTES OF JUSTINIAN 75 (American Edition 1876).
3. DIGEST 3.32.1.
4. F. SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 35 (Holloway Transl. 1867). "When the customary law contradict[s] a written law, the principle of equality direct[s] the preference always to be given to the newer of these two laws without distinction between written and customary." *Id.* at 156.

dignity.[5] Savigny goes on to say, however, that not all desuetude statutes will fail because of a lack of enforcement. Rather, there must be found a "plurality of uniform and uninterrupted acts throughout a long period of time."[6]

In the common law nation of England, one finds that the doctrine of desuetude was never accepted. As early as 1409, one reads:

> . . . in the time of our Lord the King, it is ordained that all statutes made in the time of the king's ancestors and not repealed shall be kept and observed. Therefore, if this statute was never repealed, it still remains in force.[7]

Modern English cases also agree that a statute may never be aborgated under any circumstance, even where there has been widespread and long established non-observance.[8] Some legal writers have attributed England's rejection of the doctrine to the influence of the legal philosopher Austin.[9] For with Austin, "whatever the Sovereign commands is law, and it remains that quality even though a particular command may be disobeyed or left unforced."[10] Therefore, it appears that regardless of any injustices that may arise, the English will consistently enforce the statutes before them.

One who has followed the development of American law, with its roots deeply embedded in English tradition, would suspect that desuetude, as in England, was never accepted. There are, however, early American cases that accepted the theory of the doctrine, but these were in the minority.[11] Recently, there has been some serious consideration that possibly an American statute, weary from neglect, can become worn out from non-use.[12] This change in attitude might be attributed to at least two reasons.

The first reason is the legislature itself. If our legislatures had the means and the time to consider their past acts, as well as their new legislation, the books would not contain as many desuetudal statutes. However, as Professor Johnsen points out:

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5. *Id.* at 138.
6. *Id.* at 148.
7. Y. B. Mich. 11, Hn. 4, pl. 8b (1409).
8. 44 ENGLISH AND EMPIRE DIGEST, *Statutes* § 2086-90, *Effect of Disues of Statutes* 370 (1965). *See also,* S. THORNE, A DISCOURSE UPON THE EXPOSICION AND UNDERSTANDIGE OF STATUTES (1942).
9. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement,* 49 IOWA L. REV. 389, 409 (1964) [hereinafter cited as Bonfield].
10. LON FULLER, PROBLEMS OF JURISPRUDENCE 108 (1949).
11. Porter's Appeals, 30 Pa. 496 (1858); O'Hanlon v. Myers, 10 Rich. L. 128 (S.C. 1856); Hill v. Smith, 1 Morris 95 (Iowa 1840); Wright v. Crane 13 S. & R. 447 (Pa. 1826); James v. Commonwealth, 12 S. & R. 220 (Pa. 1825).
12. Bonfield, *supra* note 9; L. and W. Rodgers, *Desuetude as a Defense,* 52 IOWA L. REV. 1 (1966) [hereinafter cited as Rodgers]; A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

> [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.[13]

The end result is more and more desuetudal statutes and no method by which we can eliminate them. Such a situation leads, as we will find out later, to various injustices. Therefore, it is suggested that there should be some "judicially enforcible limitations on the application of obsolete statutes."[14]

The second reason, which is germane to many obsolete statutes, especially to the gambling statutes in North Dakota, is the fact that many of these obsolete statutes are concerned with public morality. These statutes were enacted at a time when public sentiment supported a strict enforcement of the Sabbath, the suppression of all gambling, severe punishment of drunkenness, blasphemy and indecent speech.[15] Pressures that would ordinarily strive to repeal these obsolete laws may never develop. As Arnold suggests:

> [t]hey survive in order to satisfy m o r a l 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.[16]

If then, the legislature is unable to repeal old legislation because of the moral dilemma presented, one may have to consider other avenues of approach.

The foregoing are only some of the considerations that have led legal writers of today to conclude that a closer examination of the application of the doctrine of desuetude is warranted.

AMERICAN DESUETUDE

In analyzing the necessary elements that are required for desuetude in American jurisprudence, we find that a mere disuse is not enough.[17] Professor Bonfield lists the following prerequisites:

> (1) A violation of the statute must be "prevalent and visible," so that the failure to apply the act is a "prod-

13. JOHNSEN, LAW ENFORCEMENT 340 (1930).
14. Bonfield, *supra* note 9, at 394.
15. M. Neudec, Morality Legislation in North Dakota 1889-1914, 1964 (unpublished thesis in Chester Fritz Library at the University of North Dakota). *See also*, J. Petry, Morality Legislation in NorthDakota 1920-54, 1967 (unpublished thesis in Chester Fritz Library at the University of North Dakota).
16. THURMAN ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1935).
17. See note 24, *infra*.

uct of a conscious administrative policy of completely ignoring that provision's breach."

(2) A failure to apply the statute must be "knowable and apparent" to the community to which it is directed.

(3) There must be an absolute omission to enforce the statute for a sufficient period of time, such that it is clear the non-enforcement does not reflect a transitional or unsettled policy.[18]

While most legal systems that recognize desuetude would agree with Mr. Bonfield's first two requirements, they would be less stringent on the last requirement.[19] Under Mr. Bonfield's analysis, it would be difficult for one to establish that a particular law was not in a transitional stage or was no longer an unsettled policy. Other legal systems would require that the "practice be of such a duration and generality" as to enable the inference of the community to set up a "counter law or establish a quasi-repeal."[20] This approach appears to be more realistic. Emphasis here is on what the community in fact has accepted as their "living law."

The exact status of desuetude in American law today is uncertain. Sutherland concludes that in no way can the American courts decree that a validly enacted statute will be rendered ineffective by non-use.[21] And he has the support of a number of decisions.[22]

On the other hand, there are early cases that tended to support desuetude.[23] Furthermore, there is authority that a court may disregard a statute when conditions have so changed that the present enforcement of the law would not advance its original purpose. "Where the reason for the law ceases, the law itself also ceases."[24]

It is interesting to note that the Supreme Court of the United States has never resolved the desuetude question directly. In 1961, however, Justice Frankfurter, speaking for the majority in *Poe v. Ullman*[25] stated that the failure of Connecticut to enforce its anti-birth control statutes over a period of some eighty years amounted to "an undeviating policy of nullification." Did he mean

18. Bonfield, *supra* note 9, at 419-20.
19. *Id.* at 403-05. *See also,* Philip, *Some Reflections on Desuetude,* 43 JURID. REV. 260 (1931).
20. Philip, *supra* note 19.
21. 1 SUTHERLAND, STATUTORY CONSTRUCTION § 2034 (Horack 3 ed. 1943).
22. Dist. of Col. v. Thompson Co., 346 U.S. 100 (1953); State v. Cranston, 59 Idaho 561, 85 P.2d 682 (1938); Shutt v. State, 173 Ind. 689, 89 N.E. 6 (1909); State v. Nease, 46 Ore. 433, 80 P. 897 (1905); Pearson v. Int'l Distillery, 72 Iowa 348, 34 N.W. 1 (1887).
23. Cases cited note 11, *supra.*
24. Philip v. Boise Street Car Co., 61 Idaho 740, 107 P.2d 148, 151 (1940); *cf.* Humthlet v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955).
25. 367 U.S. 497 (1961).

that the statute had fallen to obsolesence through a long period of non-enforcement, and as such, could not be enforced? The court seemed to emphasize the very elements of desuetude, but yet never directly asserted that their reasoning was based on any desuetudal doctrine.

An interesting observation by Bonfield, in reference to the earlier decisions in this area, is that,

> most of the authority responsible for the American repudiation of desuetude are state court cases. . . . As a result, their failure to deal with questions of due process and equal protection is easily explainable. It also weakens their significance as precedent and induces a closer scrutiny of the more recent judicial excursions into this area.

THE PROBLEMS

Why does the situation warrant a closer scrutiny to determine the possible application of desuetude? The answer lies in this paper's central question. What happens in a society that permits its laws to become obsolete? In short, such a society propagates the seeds on injustice and lays the ground work for a general disrespect for the law.

To begin with, consider the discriminatory practices that may and do arise in defiance of the guarantee of equal protection under the Fourteenth Amendment of the United States Constitution. On the other hand, there is a situation in which a statute by its terms requires general enforcement, the legislature intended it, and the law enforcement agencies are enforcing the law universally or in a reasonably selective manner. Here, there is no problem, no discrimination, and no denial of equal protection. On the other hand, there is the situation involving a desuetudal statute such as the gambling statute in North Dakota, where the statute requires general enforcement, the legislature is silent, and the law enforcement agencies, for the most part, no longer enforce the law against particular classes, but yet, sporadically apply the law to other classes. Is this a denial of equal protection? In viewing the *Yick Wo*[27] case, it would be.

> Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their

26. Bonfield, *supra* note 9, at 429.
27. 118 U.S. 356 (1886).

> rights, the denial of equal justice is still within the prohibition of the Constitution.[28]

If the above is true, then why not invoke the Fourteenth Amendment when confronted with desuetudal statutes? The answer is that the present judiciary machinery could provide adequate protection, but in reality does not. This has been attributed to at least two reasons.

First, the courts are reluctant to interfere with ordinary discretionary practices by the law enforcement agencies.[29] As a result, Rodgers points out that, "many of the illegitimate considerations governing enforcement discretion escapes judicial notice."[30] A second reason is the difficult burden of proof required to maintain a defense of unequal protection in a desuetudal situation. Decisions suggest that only in cases where there is shown to be an element of intentional and unreasonable discrimination will the Fourteenth Amendment protection apply.[31] There are other cases which go further and suggest that a denial of equal protection is limited only to cases where class discrimination is established.

> The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged.[32]

If a person is required not only to prove that the discrimination was intentional and unreasonable, but also that such discrimination was directed toward a specific class to which he belonged, we find that the defendant has a difficult burden to meet. It should be remembered that a mere failure to prosecute other offenders is no basis for finding a denial of equal protection.[33]

This is not to say that a defense of equal protection against the use of an obsolete statute is impossible. Rather, in reality,

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28. *Id.* at 373-74.
29. Rodgers, *supra* note 12, at 9-10. *See also,* Goldstein, *Police Discretion Not to Invoke the Criminal Process,* 69 YALE L. J. 543 (1960).
30. Rodgers, *supra* note 12, at 10.
31. Boynton v. Fox West Coast Theatres Corp., 60 F.2d 851 (10th Cir. 1932); U.S. v. Elliot, 266 F. Supp. 318 (S.D.N.Y. 1967).
32. Oyler v. Boles, 368 U.S. 448, 346 (1962); *Accord,* Snowden v. Hughes, 321 U.S. 1 1944). *See also,* material printed by the LEGISLATIVE REFERENCE SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 39, 88th Cong., 1st Sess. 1292 (1964). "Except where discrimination on the basis of race or nationality is shown, few police regulations have been found unconstitutional on [equal protection] ground[s]." *Id.*
33. Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963); State v. Hicks, 213 Ore. 619, 325 P.2d 794 (1958).

the practical application of the defense is significantly reduced because of the burden of proof required to be met by the defendant.

The due process clause of the United States Constitution requires that statutes be framed in a manner that the public will know the kind of conduct to adhere to. The purpose is to prevent the law from becoming a trap for the unwary, by providing fair notice as to what the law will enforce. Justice Butler, speaking for the Supreme Court stated that,

> No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. . . [I]f men of common intelligence must necessarily guess at its meaning and differ as to its application, [it] violates the first essential of due process of law.[34]

Therefore, can it not be argued, as Bonfield does,[35] that a statute which is ignored and openly violated over a period of time is in essence a public notice that the law is no longer enforced? The answer seems to be involved with a consideration of whether or not the community is bound by the laws it lives by, or only by the laws as they are written in the statute books. They are not always one and the same.

What protection does the individual have who cannot distinguish between that living law which is enforced, and that written law which is still law, but not enforced? Is he really given fair notice as to what the law is? The problem confronting this individual, as Bonfield explains it, is that he is unable to distinguish between law and law.[36] And yet, Rodgers points out that our legal procedure offers no example where the application of a desuetudal act has even been nullified on grounds of fair notice.[37]

There are other injustices that may arise through the application of disused statutes. Professor Bickel mentions some of these when he states that,

> The books are full of more sinister enactments, which are used to prosecute only with exceptional, discriminatry selectivity, and are used most often administratively, short of prosecutions, to blackmail, and harass and cajole people.[38]

To this the author would add that such statutes may also be used for political purposes. Whatever avenue of abuse or mis-

34. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).
35. Bonfield, *supra* note 9, at 416-17.
36. *Id.* at 416.
37. Rodgers, *supra* note 12, at 20.
38. Bickel, *supra* note 12, at 153.

use these desuetudal statutes take, they no longer fulfill the purpose for which they were originally intended to seve by the legislatures that enacted them.

Aside from the injustices that will inevitably arise in the enforcement of desuetudal statutes, there is still another underlying danger. The danger is that of nurturing a social attitude that sanctions the disobedience of the law.

Law enforcement agencies, as well as the general public, have shown great concern over the kinds and amounts of crime being committed in our country today.[39] They focus their attention upon the rising number of murders, rapes, assaults, robberies and larcenies.

How often do these same people display a complacency and tolerance for their own lawlessness and lawlessness of others? When the public observes that law is not enforced, whether desuetudal or not, they are witnessing the condonation of lawbreaking. The question is whether such observations have the effect of inducing others to engage in the same form, as well as other forms of law breaking. A more difficult and closely related question is, what lesson is being taught to the community as a whole by a precept and example of enforcing and obeying some of the laws some of the time, and some of the laws, none of the time. Desuetudal statutes present such a paradox. They are laws, but no one enforces them nor obeys them for a period of time. Then once again they become law and are enforced.

Such a policy can only lead to a general apathy for the law and can be regarded as peculiarly damaging to the morale of the legal system and public support for the administration of justice.[40] For in a community where the "good men" cannot keep a law that is base, some bad ones will say, 'Let us keep no law at all' —then, where does the blame lie?"[41] Does it lie on the one that enacts the law, or the one who is to enforce the law, or the one who does not abide by the law? It may be the fault of all three in the case of a desuetudal statute. The legislature could have repealed it, the law enforcement agencies could have enforced it, and the citizen could have obeyed the law regardless of the injustices. Interestingly enough, the citizen may have had the least guilt, but he is the only one of the three who will bear the burden, for he is the only one who will be prosecuted. The question remains, does the society that allows her laws to become obsolecent provide the impetus for a general apathy towards the

39. Address by F. E. Inbau, *Lawlessness Galore,* VITAL SPEECHES, Nov. 15, 1965, at 95; *Crime in the U. S. Still Climbing,* U. S. NEWS & WORLD REPORT, Mar. 21, 1966, at 16.
40. Allen, *Civil Disobedience and the Legal Order,* 36 U. CIN. L. REV. 1, 19 (1967).
41. *Id.* at 178-79.

law and a general acceptance by the community to obey only those laws it desires to obey? The end result is civil disobedience and no law at all.

NORTH DAKOTA

Before proceeding to discuss the case of desuetude against gambling in North Dakota, it may be well to first examine the status, past and present, of gambling in the state. Gambling is defined in rather broad terms by the *N. D. Cent. Code.* It includes,

> Any person who participates in any manner whatever in any game of cards or other game of chance upon which money or other property is wagered. . . . [42]

This would include all types of lotteries, raffles, or whatever term is used. Furthermore,

> Any house, building, room, vessel, float, or other place . . . that keeps any apparatus used or intended to be used for any game of chance . . . is a common nuisance . . . Any person who owns or keeps such a place . . . shall be punished by a fine not less than $25 nor more than $1,000, and by imprisonment in the county jail for not more than one year.[43]

To the best of this author's knowledge, there have been only a handful of reported cases of convictions under the North Dakota gambing statutes.[44] Furthermore, most of these cases date back forty years or more.[45] It should be noted, however, that from time to time there have been various crackdowns on gambling in the state. Whether there were convictions resulting from these crackdowns or if these crackdowns were mere hand spanking occasions, is in some instances questionable. The fact remains that gambling has been carried out on a "lucrative scale."[46] The Assistant Attorney General of North Dakota, Paul Sand, admits that there still is a great deal of gambling going on in the state. It was pointed out that:

> Enforcement of the anti-gambling laws could be a tough job, because they have seldom been enforced in North Dakota since they were written into the state Constitution and the code years ago.[47]

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42. N. D. CENT. CODE § 12-23-01 (1960).
43. N. D. CENT. CODE § 12-23-02 (1960).
44. Middlemas v. Strutz, 71 N.D. 186, 299 N.W. 589 (1941); Erickson v. North Dakota State Fair Assn. of Fargo 54 N.D. 830, 211 N.W. 597 (1926); Thoreson v. Hector, 54 N.D. 651, 210 N.W. 169 (1926); State v. Chase and Dwyer 17 N.D. 429, 117 N.W. 537 (1908); People v. Sponsler, 1 Dak. 277, 46 N.W. 459 (1876).
45. *Id.*
46. Grand Forks Herald, Jan. 19, 1962, at 8, col. 1.
47. Grand Forks Herald, Sept. 24, 1967, at 1, col. 4.

The most recent attempt to enforce the gambling laws in the state has come from Traill County. The first term State's Attorney gave official notice that his county had until October 1, 1967, to cease all gambling activities. He explained that, "the action is not taken because he considers lotteries morally wrong, but because the law exists and must be enforced."[48] Professor Bickel would argue to the contrary for,

> [When an unenforced statute] is resurrected and enforced, it represents the *ad hoc* decision of the prosecutor, and then of the judge and jury, unrelated to anything that may realistically be taken as present legislative policy.[49]

Even where public notice of a present intent to enforce is provided, such an action is said by Bonfield to constitute an "executive usurpation" of legislative perogative by allowing penal administrators to effectively create substantive criminal law.[50] The proper procedure would be a re-enactment by the legislature that would truly reflect the present will of the legislature.[51] It could be further added, that such re-enactment would also reflect the sentiment of the public which the Legislature is supposed to represent.

Before viewing the law enforcement agencies role in this case, two statements should be made. First, that which is discussed here does not pertain to all law enforcement agencies now or in the past. Secondly, one should recognize the dilemma in which these agencies have been placed for they are expected to enforce obsolete statutes that the public no longer support.

Interestingly enough, the law enforcement agencies do have the necessary machinery to enforce the gambling statutes in the state. Under the licensing department, the Attorney General of the state was authorized to appoint a state inspector and four deputy inspectors and investigators,

> [Who] shall possess the powers of police officers everywhere in the state . . . and shall be authorized to investigate and conduct investigations of any immoral or corrupt practices or violations of laws of this state. . . .[52]

The Attorney General's licensing department has recently been incorporated into the Bureau of Criminal Identification and Apprehension.[53] The Attorney General's office, however, assures the

48. *Id.* at 2, col. 2.
49. Bickel, *supra* note 12, at 152.
50. Bonfield, *supra* note 9, at 423.
51. *Id.* at 422.
52. N.D. Sess. Laws 1945, Ch. 288, § 1, N.D. CENT. CODE, § 54-12-12 (repealed 1967).
53. N.D. CENT. CODE, § 12-60-07 (Supp. 1967).

writer that the Bureau has the same powers as the old licensing department.[54] Pursuant to the North Dakota Century Code § 53-06-04, the Bureau has authority "to seize any device of any kind, nature, description, used as a game of chance by any person, firm, corporation doing business in the state."[55] Furthermore, any "sheriff, deputy sheriff, constable, policeman, and peace officer is authorized to visit and inspect . . . and to enforce all the provisions" related to the licensing chapter.[56]

Any failure to enforce such laws by such inspectors or investigators is to result in dismissal from the service.[57]

There have been various explanations given for the failure to enforce the gambling laws in the state. A common explanation is that it is difficult to get a complaint. As the Assistant Attorney General puts it,

> and if you g a m b l e in a club or other public place, you seldom will be charged, because it is difficult to get a complaint signed.[58]

It should be noted that any state's attorney or sheriff can sign a complaint if they so desire.[59] The most prevalent explanation given is that the law need not be enforced unless the gambling goes beyond control. This would mean, either an influx of professionals or corrupt and cheating practices by those establishments that permit gambling. Another explanation is the consideration that one's own office might be at stake and to enforce the gambling statutes might result in failure to be re-elected. Then again, is it not also true that one's office is also in jeopardy if there is failure to enforce the laws of the state?[60]

With this sketchy and general background of gambling in the state, let us now turn to our earlier consideration of desuetude and its feasible application to our gambling laws. Keep in mind that the doctrine requires more than mere disuse before a statute is repealed. It requires that a "sufficiently prevalent and visible" violation of the statute exist[61] for such a duration of time that the community itself has developed a "counter law or has established a quasi-repeal."[62]

It is difficult to estimate exactly what proportion of the state's

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54. Letter from Attorney General's Office to R. Johnston, Oct. 23, 1967.
55. N.D. CENT. CODE, § 53-06-04 (1960).
56. N.D. CENT. CODE, § 53-06-09 (1960).
57. N.D. CENT. CODE, § 53-06-10 (1960).
58. *Supra* note 47.
59. N.D. CENT. CODE, § 29-05-02 (1960).
60. N.D. CENT. CODE, § 53-06-10 (1960).
61. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 419-20, (1964).
62. Philip, *supra* note 19.

population favors gambling. If one considers the number who do gamble,[63] and the number who never express disapproval of such activities, it appears that the community itself no longer objects to some form of gambling. The exception as noted earlier, is the consensus that such gambling should be among the local citizens and that any influx of professional gamblers should be discouraged. Therefore, while the people do not sanction an open and free gambling state, they have expressed and have become acquiescent to a custom or counter law that recognizes certain prescribed modes of gambling. Such a feeling is wide spread and openly recognized by the people of the state.

There are only several recorded instances where actual prosecutions have taken place.[64] It was previously noted that there have been various crackdowns through the years in which convictions may or may not have taken place. (This information is unavailable since only North Dakota Supreme Court cases are reported.) But as a whole, the law as it reads in the North Dakota Century Code apparently is seldom obeyed and seldom enforced. Therefore, is it not arguable, that our gambling statutes are guilty of obsolesence, disuse, nonenforcement and abandonment by the general community against whom they were to be enforced?

The weak point in the argument may lie in the question of enforcement, for the situation has been one of partial enforcement. If one accepts Bonfield's requirement that there must be an "absolute nonenforcement," the case begins to fall.[65] Then again, if one accepts the other view that does not require absolute omission, but rather that a counter law has arisen in the community, the argument gains ground.[66]

Aside from determining who wins or loses, there is another consideration—the North Dakotan. He is the one who will pay the price of absolesence. There are times when he may be discriminated against. He may not be among the privileged who can belong to clubs that provide their members with a place to gamble. Someday, he may be singled out and prosecuted at the whim of an eager prosecutor out to set an example or acquire a political name for himself.

More important is the resentment and apathy towards the law that may be formulated in the minds of the people of the state. An anonymous writer from Wahpeton made this reply when

63. Grand Forks Herald, Dec. 22, 1961 at 7, col. 3. "If everyone who participates in some form of gambling during the year was prosecuted for it, the law would have to fence off the badlands as a prison, because none of the present facilities would hold all the lawbreakers."
64. Cases cited note 44, *supra*.
65. Bonfield, *supra* note 61, at 420.
66. *Id.* at 408-05.

he observed certain clubs were allowed to gamble with apparent official protection.

"Maybe a little money passes under the table or do you have special friends who get favors?"[67]

In the same article, another individual made this comment,

> With this type of law enforcement . . . you will keep North Dakota the small thinking state that it has been for so many years. You will not and cannot expect to attract investors when an office like yours . . . protects the already pot-bellied, cigar-smoking men that have laughed up their sleeves for years while shaking dice and drinking at the_____club.[68]

The validity of these statements is not the important consideration, but what is important is the reaction in the minds of these people. Their response is not surprising. Anytime the law is discriminatory or unjust in its enforcement, a suspicion of unfairness is found. Unfairness is inherent in desuetudal laws, for their very presence invites this kind of sporadic and discriminatory enforcement. Can we expect people to have faith in a legal system that warrants this kind of suspicion?

CONCLUSIONS

There seems to be little value in debating the usefulness of obsolete statutes. The remaining problem is how will we handle these statutes and the injustices that are inherent in them. First, one may begin as this paper did, by re-evaluating the Civil Law doctrine of desuetude. In one form or another, it may have a possible application in our own legal system. As of now, much of the leading case law on desuetude comes from the turn of the century.[69] These cases were decided during a time when the problems of coping with the old legislative enactments was not yet a reality. Today the reality exists.

A second consideration which has some merit is the one proposed by Rodgers. Rodgers advocates that a new subsection be added to the *Model Penal Code* which would read as follows:

> (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
> . . . ; or
>
> (c) [the accused] acts in reasonable reliance upon a clear practice of nonenforcement of the statute or other

67. Grand Forks Herald, *supra* note 66.
68. *Id.*
69. Cases cited note 11 and 22, *supra*.

> enactment defining the offense by the body charged by law with responsibility for enforcement, unless notice of intent to enforce the statute or other enactment is reasonably made available prior to the conduct alleged.[70]

Such a provision, it is felt, would protect the innocent defendant in "circumstances of manifest unfairness."[71] This is progress in the right direction, but it does not eliminate the source of the problem which is the desuetudal statute itself. Of course, the obvious machinery for this is the legislature. And yet, if the legislature lacks the time, or if its hands are tied by the moral stigma that would surround repealing these statutes, one may never see their abrogation.

In summary, one should keep in mind that these are laws that were fashioned on what is now yellow and brittle paper. On them are stamped the rules of conduct that governed our forefathers. In a time that demands change, so must our laws change to keep pace with the demands of the community it serves. If one has disrespect for the law in this country, it is in part due to the law that does not reflect the will of the people. If we have laxity on the part of our law enforcement agencies, it is in some degree because of the obsolete laws that they are expected to enforce.

Rudyard Kipling would sum the beginning and the end as follows:

> That bids him flout the law he makes,
> That bids him make the law he flouts,
> Till, dazed by many doubts, he wakes
> The drumming guns that—have no doubts.[72]

Desuetude rest its case.

RODGER JOHNSTON

70. L. and W. Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 28 (1966).
71. *Id.*
72. R. KIPLING, *An American*, RUDYARD KIPLING'S VERSE (1940).