Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation

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Long after criminal laws have lost their vigor in the context for which they were drafted, they may rise again elsewhere. The American legal system has yet to develop a coherent policy delineating when or if historically unenforced penal statutes can be invoked in non-criminal contexts. This issue is particularly evident in cases where the relevant laws are caught between shifting moral sentiments. Fornication, for example, remains illegal in many states, but it is rarely prosecuted. Should one of the participants in this “criminal” act contract a sexually transmitted disease and sue her partner in tort, however, these disused statutes may be invoked under the “clean hands” doctrine to bar recovery. There is a growing body of ill-considered, contradictory case law regarding the legitimacy of such non-criminal invocation of profoundly disused criminal laws.

The lack of a coherent approach to secondary applications of disused laws warrants fundamental consideration of the issue rather than the piecemeal attention it has received. Academics have grappled extensively with issues stemming from the renewed enforcement of disused criminal laws, which I shall call primary applications. At the same time, however, commentators have virtually ignored a potentially larger issue: the permissibility of what I shall call the secondary application of these laws in civil, family, and other non-

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2. See infra note 32 and accompanying text.
4. The terminology “primary application” and “secondary application” has been used within different contexts and with different meanings. See, e.g., Jennifer Erdman Shirkey, The Constitutionality of Multistatute Antitakeover “Schemes” Under the Commerce Clause: Potential Consequences of the West Lynn Creamery Decision, 52 WASH. & LEE L. REV. 1475 (1995) (describing anti-takeover statutes used both as part of a scheme (a primary application) and individually (a secondary application)).
criminal actions.\textsuperscript{5} Primary and secondary applications differ in fundamental ways.

The unique challenges that secondary applications pose must be addressed. This Note argues that secondary applications of a disused law are unjust and should be permitted only when the possibility of primary applications of that law persists. In the absence of any primary applications, the courts should be able to bar secondary applications with a doctrine I advance under the name of conditional desuetude.

In Part I of this Note, I identify the important phenomenon of secondary applications of unenforced penal statutes. Oscillating between giving full force and no force to disused laws in secondary applications,\textsuperscript{6} judicial decisions betray a lack of any consistent doctrine that acknowledges the intrinsic link between the enforcement history of a criminal statute and its secondary usage. In Part II, I explore the nature of this link and argue that roughly contemporary prosecutions under a criminal law ought to be a prerequisite of its application in any non-criminal fora. A profoundly disused criminal law is of uncertain legitimacy. Such uncertainty should, at minimum, relax the "gravitational pull" that the disused law exerts through secondary applications.\textsuperscript{7} The modification of an individual's rights based on legally obsolete statutes invariably works injustice. Thus, in Part III, I argue that the most viable protection against this injustice is recognition of a modified desuetude doctrine: conditional desuetude. Under conditional desuetude, nonenforcement of a criminal law would preclude its use in secondary applications. This new doctrine can resolve the secondary usage problems of obsolete legislation that would otherwise defy direct constitutional challenges. At the same time, conditional desuetude escapes the separation of powers issue that plagues application of the traditional doctrine of desuetude. Conditional desuetude does not require the courts to encroach upon the purely legislative sphere.\textsuperscript{8}

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\item \textsuperscript{5} But see, e.g., POSNER & SILBAUGH, supra note 1, at 98-99 (noting that morality laws, specifically fornication, "can retain significance even where they are no longer directly enforced.... [They] may be cited in a range of unexpected [non-criminal] legal actions."); Note, \textit{Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex}, 104 HARV. L. REV. 1660, 1662, 1672-74 (1991) (noting that, even if unenforced, fornication and adultery statutes may result in "civil penalties").
\item \textsuperscript{6} See infra Sections I.C-D for contrasting judicial opinions regarding the relevance of disused laws in secondary contexts. In the cases contained in the former Section, such laws are considered highly relevant. In the cases discussed in the latter Section, such laws are considered largely irrelevant.
\item \textsuperscript{7} Ronald Dworkin uses the term "gravitational force" to characterize the precedential value earlier decisions have on later decisions, "even when these later decisions lie outside [the earlier decision's] particular orbit." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1977). Restated in more general terms: "[L]egal materials" exert influence "that goes beyond their literal terms." Christopher L. Eisgruber, \textit{Birthright Citizenship and the Constitution}, 72 N.Y.U. L. REV. 54, 91 (1997). Within this Note, "gravitational pull" is meant to describe the influence of criminal law in non-criminal legal contexts.
\item \textsuperscript{8} See Chivers, supra note 3, at 451 (defining "traditional desuetude" as "voiding a statute").
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I. SECONDARY APPLICATIONS OF UNENFORCED PENAL STATUTES

In a small legion of cases, courts have considered the pertinence of historically unenforced criminal laws to non-criminal legal proceedings. Their conclusions have hinged upon an evaluation of the probative value of society's nonenforcement of a statute in light of society's retention of that statute. In the following section, primary and secondary applications are distinguished based on their criminal and non-criminal characters, respectively, and the very different underlying social dynamic that motivates the use of a law exclusively within a secondary context is illuminated. Secondary usages entail an additional layer of legal and public policy concerns. Unsurprisingly, judicial deliberations have come to reflect society's mixed messages regarding the criminal laws in question.

A general survey of the case law reveals the variety of possible secondary applications of disused criminal laws and the variety of courts' responses to such applications. Courts permitting such secondary applications tend to reject or ignore the relevance of the lack of enforcement. Conversely, those courts that do not permit such applications consider the history of nonenforcement important, if not controlling. No court satisfactorily explains its treatment of enforcement history.

A. Primary and Secondary Applications of Disused Law Defined

In primary applications, the criminal law is applied in the context prescribed within the law itself, a prosecution. In secondary applications, the criminal law is used in the context of a non-criminal proceeding. Primary usage necessarily involves state action; secondary usage usually occurs within private actions. Designation of legal actions as primary and secondary does not require that each instance of secondary reliance be predicated upon an underlying prosecution. Nothing approximating a one-to-one correspondence is necessary. Rather, the general criminalization of the conduct that is at issue provides a sufficient rationale for the incorporation of the criminal law's commands into the noncriminal action.

When unenforced laws are relied upon in either type of application, the central legal issue, whether identified as such or not, is desuetude.
tude, which literally means disuse,\textsuperscript{14} refers to the civil law doctrine whereby prolonged disuse can abrogate a statute.\textsuperscript{15} Primary applications of disused law necessarily bring the history of nonenforcement to the fore within the context of an effort to resurrect and enforce the law. As such, by their very nature, such applications challenge the conception of a statute's long-standing disuse. In contrast, the secondary applications at issue here entail incontrovertibly disused laws.\textsuperscript{16} Secondary applications may, and in fact do, occur in the absence of any criminal prosecutions. This distinction is critical. As will be discussed later,\textsuperscript{17} it has profound implications regarding the need for and availability of desuetude-based remedies.

The disuse at issue throughout this Note will be referred to as historic or profound. None of the judicial decisions analyzed here attempts to define such extreme disuse in terms of a specific number of years. The value of a numerical measure should be neither exaggerated nor understated.\textsuperscript{18} As a practical matter, one could identify a minimum number of decades of nonenforcement that would prompt consideration of desuetude.\textsuperscript{19} It is not, however, merely a question of the length of disuse, but rather of what occurred during that period. There must have been a combination of open violations of the law and conscious decisions not to prosecute.\textsuperscript{20} For example, an extended

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\textsuperscript{14} \textsuperscript{See} \textit{BLACK'S LAW DICTIONARY} 449 (6th ed. 1990).
\textsuperscript{15} \textsuperscript{For} \textsuperscript{a} \textsuperscript{discussion} \textsuperscript{of} \textsuperscript{the} \textsuperscript{origins} \textsuperscript{of} \textsuperscript{desuetude} \textsuperscript{in} \textsuperscript{Roman} \textsuperscript{and} \textsuperscript{continental} \textsuperscript{European} \textsuperscript{law}, \textsuperscript{see} \textit{Bonfield}, \textit{supra} \textit{note} 3, \textit{at} 395-401.
\textsuperscript{16} \textsuperscript{Secondary} \textsuperscript{applications} \textsuperscript{of} \textsuperscript{enforced} \textsuperscript{laws}, \textsuperscript{though} \textsuperscript{potentially} \textsuperscript{controversial}, \textsuperscript{fall} \textsuperscript{beyond} \textsuperscript{the} \textsuperscript{scope} \textsuperscript{of} \textsuperscript{this} \textsuperscript{Note}.
\textsuperscript{17} \textsuperscript{See} \textit{infra} \textit{Section} \textit{III.B}.
\textsuperscript{18} \textsuperscript{See} \textit{Jack} \textit{Davies}, \textit{A} \textit{Response} \textit{to} \textit{Statutory} \textit{Obsolescence: The Nonprimacy of Statutes Act}, \textit{4 VT. L. REV.} 203 (1979), \textit{and} \textit{Guido} \textit{Calabresi}, \textit{The Nonprimacy of Statutes Act: A Comment}, \textit{4 VT. L. REV.} 247 (1979), \textit{for} \textit{contrasting} \textit{positions} \textit{on} \textit{the} \textit{feasibility} \textit{of} \textit{quantifying} \textit{statutory} \textit{obsolescence}. \textit{Davies}, \textit{a} \textit{Minnesota} \textit{State} \textit{Senator}, \textit{argues} \textit{that} \textit{“a} \textit{twenty-year} \textit{old} \textit{statute} \textit{will} \textit{no} \textit{longer} \textit{carry} \textit{the} \textit{shield} \textit{of} \textit{legislative} \textit{primacy} \textit{which} \textit{had} \textit{placed} \textit{it} \textit{beyond} \textit{the} \textit{reach} \textit{of} \textit{the} \textit{judicial} \textit{branch}.” \textit{Davies}, \textit{supra}, \textit{at} 205. While \textit{Calabresi} \textit{agrees} \textit{with} \textit{the} \textit{underlying} \textit{concept} \textit{of} \textit{limiting} \textit{statutory} \textit{supremacy}, \textit{he} \textit{criticizes} \textit{the} \textit{“mechanical”} \textit{nature} \textit{of} \textit{Davies’} \textit{proposal}. \textit{See} \textit{Calabresi}, \textit{supra}, \textit{at} 253-54. \textit{Calabresi} \textit{offers} \textit{a} \textit{“judgmental”} \textit{approach}. \textit{See} \textit{id.} \textit{at} 254.
\textsuperscript{19} \textsuperscript{T}ypically, \textsuperscript{enforcement} \textsuperscript{has} \textsuperscript{lapsed} \textsuperscript{for} \textsuperscript{approximately} \textsuperscript{three} \textsuperscript{decades} \textsuperscript{before} \textsuperscript{questions} \textsuperscript{of} \textsuperscript{desuetude} \textsuperscript{begin} \textsuperscript{to} \textsuperscript{arise}. \textit{See}, \textit{e.g.}, \textit{Hill v. Smith}, \textit{1 Morris 95} (Iowa 1840); \textit{Alice D. v. William M.}, \textit{450 N.Y.S.2d} 350 (Civ. Ct. 1982).
\textsuperscript{20} \textsuperscript{See} \textit{Bonfield}, \textit{supra} \textit{note} 3, \textit{at} 420. \textit{A} \textit{law} \textit{will} \textit{be} \textit{considered} \textit{“disused”} \textit{so} \textit{long} \textit{as} \textit{there} \textit{is} \textit{no} \textit{history} \textit{of} \textit{enforcement} \textit{against} \textit{individuals} \textit{whose} \textit{conduct} \textit{is} \textit{otherwise} \textit{lawful}. \textit{For} \textit{example}, \textit{Virginia’s} \textit{fornication} \textit{statute} \textit{is} \textit{enforced}—\textit{to} \textit{the} \textit{marginal} \textit{extent} \textit{it} \textit{is} \textit{at} \textit{all}—only \textit{against} \textit{prostitutional} \textit{or} \textit{non-private} \textit{behavior}. \textit{See} \textit{Doe v. Duling}, \textit{782 F.2d} 1202, 1206 (4th Cir. 1986). \textit{The} \textit{threat} \textit{of} \textit{prosecution} \textit{for} \textit{adults} \textit{engaging} \textit{in} \textit{consensual,} \textit{non-public} \textit{fornication} \textit{is} \textit{purely “theoretical.”} \textit{Id.} \textit{The} \textit{statute} \textit{is, therefore, properly characterized as “unenforced.”} \textit{See} \textit{id.} \textit{at} 1207; \textit{see also} \textit{Doe v. Roe}, \textit{841 F. Supp. 444, 447 n.8} (D.D.C. 1994); \textit{William J. Stuntz}, \textit{Substance, Process, and the Civil-Criminal Line}, \textit{7 J. CONTEMP. LEGAL ISSUES} 1, 35-36 (1996) (arguing that private, consensual sodomy between adults is not prosecuted as a crime but is only accepted as a plea when there is a weak sexual assault case or a public indecency arrest); \textit{infra} \textit{Sections} \textit{II.B} (discussing nonenforcement and decriminalization) \textit{and} \textit{III.C}
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period during which there has happened to be no criminal incidents of a particular type differs from a period of purposeful nonenforcement. Only the latter would constitute "disuse" for purposes of identifying secondary applications of disused penal laws.21

B. The Origin of Secondary Applications of Disused Law

This Note focuses upon a subset of the criminal law: the so-called "morality laws" that proscribe sexual conduct (for example, adultery, fornication, and sodomy) between consenting adults.22 The pervasiveness of secondary applications of disused laws within this particular legal context helps illuminate the nature of secondary applications generally. But before discussing morality laws, it is worth noting those areas of law that do not exhibit the secondary applications at issue. Non-criminal laws, by definition, will not be subject to both primary and secondary applications. Non-criminal laws are also not likely to fall into profound disuse. Even if "anachronistic," non-criminal laws tend to remain vital because "litigants find them advantageous in their own specific situations."23

While any type of criminal law could fall into a pattern of nonenforcement despite retention in the penal code, most do not. Commentators ranging from academics to legislators have noted that the unique combination of social impulses necessary to retain but not to enforce a statute arises almost exclusively within the sphere of morality laws. T.W. Arnold's observation, made over a half-century ago, explains the continued persistence of unenforced criminal statutes that constrain sexual conduct between consenting adults: "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 (discussing partial disuse).

21. In United States v. Elliott, 266 F. Supp. 318 (S.D.N.Y. 1967), the defendant, an American, had allegedly conspired to destroy a bridge in the Republic of Zambia. Federal criminal law prohibits conspiracies from within the United States to destroy the property of foreign governments with which the United States is at peace. See 18 U.S.C. § 956 (1994). The defendant argued that "the absence of any prosecution under this statute since its promulgation in 1917 render[ed] it void because of desuetude." Elliott, 266 F. Supp. at 325. The court noted that social opprobrium for the destructive conduct had persisted since the law's enactment. The function of the statute, "punish[ing] acts of interference with the foreign relations . . . of the United States," remains "vibrantly vital." Id. at 325. In sum, the court rejected the applicability of desuetude rather than the availability of the doctrine generally. See id. at 326.

22. See generally POSNER & SILBAUGH, supra note 1 (cataloging existing morality laws). Presently, 28 states criminalize sodomy, see id. at 66-71, 17 states criminalize fornication, see id. at 99-102, and 26 states criminalize adultery, see id. at 104-10.

23. GUIDO CALABRESE, A COMMON LAW FOR THE AGE OF STATUTES 21 (1982); see also Newman F. Baker, Legislative Crimes, 23 MINN. L. REV. 135, 137 (1939) (noting that social legislation, particularly penal codes, is less likely to be updated over time than legislation in other areas, such as business).
The Alabama legislature, in the commentary accompanying the provision of the penal code outlawing adultery, candidly acknowledged this dynamic. Although there was "strong sentiment that adultery should not be regulated by criminal sanction, the legislative committee was of the opinion that the political success of a proposal formally to abolish this crime [would be] doubtful." The legislature further noted that "the reluctance of public officials to enforce the law is resulting in an informal abolition of any criminal stigma." Thus, a law that the committee itself referred to as "dead letter" remained on the books. So long as secondary applications are permitted, however, a statute that is presumed defunct can nevertheless have a gravely serious impact.

C. Secondary Applications Permitted

The chain of events adumbrated in the introduction, which involved fornication, disease transmission, and a resulting tort action, typifies the potential civil impact of an unenforced criminal law. In one such case, Zysk v. Zysk, the Virginia Supreme Court barred a wife's tort action against her husband for herpes transmission. The couple had engaged in premarital sex,

24. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1935); see also ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 96 (1990) (noting that such statutes "are never enforced, but legislators, who would be aghast at any enforcement effort, nevertheless often refuse to repeal them"); Chivers, supra note 3, at 474 ("[T]he legislature may allow an obsolete statute to stay on the books for the sole purpose of making a statement of a moral ideal, fully expecting that it will not be enforced.").

Connecticut's recent experience with the enforcement of its adultery prohibition confirms these observations. In the summer of 1990, there was a spate of arrests for adultery, although none of these resulted in sentences because prosecutors declined to pursue them. See Bill to Void Adultery Laws to Go to Weicker, N.Y. TIMES, Apr. 4, 1991, at B7. Within one year, the Connecticut legislature passed a bill to rescind the prohibition. The law officially went into effect on October 1, 1991. See Mark Pazniokas, 200 Dos and Don'ts Start Oct. 1, HARTFORD COURANT, Sept. 29, 1991, at A1. A few years before these events, a Connecticut state commission recommended abolition of the law. See In Connecticut, Adultery Victims Call the Cops, CHI. TRIB., Sept. 23, 1990, at 16 ("[L]egislators said it wasn't worth the effort since the law was never enforced."). The adultery prohibition had been enacted in 1902. See CONN. GEN. STAT. § 53a-81 (repealed 1991).

26. Id.
28. See also Gabriel v. Tripp, 576 So. 2d 404, 405 (Fla. Dist. Ct. App. 1991). In Gabriel, the court was confronted with a tort action in which the defendant allegedly infected the plaintiff with herpes during sexual intercourse. In Florida, infecting another person with a sexually transmitted disease is a first-degree misdemeanor. See id. at 404. The court held that violation of that statute was not negligence per se. See id. It noted in dicta that, "if the defendant establishes that the plaintiff was engaged in an illegal act at the time he or she contracted the disease, this will bar any recovery." Id. at 405. The relationship of the two parties was not discussed, but it should be noted that Florida's criminal statutes prohibit living in open adultery and lewd and lascivious behavior. See FLA. STAT. ANN. ch. 798.01-02 (Harrison 1991). Both are second-degree misdemeanors. If those statutes were in profound disuse, then it would be possible (in Florida) for a defendant to be jailed or fined for violation of a vital criminal law at the same time that he is exonerated from financial liability because of the injured party's mere violation of a disused criminal law.
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and fornication was a class four misdemeanor. The State neither prosecuted nor threatened to prosecute the Zysks under the fornication statute. Such nonenforcement was consistent with the general state of disuse into which the law had fallen. The husband filed a demurrer and the court found the "clean hands" defense appropriate because of the plaintiff's "criminal activity" of violating the law. The "clean hands" defense relies on the equitable maxim that courts will not grant relief to those seeking to take advantage of their own wrongdoing and is often invoked to bar recovery of damages for injuries sustained while committing a crime.

The Zysk court framed its ruling in terms of protecting the "public interest," which the court suggested was coextensive with the aim of the penal statutes. The court felt this interest, which the conduct in question "invaded," was "protected sufficiently by criminal sanctions . . . ." The competing interest of tort victims to receive adequate compensation for their injuries was dismissed blithely. Such an uncompromising position regarding the clean hands doctrine reflects an assessment of the criminal law that is based entirely upon the fact that the law exists and is heedless of the law's history of nonenforcement.

29. See Zysk, 404 S.E.2d at 722. The couple had been married for eight months prior to separating permanently. See id. at 721. Although it is unclear from the opinion how the time of the disease transmission was identified with such specificity, that point was not contested.


31. The last reported conviction for fornication in Virginia was in 1849. See Commonwealth v. Lafferty, 47 Va. (6 Gratt.) 874 (1849). A federal circuit court characterized prosecution under this statute as "at most, a matter of historical curiosity." Doe v. Duling, 782 F.2d 1202, 1206 (4th Cir. 1986). Efforts to "update that history" revealed a "total absence of prosecutions" against adults engaging in consensual, non-prostitutional, private activity. Id. Only three fornication arrest records, all involving prostitution, were entered into evidence. See id. Additional evidence suggested that several arrests for fornication resulted from public conduct (e.g., activity in a car or in a public park). See id. 1205 & n.1.


33. In Zysk, the court initially suggested that an "immoral or illegal act" could constitute such a wrong. 404 S.E.2d at 722 (emphasis added). The remainder of the opinion and all the cases cited therein, however, focused solely upon illegal acts.

Generally, however, violation of a criminal law does not necessarily bar civil actions for injuries related to the criminal act. See Adams v. Smith, 201 S.E.2d 639, 642-43 (Ga. App. 1973) ("A person does not become an outlaw and lose all rights by doing an illegal act."). Thus, a woman who contracted genital herpes while engaging in fornication was able to collect damages from her negligent paramour. See Long v. Adams, 333 S.E.2d 852, 855-56 (Ga. App. 1985). Significantly, the Long court did not contest the criminal character of the activity, but rather its implications within the civil arena. Disuse was not considered. See id.

34. 404 S.E.2d at 722.

35. Id.

36. See Zechariah Chafee, Jr., Coming into Equity with Clean Hands, 47 MICH. L. REV. 1065, 1092 (1949) ("[T]he concentration of judges on the clean hands maxim sometimes does harm by distracting their attention from the basic policies which are applicable to the situation before them.").

37. Despite the plaintiff's allegations that she had been afflicted with "a permanent and incurable condition," the court held that there is no "require[ment] that the participant receive compensation." Zysk, 404 S.E.2d at 722.

38. See generally Doe v. Roe, 841 F. Supp. 444, 447 n.8 (D.D.C. 1994) (criticizing Zysk's logic regarding "the public interest" as "flawed considering Virginia's apparent unwillingness to enforce [the
To buttress its position, the court cited cases involving superficially analogous instances of criminal law informing civil proceedings. Unlike the issue at hand, however, all of the cases that the court cited involved criminal laws enforced at the time of the civil actions. These precedents are inconsistent with Zysk’s narrow reliance upon unenforced statutes to define the public interest. In one such case, Miller v. Bennett, the court barred a wrongful death action against an abortionist. At the time of the suit, a “general anti-abortion criminal statute” was on the books. Not only was the law enforced, but the Miller court referred to the criminal prosecution of the abortionist arising from the same incident upon which the civil suit was based. The Zysk court failed to justify its assumption that the relationship between the public interest and historically unenforced statutes is the same as the relationship between the public interest and routinely enforced statutes.

Disregard for the state of nonenforcement characterizes other decisions, including Jarrett v. Jarrett. In Jarrett, the Illinois Supreme Court affirmed the revocation of a mother’s custody of her children as a result of her ongoing cohabitation with her paramour. The father then received custody. “[I]t is the legislature which has established the standards she has chosen to ignore, and the action of the trial court merely implemented principles which have long been followed in this State.” The court cited and quoted section 11-8 of the Illinois Criminal Code of 1961, which established “the relevant standards of fification statute”).

40. Among the cases cited by the Zysk court were: Miller v. Bennett, 56 S.E.2d 217 (1949) (barring the heirs of woman who received an abortion from suing practitioner for woman’s wrongful death under a criminal anti-abortion statute); Levy v. Davis, 80 S.E. 791 (1914) (preventing seller from recovering property knowingly sold to proprietor from brothel with income supplied from that illegal enterprise); and Roller v. Murray, 72 S.E. 665 (1911) (finding an illegal contract unenforceable, either directly or indirectly, through legal action).
41. 56 S.E.2d 217 (Va. 1949), cited with approval in Zysk, 404 S.E.2d at 722.
42. See id. at 220.
43. See id. at 218.
45. 400 N.E.2d 421 (I1l. 1979).
46. See id. at 426. This change in custody constituted a modification of the divorce decree between the Jarretts. The mother had received a divorce from the father “on grounds of extreme and repeated mental cruelty.” Id. at 421.

Aside from custody proceedings, violation of a disused statute could also arise in adoptions or surrogacy agreements:

47. Jarrett, 400 N.E.2d at 425.
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conduct."48 The court looked solely to the mother's criminal activity to demonstrate her inadequacy as the custodial parent, finding that the mother's cohabitation indicated to her children that they may "contravene statutorily declared standards of conduct."49 Chief Justice Goldenhersh, in dissent, aptly summarized the majority's position: "[T]he majority has held that on the basis of her presumptive guilt of fornication,50 a Class B misdemeanor, plaintiff, although not declared to be an unfit mother, has forfeited the right to have the custody of her children."51

There is an inherent tension in the Jarrett court's ruling. Violation of an historically unenforced statute was characterized as "offend[ing] prevailing public policy."52 The cases that the court cited to support its ruling serve only to highlight the inaccuracy of that characterization. It is significant that the Jarrett court chose to rely not on the mere existence of the law but on convictions under that law.53 Although Jarrett itself was decided in 1979, the court cited cases that were decided in 1852, 1902, and 1943. These cases may represent "prevailing" policy, but that of a bygone era.54 There is also a crucial distinction between the policy at issue in Jarrett and the cases discussed within the opinion. Jarrett involved fornication, but the court cited adultery cases. The failure of the court to marshal any cases specific to fornication casts doubt upon the force of that prohibition in modern times.55

48. Id. at 423-24, 427. Fornication is committed when "(a)ny person . . . cohabits or has sexual intercourse with another not his spouse . . . if the behavior is open and notorious." Id. at 424.
49. Id. at 425.
50. The State neither prosecuted nor threatened to prosecute Jacqueline Jarrett or her paramour. Telephone Interview with Michael H. Minton, Counsel to Jacqueline Jarrett (Oct. 2, 1997).
51. Jarrett, 400 N.E.2d at 427 (Goldenhersh, C.J., dissenting). Revisiting this issue in In re Thompson, 449 N.E.2d 88 (Ill. 1983), the Illinois Supreme Court stated that "moral transgressions" (i.e., cohabitation) do not establish a "conclusive presumption" of parental unfitness. Id. at 93 (emphasis added). Nevertheless, the Thompson court permitted the secondary application of the cohabitation statute (though in potentially attenuated form).
52. Jarrett, 400 N.E.2d at 424 (emphasis added).
53. See id. The three cases cited were appeals from criminal convictions for adultery. See People v. Potter, 49 N.E.2d 307 (Ill. App. 1943); Lyman v. People, 64 N.E. 974 (Ill. 1902); Sears v. People, 13 Ill. 597 (1852).
54. The dissent by Chief Justice Goldenhersh criticizes reliance on cases that are so old and states that the "prevailing" policy underlying those prosecutions was animus toward interracial relationships. See Jarrett, 400 N.E.2d at 426-27 (Goldenhersh, C.J., dissenting).
55. Jacqueline Jarrett appealed this ruling to the United States Supreme Court. Cariori was denied, and Justice Brennan, writing in dissent, argued that the Illinois Supreme Court's presumption of the mother's lack of fitness based on her "ostensible violation" of the fornication statute violated due process. See Jarrett v. Jarrett, 449 U.S. 927, 928 (1980) (Brennan, J., dissenting). This presumption, Justice Brennan argued, was not rationally based; it was supported in neither the record nor in logic, given Illinois' failure to enforce the statute. See id. at 931 (Brennan, J. dissenting).

The latest recorded successful prosecution for fornication was in 1916. See People v. Green, 114 N.E. 518 (Ill. 1916). In the intervening three-quarters of a century, there has been only one recorded unsuccessful prosecution effort. See People v. Garcia, 185 N.E.2d 1 (Ill. App. Ct. 1962) (involving public conduct). Thus the City of Chicago Commission on Human Relations recently cited this lack of prosecution as the basis for "discount[ing]" the statute's significance. See Jaslowski v. Rushing, 678 N.E.2d 743, 753 (Ill. App. Ct. 1997). The Commission urged the Illinois Appellate Court to extend antidiscrimination protections to those who violate the fornication prohibition. See id.
Courts have permitted secondary applications of morality laws even in lawsuits that do not arise between former lovers. For example, dependency exemptions claimed by cohabiting couples on federal income tax returns are denied if their living arrangements violate the criminal law of their state.56 Federal prosecutors have also argued that violation of an unenforced cohabitation prohibition is relevant to determinations regarding one's fitness to serve on a jury.57 Insurance companies may deny coverage for injuries arising during violations of disused penal laws under criminal acts exclusions.58 Courts have also refused to extend to cohabiters protection under laws prohibiting housing discrimination (which do not explicitly encompass unmarried couples) when there are statutory prohibitions—albeit unenforced—of unmarried cohabitation.59

D. Secondary Applications Denied

In contrast to the preceding cases, other courts have found the history of nonenforcement to be not only relevant, but controlling.60 In Fort v. Fort,61 a case virtually identical to and decided almost concurrently with Jarrett, a Massachusetts court held that the parents' violations of statutes prohibiting fornication and lascivious cohabitation were "immaterial" to their child-custody determination: "Evaluated in terms of practical effect, a criminal statute which

56. For example, the Tax Court disallowed a dependency exemption "for an individual whom the taxpayer is maintaining in an illicit relationship in conscious violation of a criminal law of the jurisdiction of his abode." Turnipseed v. Commissioner, 27 T.C. 758, 760 (1957). This position has been reaffirmed over the years and remains controlling law. See, e.g., Emsminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979); Majorie E. Kornhauser, Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return, 45 HASTINGS L.J. 63, 71 n.26 (1994) ("As recognition of nontraditional [family] arrangements grows, the discrepancy between tax and nontax treatment of couples will also increase.").

57. See United States v. Nichols, 937 F.2d 1257, 1263 (7th Cir. 1991) (noting that the government had defended a prosecutor's use of peremptory challenges to strike potential jurors who had violated a cohabitation statute by arguing that the prosecutor had been justified in "looking for people who abide by the law," regardless of whether the law was enforced).

58. See Allstate v. Holt, No. 90-1473, 1991 WL 65204 (6th Cir. Apr. 9, 1991). During an adulterous relationship, James Holt infected his partner, Theresa Zurek, with herpes. A damage action was brought against Holt, who tendered his defense to his insurer, Allstate. In dicta, the court noted that the criminal acts exclusion of the homeowners policy barred insurance company exposure. This type of secondary application will not arise if the insurance policy requires, as many do, a judgment establishing the criminal act. See Esther Z. Hirsch & Howard M. Garfield, Directors' and Officers' Liability Insurance: Does it Cover Preferential and Fraudulent Transfers?, in DIRECTORS AND OFFICERS' LIABILITY INSURANCE 1993, at 473, 489 (PLI Comm. Law & Practice Course Handbook Order No. A4-4416, 1993).


60. There are also a number of civil cases involving nominally criminal conduct in which the criminality of the conduct is neither rejected nor circumvented but simply ignored. See, e.g., Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Ct. App. 1984). It is unclear, however, whether the courts' silence in such cases stems from inadvertence or undisclosed substantive considerations.

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is wholly ignored is the same as no statute at all." The court, however, did not justify its extreme characterization of a statute that had been purposefully retained as "wholly ignored" and did not offer any reason for failing to consider the symbolic implications of the statute's retention.

A New York court reached a similar result in In Re Alice D. v. William M. In that case, the defendant had falsely represented that he was sterile before engaging in an adulterous relationship. An unwanted pregnancy had ensued, and the plaintiff sued for, and received, damages resulting from abortion-related expenses as well as pain and suffering. The court held that rare enforcement of the penal code provision prohibiting adultery rendered application of the clean hands doctrine in the instant case unjust.

The Alice D. court used harm as the lodestar of its analysis, identifying the harm typically occasioned by the crime of adultery as befalling the innocent spouse. That spouse (the defendant's wife), however, was not a party in the instant case. Meanwhile, the plaintiff was undeniably harmed. "It would be incredible and intolerable to state that a woman who becomes pregnant against her wishes and then aborts, has not been harmed." Society's more generalized interest in obeisance of the law was accorded little weight given the "few reported instances involving the enforcement of Sec. 255.17 of the Penal Code during the past thirty years."

The Alice D. court's discussion of harm in conjunction with enforcement refined the court's thinking about the significance of the relevant statute's persistence on the books. The inquiry that naturally emerges from such an approach is whether nonenforcement reflects society's reconsideration of the legal cognizability of the "harm." Is a policy of conscious nonprosecution irreconcilable with the notion that the proscribed behavior harms society? The court suggested that this might be so when it refused to presume that social harm arose from a violation of an unenforced law in light of the readily apparent harm that the person who had engaged in the nominally proscribed conduct would suffer through dismissal of her tort claim.

The preceding paradigmatic cases illustrate both successful and unsuccessful invocations of historically disused statutes within secondary applications. The significance of the issues involved transcends the frequency with which they arise before the courts. Secondary applications of disused morality laws implicate fundamental legal questions that profoundly, and often intimately, affect the lives of those involved. Moreover, these cases probably arise more often than the typical kinds of litigation statistics would indicate. For example,

62. Id. at 759.
64. See id. at 355.
65. Id. at 356.
66. Id. at 355.
the relevant appellate decisions do not necessarily reveal the frequency (much less the potential frequency) of similar cases. More than one-half of the states presently have some form of morality law on the books, and the large number of people who violate these laws are potentially vulnerable to secondary applications.

Many judicial assumptions regarding what is public policy or what is in the public interest are made based upon what conduct is criminalized. Most often, those assumptions are well-founded. The next Part will argue that those criminal laws in profound disuse, however, are not reliable proxies for public policy. Whether by unwitting implication or bald assertion, the opinions in the foregoing cases suggest that a penal statute's enforcement history is fundamentally relevant to the statute's meaning and, hence, to its adaptability to secondary applications.

II. THE INJUSTICE OF SECONDARY APPLICATIONS

Injustice arises when secondary applications are predicated upon the mere persistence of a law without regard to its state of nonenforcement. The argument has three steps. First, the courts have predicated their ultimate rulings regarding secondary applications upon their determinations regarding the criminality of the conduct at issue. Second, the criminal nature of conduct is established not only by the existence of a criminal statute but also by its enforcement. One cannot fairly characterize statutes that linger, unenforced, on the books as being intended to order conduct through criminalization. Third, a criminal statute's lack of enforcement thus renders secondary applications of the statute inappropriate. Courts must, therefore, consider enforcement history

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61. See POSNER & SILBAUGH, supra note 1, at 98-99.
62. The combination of increases in disease transmission and changes in the relationship of sexual partners may give rise to tort actions and thus the defense of unclean hands. For a discussion of the recent trend of awarding damages based on the contraction of STDs, see Sharlene A. McEnvoy, When You Have No Right to Remain Silent: Tort Liability for Sexually Transmitted Diseases, 23 BRIEF 14 (1994). See also Stewart G. Pollock, The Art of Judging, STAR LEDGER (Newark), July 29, 1996, available in 1996 WL 7956888. Associate Justice Pollock of the New Jersey Supreme Court delineates several of the changing features of "the way people live." Id. There has been a "proliferation of unmarried cohabitants." Id. "There are six unmarried couples for every 100 couples who are married, compared with one for every one hundred in 1970." Id. There has also been a tremendous decrease in the number of traditional nuclear families. In 1956 to 1996, the percentage of American households comprising nuclear families decreased from approximately 50 to 26. See id. "With increasing frequency, American families consist of single parents, unmarried cohabitants, or same-sex parents." Id. With regard to disease, "[t]he incidence of STDs is rising at an alarming rate." Sexually Transmitted Diseases in the '90s, Impact on Men, Women, and Families Conference to be Held in San Francisco, May 21-23, PR NEWSWIRE, Apr. 28, 1993. The United States has "among the highest" STD rates in the industrialized world. Id. Twelve million additional STD infections occur annually, and, increasingly, those infected are young adults and teenagers. See id. AIDS, which was not recognized as a disease until a dozen years ago, "has become a leading cause of death among people aged 25-44. 1 million Americans are believed to be infected with the AIDS virus." Facts on the Extent of Sexually Transmitted Diseases, GANNETT NEWS SERV., Mar. 31, 1993.
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in assessing the availability of a criminal statute for secondary actions.

Consider the following: An anti-discrimination measure, applicable to housing, is passed a couple of years prior to the repeal of a disused criminal statute prohibiting cohabitation. Consequently, the two statutes coexist on the books for a limited time. Whether a court permits cohabiting couples during this period to receive the benefit of the anti-discrimination law depends upon the extent to which the court's statutory interpretation transcends the written text of the criminal law.

As Part I suggested, an array of positions characterizes court rulings on this issue. One court, in the case of McFadden v. Elma Country Club, has held that the overlap of the statutes renders it impossible to conclude that the legislature extended anti-discrimination protections to cohabiting couples. In contrast, another court concluded that "it would be manifestly unreasonable to limit the effect of these modern, remedial provisions by reference to an outdated criminal statute which was repealed." The second court got it right. The ruling of the McFadden court, by ignoring the decriminalization of cohabitation that had occurred before the relevant statute had been formally repealed, contravened clear legislative intent and denied the aggrieved parties protections to which they otherwise would have been entitled. The cohabitors should have been protected despite the formal existence of the unenforced cohabitation prohibition.

Because it is easier for legislators to pass new laws than to revise or repeal existing ones, "laws are governing us that would not and could not be enacted today, and that . . . are in some sense inconsistent with . . . our whole legal landscape." Penal statutes that are unenforced but that nevertheless remain on the books run the greatest risk of falling dramatically out of step with legal and social developments. Within this Part, I argue that there

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70. See id. at 150.
71. Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1202 (Alaska 1989) (presenting a useful survey of the varied results of other jurisdictions that have considered the issue).
72. See Bonfield, supra note 3, at 394-95; Calabresi, supra note 18, at 247; Davies, supra note 18, at 227-29.
73. CALABRESI, supra note 23, at 2.
74. Sometimes a statute that has fallen into profound disuse will not only become inconsistent with general legal and social developments but will also be inconsistent with subsequent legislative enactments. Should such incompatible legislation be adopted, it could form the basis for legally challenging the prior legislation as implicitly repealed. Through implied repeal, a court ascribes to the legislature an affirmative decision to repeal—one that was made implicitly rather than explicitly. See Rodgers & Rodgers, supra note 3, at 9-11. The quintessential example of implied repeal of a disused law involves Mississippi prohibition. The stricture was enacted at the turn of the century and persisted through the 1960s. The courts rejected an effort to enforce that law. The state had not only failed to enforce the law, but implicitly sanctioned the proscribed activity by licensing liquor dealers and taxing liquor sales. See Robert C. Berry, Spirits of the Past—Coping with Old Laws, 19 U. FLA. L. REV. 24, 25-26 (1966). With the specific morality laws that persist today, however, "[s]uch positive actions will rarely occur." Id. at 31.
comes a point at which strict adherence to statutory language, without heed of social change, works injustice. A self-conscious judiciary is the only viable check on this injustice.\footnote{5}

A. Judicial Reliance on Underlying Criminalization

When courts have permitted the secondary application of criminal statutes, the courts have relied, with varying degrees of explicitness, upon the premise that the statutes criminalize behavior. These courts could have relied on their ad hoc evaluations of the societal condemnation arguably underlying the retention of such statutes while not relying on the statutes’ criminal character. The significance of the statutes’ retention, however, was inevitably attenuated by their nonenforcement.\footnote{6} In the absence of such an alternative basis for reliance, the courts have inevitably established the criminal nature of a law as integral to its secondary application. This de facto importance of a law’s criminal character is reflected in both the normative assessment of, and possible judicial remedy for, the secondary applications of disused criminal statutes.

B. Nonenforcement and Decriminalization

The true significance of nonenforcement becomes clearer when one stops to consider what it means to make something a crime. It is often said that “whatever the lawmaker defines as a crime is crime.”\footnote{7} A crime is conduct that society prohibits and wants to discourage. Although there are few restrictions on the potential subjects of criminal law, its forms are circumscribed in several regards. Most importantly, a criminal law prescribes “one or more sanctions for disobedience which the community is prepared to enforce.”\footnote{8} This has been described as society’s way of saying of the prohibition “we really mean [it].”\footnote{9} Prolonged failure to impose sanctions,
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despite, casts doubt upon what society really "means." Nonenforcement of
a criminal statute could, in short, effectively decriminalize the conduct
proscribed by the statute.

The language of morality laws unambiguously "criminalizes" the conduct
prohibited by those laws, but, particularly in the context of historically disused
statutes, judicial inquiry should not end with the text. Society's assessment of
the formally prohibited conduct as "criminal" cannot be fully revealed solely
through legislative prose.

It would be a narrow conception of jurisprudence to confine the notion of "laws"
to what is found written on the statute books, and to disregard the gloss which life
has written upon it. Settled state practice . . . can establish what is state law . . . .
Deeply embedded traditional ways of carrying out state policy . . . are often
tougher and truer than the dead words of the written text.8

This notion, articulated by Justice Felix Frankfurter, should extend to "[s]ettled
state practice," even if that practice is inaction.81 Nonenforcement is as much
a policy decision as any other course of action.82

A criminal law not only proscribes certain conduct, it also prescribes
official responses to violations of the law. A crime is "conduct which, if duly
shown to have taken place, will incur a formal and solemn pronouncement of
the moral condemnation of the community."83 In cases involving the second-
ary application of an unenforced law, however, there has been no infliction of
the sanctions prescribed by the law—notwithstanding open and notorious
transgressions.84 In theory, sanctions need not entail "hard" punishment;
symbolic condemnation alone could be sufficient.85 The denunciation implicit
in the statute itself does not alone satisfy this purpose, however. Condemnation
requires an adjudication of guilt even if no additional consequences are

referencing Nashville, Chivers argues that a finding of desuetude is warranted when "the policy of
nonenforcement becomes 'truer law' to the public than the words found on the face of the statute." Chivers, supra note 3, at 486.
81. Bonfield, supra note 3, at 416.
82. See id. at 391. The United States Supreme Court has addressed the legal implications of a
policy of nonenforcement. In Poe v. Ullman, 367 U.S. 497 (1961), the Court noted that despite the
existence of "ubiquitous, open, public sales" of nominally illegal contraceptives which could "quickly
invite the attention of enforcement officials," there were no prosecutions recorded. Id. at 502. "The
undeviating policy of nullification . . . throughout all the long years that [the anti-contraception laws]
have been on the statute books bespeaks more than prosecutorial paralysis." Id. What it indicated, the
Court concluded, was "state policy" to decriminalize the conduct. See id. The logical extension of
recognizing the state's authority to make public policy decisions regarding enforcement practices is to
give those decisions their natural cumulative effect.
83. Hart, supra note 76, at 405.
84. Judge Bork has noted the "problem" with unenforced morality laws: "They are kept in the
codebooks as precatory statements, affirmations of moral principle. It is quite arguable that this is an
improper use of law, most particularly criminal law, that statutes should not be on the books if no one
intends to enforce them." BORK, supra note 24, at 96.
imposed. It is not enough merely to reject the conduct generally without applying that judgment to individual offenders as well. 86 "[T]he mere presence of statutes criminalizing [conduct] . . . does not necessarily indicate societal disapproval. That is especially true when such laws are seldom, if ever, enforced.", rev'd on other grounds, 117 S. Ct. 2258 (1997).

When a sanction goes persistently uninflicted, doubt is cast upon society's future willingness to impose it and, by implication, upon society's rejection of the underlying conduct. 88 "A statute honored mainly in the breach begins to lose its character as law, unless, as we say, it is vindicated (emphasis reaffirmed). Clearly the way to do this (indeed the only way) is to punish those who violate it." 89 Without more, then, the social condemnation arguably expressed by the retention of unenforced morality laws provides an insufficient basis for presuming that the conduct that such laws proscribe is actually criminalized. 90

It is true that the government must modify enforcement practices to reflect its assessment of the costs of enforcement. The two most prominent costs are to the investigative and prosecutorial resources of the government and to the privacy of citizens. 91 The latter cost poses unique challenges for the enforcement of morality laws. Most obviously, the intrusive practices that would be necessary for full enforcement of most morality laws would not likely be tolerated by society. 92 Although this practical consideration would explain underenforcement, however, it would not explain nonenforcement. The costs of prosecuting violations that are flagrant and long-standing would be small. If popular or legislative sentiment supported the enforcement of a morality law, prosecutions of at least these violations should occur. When they do not, the conclusion that the law nevertheless criminalizes conduct is inevitably undermined.

Throughout this Section, "society" is characterized as nominally criminalizing conduct. On a practical level, of course, the executive and legislative branches of government share the primary responsibility for doing so. 93 James

86. See id. at 146, 240; Joel Feinberg, Doing & Deserving 104 (1970).
87. Duff, supra note 85, at 147.
88. See Compassion in Dying v. Washington, 79 F.3d 790, 811 (9th Cir. 1995) ("[T]he mere presence of statutes criminalizing [conduct] . . . does not necessarily indicate societal disapproval. That is especially true when such laws are seldom, if ever, enforced.", rev'd on other grounds, 117 S. Ct. 2258 (1997).
89. Feinberg, supra note 86, at 104.
90. It should be noted, too, that it is not inconsistent with deterrence goals to require enforcement of a criminal statute in order to find the proscribed conduct actually criminalized. Indeed the deterrent power of a law depends upon its occasional enforcement.
92. See id. at 161.
93. The support of all three branches of government, including the judiciary, is necessary to criminalize conduct. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1194 (1991).
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Willard Hurst characterizes legislation as part of a "continuing process."94 Part of that process, performed by the legislature, is "putting words into a statute book," and another part, performed by the executive, is "what those charged with applying [the statute] do to give it force."95 Although this characterization is accurate, it understates the complexity of the relationship by ignoring the possibility of interaction between the two processes. Criminalization may entail more than a simple, disjointed two-step process wherein the executive, because it necessarily must act last, acquires an unrestricted veto power.

Executive discretion in the enforcement of the laws encompasses not only deciding whether to proceed on individual cases but also whether to prosecute a given type of case at all. The legislature can, however, respond in a multitude of ways to induce the enforcement of any law—for example, by targeting resources to particular enforcement activities or by tying receipt of resources in other areas to enforcement of the targeted statute. Executive enforcement practices, therefore, are not entirely independent of the legislature's will. When the legislature completely acquiesces to executive nonenforcement for an extended period of time, nonenforcement must be taken as the legislature's intent as well as the executive's.96 Also, one must not overstate the degree of executive support necessary to criminalize conduct. Even only occasional enforcement by the executive is sufficient.97 Executive inaction, therefore, is unlikely to conceal significant societal support for the criminalization of conduct that is prohibited by an unenforced penal statute.

Nor can societal support for the criminalization of the behavior be inferred from secondary applications of the statute alone. Such an inference would constitute circular reasoning. Secondary applications are predicated upon the very criminality of the conduct at issue. There must be a prior and independent social judgment regarding the nature of the conduct before secondary applications can be legitimately invoked. The legitimacy of secondary applications of a criminal statute depends upon the existence of support for primary applications of the statute.

A continuum exists between criminal laws that are vital and those that have lost their criminal character. When historical disuse continues through the present, the prohibition cannot be said to exist in any meaningful way: "[T]he moral message communicated by the law is contradicted by the total absence of enforcement . . . ."98 At most, an element of disapproval persists—one of

94. JAMES WILLARD HURST, DEALING WITH STATUTES 40 (1982).
95. Id. at 40-41.
96. See, e.g., Bonfield, supra note 3, at 391; Stuntz, supra note 20, at 40 (arguing that disused laws "do not represent majoritarian norms" and that the legislature recognizes the role of nonenforcement in the retention of those laws).
97. See supra text accompanying notes 91-92 (discussing underenforcement and nonenforcement).
98. Kadish, supra note 91, at 160.
profoundly uncertain representativeness or intensity. The mere possibility of society’s latent disapproval cannot alone justify the conclusion that there is societal support for the criminalization of conduct proscribed by an unenforced morality law.

C. Nonenforcement Bars Secondary Applications

In secondary applications, nominally prohibited behavior is taken into account because society has condemned it as criminal conduct. The challenge for the courts, then, becomes largely epistemological. Until a disused criminal law is repealed or resurrected, it is impossible to know society’s assessment of an act’s criminality with absolute certainty. But the American legislative process provides little impetus for either repealing or resurrecting unenforced laws and every incentive for allowing them to persist indefinitely in a state of twilight. The stated rationale for modifying the legal rights of litigants with the secondary application of these laws is thus inevitably undermined.99

Despite the impossibility of inferring the criminality of an act from the retention of the criminal statute prohibiting that act, the secondary application of the criminal statute might be defended with the possibility that the legislature has deliberately retained the statute precisely for its secondary application. There is, however, no evidence of this possibility. The explicit legislative purpose of criminal statutes is to punish certain conduct criminally. The executive has ignored this fact for decades and the legislature has permitted this policy.

Even if a case for such legislative intent could be mustered, it would not justify secondary applications of unenforced statutes. The legislature cannot legitimately prescribe penalties that it does not want or expect to be imposed: “Moral adjurations vulnerable to a charge of hypocrisy are self-defeating no less in law than elsewhere. . . . [T]he spectacle of nullification of the legislature’s solemn commands is an unhealthy influence on law enforcement generally.”100 The criminal law signals highly specific and extremely important social assessments of given conduct. To “criminalize” conduct in a way that no longer comports with those assessments cannot help but be detrimental to the citizens directly affected and to society as a whole.

III. CONDITIONAL DESUETUDE AS A REMEDY FOR SECONDARY APPLICATIONS

The injustice arising from secondary applications of disused law is not

100. Kadish, supra note 91, at 160.
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easily remediable. It does not arise simply from the law's profound disuse or from the law's secondary application, but from the law's secondary application only after it has fallen into profound disuse. Consequently, only limited guidance can be had from judicial opinions and academic works that discuss resurrected criminal laws and desuetude as a consideration in their primary application. It is particularly important to note that constitutional challenges (based on either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment) to the application of unenforced laws that are available in the primary context are not available in the secondary context.

Courts can, however, ameliorate the injustice of secondary applications through the doctrine of conditional desuetude. This proposed doctrine is not merely traditional desuetude applied to a different circumstance; it is a different doctrine. The modifications that enable conditional desuetude to address the unique legal circumstances posed by secondary applications also enable it to avoid certain, often overblown, criticisms of the traditional doctrine.

A. The Unavailability of Constitutional Challenges

Secondary applications of disused law, while unjust, are not necessarily unconstitutional. Under current constitutional doctrine, it is unclear whether individuals subject to secondary applications of a statute could even gain standing to bring constitutional challenges to the statute itself under the Equal Protection Clause or the Due Process Clause. Such constitutional attacks are largely unavailable in defending oneself from the primary application of an historically unenforced law; they would inevitably be even less available in defending oneself against the secondary application of such a law.

When a statute is unenforced, it carries no real threat of prosecution. Thus, it is difficult to gain standing to challenge the law's constitutionality. In

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101. The constitutionality of renewed enforcement of disused penal statutes can be challenged on two main grounds. First, such laws do not provide fair notice, and therefore are violative of due process. Second, owing to the highly discretionary nature of enforcement, these laws are particularly susceptible to discriminatory enforcement, which violates the guarantee of equal protection. See Bonfield, supra note 3, at 409-18; Rodgers & Rodgers, supra note 3, at 9-20.

102. See Rodgers & Rodgers, supra note 3, at 29.

103. See generally Mark Peter Henriques, Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws, 76 VA. L. REV. 1057, 1076-77 (1990) (discussing the difficulty of acquiring standing to challenge the constitutionality of disused laws given the unlikelihood of renewed primary applications and proposing increased judicial reliance on the federal Declaratory Judgment Act as a remedy). Through disuse, criminal laws thus evade constitutional scrutiny. Depending upon when the period of disuse commenced and how long it has persisted, a criminal law may have fallen considerably out of step with contemporary constitutional norms. Due to the subsequent judicial articulation of a right to privacy, for instance, the legitimacy of many morality laws is far less certain than when most of them were first enacted. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the constitutionality of Georgia's sodomy statute). But see State v. Saunders, 381 A.2d 333, 339 (N.J. 1977) (holding that the state's fornication statute unconstitutionally infringes the right to privacy). The underlying propriety of criminal laws governing adult sexual morality is also controversial. See H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); Graham Hughes, Morals and the Criminal Law, 71 YALE L.J. 663
Doe v. Duling, an unmarried couple challenged the constitutionality of Virginia's fornication and cohabitation statutes. The court found that there was no "case or controversy," because of the extremely theoretical threat of prosecution, and dismissed the lawsuit. Several years later, however, in Zysk v. Zysk, the same fornication statute was the basis for barring a damage action involving a sexually transmitted disease. Although the court was itself willing to rely upon historical disuse to deny declaratory relief in Doe, neither prosecutors nor other parties were required to abide by that disuse. 

The equal protection doctrine is the vehicle for challenging resurrection of a disused statute based on the identity of the defendant. To successfully challenge a primary application as a violation of equal protection, the defendant must "plead and prove unreasonable and intentional discrimination on the part of the law enforcement agency." This can be achieved, in theory, by showing that a patently disused statute has been resurrected for use solely against the discrete class to which the defendant belongs and that the statute's resurrection will not be followed by general enforcement. With secondary applications of disused laws, however, there are no instances of impermissible discrimination among persons to be prosecuted because no one is prosecuted at all. Discriminatory patterns in the secondary applications of criminal laws reflect only the broad impact of unrelated state laws and judicial doctrines, not prosecutorial discretion. Persons similarly situated vis-à-vis the moral "crime" are treated differently simply because only those whose interests are at stake within certain types of non-criminal legal actions may be adversely affected by the law.

One might raise a constitutional challenge to the secondary application of an unenforced law based on lack of fair notice, but the challenge probably would not prove successful. "Due process requires that criminal statutes be
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framed in language sufficiently precise to apprise the population of the exact nature of the conduct condemned.” Commentators have applied this fair-notice requirement to cases involving previously disused laws: “[A] penal enactment which is linguistically clear, but has been notoriously ignored by both its administrators and the community for an unduly extended period, imparts no more notice of its proscriptions than a statute which is phrased in vague terms.” Such reasoning, though forceful, has not yet been recognized as the basis for declaring primary applications unconstitutional.

Because the due process rights accorded criminal defendants exceed those accorded civil litigants, it follows, *a fortiori*, that such a defense would probably fail against secondary applications of an unenforced statute.

B. **Conditional Desuetude Defined**

Under conditional desuetude, the doctrine that I am proposing, historically unenforced criminal laws would be irrelevant in civil proceedings. Whereas the doctrine of traditional desuetude dictates that a “statute may be void because of its lack of use,” conditional desuetude would void only a particular application of the statute, not the statute itself. The availability of this form of desuetude in the secondary context is conditioned upon profound disuse in the primary context. Several features of conditional desuetude should be noted. First, conditional desuetude neither invalidates the law itself nor precludes the possibility of renewed primary application of the law. Stated alternatively, adoption of conditional desuetude would not dictate any particular outcome in deliberations concerning desuetude itself. Second, under the doctrine of conditional desuetude, a court’s assessment of the validity of a secondary application is itself provisional. If primary application practices were to change, so too would the permissibility of secondary applications. Third, the requisite period of nonenforcement for conditional desuetude would, necessari-

111. *Id.* at 19.
112. *Id.* at 20.
115. In Part I, it was observed that secondary applications of disused laws occur primarily within the limited sphere of morality laws, but, in theory, they could involve other types of criminal law. The proposed methods of analyzing and addressing secondary applications of disused law have not, therefore, been tailored to any particular area of criminal law—morality or otherwise. For example, no reason (such as a particular form of political pressure) is specified for the criminal law’s persistence despite its disuse. Nor is there any single prescribed time frame which signals historic disuse. Depending upon the obstacles to and opportunities for enforcement, the same time span could have differing relevance, given the legal context. The general terms of the proposal presented, if adopted by the judiciary, would foster case-by-case assessment and preserve flexibility in responses.
ly, be shorter than it would be for desuetude. The degree of disuse necessary to undermine a statute's "gravitational force" over secondary applications is less than the degree of disuse necessary to void the statute itself.\textsuperscript{117} Collectively, these factors enable courts to acknowledge both the practical reality of nonenforcement and the resulting uncertainty of the law's validity.

What if a general state of disuse has been punctuated by "extremely rare and sporadic enforcement" over the course of decades? Several commentators, who endorse either desuetude or variations thereof to preclude primary applications of disused laws, are particularly concerned about this type of "quasi-enforcement," which would evade the prohibitions they propose.\textsuperscript{118} Such "errant" enforcement (for example, token prosecutions every ten years) could preclude the availability of conditional desuetude as well. Before reaching this conclusion in a specific case, however, a court would have to distinguish the underlying offense from the offense that provoked the token enforcement. Most often, morality laws are enforced only when additional criminal conduct is present—for example, when the conduct involved is public or entails solicitation.\textsuperscript{119} The prosecuted crime, therefore, differs materially from that described by the statute that is invoked for secondary purposes.\textsuperscript{120} In such a case, the law's partial disuse in the primary context provides an adequate foundation for voiding a secondary application of the law under the doctrine of conditional desuetude.\textsuperscript{121} Establishing conditional desuetude within a context of partial, rather than absolute, disuse thus might entail only a more searching judicial inquiry into the history of the statute's enforcement.

C. \textit{The Viability of Conditional Desuetude}

Any remedy, such as conditional desuetude, for the injustice that results

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117. Voiding a statute is a far more weighty undertaking, requiring greater justification, than voiding merely an application of that statute. A criminal statute's influence over a secondary application is, necessarily, already attenuated. \textit{See} \citeauthor{dworkin1997}, \textit{supra} note 7, at 111.
118. \textit{See} \citeauthor{chivers2001}, \textit{supra} note 3, at 467; \citeauthor{rogers1997}, \textit{supra} note 3, at 633.
119. \textit{See} \citeauthor{kadish1998}, \textit{supra} note 91, at 161.
120. \textit{See generally} Martha Fineman, \textit{Laws and Changing Patterns of Behavior: Sanctions on Non-Martial Cohabitation}, 1981 \textit{Wis. L. Rev.} 275, 277-78, 289-94. Fineman's study of cohabitation prosecutions demonstrated that they were always used to pursue other illegal conduct, including welfare fraud, domestic abuse (especially if the victim was uncooperative), or other "real" criminal activity. \textit{See id.} at 289; \textit{see also} Stuntz, \textit{supra} note 20, at 34-38 (criticizing such pretextual prosecutions and arguing that a doctrine of "constitutional desuetude" should be deployed to void the criminal statutes under which they are brought, leaving "only 'real crimes'—crimes the state enforces nonstrategically—as crimes").
121. The idea of partial desuetude, discussed by some commentators, refers to selective enforcement of a statute against a subset of violators—usually the most egregious. \textit{See} \citeauthor{pepper1998}, \textit{supra} note 77, at 1558. This idea aptly characterizes New York State's prohibition of assisted suicide. Although disused with regard to physicians assisting terminally ill patients who sought to commit suicide with their physicians' participation, it would be enforced only against those who "'work[ed] upon the mind of a susceptible person to induce suicide.'" Quill v. Vacco, 80 F.3d 716, 734 (2d Cir. 1996) (quoting \textit{STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1937}, at 832 (1937)), \textit{rev'd}, 117 S. Ct. 2293 (1997).
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from secondary applications of unenforced statutes will probably have to come from the courts. The same political dynamic that inhibits the repeal of unenforced statutes would likely militate against the development and success of any legislative effort to formulate a remedy. Unfortunately, as discussed in Part I, no American court has developed a satisfying doctrine with which to resolve these cases. There is room for optimism, however. Because no court has considered any remedy akin to the doctrine of conditional desuetude, no court has yet rejected its theoretical foundations.

American courts have not historically embraced the notion of desuetude, but neither the definitiveness nor the relevance of their rulings should be overstated. Desuetude has arisen rarely in American jurisprudence, and, when it has arisen, it has been only imprecisely addressed. Some of the more celebrated cases in which courts have formally considered claims of desuetude reveal an initial and often lingering judicial reluctance to apply historically unenforced statutes in the same manner as those that are routinely enforced.

The case of District of Columbia v. John R. Thompson Co.\textsuperscript{122} ostensibly establishes the American rejection of desuetude—though more so for commentators than for judges.\textsuperscript{123} Thompson, decided by the United States Supreme Court in 1953, involved a prosecution under laws forbidding racial discrimination in food service.\textsuperscript{124} Except for the prosecutions giving rise to the instant litigation, the only prior attempt at enforcement (several “abortive efforts”) had occurred approximately eighty years before—when the laws were passed.\textsuperscript{125} The prosecutions at issue, however, were not instances of surprise resurrection. The District of Columbia prosecutors had issued warnings of their intention to prosecute violators under the laws.\textsuperscript{126}

The Thompson Court ruled in this context that “the failure of the executive branch to enforce a law does not result in its modification or repeal. The repeal of laws is as much a legislative function as their enactment.”\textsuperscript{127} In upholding the enforceability of the 1873 Act, the Court did not refer to the doctrine of desuetude despite its self-evident relevance. Rather than being constrained by either outright acceptance or rejection of the doctrine, the Court assumed a hybrid position. The Court concurrently characterized repeal and modification of statutes as a legislative function and reserved a sphere—albeit of uncertain dimensions—for judicial discretion: “Cases of hardship are put where criminal

\textsuperscript{122} 346 U.S. 100 (1953).
\textsuperscript{124} For a discussion of the judicial treatment of desuetude prior to Thompson, see Bonfield, supra note 3, at 423-31. Recorded cases dating back to 1802 reveal considerable disagreement among American courts on the topic. The tensions that preceded Thompson also inhere in and persist after that decision.
\textsuperscript{125} See Thompson, 346 U.S. at 102 & n.1.
\textsuperscript{126} See id.
\textsuperscript{127} Thompson, 346 U.S. at 114 (citations omitted).
laws so long in disuse as to be no longer known to exist are enforced against
innocent parties. But that condition does not bear on the continuing validity of
the law; it is only an ameliorating factor in enforcement." 128 It is unclear
what "ameliorating" means in practical terms. The Court has not had occasion
to expand upon its meaning, largely because the Court has neither reconsidered
nor extensively relied upon its supposed rejection of desuetude in Thompson.
The American judiciary's position on disused law has not evolved clearly since
that decision.

In addition to an ambiguous opinion and progeny, another factor circum-
scribing the force of Thompson as precedent is that its singular facts differ
markedly from both the morality cases at issue and most questions of
desuetude. Since the passage of the law at issue in Thompson, social and legal
mores had become increasingly consistent with the statutory prohibition. This
is the opposite of the dynamic underlying most cases that involve unenforced
laws.

Relatively few judicial decisions, either before or after Thompson, have
turned upon establishing the availability of a law for enforcement purposes.
Whether desuetude was rejected explicitly or implicitly, its rejection need not
trigger actual application of the historically unenforced law. 129 Other deci-
sions, building most directly upon Thompson, eschewed desuetude but
considered mitigating factors related to disuse before applying the law.130
Several years ago (and nearly forty years after Thompson), the West Virginia
Supreme Court of Appeals held a statute void under the doctrine of desuetude in
Committee on Legal Ethics of the West Virginia State Bar v. Printz. 131
Attorney Charles Printz, Jr., representing an embezzlement victim, attempted
to negotiate a settlement between his client and the embezzler whereby the
embezzler would adhere to a strict schedule for repayment of the stolen money
or face criminal prosecution. 132 The last reported case under the 1923 statute
prohibiting misprision was in 1938. The court found that Printz's actions were
not criminal and, therefore, did not provide an adequate basis for a profession-
al disciplinary action.133

128. Id. at 117.
(evaluating the availability of attorney fees based, in part, upon whether the Statute of Gloucester,
enacted by Parliament in 1278, is binding).
130. See, e.g., Pacific Shrimp Co. v. United States Dep't of Transp., 375 F.Supp. 1036, 1041-42
(W.D. Wash. 1974) (noting that the relevant statute involved protection of the public interest and that
a recent amendment suggested that the vessels in question were not meant to be excluded from
inspection despite the history of noninspection that spanned more than three decades).
132. See id. at 722. West Virginia law prohibited a person from agreeing, in exchange for money
or reward, to refrain from prosecuting a known criminal. The possible penalties included confinement
in jail for not more than one year and a fine of not more than five hundred dollars. See id. at 723.
133. See id. at 727. The Printz court established the following framework for determining when
penal statutes become void: "(1) The statute proscribes only acts that are malum prohibitum and not
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Despite the range of holdings in Thompson's wake, its enduring legacy is its articulation of the separation-of-powers concerns that plague the judicial voiding of disused statutes. Through retaining, or re-enacting, criminal code provisions, legislatures effectively reserve the right for enforcement by the executive. Courts that reject traditional desuetude are usually seeking to respect that legislative decision. The same separation-of-powers concerns, however, require courts to reject secondary applications of disused laws. As discussed in Part II, legislative retention of a statute despite a protracted failure to enforce it does not constitute ongoing criminalization of the conduct prohibited by the statute. The judiciary would be ignoring the significance of executive inaction if it permitted what amounts to a form of private enforcement.134

Reliance on the doctrine of conditional desuetude would reinforce the separation of powers by enabling courts to prompt the legislature to clarify its position—to take a “second look” at historically unenforced legislation.135 “[T]he object of the second look [is] to force majoritarian bodies like legislatures to face the issues . . . .”136 Legislatures could even respond to this judicial invitation to take a “second look” by amending the statutory language to provide for private causes of action explicitly. For example, a legislature could state that violation of a particular morality statute would be grounds for denying or revoking child custody.137 Otherwise, legislatures could, upon receiving the invitation, merely choose to repeal the entire statute.

The doctrine of conditional desuetude would probably have conflicting effects on society’s impulse to confront the retention of disused laws. On the one hand, it would underscore the legal twilight zone of unenforced morality laws. On the other hand, it would radically reduce, if not eliminate, the practical effect of such laws and, as a consequence, organized opposition to them. In either case, however, conditional desuetude would reduce the particular form of injustice occasioned by the secondary application of historically unenforced morality laws.

CONCLUSION

A precarious balance exists between the nonrepeal and nonenforcement of

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134. For a discussion of the role of third-party, private interests in primary applications, see Chivers, supra note 3, at 482.
135. See generally CALABRESI, supra note 23, at 18-19 (assessing traditional desuetude and other means by which outdated laws can be temporarily nullified and the legislature induced to reconsider them); Stuntz, supra note 20, at 36-37 (advocating “constitutional desuetude” to void disused statutes, which the state could subsequently revitalize through re-enactment and routine enforcement).
136. CALABRESI, supra note 23, at 19.
137. See, e.g., Rescission of Anti-Adultery Law Passes, SACRAMENTO BEE, Apr. 4, 1991, at A13 (reporting Connecticut's repeal of its statute criminalizing adultery and retention of civil statutes providing that such behavior is nevertheless relevant to issues of child-custody and alimony).
many criminal prohibitions. The uncertainty attending that precarious balance stems not from a significant likelihood of renewed enforcement of a law but from the real possibility that the law will be invoked in noncriminal litigation. So-called morality laws are particularly susceptible to this combination of secondary use and primary disuse. In deciding whether to permit secondary applications of unenforced laws, courts must consider whether the prohibited conduct is actually criminalized. Formal repeal is only one mechanism by which laws are unmade. Prolonged failure to enforce the statute may decriminalize the conduct in question. Failure to appreciate this practical insight can infuse laws with unwarranted residual power. The doctrine of conditional desuetude remedies this by compelling the courts to consider the full range of activities of the other branches of government. Courts must recognize that the secondary application of an historically unenforced criminal law is unjust, and they must confront their obligation to remedy that injustice.