Country Report United States

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Introduction

Unlike in the United Kingdom and Canada, where statutes of limitations in criminal cases are essentially not recognized, the United States (hereafter U.S.) has known such statutes since colonial times. It is unclear why

the U.S. did not follow the practices of the mother country, England, in this area,[1] and rather that of Roman law and continental Europe.[2]

The early statutes provided for quite short time limits within which criminal cases had to be charged, yet allowed for the charging of capital cases at any time.[3] The Colony of Massachusetts, for instance, provided for a 1-year statute of limitations for most crimes as early as 1652.[4] After the promulgation of the U.S. Constitution in 1787, New York provided in 1788 that all crimes, except murder, had to be prosecuted within 3 years. New Jersey, in 1796, provided that all capital offenses, except murder, had to be prosecuted within 3 years, and all noncapital offenses, within two. Vermont, in 1797, provided that all crimes except murder and arson had to be prosecuted within 3 years, but had an extended 6-year period for theft, robbery, burglary and forgery.[5] In 1790, federal law provided for a 3-year statute of limitations for capital offenses other than forgery and willful murder, and a 2-year period for most other offenses.[6]

Some other basic principles, which still exist today, are that statutes of limitations begin to run for most crimes at the time the commission of a criminal offense has been completed, that is, when all material elements of the crime have been met. For some difficult to detect crimes, such as fraud or some thefts, either longer terms have been recognized, or the period only runs from the *discovery* of the commission of the offense. For continuing crimes, the period runs only after the defendant commits his last criminal act.[7]

Over the nearly 250 years since the first statutes of limitations there have been many developments, which will be discussed in this chapter. For instance, the base period for statutes of limitations has continued to grow and even longer periods are recognized for certain kinds of crimes. Statutes of limitations have been eliminated for many non-capital crimes as well.

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1 In England, the idea prevailed that *nullum tempus occurrit regi*, "time does not run against the king", though, today, some individual statutes may have limitations periods and England always recognized statutes of limitations in civil cases. *Powell*, Am. Crim. L. Rev., Vol. 45. 2008, 115 (121–22).

2 Some look to the influence of natural law theories or even the influence of French law after the revolution, which may have led to early introduction of the French institution of a public prosecutor. *Adelstein*, Wm. & Mary L. Rev., Vol. 37. 1995, 199 (253).

3 *Robinson*, Criminal Law Defenses. Vol. 2. 2018, § 202(a).

4 *Powell*, Am. Crim. L. Rev. 2008, 115.

5 *Adelstein*, Wm. & Mary L. Rev. 1995, 252.

6 *Powell*, Am. Crim. L. Rev. 2008, 115.

7 *Robinson* (Fn. 3), § 202(c).

This is especially true in relation to crimes against children, or crimes of sexual violence in general. In such cases, where a statute of limitations still exists, it may be tolled by filing a charge against an anonymous defendant ("John Doe"), or against his DNA profile.

For the purposes of this report it is also important to briefly summarize the terminology used to distinguish between serious crimes and less serious crimes for these categories impact the length of statutes of limitations. Traditionally, U.S. jurisdictions recognized only two or three categories of crimes. All jurisdictions call the most serious crimes *felonies*. These crimes are punishable by death (now limited to aggravated murder) or deprivation of liberty in the state (or federal) prison (usually a minimum of 1 to 2 years). Lesser offenses are called *misdemeanors* and are usually punished by fines or deprivation of liberty in a local or county jail for no more than 1 year. Some states recognize a third category, *infractions*, or *violations*, which are punished only by fines. Some states recognize various categories of felony. For instance, there are five in New York (Class A through Class E) and even two categories of misdemeanor (Class A and B).[8]

A. Abstract Analysis of Federal and State Legislation and Case Law

First Complex: Criminal Statutes of Limitations as a Legal Institution

I. Legitimation of Statutes of Limitations

In the commentaries to the influential Model Penal Code (MPC), which the American Law Institute published in 1962, the authors laid out five justifications for imposing statutes of limitations: (1) the requirement of trying defendants based only on fresh evidence; (2) as time passes, the need to punish an offender may decrease due to his or her possible reformation; (3) after a long period of time, society's "retributive impulse" may be replaced by sympathy for a long-forgotten offense; (4) the potential for blackmailing someone for an old offense; (5) limitations statutes "promote repose by giving security and stability to human affairs".[9]

8 N.Y. Penal Law § 55.05.

9 MPC § 1.06, Part I, Commentaries, Vol. I, 85, cited in *Adelstein,* Wm. & Mary L. Rev. 1995, 264–65.

The U.S. Supreme Court (hereafter USSC) pointed to quite similar justifications:

> "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before 'the principle that criminal limitations statutes are to be liberally interpreted in favor of repose'."[10]

The somewhat antiquated term *repose*, which the USSC in an earlier decision said was "fundamental to our society and our criminal law"[11], basically means tranquility, but I believe it is close to notions of legal security" (*Rechtssicherheit*) or "finality" (*Schlussstrich*). One can also see that the USSC links repose with the necessity of accuracy in factfinding by preventing trials long after a crime has happened, and also sees it as pushing police and prosecutors to diligently investigate crimes before the evidence becomes too stale, or memories falter.

Accuracy in fact finding is especially important in the U.S., where hundreds of persons have, in the last 20 years or so, been declared factually innocent of heinous crimes which have led to their being sentenced to death or long prison sentences based on false evidence, often in the form of erroneous eyewitness identification. A majority of the exonerations has been due to DNA analysis and thus have related to sexual assaults against children and adults, precisely the types of cases where statutes of limitations have, in the past years, been extended or abolished.[12]

U.S. courts have in this context emphasized that statutes of limitations seek to balance "the government's need for sufficient time to discover and investigate crime against the defendant's right to avoid perpetual jeopardy for offenses committed in the distant past … when basic facts may have be-

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10 Toussie v. United States, 397 U.S. 112, 114–115 (1970).

11 Bridges v. United States, 346 U.S. 209, 215–216 (1953).

12 *Thaman*, in: Ross/Thaman (eds.), Comparative Criminal Procedure, 2016, 75 (75); *Thaman*, in: Ackermann/Ambos/Sikirić (eds.), Visions of Justice, Liber Amicorum: Damaška, 2016, 383 (383–384).

come obscured by passage of time."[13] The USSC asserted, fairly recently, that "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict" and that "that judgment typically rests, in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable".[14]

Paul Robinson has criticized this aspect, because he feels that the evidentiary rules, the presumption of innocence, and the requirement of proof beyond a reasonable doubt, applicable in U.S. trials will prevent convictions based on evidence, the credibility of which has been undermined by time, and an absolute rule will prevent trials of old cases where there still exists sufficient credible evidence.[15]

Statutes of limitations also seek to unburden the courts in two ways, the most obvious, by declaring cases non-triable due to the lapse of the statute, "spar[ing] the courts from litigation of stale claims,"[16] and related thereto, the absolute nature of the time-limit makes it unnecessary for the courts to perform a case-by-case inquiry into the appropriateness of prosecution after a long pre-charge delay.[17]

Yet, especially when the courts are dealing with conspiracy, or other continuous offenses, such time savings do not always materialize, as the question of when an offense was complete, and therefore whether a statute of limitations bars prosecution in such cases, may only be answered after all of the evidence at trial has been taken.[18]

Whereas the MPC justifies the continued use of statutes of limitations with the notion that the need for special deterrence may dissipate if a person is tried long after the alleged criminal conduct took place, Paul Robinson again takes a contrary stand, noting that "this argument ignores the *general* deterrence purpose and what is termed the 'just punishment' purpose of the criminal sanction. Punishment of offenders, even those who are unlikely to repeat their conduct, may well be appropriate either because such punishment will deter others, because it reinforces the social order, or because the offender *deserves* punishment."[19]

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13 United States v. DiSantillo, 615 F. 2d 128, 134 (3rd Cir. 1980).
14 Stogner v. California, 539 U.S. 607, 615 (2008).
15 *Robinson* (Fn. 3), § 202(b).
16 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).
17 *Powell*, Am. Crim. L. Rev. 2008, 131.
18 *Powell*, Am. Crim. L. Rev. 2008, 144.
19 *Robinson* (Fn. 3), § 202(b).

II. Legal Nature of the Running of Statutes of Limitations

Paul Robinson calls statutes of limitations a "non-exculpatory defense" which "bars conviction of a defendant even though he may be entirely culpable".[20] It has long been held that criminal statutes of limitations, unlike those in civil cases, are *jurisdictional* – a true limitation of the power to charge and adjudicate a case, and not just a "statute of repose going to remedy only".[21] Neither the parties nor the court could create jurisdiction over the offense, because the statute of limitations had removed it.[22] The California courts in years past went as far as to say that "an indictment or information which shows on its face that the prosecution is barred by limitations fails to state a public offense".[23]

In some states, whether or not an offense took place within the statute of limitations is treated as an element of the offense. The prosecutor must show "probable cause" that this is the case before a grand jury or preliminary hearing in order to have a felony charged.[24] If the claim is raised by a defendant before trial, the defendant bears the burden of proving the limitations period has expired as a matter of law.[25]

III. Statutes of Limitations in Light of the Constitution

1. Statutes of Limitations, Due Process, and the Right to a Speedy Trial

No U.S. jurisdiction has held that the constitution compels states to enact statutes of limitations. Whether a state has a statute of limitations or not, is completely up to the legislator and, as such, the limitations periods can be freely changed or eliminated.[26]

Many of the concerns articulated to justify statutes of limitations, however, apply equally as well to the right to a speedy trial, guaranteed by the Sixth Amendment of the U.S. Constitution. Where they exist, statutes of limitations are the outer limit permitted the state before *charging* a person

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20 *Robinson* (Fn. 3), § 202(b).
21 Benes v. United States, 276 F. 2d 99, 108–109 (6th Cir. 1960).
22 *Adelstein*, Wm. & Mary L. Rev. 1995, 207–08.
23 People v. Holtzendorff, 2 Cal. Rptr. 676, 678 (Cal. App. 1960), citing People v. McGee, 36 P. 2d 378 (Cal. 1934).
24 People v. Zamora, 557 P. 2d 75 (Cal. 1976).
25 People v. Moore, 97 Cal. Rptr. 3d 844, 847 (Cal. App. 2009).
26 *Adelstein*, Wm. & Mary L. Rev. 1995, 250–51.

with a crime. The Sixth Amendment right to a speedy trial, however, applies only *after charge*,[27] and its outer limits are usually set by so-called *speedy trial statutes*, which exist in many states and in the federal system.[28] For instance, in the federal system, the Federal Speedy Trial Act of 1984 sets out how long after arrest a person must be charged, and how long after the charge, the person must be brought to trial.[29] Although a few states require automatic dismissal with prejudice if the time limits are violated,[30] laws often provide for exceptions *in the interests of justice* for complex cases,[31] and will also allow a case to be dismissed and recharged, at least once, which causes a new period to commence.[32] Some states do not find that the violation of a speedy trial statute will necessarily mean a violation of the Sixth Amendment, or the state constitutional right to a speedy trial, but see it only as a factor in the analysis of the claim.[33]

If a violation of a state speedy trial statute does not trigger a dismissal with prejudice of the charge, and it seldom does, then the courts will engage in a balancing test, to see if a long post-charge delay violated the Sixth Amendment right to a speedy trial. In its seminal case in this area, the USSC held that, after a long delay in bringing a charged defendant to trial has been alleged, the court will balance "the length of delay, the reason for the delay, the defendant's assertion of his right [to a speedy trial], and prejudice to the defendant."[34] The USSC also stressed that prejudice would mean losing crucial defense evidence, but could also consist in having to endure long periods of pretrial detention, leading to suffering, loss of income, etc.[35] As with other constitutional rights, a defendant may waive the right to a speedy trial under the speedy trial statutes, and in general under the balancing test, and such time-waivers are very common in capital cases. To what extent a defendant may waive a statute of limitations defense will be discussed, *infra*.

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27 United States v. Marion, 404 U.S. 307, 313 (1971).
28 *Robinson* (Fn. 3), § 202(a).
29 18 U.S.C. § 3161: in general, a person must be tried within about 120 days of arrest.
30 Alaska Crim. R. 45(g). Commonwealth v. Denehy, 2 N.E.3d 161, 168–169 (Mass. 2014). In Illinois, the trial must begin within 120 days if the defendant is in custody, 725 ILCS § 5/103–5(a).
31 18 U.S.C. § 3161(h)(8)(A).
32 18 U.S.C. § 3161(d)(1); State v. Huntley, 983 A.2d 160, 169 (Md. 2009).
33 State v. Iniguez, 217 P.3d 768, 772–79 (Wash. 2009).
34 Barker v. Wingo, 407 U.S. 514, 530 (1972).
35 *Ibid.*, 520.

The USSC has also developed a balancing test for deciding whether a delay between the commission of a crime (or its discovery) and the charging of a crime violates due process, as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution, both which provide that no one shall be "deprived of life, liberty or property without due process of law". Here, the statute of limitations is the outer limit for bringing a prosecution, yet a defendant could still claim a violation of due process, even if the charge is brought within the statutory time window.[36] Under the due process test, prejudice must be shown, but is not, in itself, sufficient to make out a violation.

In general, most jurisdictions see in the statute of limitations the prime guarantee against bringing excessively old criminal cases,[37] yet in capital and other cases, where there are no limitations to bringing a charge, the due process test is the only hope for a defendant who claims a long delay prior to charging.

2. *Does the Defendant Have a Due Process Right to Waive the Protection of the Statute of Limitations?*

As we will see below, murder and other serious crimes often have no statute of limitations and thus may be prosecuted at any time. But this is not necessarily true about what are called *lesser-included offenses* in the U.S. For instance, in cases of intentional, or premeditated and deliberate murder of the first degree, for which there is often no limitations period, a defendant may be actually guilty of voluntary manslaughter, or second-degree murder, which might have a statute of limitations which has already run at the time of the trial. A person might be charged with burglary (entry into a dwelling house with intent to commit theft or another felony therein), which might have no limitations period, or a long one, yet the defendant may only be guilty of a misdemeanor trespass, due to denial of the intent to steal when entering the house, yet the statute of limitations for trespass might already have lapsed.

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36 United States v. Lovasco, 431 U.S. 783, 789 (1977); United States v. Marion, 404 U.S. 307, 319 (1971). Fed. R. Crim. Proc. 48(b)(2) also provides that a "court may dismiss an indictment, information, or complaint if unnecessary delay occurs in … filing an information against a defendant" after he or she has been arrested.

37 See, for instance State v. Davis, 585 S.W.2d 60, 63 (Mo. App. 1979).

The USSC has indicated that a failure to instruct the jury on appropriate *lesser-included offenses* can raise issues of due process.[38] In capital cases, the court has been clear that denial of instructions on lesser forms of homicide would violate due process and even the Eighth Amendment protection against cruel and unusual punishment.[39] In *Beck*, the USSC recalled that "at common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged".[40]

The doctrine on instructing the jury on *lesser-included offenses* is interpreted differently throughout the country. The most important issue here, is, however, when the defendant seeks an instruction, say, on voluntary manslaughter or second-degree murder so as to have a possibility of avoiding a first degree murder conviction and perhaps the death penalty or life imprisonment. Sometimes, however, the prosecutor may seek an instruction on a lesser offense, because she feels the jury might acquit of the more serious charged offense. In still other jurisdictions, the judge may, *sua sponte*, instruct on a lesser offense. Finally, some jurisdictions require the jury to acquit beyond a reasonable doubt of the more serious charge, before they may begin deliberating about the lesser offense, whereas others allow juries to return a verdict of guilt as to a lesser offense if they are unable to agree about the more serious offense.

Some years back, many states saw the statute of limitations as being jurisdictional and deemed it impossible for the state to accept a conviction for a *lesser-included offense* as to which the statute of limitations had run.[41] Some states would thus not instruct on the lesser offense and leave the jury to simply decide, say, the issue of guilt as to murder. Others would instruct the jury as to the elements of the lesser offenses, but then inform the jury that, if they found the defendant guilty of the lesser offense, judgment could not be entered as to that offense due to the statute of limitations.[42] Finally, some states allowed the instruction as to the time-barred lesser offense, but do not tell the jury that a conviction for that offense would be a nullity.[43]

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38 Keeble v. United States, 412 U.S. 205, 212–14 (1973).
39 Beck v. Alabama, 447 U.S. 625, 642–43 (1980).
40 *Ibid.*, 633. For discussion *Adelstein*, Wm. & Mary L. Rev. 1995, 269.
41 *Adelstein*, Wm. & Mary L. Rev. 1995, 207–08, 216–17.
42 State v. DeLisle, 648 A.2d 632, 639–41 (Vt. 1994). *Adelstein*, Wm. & Mary L. Rev. 1995, 242–43.
43 State v. Short, 618 A.2d 316, 324 (N.J. 1993); State v. Muenter, 406 N.W.2d 415, 417–19 (Wis. 1987). See *Adelstein*, Wm. & Mary L. Rev. 1995, 237.

It appears, however, that more states are moving to view the statute of limitations as a protection for the defendant which, like other protections, such as the privilege against self-incrimination, or the right to a speedy trial, may be waived. Thus, the California Supreme Court abandoned its view that the statute of limitations was jurisdictional, and could not be waived in 1996, allowing for a knowing and voluntary waiver, made for the defendant's benefit after consultation with counsel.[44] Thus, the defendant could agree to be convicted of, say, voluntary manslaughter in lieu of murder, even though the statute of limitations may have run as to that charge.[45] However, some courts, which deem the statute to be waivable right, insist that the defendant asserts it as an affirmative defense at trial, or will be deemed to have been waived.[46] In some courts, a guilty plea will impliedly waive the application of the statute of limitations as well.[47] Some courts have also recognized waivers of the statute of limitations that are taken before a case is charged, often as part of plea agreements.[48]

Some states, however, have solved the issue by enacting legislation, which abolishes a separate statute of limitations for lesser offenses. For instance, the Maine statute reads:

> "The defense established by this section [the general statute of limitations] shall not bar a conviction of a crime included in the crime charged, notwithstanding that the period of limitation has expired for the included crime, if as to the crime charged the period of limitation has not expired or there is no such period, and there is evidence which would sustain a conviction for the crime charged".[49]

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44 Cowan v. Superior Court, 926 P.2d 438 (Cal. 1996).

45 For other courts taking this approach, see United States v. Wild, 551 F.2d 418, 424 (D.C.Cir. 1977); United States v. DeTar, 832 F.2d 1110, 1112–15 (9th Cir. 1987); Commonwealth v. Littlejohn, 508 A. 2d 1376, 1382 (Conn. 1986); State v. Lambrechts, 585 A.2d 645, 646–647 (R.I. 1991); State v. Leisure, 796 S.W.2d 875, 879 (Mo. 1990). For a discussion, see *Adelstein*, Wm. & Mary L. Rev. 1995, 215, 232–33.

46 The USSC has now taken this position. See Musacchio v. United States, 136 S. Ct. 709 (2016). See also Brooks v. State, 584 A.2 82, 86 (Md. Spec. App. 1991); United States v. Arky, 938 F. 2d 579, 581–82 (5th Cir. 1991); State v. Cotton, 295 S.W. 3d 487 (Mo. App. 2009).

47 Conerly v. State, 607 So. 2d 1153, 1158 (Miss. 1992); State v. Pearson, 858 S.W. 2d 879, 886–87 (Tenn. 1993); Ciampi v. United States, 813 F. Supp. 2d 237 (D. Mass. 2011). See *Adelstein*, Wm. & Mary L. Rev. 1995, 216.

48 United States v. Stewart, 425 F. Supp. 2d 727, 736–738 (E.D. Va. 2006); United States v. Sindona, 473 F. Supp. 764, 766 (S.D.N.Y. 1979).

49 Me. Rev. Stat. Ann. tit. 17-A, § 8(7).

Similar statutes can also be found in Arkansas, North Dakota, Utah and Louisiana.[50]

3. *Recognition of the Presumption of Innocence and Proof Beyond a Reasonable Doubt as to the Running of the Statute of Limitations?*

As we have noted in the preceding section, the jury will sometimes be instructed as to the elements of a lesser-included offense that may be time-barred. But the jury also plays a role, when there is a real issue as to whether the time has run as to a particular offense. This situation usually occurs in relation to continuous offenses, where it is unclear when the last criminal act might have been committed.[51]

In such situations, the running of the statute of limitations is a "non-exculpatory defense", and the instructions given to the jury depend on the rules applied in the particular jurisdiction in relation to such a defense. It could be characterized as an "affirmative defense", which means it must be pleaded by the defendant or the defendant waives its benefit, as we have shown above.

In some jurisdictions, the defendant needs only to raise or "inject" the defense, and then the burden shifts to the prosecution to prove beyond a reasonable doubt that the defendant's criminal conduct fell within the limitations period. Other jurisdictions may place a burden of proof on the defendant, say of a preponderance of the evidence, to show that her conduct occurred after the running of the statute. In California, a failure to ask that the jury be instructed on the statute of limitations, meant that the defendant forfeited the possibility of the jury finding that some of the six counts of lewd acts with a child might have been committed after the limitations period.[52]

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50 Ark. Code Ann. § 5–1–109(d); Utah Code Ann. § 76–1–305; N. D. Cent. Code § 29–04–02 (1991); La. Code Crim. Proc. Ann, Art. 574. See *Adelstein*, Wm. & Mary L. Rev. 1995, 245–47.

51 For example, it was the task of the jury to determine when drug importation offenses were completed. United States v. Edwards, 968 F.2d 1148, 1153 (11th Cir. 1992), or when an embezzlement was completed. United States v. Walsh, 928 F.2d 7, 11–12 (1st Cir. 1991), or whether "racketeering activity" under the RICO statute occurred before the running of the statute, United States v. Castellano, 610 F.Supp. 1359, 1381 (S.D.N.Y. 1995).

52 People v. Ortega, 160 Cal. Rptr. 3d 880 (Cal. App. 2013).

4. Retroactivity of a Statute Lengthening the Statute of Limitations

Art. I Section 10 (1) of the U.S. Constitution prohibits the passing of any *ex post facto* laws. The USSC, in *Stogner v. California*, has ruled that a statute which extends the statute of limitations as to a particular offense may only be applied retroactively to offenses as to which the statute of limitations had not yet run as of the effective date of the new rule. Otherwise, the new law would constitute a violation of Art. I Section 10 (1).[53] This is the prevailing view in the states as well.[54] A renewed start of the already expired statute of limitation is in principle inadmissible.

Two years after the *Stogner* ruling Congress enacted 18 U.S.C. § 3297, which provides an exception to this principle:

> "In a case in which DNA testing implicates an identified person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period."

In a recent decision, a federal court of appeals held that the discovery of DNA relating to a robbery, triggers a new 5-year statute of limitations as of the time of discovery, even though the 5-year statute of limitations had already run as to the robbery as provided by 18 U.S.C. § 3297, as long as the statute had been enacted before the robbery took place.[55]

Second Complex: Limitations on Prosecution

I. Criminal Offenses with No Statute of Limitations

1. Jurisdictions with No Statutes of Limitations

Although statutes of limitations have a long history in the U.S., unlike in the United Kingdom and other common law countries, two U.S. states, South Carolina and Wyoming, have no statutes of limitations.[56] Kentucky,

53 Stogner v. California, 539 U.S. 607, 632–33 (2003).
54 Cal. Penal Code § 803.6(b).
55 United States v. Hano, 922 F. 3d 1272, 1283–85 (11th Cir. 2019).
56 *Adelstein*, Wm. & Mary L. Rev. 1995, 250.

Maryland, and North Carolina only limit the time period for prosecuting misdemeanors.[57] Virginia and West Virginia do not limit the prosecution of any traditional common law felonies.[58] Even if there are no statutes of limitation, the prosecution of long past crimes may still violate the Due Process Clause of the 5th Amendment to the United States Constitution.

2. *Capital Crimes and Murder*

Since quite early, there has been a nearly universal rule to allow prosecution of capital crimes at any time, making them an exception, and at times the only exception, to otherwise fairly short statutes of limitations. This became the model in federal law in 1939 and still exists today.[59] Murder, rape, some other violent or dangerous felonies used to be punishable by death, as did treason, but today capital punishment is limited to aggravated murder, and is currently still on the books in 30 of the 50 states, and in federal law. But most states do not recognize a statute of limitations for capital murder or non-capital murder, regardless of whether they have maintained the death penalty.[60] California recognizes no statute of limitations for all cases punishable by death or life imprisonment, whether with or without a possibility of parole and, interestingly, embezzlement.[61]

§ 1.06 of the Model Penal Code maintained the common law tradition of recognizing no statute of limitations for murder.

War crimes and the crime of genocide may be prosecuted at any time.[62] The U.S. Code does not yet provide for punishment for crimes against humanity or the crime of aggression.

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57 Ky. Rev. Stat. Ann. § 500.050; Md. Code. Ann., Cts. & Jud. Proc. § 5–106; N. C. Gen. Stat. § 15–1.

58 Va. Code. Ann. § 19.2 – 8; W. Va. Code § 61–11–9.

59 18 U.S.C. § 3281; *Adelstein*, Wm. & Mary L. Rev. 1995, 251.

60 An exception is New Mexico, which provides for a limitations period of 15 years for all capital and first-degree felonies. N. M. Stat. Ann. § 30–1–8. *Adelstein*, Wm. & Mary L. Rev. 1995, 251–52.

61 Cal. Penal Code § 799(a). Life imprisonment without possibility of parole is the alternative sentence to death if the jury finds a first-degree murder with aggravating circumstances. California Governor Gavin Newsom declared a moratorium on execution of the death penalty, however, in early 2019.

62 18 U.S.C. 1091 (f) (genocide), 18 U.S.C. 2241 (war crimes).

3. Other Serious Felonies

As stated above, some states provide no statute of limitations for serious common law crimes, other than murder. Thus, in Illinois, no limitations period exists for murder, involuntary manslaughter, reckless homicide, treason, arson or forgery.[63] In Mississippi no limitations period exists for murder, manslaughter, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, false pretenses and abuse offenses against children.[64] Kansas has a 2-year statute of limitations for all crimes, except murder, certain sex offenses and certain crimes by public employees.[65] Missouri and New York have no statute of limitations for murder, forcible, attempted and completed rapes, and any class A felony.[66]

Modern developments have also led to an increase in the types of crimes for which no statute of limitations restricts prosecution. For instance, the U.S. Congress after the 9–11 attacks in 2001 eliminated any statute of limitation for terrorism offenses that "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person".[67] New York introduced a similar law, as well.[68]

Other jurisdictions have, like Mississippi, Kansas, Missouri and New York, allowed for prosecution of some sex crimes unencumbered by a limitations period of any kind. In 2006, Congress eliminated any limitations period for kidnapping offenses involving minor victims and for certain sexual offenses involving any victim.[69] The same is true in California.[70]

63 720 ILCS, § 5/3–5.
64 Miss. Code Ann. § 99–1–5. See *Adelstein*, Wm. & Mary L. Rev. 1995, 251–252.
65 Kan. Stat. Ann. § 21–3106.
66 V.A.M.S. § 556.036; N.Y. Crim. Proc. L. § 30.10.
67 See 18 U.S.C. § 3286.
68 § 30.10(2)(g) N.Y. Crim. Proc. L.
69 18 U.S.C. § 3299.
70 Cal. Penal Code § 799(b).

II. The Period of Limitations

1. Parameters for the Length of the Limitations Period

a) The Early Model: Single Limitations Period for All Non-Capital Crimes

Most of the old statutes made an exception for capital crimes, and otherwise applied one limitations period to virtually all other offense. These general limitations periods have grown since the early days, but are still quite short in comparison with those in Europe.[71] The allowance for exceptions to the rule, however, is just as old as the rule itself,[72] and we will explore, below, typical exceptions.

A commission reviewing the federal law in this area considered the MPC's model of having different limitations periods for different classes of offenses, but nonetheless remained with the old model of having one limitations period with exceptions.[73] The commission felt that the seriousness of the crime did not always reflect how much time would be needed to investigate and make the decision to prosecute. The commission also noted, that in cases where the federal courts have concurrent jurisdiction with one or more states, the prosecutorial decision "may frequently have to wait upon whether the local authorities are capable or willing to exercise their primary responsibility." It also emphasized, that the regulatory nature of many federal offenses requires coordination among federal agencies and prosecutorial authorities and complicates the investigative process. The decision whether to proceed with a criminal, rather than a civil or administrative complaint also complicates the decision in regulatory matters.[74]

The general statute of limitations in the federal system rose from two to 3 years in 1876, and from 3 years to 5 years in 1954 and it has remained at 5 years.[75]

The most typical period of limitations for general felony offenses other than murder, etc., is 3 years.[76]

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71 *Adelstein*, Wm. & Mary L. Rev. 1995, 255.
72 *Powell*, Am. Crim. L. Rev. 2008, 116.
73 *Powell*, Am. Crim. L. Rev. 2008, 141–42.
74 Cited in *Powell*, Am. Crim. L Rev. 2008, 141–42.
75 18 U.S.C. § 3282; *Powell*, Am. Crim. L Rev. 2008, 146.
76 See, e.g., Colo. Rev. State. § 16–5–401; 720 ILCS, § 5/3–5; Iowa Code Ann. § 56–802.3; V.A.M.S. § 556.036; Neb. Rev. Stat. § 29–110; N. D. Cent. Code § 5–29–04–02. See *Adelstein*, Wm. & Mary L. Rev. 1995, 251.

b) Limitations Periods Governed by the Magnitude of the Threatened Punishment

Seriousness of the offense normally leads to a longer period of limitations, if not its complete elimination and some U.S. courts acknowledge the argument that statutes of limitations are "equivalent to acts of amnesty" and therefore should relate to the "heinousness of the crime".[77]

State statutes commonly differentiate between degrees of offenses.[78] Since the Model Penal Code was published in 1962, its provision on statutes of limitations has provided the model for statutes in several states. MPC § 1.06 provided that, with the exception of murder, that all first-degree felonies be charged within 6 years of commission, all other felonies within 3 years, misdemeanors within 1 year, and violations within 6 months of commission.[79] Missouri has a nearly identical approach.[80] New York provides for a 5 years statute of limitations for felonies (other than those with no limitation), 2 years for misdemeanors and 1 year for "petty offenses", (i.e. infractions).[81]

California, which has otherwise not enacted any provisions of the MPC into its legislation, follows a similar scheme in relation to statutes of limitation. Thus, other than crimes with no statute of limitations, those felonies punishable by 8 years or more deprivation of liberty must be charged within 6 years of their commission.[82] Lesser felonies punishable by sentence to state prison must be charged within 3 years of commission.[83] Misdemeanors, punishable by no more than 1 year in the county jail, must be charged within 1 year of commission.[84]

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77 Handel v. Artukovic, 601 F. Supp. 1421, 1430 (C.D. Cal. 1985). *Powell*, Am. Crim. L. Rev. 2008, 141–42.

78 Ohio Rev. Code Ann § 29–2901.13 (different periods for felonies other than murder, misdemeanors, and minor-misdemeanors). *Adelstein*, Wm. & Mary L. Rev. 1995, 251.

79 The MPC has some exceptions as well, which will be discussed below.

80 V.A.M.S. § 556.036 (2).

81 N.Y. Crim. Proc. L. § 30.10(b-d).

82 Cal. Penal Code § 800.

83 Cal. Penal Code § 801.

84 Cal. Penal Code § 802(a). However Cal. Penal Code §§ 802(b-e) contain a number of exceptions for categories of misdemeanors which have longer statutes of limitations, some up to 3 years.

c) Exceptions for Specific Categories of Crime

As was mentioned above, there are countless exceptions to the categorical limitations periods set in many jurisdictions for felonies, misdemeanors or infractions. Some of these follow.

aa) Crimes of Violence

Whereas some states (see above) have no statute of limitations for serious violent felonies, other states provide for a longer limitations period than exists for less grave felonies. Thus Michigan provides for a 10-year limitation period for kidnapping, extortion, assault with intent to murder, and conspiracy to murder.[85] Federal law also provides for a 10-year period for arson[86] and human-trafficking-related offenses.[87]

bb) Terrorist Crimes

After September 11, 2001, the U.S. Congress extended the limitations period for non-capital terrorist offenses to 8 years[88] as did the state of New York.[89]

cc) Crimes Against Children

Whereas most of the exceptional (and long) statutes of limitations relate to crimes against children, especially of a sexual nature, the U.S. Congress has set a special 10 year period for charging the crime of recruitment or use of child soldiers.[90]

85 Mich. Comp. Laws. Ann. § 767–24. *Adelstein*, Wm. & Mary L. Rev. 1995, 251.
86 18 U.S.C. § 3295.
87 18 U.S.C. § 3298.
88 18 U.S.C. § 3286(a).
89 N.Y. Crim. Proc. L. § 30.10(3)(g).
90 18 U.S.C. § 3300.

dd) Financial Crimes

Federal law has extended to 10 years the limitations period for certain violations involving financial institutions, including false entries, bank fraud, mail and wire fraud, and criminal violations of the RICO statute.[91]

ee) Miscellaneous Exceptions

The federal statute of limitations for "theft of major artwork" is now 20 years.[92]

d) Impact of a Conviction for a Lesser Offense or a Punishment Usually Reserved for a Lesser Offense

We have already discussed the problems which arise when the defendant is convicted of a lesser-included offense for which the statute of limitations has already run. There are, however, other problems, which arise due to the mode of charging and prosecuting certain offenses in the U.S. For instance, in states like California there exist crimes, called "wobblers", which can be charged either as felonies or misdemeanors,[93] and even if charged as felonies, they may be punished as misdemeanors pursuant to a plea bargain or subsequent reduction of the charges. As long as the prosecutor did not charge a felony specifically for the purpose of circumventing the misdemeanor limitations statute, the felony limitations period will apply.[94]

There are also general recidivist statutes, where one charged with a theft, which may in the abstract be punishable only as a misdemeanor, or a felony with no more than 1 or 2 years in prison, could be subject to much higher punishments, or even life in prison with possibility of parole, if

91 18 U.S.C. § 3293.
92 18 U.S.C. § 3294.
93 Examples would be violations of Cal. Penal Code § 487, so-called *grand theft* which consists, among other things, in theft of over $ 950 U.S. in goods, or theft from the person, or petty theft, when the person has previously been convicted of petty theft.
94 People v. Mincey, 827 P. 2d 388, 415–16 (Cal. 1992).

charged with one or more prior convictions.[95] Thus, the 3-year statute of limitations for a felony applied in California to a person charged with what would normally be a misdemeanor attempt to molest or annoy a child, due to the defendant's prior conviction, which led to a felony charge.[96] However, under the California "Three-Strikes" law, the 3-year statute of limitations for robbery applied, even though charging prior convictions could raise the possible sentence to life imprisonment, because the statute of limitations were based on maximum punishment "for the offense", and not for aggravating factors not included in the offense.[97]

It is generally the case that the fact that the defendant only receives a fine, a typical punishment for a misdemeanor or infraction (violation) as a result of a case charged as a felony, does not mean a misdemeanor statute of limitations would apply.[98] The same applies if a person charged with a "wobbler" felony, gets sentenced for a misdemeanor.[99]

2. *Parameters for the Beginning of the Limitations Period*

a) Commission of the Crime: the Default Rule

The default rule is that the limitations period begins upon the commission of the crime,[100] that is, when all of the elements of the crime have been satisfied.[101] Although this would be the time of the taking for most theft offenses, in the case of certain crimes against property it could be when the defendant gained title to the property.[102]

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95 Such "Three Strikes and You Are Out" laws have been upheld by the USSC in Ewing v. California, 538 U.S. 11 (2003), and Lockyer v. Andrade, 538 U.S. 63 (2003).

96 People v. McSherry, 49 Cal. Rptr. 3d 389 (Cal. App. 2006).

97 People v. Turner, 36 Cal. Rptr. 3d 888 (Cal. App. 2005).

98 People v. Weaver, 133 P.2d 818, 821–22 (Cal. App. 1943).

99 People v. Thompson, 299 P. 821 (Cal. App. 1931).

100 § 30–10(2)(b) NY Crim. Proc. L.; Cal. Penal Code § 800.

101 § 556.036(4) V.A.M.S.

102 For instance, the statute of limitations begins to run not upon the signing of a fraudulent contract for the sale of property, but when the deed transferring ownership is filed. See People v. Pugh, 289 P. 2d 826, 829 (Cal. App. 1955).

b) Continuing Crimes

Missouri law provides that "an offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the person's complicity therein is terminated. Time starts to run on the day after the offense is committed."[103]

An example of a continuing crime can be the inchoate crime of conspiracy, which in the federal system and California, can be punished along with the target crime one conspires to commit. In California, conspiracy has a longer statute of limitations (3 years) than might be the case for the target crime.[104] Thus, even though the target-crime of a conspiracy occurred more than 3 years before the conspiracy was charged, conspiracy can be a continuing crime, which extends beyond one of the targeted crimes.[105] In California, the limitations period as to conspiracy as a continuing crime, begins when the last overt act in furtherance of the conspiracy is committed.[106]

Child abuse has been treated as a continuing crime, and in New York, the statute of limitations of 5 year in such cases only begins to run after the last act of abuse has occurred.[107]

Federal law has declared that concealment of a bankrupt's assets is a continuing offense "until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge."[108]

c) Upon Discovery of the Crime

Legislators have two options when it comes to determining the statute of limitations for crimes that are perceived as being difficult to uncover: ei-

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103 Robinson (Fn. 3), § 202(c); § 556.036(4) V.A.M.S. In California, a kidnapping and false imprisonment are continuous crimes and are only complete when the imprisonment ends. This is when the statute of limitations begins. Parnell v. Superior Court, 173 Cal. Rptr. 906, 914–16 (Cal. App. 1981).

104 People v. Prevost, 71 Cal. Rptr. 2d 487 (Cal. App. 1998): involving conspiracy to commit a misdemeanor.

105 People v. Diedrich, 182 Cal. Rptr. 354, 365 (Cal. App. 1982).

106 People v. Witt, 125 Cal. Rptr. 653, 658 (Cal. App. 1975).

107 § 30.10(2)(e) N.Y. Crim. Proc. L.

108 18 U.S.C. § 3284.

ther to extend the statute of limitations, as has been done for fraud, stolen artwork, etc., or to provide that the limitations period only runs upon discovery of the offense, and then to provide for a shorter statutory period upon discovery.

Several jurisdictions have taken the latter approach. Arizona's limitations periods begin with the state's actual discovery of the offense, or when state officials, had they exercised "due diligence", should have discovered the offense.[109]. Nevada also begins the running of the limitations period with *discovery* of the offense (felonies and misdemeanors), but only if the crime is committed "in a secret manner."[110]

The MPC contains an exception, by allowing crimes involving fraud and breach of fiduciary duty to be commenced within 1 year of the *discovery of the offense*, but in no case longer than 3 years after commission of the offense.[111] In California, certain offenses, including grand theft, fraud and perjury, "shall be commenced within 4 years after discovery of the commission of the offenses".[112] The California courts have determined that the crucial question is whether "law enforcement authorities or the victim had actual notice of circumstances sufficient to make them suspicious of fraud, thereby leading them to make inquiries which might have revealed the fraud". Mere discovery of a loss will not trigger the running of the period.[113] California has greatly expanded the number of crimes for which the period of limitations only begins to run upon discovery. These include, as has been noted above, crimes involving fraud and breach of fiduciary duty, but also extortion of the elderly, a number of crimes committed by public officials, such as bribery, criminal violations of some administrative codes, and some sexual crimes committed against minors.[114]

According to New York law, the period for charging certain crimes also begins only upon discovery of the offense. This is true for theft by someone in violation of a fiduciary duty,[115] and for some violations of environ-

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109 Within 7 years after discovery for felonies, within 1 year for misdemeanors, and within 1 month for "petty offenses". Ariz. Rev. Stat. Ann. § 13–107(B).

110 Nev. Rev. Stat. Ann. § 171.095.

111 MPC § 1.06(3). See V.A.M.S. § 556.036(3) for a similar provision.

112 Cal. Penal Code § 801.5.

113 People v. Petronella, 160 Cal. Rptr. 3d 144, 154–55 (Cal. App. 2013).

114 Cal. Penal Code §§ 803(c), (e), (f)(1), (l).

115 § 30.10(3)(a) N.Y. Crim. Proc. L.: within 1 year after the facts constituting such offense are discovered or, in the exercise of reasonable diligence, should have been discovered by the aggrieved party or by a person under a legal duty to represent him who is not himself implicated in the commission of the offense.

mental criminal laws.[116] New York law provides that the statute of limitations for certain sex offenses against children under 18 years of age only runs when the child reaches the age of 23 years, or when the offense is reported, whichever occurs sooner.[117]

d) Upon a Public Servant's Leaving Office

In New York, any offense based upon misconduct in office by a public officer or employee may be commenced at any time when the person is in public office or employment or within 5 years thereafter (depending on the time of offense), but the period of limitations may not be extended more than 5 years.[118]

3. Circumstances Influencing the Running of the Limitations Period

a) The Tolling of the Statute upon Filing of Charges

Unlike in some European countries, it is the charging of a defendant, which tolls, or interrupts the running of the statute of limitations, and not when a judgment becomes final after the trial and appeal or cassation procedures.[119] The charging process begins with the filing of formal charges or the issuance of an arrest warrant for the defendant.[120] After that the question of the statute of limitations is settled. From then on, only a violation of the Speedy Trial Clause of the Sixth Amendment to the United States Constitution is possible.

116 § 30.10(3)(c) N.Y. Crim. Proc. L.
117 § 30.10(3)(f) N.Y. Crim. Proc. L.
118 § 30.10(3)(b) N.Y. Crim. Proc. L.
119 See § 78(1,2) Ugolovnyy kodeks Rossiyskoy Federatsii (Criminal Code of Russia), providing for tolling of the statute of limitations only upon a final judgment (which occurs after appeals have been decided).
120 Cal. Penal Code § 804; § 556.036(5) V.A.M.S. See also Toussie v. United States, 297 U.S. 112, 114–115 (1970).

aa) The Charging of DNA Profiles

Some states have, even before the perfection of DNA analysis, allowed charging anonymous defendants through so-called "John Doe Indictments" to avoid the running of the statute of limitations.[121] The new practice of charging an unknown suspect in terms of that suspect's DNA profile is a variation on this practice.

The first indictment of a DNA profile to toll the statute of limitations, which was not authorized by statute occurred in Milwaukee, Wisconsin, in 1999. Since then, some legislatures have enacted statutes that allow charging of unknown suspects based only on DNA profiles.[122] These statutes, along with those that remove statutes of limitations once a DNA sample from the suspect has been gathered, have been enacted to avoid the injustice to rape victims caused after a "cold hit" leads to identification of a rapist after the statute of limitations has expired.[123]

Some statutes, such as that in Delaware, simply allow indictment of a DNA profile in any case where the accused is unknown but without altering the statute of limitations.[124] A similar provision exists in federal law.[125] A similar law in New Hampshire allows charging based on fingerprints as well as DNA.[126] Under such statutes, the limitations period is tolled, until prosecutors find more specific information to find and prosecute a suspect.[127] Some statutes allow such DNA indictments only within a certain period after the alleged crime and require some form of "due diligence" or assuredness, that the DNA which is charged belongs to the alleged suspect.[128]

In Arkansas, DNA-indictments are permitted "[I]f there is biological evidence connecting a person with the commission of an offense and that person's identity is unknown" and "the indictment contains the genetic information of the unknown person and the genetic information is accepted

121 This practice, also in relation to DNA charging, has been upheld by the California Supreme Court as not violating the requirement of particularity in charging and the right of the accused to have notice of the charges. People v. Robinson, 224 P. 3d 55, 60–61 (Cal. 2010).
122 *Akehust-Moore*, High Tech L. J., Vol. 6. 2006, 213 (214).
123 *Akehurst-Moore*, High Tech L. J. 2006, 218.
124 Del. Code Ann., tit. 11, § 3107(a).
125 18 U.S.C. § 3282(b)(1).
126 N.H. Rev. Stat. § 592A-7:2(II).
127 *Akehurst-Moore*, Hich Tech L.J., 2006, 220.
128 Mich. Com. Laws § 767.24(2)(b); Ark. Code Ann. § 5–1–109(i)-(j). *Akehurst-Moore*, High Tech L.J. 2006, 220.

to be likely to be applicable only to the unknown person".[129] In Arkansas, first-degree sex crimes and sex crimes against children under 18 years-of-age have no statute of limitations.[130] Although a non-first-degree rape charge against an adult has a 6-year limitations period, if the culprit is unknown and "if biological evidence of the alleged perpetrator is identified that is capable of producing a deoxyribonucleic acid (DNA) profile" then the statute of limitations is eliminated.[131]

bb) Preservation of DNA Profile Eliminates Statute of Limitations

In Illinois, any statute of limitations is eliminated for any of certain listed offenses involving sexual conduct or sexual penetration, "in which the DNA profile of the offender is obtained and entered into a DNA database within 10 years after the commission of the offense". The only conditions are that the victim reported the offense within 3 years of its commission, unless he or she was murdered during the commission of the offense or within 2 years after the offense.[132] Similarly, Texas, which has no statute of limitations for the most serious sexual assaults,[133] has allowed the charging of any lesser sexual assault case at any time, if "during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained".[134]

cc) The Affect of Dismissal and Recharge upon the Statute of Limitations

Amendments to an indictment or filing a new indictment will not affect the tolling of the statute unless they charge substantially different offenses or conduct.[135] Some jurisdictions also allow the prosecutor to dismiss an

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129 Ark. Code Ann. § 5–1–109(j). Once an identification is made, however, no new limitations period will be imposed.
130 Ark. Code Ann. § 5–1–109(a)(1)(D-M).
131 Ark. Code Ann. §§ 5–109(b)(1)(A-B).
132 720 ILCS § 5/3–5(a)(2).
133 § 12.01(1)(b) Tex. Crim. Proc. Code.
134 § 12.01(1)(c) Tex. Crim. Proc. Code.
135 United States v. Davis, 953 F. 2d 1482, 1490–91 (10th Cir. 1992). A substantially similar offense may even be classified as a more serious felony. State v. Feldt, 512 S.W. 3d 135, 151–152 (Mo. App. 2017): Class B felony for possession of child

indictment and to recharge within a certain period without fear of violating the statute of limitations.[136] This is also possible if charges are dismissed as part of a plea bargain or agreement and reinstated after the plea was vacated upon request of the defendant[137] or after the defendant challenges a guilty plea and is held in breach, resulting in the reinstatement of the original charges.[138]

However, the government can still run into a limitations problem if it seeks to reinstate charges that were dropped pursuant to a guilty plea that is later withdrawn. Absent a waiver of the statute, the reinstatement must occur before the limitations period has run and there is no "good faith" exception for such a situation.[139]

b) Circumstances Which Toll the Statute, and When Eliminated, the Statute Again Runs

aa) Wartime

Federal law provides for the suspension of the statute of limitations when the U.S. is at war, in relation to any offenses involving fraud against the U.S., involving property belonging to the U.S., or involving government contracts related to the war effort. The limitations period begins to run (or continues) 5 years after the end of hostilities has been declared.[140]

bb) Suspension to Obtain Foreign Evidence

Federal law also provides for suspension of the running of the statute of limitations upon a verified claim by the government that evidence necessary to charge and prosecute the case is located abroad. The government

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porn film, in lieu of Class C felony for possession of a still child porn photograph.

136 18 U.S.C. §§ 3288, 3289 (if recharging within 6 months of dismissal without prejudice);§ 30.10(4)(b) N.Y. Crim. Proc. L.

137 18 U.S.C. § 3296 (as long as the government moves to reinstate the charge within 60 days of the date the vacating of the plea becomes final).

138 State v. White, 838 S.W. 2d 140, 142–43 (Mo. App. 1992).

139 United States v. Podde (Reguer), 105 F. 3d 813, 818–21 (2d Cir. 1997). See also People v. Shinaul, 88 N.E. 3d 760, 767 (Ill. 2017), citing *Podde* with approval.

140 18 U.S.C. § 3287.

then has up to 3 years to obtain that evidence through mutual aid before the statute again begins to run.[141]

cc) Suspect is a Fugitive

Most jurisdictions provide for a tolling of the statute of limitations if the suspect is a fugitive and avoids submitting to the authorities to be charged and prosecuted. Federal law provides, simply: "No statute of limitations shall extend to any person fleeing from justice."[142] Missouri law states that the period of limitations does not run "[d]uring any time when the accused is concealing himself from justice either within or without this state".[143]

If a person is out of state, but not necessarily avoiding justice, some states will limit the time the statute will be suspended. California and Missouri law provides that the suspension period will be up to a maximum of 3 years.[144] New York law puts a limit of 5 years on the tolling in such situations.[145]

dd) Time a Suspect is Determined to be Mentally Unable to Stand Trial

In many jurisdictions, the statute of limitations is suspended, if a criminal suspect is determined to be mentally ill to the extent that they may not stand trial. As soon as the court determines that the person is again able to stand trial, the limitations period would again begin to run.[146]

c) Factors Affecting the Running of the Statute of Limitations Based in the Person of the aggrieved party

As was noted above, many states have no statute of limitations for the prosecution of serious sex crimes against children. Others, however, allow suspension of any statute of limitations until the child reaches a certain age.

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141 18 U.S.C. § 3292(a)(1), (c)(1).
142 18 U.S.C. § 3290.
143 § 556.036(6)(2) V.A.M.S.
144 Cal. Penal Code § 803(d); § 556.036(6)(1) V.A.M.S.
145 § 30.10(2)(4) N.Y. Crim. Proc. L.
146 § 556.036(6)(4) V.A.M.S.

Federal law has come close to abolishing a statute of limitations for the prosecution of offenses "involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years" by allowing prosecution "during the life of the child, or for 10 years after the offense, whichever is longer."[147] In Missouri, prosecutions for "unlawful sexual offenses involving a person 18 years of age or under" must be charged within 30 years after the victim reaches the age of 18, unless the crime is a violent attempted or completed sexual offense or kidnapping, in which case there is no statute of limitations.[148] In California, a prosecution for a sex crime involving penetration with an unknown object against a person under 18 years of age may be commenced any time prior to the victim's 40th birthday.[149]

d) Effect of DNA Identification on the Statute of Limitations

Many jurisdictions, some of which have quite long statutes of limitations for sexual crimes against children, provide for a shortening of the limitations time once an unknown suspect has been identified through DNA comparisons. Thus, in Iowa, the statute of limitations for crimes against children under the age of 18 is 10 years after the child's 18th birthday. However, when a DNA match has identified a suspect, the state then has only 3 years from the date of the identification to file charges.[150] Most states follow this "Iowa" model as they feel more comfortable charging a known person, than just a DNA profile.[151] In California, the prosecutor has 1 year after a positive identification of a suspect through his or her DNA to bring charges.[152]

Though not required in Iowa, some states have required that certain conditions be met before a charge of a known person based on a DNA match, such as preservation of the DNA evidence and making it available to the accused.[153]

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147 18 U.S.C. § 3283.
148 § 556.037 V.A.M.S.
149 Cal. Penal Code § 801.1.
150 Iowa Code §§ 802.2; 802.2B.
151 *Akehurst-Moore*, High Tech J. 2006, 222.
152 § 803g(1) Cal. Penal Code.
153 Fla. Stat. § 775.15(15); Ga. Code Ann. § 17–3–1; Minn. Stat. § 628.26(f) (2005); Okla. Stat. tit. 22, § 152(c). See *Akehurst-Moore*, High Tech L. J. 2006, 222–23.

III. Consequences of the Running of the Limitations Period

If it turns out that a crime was charged after the statute of limitations had run, then, pursuant to the traditional approach, the state had no jurisdiction to punish the defendant, whether or not he or she was willing to waive the protection of the statute. The case should be dismissed with prejudice at the request of the defendant. There is, however, an increasing trend to view the protection of the statute of limitations as a kind of "right", which the defendant may waive. Thus, it is generally the case nowadays that the burden is on the defendant to raise the bar to prosecution based on the running of the statute of limitations as to the charged offense before or at least during trial or a resultant conviction will not be overturned.[154]

If a crime was committed overseas, but is punishable under U.S. law, then U.S. prosecutors have discretion whether or not to prosecute it, and, will prosecute if they deem it to be "reasonable". Clearly, the fact that the country where the criminal acts took place did prosecute the person is one factor, which militates against re-charging the case in the U.S.[155] However, if the crime was not charged within the limitations period of the country where the acts took place, and the statute of limitations had not run in the U.S., then there would of course be no legal hindrance to prosecuting the case in the U.S.

A crime which was never charged due to the running of the statute of limitations cannot, of course, be charged as a "prior conviction" which might lead to mandatory minimum sentences, or a higher maximum sentence within statutory sentencing schemes.[156] However, judges can take into account uncharged crimes, which for sentencing purposes need only be proved to a preponderance of the evidence, the civil law standard, and not beyond a reasonable doubt, in determining whether to sentence in the upper range of the sentencing parameters prescribed for the crime for which

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154 Askins v. United States, 251 F. 2d 909, 913 (D.C. App. 1958).

155 For a discussion of U.S. international jurisdiction and the role of prosecutorial discretion in charging crimes committed overseas, see *Thaman*, in: Sinn (ed.), Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität, 2012, 475 (485–87).

156 Prior convictions may be taken into consideration by judges in sentencing, even if they lead to a mandatory minimum sentence or if they raise the maximum sentence. Otherwise, sentencing issues, which lead to mandatory minimum or increased maximum sentences must normally be determined by the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 566 (2000); Alleyne v. United States, 570 U.S. 2013.

the person is being sentenced. Thus, the USSC has held that a judge could aggravate a sentence based on a crime for which the defendant was acquitted, as the burden of proof is less than that of beyond a reasonable doubt.[157]

In the First Complex III.2. above, we discussed the situation, where a serious crime may be charged, such as murder or rape, which often has no statute of limitations or a long one, but where a lesser-included offense is barred by the statute of limitations. In the Second Complex II.2.b. it was also noted how a preparatory crime, like conspiracy, could even have a longer statute of limitations than the crime the conspiracy has as its target. In addition, with continuous crimes, the statutory period often does not begin to run until the last act is committed, and therefore it is irrelevant if a preparatory act might have taken place earlier and be beyond the statute of limitations.

When two states have concurrent jurisdiction, neither an acquittal nor a milder sentence in one of two states with criminal jurisdiction will prevent a new indictment and conviction in the other state.[158] The Double Jeopardy Clause (ne bis in idem) does not prevent further punishment in this case. This is also true if a state wants to re-accuse after an acquittal or a lenient sentence by a federal court.[159] Some states, however, interpret their own constitutions to prohibit an indictment after an acquittal in federal court.[160] The federal legal system may also prosecute after an acquittal in an individual state.[161]

Accordingly, if a charge is dismissed due to a running of the statute of limitations in one jurisdiction, but another jurisdiction, state or federal, had a longer statute of limitations or none, ne bis in idem would not prevent further charges in most cases.

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157 United States v. Watts, 519 U.S. 148, 151–153 (1997). See also United States v. Drain, 740 F. 3d 426, 431–432 (7th Cir. 2014): OK to aggravate sentence based on long list of arrests which never went to court.

158 For example, a murder where the victim was kidnapped in a state and killed in the adjacent state. Heath v. Alabama, 474 U.S. 82 (1985).

159 Bartkus v. Illinois, 359 U.S. 121 (1959).

160 State v. Hogg, 385 A.2d 844 (N.H. 1978).

161 Abbate v. United States, 359 U.S. 187 (1959).

IV. Extent of the Limitation on Prosecution

1. Forfeiture of Property after Statute Has Run

The 1790 federal criminal statute of limitations applied to fines and forfeitures for violations of penal statutes, as well as criminal offenses. The statute of limitations that now governs civil fines, penalties, and forfeitures, however, also provides for a 5-year limitations period.[162]

2. Preventive Measures after Statute Has Run

If the statute of limitations has run, then no criminal preventive measures may be applied to someone who committed the criminal acts. However, civil proceedings to commit a dangerous person to a mental institution may be taken regardless of whether a crime may be charged, or not.[163]

3. Restitution

In general, statutes of limitations in the U.S. do not apply to sentencing procedures. Thus, a California court held that, even though some of the acts upon which restitution was based, were time-barred, restitution could nonetheless be ordered.[164] It is also appropriate to note, that since 95 % or more of criminal cases are resolved through plea bargaining, a defendant might willingly trade a reduction in jail time for agreeing to pay restitution even on time-barred counts.

Third Complex: The Lack of Statutory Limitations on Execution of Sentences

The U.S. does not distinguish between the running of a limitations period for charging and one for execution of sentences. There are no statutory limitations on the latter. In general, if the case is charged within the limitations period, then a defendant can only complain about a long delay in sentence, by alleging that his or her due process rights under the Fifth and

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162 28 U.S.C. § 2462. See *Adelstein*, Wm. & Mary L. Rev. 1995, 249.
163 See § 5150 Cal. Welfare & Institutions Code.
164 People v. Goulart, 273 Cal. Rptr. 477, 481–82 (Cal. App. 1990).

Fourteenth amendments were violated. The USSC recently held that the Sixth Amendment right to a speedy trial is extinguished upon conviction, whether following a verdict by jury or court, or following a guilty plea, though it did leave open the possibility of a challenge under the rubric of due process.[165]

In the U.S., sentences are normally executed before the defendant exercises his or her first appeal of right. Courts have found violations of the right to due process, though these violations do not, necessarily, lead to dismissal of the charges or release from prison.[166] A 6-year delay in a court reporter's preparation of a transcript for appeal, however, was held by a North Carolina court not to due process.[167]

B. Problems and Reform Trends

I. Critiques of the Arbitrariness of Statutes of Limitations

Some commentators believe that the particular periods of limitations picked by legislatures are inherently arbitrary, because they will prevent prosecutions that would be in the public interest, while allowing others to proceed, though an injustice may result.[168] As Justice Jackson wrote in reference to civil statutes of limitations:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. … They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay."[169]

Paul H. Robinson and *Michael T. Cahill* have recently called statutes of limitations relics of a bygone era, largely due to technological advances, such as DNA, which have given prosecutors reliable evidence of guilt in cases be-

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165 Betterman v. Montana, 136 S.Ct. 1609, 1612–13 (2016).
166 Simmons v. Reynolds, 898 F. 2d 865, 868–69 (2d Cir. 1990): 6-year delay in appeal; Muwwakkil v. Hoke, 968 F. 2d 285 (2d Cir. 1992): 13-year delay.
167 State v. Berryman, 624 S.E. 2d 350, 358 (N.C. 2006).
168 *Powell*, Am. Crim. L. Rev. 2008, 118.
169 Chase Securities Corp. v. Donaldson et al, 325 U.S. 304, 313 (1945).

yond the limitations period. They also note the outrage felt by citizens when the statutes prevent the prosecution of a clearly guilty person.[170]

The argument is, that some long delays do not necessarily affect memories of witnesses or the quality of evidence, whereas others do. Thus, the balancing tests developed under the Sixth Amendment speedy trial guarantee and the due process cases is better suited to finding the justice of the particular case. This has led some to suggest abolishing statutes of limitations and taking an approach like that in Great Britain, Canada and the few U.S. states which have no such statutes by deciding whether to allow prosecutions of old cases on a case-by-case basis.[171]

II. Reform Trends

1. Trend Toward Lengthening or Eliminating Limitations Periods

The trend in the U.S. is definitely to extend the limitations for some crimes and to eliminate them altogether for others.[172] Congress has enacted exceptions to its original short limitations periods since 1804, and has continued to do so every couple of decades, purportedly to address new pressing crime control problems.[173]

This trend has especially been evident in relation to child abuse offenses and financial crimes and may continue in the future, though most doubt that the statutes will be eliminated altogether.[174]

The decisions to lengthen or eliminate the statutes has, according to critics, been justified only in the most superficial ways, such as by mentioning the difficulty of proving some crimes, yet no attempt has been made to square these decisions with the underlying reasons for the statutes in the first place, foremost of which are to compel law enforcement to work quickly and efficiently, and to prevent prosecutions in which it is difficult for the defense to counter charges due to the passage of time and loss of witnesses and memories.[175]

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170 *Robinson/Cahill,* Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve, 2005, 58–63.
171 *Powell*, Am. Crim. L. Rev. 2008, 147–149.
172 *Adelstein*, Wm. & Mary L Rev. 1995, 250.
173 *Powell*, Am. Crim. L. Rev. 2008, 122–123.
174 *Adelstein*, Wm. & Mary L. Rev. 1995, 250–269.
175 *Powell*, Am. Crim. L. Rev. 2008, 131–34.

Critics of the lengthening and elimination of limitations periods see these changes as another facet of the radical shift in U.S. criminal policy from one based in utilitarian and rehabilitative models, to a "get-tough-on-crime" approach and an emphasis on retribution and victims' rights, which began in the early 1970's.[176] Other aspects of this change are the extraordinary increase in the length of prison sentences, including mandatory minimums and life-sentences, for instance, for recidivist thieves, which has led to a coercive system of plea bargaining, the virtual disappearance of jury trials,[177] and to the U.S. having the largest prison population in the world.[178]

2. *Trend Toward Treating Statutes of Limitations as Waivable Rights*

Some critics applaud the trend away from treating the statutes of limitations as jurisdictional and not subject to waiver by the defendant.[179] This is especially important in the context of trials for serious offenses, where instructions as to *lesser-included offenses* may be prohibited due to the time-barred nature of those offenses. The same is true in the setting of plea bargaining, as prosecutors would be prevented from offering pleas to manslaughter, in lieu of murder, say, by the jurisdictional nature of the statutes.

3. *Problems Caused by DNA Technology and Attempts to Deal with Them*

As we have discussed, some states allow the charging of DNA to toll the statute of limitations. Yet this can have some serious detrimental effects to the quality of the evidence eventually presented at trial. If police rely on eventually getting a DNA match in the future, they may not diligently investigate the case to find possible suspects from the outset, and thus put off

176 *Powell*, Am. Crim. L. Rev. 2008, 136–37.
177 *Thaman*, in: Thaman (ed.), World Plea Bargaining. Consensual Procedures and the Avoidance of the Full Criminal Trial, 2010, 297 (374–377).
178 Despite decreases in recent years, the U.S. still has the largest prison population in the world, at 2,121,600, and the highest rate of incarceration, at 655 per 100,000 of population, https://en.wikipedia.org/wiki/List_of_countries_by_incarceration_rate (last visited 9 June 2019).
179 *Adelstein*, Wm. & Mary L. Rev. 1995, 268.

the trial, perhaps, to a much later time, when the memories of witnesses, alleged victims and suspects will be less clear.[180]

Some jurisdictions have, however, included evidentiary preconditions in their laws to address these problems.[181] In some states, the police must collect, analyze, and preserve relevant DNA evidence before the statute may be tolled, either by a DNA charge, or just due to the presence of the DNA specimen.[182] In California, the biological evidence must be analyzed within 2 years of the crime's commission,[183] and in Illinois, the sample must be entered into the DNA database within 10 years of the crime.[184] In some states, the law also attempts to protect victims against diminished memory by requiring them to report the crime within 5 years of its occurrence, or the statute will not be tolled by an identification.[185]

Once a possible match has occurred, Maine requires that the state present the evidence of the DNA match to a court in closed session, and the court must find a match by a preponderance of the evidence for the statute of limitations to be tolled.[186]

C. *Examples Relevant for Criminal Practice*

Due to the great variety of approaches in the 50 states and the federal system, it is difficult to present general examples relevant for criminal practice, which apply across the board.

There are, however, certain areas discussed in this report which defense lawyers, prosecutors and courts have to deal with in some jurisdictions and which require strategic decisions and therefore keen knowledge of the law. Thus, when the limitations period may have run on *lesser-included offenses* but not on more serious charges, like murder, the defense must tactically assess whether they want to waive the protection of the statute as to the lesser offenses and ask for an instruction thereon, or hope the jury will ac-

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180 *Akehurst-Moore*, High Tech L. J. 2006, 235.
181 *Akehurst-Moore*, High Tech L. J. 2006, 232–233.
182 See discussion of the various types of statutes, above. Fla. Stat. § 775.15(15); Ga. Code Ann. § 17–3–1; Okla. Stat. Tit. 22, § 152(c)(2); Minn. Stat. § 628.26(f).
183 Cal. Penal Code § 803(i).
184 720 I.L.C.S. § 5/3–5(a)(2).
185 Conn. Gen. Stat. § 54–193b. Cf. 720 I.L.C.S. § 5/3–5(a)(2): 2 years; Okla. Stat. tit. 22, § 152(c)(2): 12 years.
186 Me. Rev. Stat. Ann., tit. 15, § 3015-A(1); *Akehurst-Moore*, High Tech L. J. 2006, 235.

quit on the more serious charge, leaving the prosecutor and jury no lesser alternative on which to hang their hats. As was mentioned above, similar choices must be made during the plea negotiations in such cases.

Another area, which is tricky for practitioners, is the area of continuous offenses, which make it sometimes difficult to determine when the limitations period runs. Is a crime, such as conspiracy, a continuous crime, which allows its prosecution even after the statute might have run as to the target crime, or is it not continuous, such as when one is dealing with a single conspiracy between two people to commit just one crime?

It is also conceivable that much practical litigation could arise in relation to tolling of the statute in DNA cases, focusing on whether the police were duly diligent in trying to ascertain the identity of a rape suspect, or whether the DNA sample was properly preserved, or whether it is clearly the one attributable to the suspect.