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COMMENTS

CRIMINAL LAW: LIMITATION OF PROSECUTION---TIME

Limitation of criminal prosecution to a specified period of time after the commission or discovery of a crime is not, according to most commentators, a part of the common law.¹ The principle of setting a time limit for such prosecutions has been widely accepted, however, and Wyoming and South Carolina have long been the only states without criminal statutes of limitation.² The purpose of this Comment is to consider the origins and objectives of such statutes, their treatment by the courts, illustrative provisions of current statutes—both state and federal, their possible disadvantages as well as advantages, and constitutional considerations which may be involved. Information on these points should aid in a determination of whether or not it would be advisable for Wyoming to enact a criminal statute of limitations.

In 1803 Lord Ellenborough made the statement that there was no limitation at common law to a criminal prosecution by indictment.³ Blackstone's editors enlarged upon this by commenting that the crown was not precluded from preferring an indictment at any distance of time from the actual perpetration of the offense, unless some particular statute limited the time of prosecuting; and there was no general statute of limitations applicable to criminal proceedings.⁴ Statutes enacted in the first half of the sixteenth century,⁵ including one setting a thirty-day limitation period for prosecution of treasons committed by spoken words,⁶ are said to have abolished the maxim *nullum tempus occurrit regi* (no lapse of time bars the king) in the cases to which they applied.⁷ Other limitation statutes applicable to particular offenses have

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1. WHARTON, CRIMINAL PLEADING AND PRACTICE § 316, at 209 (8th ed. 1880); BISHOP, STATUTORY CRIMES § 257 (3d ed. 1901); *People v. Bailey*, 103 Misc. 366, 171 N.Y. Supp. 394, 395 (Sup. Ct. 1918). *Contra*, DANGEL, CRIMINAL LAW § 107 (1951).
 2. 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 179, at 417 n. 8 (Anderson ed. 1957).
 3. *Dover v. Maester*, 5 Esp. 92, 93 (1803).
 4. 4 BLACKSTONE, COMMENTARIES 301 n. (Christian, Chitty, Lee, Hovenden & Ryland ed. 1870).
 5. 7 Henry 8, c. 3; 31 Eliz. 1, 3. 5.
 6. 1 Edward 6, c. 12 § 19.
 7. 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW 525 (1924).

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since been passed in England, many of them during the twentieth century.⁸

Criminal statutes of limitation have found even greater acceptance in this country than in England, as shown by their enactment by Congress and forty-eight of the state legislatures, and by their applicability to a broad range of criminal offenses.⁹ Most of these statutes have been in effect for many years, and there has been no discernible general trend toward repealing them, extending the limitation periods they set, or limiting their application.

It appears that these statutes serve society's interest in the efficient administration of criminal law and in adjudications of guilt that are more likely to be just if based on relatively fresh and therefore reliable evidence. Such statutes encourage law enforcement agencies to concentrate on recent crimes, which offer a greater threat to society than those committed in the distant past. It seems self-evident that if a person committed a crime for which he can no longer be prosecuted because of a limitation statute, either he represents no further threat to society because he has committed no further crimes, or the threat he represents will be met by prosecution for his recent crimes.

It has been stated that the most important reason for statutes of limitation for criminal prosecutions is to protect the individual accused from the burden of defending himself against charges of long-completed misconduct.¹⁰ This burden becomes heavier with the passage of time, as witnesses cannot be traced and evidence needed for a defense is lost or destroyed. When these same difficulties face a prosecutor, he may elect not to proceed; but a defendant has no such choice and may be at an unfair disadvantage in rebutting the prosecution's proof.

Lack of a limitation statute will cause further unfairness if a prosecutor chooses to file a complaint on one count and withhold other charges on which he has sufficient evidence to

8. See 10 HALSBURY, LAWS OF ENGLAND 341 (3d. ed. 1955), for examples of these statutes.

9. See accompanying table.

10. Note, *The Statute of Limitations in Criminal Law: A Penetrable Bar to Prosecution*, 102 U. PA. L. REV. 630 (1954), quoted in *Commonwealth v. Howard*, 210 Pa. Super. 284, 232 A.2d 207, 210 (1967).

file. After trial and conviction on the first charge, such a prosecutor is in a position to prevent the defendant from appealing his conviction or from availing himself of some other right that is his by threatening the filing of the complaint or complaints which have been withheld. A statute limiting the period within which prosecution may be initiated would prevent such a tactic—a tactic which seems to raise a constitutional due process question by constituting a denial of “natural, inherent, fundamental principles of fairness.”¹¹

Criminal limitation statutes also play a part in providing the constitutional protection of the right to a speedy trial.¹² Alone they cannot assure the right, as they provide only for the commencement of prosecution within a stated time and do not control the time of trial; but applied in conjunction with the usual type of statute limiting the time for trial after prosecution has been initiated,¹³ the criminal limitation statute should aid in achieving the desired constitutional result.

To the extent that the administration of the criminal law is intended to rehabilitate the criminal, the limitation statutes appear to serve a public purpose as well as a private one by encouraging self-rehabilitation. The statutes will relieve the man who has made one undiscovered criminal error of the fear that his efforts at self-rehabilitation over a period of many years may be destroyed by prosecution for the crime committed so far in the past.

An arguable disadvantage of the criminal limitation statutes is that they may, in cases where they apply, prevent accomplishment of the atavistic retaliatory purposes of the criminal laws; but it is hard to believe that they present an added danger to society, for it seems unlikely that an habitual criminal will wait for the statute to run on one crime before committing another.

Although the legal writers have shown little interest in the criminal limitation statutes and their legislative history is scanty, the courts have not neglected to comment upon them. A plea of the statute has been universally classed as a plea in

11. *Betts v. Brady*, 316 U.S. 455, 464 (1941); WILLOUGHBY, CONSTITUTIONAL LAW 1681 (2d ed. 1929).

12. U.S. CONST. amend. VI; WYO. CONST. art. 1, § 10.

13. *See, e.g.*, WYO. STAT. §§ 7-234 and -235 (1957).

bar and not in abatement¹⁴ and one that raises a question going to the merits of the defendant's claim of right to an acquittal or discharge,¹⁵ although not to the question of his guilt or innocence.¹⁶ It has been held that prosecution within the statutory period is an essential element of an offense, and that the bar of the statute of limitations goes to the jurisdiction rather than merely to the remedy.¹⁷

It was long ago said, and much repeated since, that a criminal statute of limitations is a matter of legislative grace, not right;¹⁸ but it has also been said and often repeated that protection under the statute is a substantive right, not a mere procedural one.¹⁹ A state court recently held that these statutes are fundamental to our society and to the criminal process and that they impose a limitation upon the power of the sovereign, not a mere limitation upon a remedy as in a civil case.²⁰

There seems to be no question as to the validity of the criminal limitation statutes, for they have often been held constitutional even where the limitation period had been extended by the legislature after the commission of a particular crime.²¹ In *Commonwealth v. Duffy*,²² the court characterized the statutes as measures of public policy only and entirely subject to the will of the legislature, which might change or repeal them altogether,²³ and held that where the right to acquittal has not been absolutely acquired by completion of the period of limitation, that period is subject to enlargement or repeal without violating the constitutional prohibition against *ex post facto* laws. These statutes have been held subject to the rule of liberal construction in favor of the defendant,²⁴ like other criminal statutes.

Reference to the accompanying table will show that current state statutes have two types of provisions setting limi-

14. *United States v. Oppenheimer*, 242 U.S. 85, 88 (1916); *United States v. Barber*, 219 U.S. 72, 78 (1910).

15. *United States v. Barber*, *supra* note 14, at 78.

16. WHARTON *supra*, note 2, § 179, at 418.

17. *People v. Doctor*, 64 Cal. 608 (Ct. App. 1967).

18. *Commonwealth v. Duffy*, 96 Pa. 506, 514, 32 Am. Rep. 577 (1881).

19. *United States v. Mathues*, 27 F.2d 137 (E.D. Pa. 1928).

20. *Cunningham v. District Court of Tulsa County*, 432 P.2d 992, 997 (Ct. Crim. App. Okla. 1967).

21. *See, e.g., United States v. Vidal*, 155 F. Supp. 180 (D. P.R. 1957).

22. *Commonwealth v. Duffy*, *supra* note 18, at 514.

23. No state has repealed its criminal limitation statute.

24. *United States v. Udell*, 109 F. Supp. 96, 98 (D. Del. 1952).

tation periods for prosecution of criminal offenses: those which apply to particular offenses, and those which apply to "other felonies," "felonies," "misdemeanors," "felonies punishable by hard labor" etc., without naming the specific offense. Murder and capital crimes are the categories most often excepted from any period of statutory limitation of prosecution, along with arson, forgery and treason. The most common limitation period for felonies (or for "other felonies" where certain specific felonies are excepted from the operation of the limitation statute) is three years after the commission of the offense; the length of the limitation period for prosecution of felonies ranges from two to six years.

Limitation periods for the prosecution of misdemeanors range from one to six years, with fourteen states setting a period of one year and fourteen others a period of two years; only one state statute prescribes a period longer than three years. Crimes involving public officials, such as bribery, falsification of public records and embezzlement of public funds, are often made subject to prosecution for an exceptionally long time after their commission or discovery; some of the statutes except prosecution for these crimes from any time limitation at all. The longest limitation period provided in the statutes is ten years, this period being applicable to capital crimes and first-degree felonies in New Mexico, kidnapping and extortion in Michigan, and treason in Vermont.

Nearly all of the states have provided that the time during which the accused is absent from the state or is in the state under an assumed name or under concealment as a fugitive from justice does not count toward the limitation period. Thus as long as any of these circumstances continued, the statute could never run in favor of the accused.

Agreeing with forty-eight of the state legislatures on the desirability of setting a time limit for criminal prosecutions, the United States Congress has also enacted a limitation statute. Title 18 of the United States Code excepts capital offenses from any limitation period²⁵ but provides a five-year period for all other offenses,²⁶ except one year for criminal

25. 18 U.S.C. § 3281 (1964).

26. 18 U.S.C. §§ 3282-83 (1964).

contempt²⁷ and seduction on a United States vessel,²⁸ and ten years for violation of the naturalization²⁹ and passport laws.³⁰

This summary shows that most of the current statutes relate the length of the limitation period to the seriousness of the crime. In 1954 this approach was criticized as being motivated by the desire for retribution rather than for an effectuation of the proper aims of limitation statutes.³¹ That critic also suggested that:

[L]egislators, in determining a particular limitation for a particular crime, should base the statutory period for the crime primarily upon the length of time during which the facts constituting the elements of the crime can be accurately ascertained, bearing in mind the time needed to discover and investigate the crime as promptly as possible.³²

Perhaps the scientific investigations necessary to aid legislators in making their determinations upon the basis suggested have not been conducted. At any rate, the suggestion has brought no apparent response from the legislatures nor even from the writers in the legal periodicals.

The statement that criminal statutes of limitation "are essential in a system of criminal law which is designed to afford to individuals the utmost protection from unjust prosecution"³³ seems to have as much validity today as it did in 1954. It may have gained even greater validity since 1954 as a result of the many Supreme Court decisions aimed at protecting the rights of the individual in the context of the administration of the criminal law.³⁴ If the interests of the individual and of society as a whole are in conflict, they must always be

27. 118 U.S.C. § 3285 (1964).

28. 18 U.S.C. § 3286 (1964).

29. 18 U.S.C. §§ 1423-28 (1964).

30. 18 U.S.C. §§ 1541-44 (1964).

31. Note, *supra* note 10, at 636.

32. *Id.* at 637.

33. *Id.* at 651.

34. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

balanced against each other and care must be taken to assure that protection of the one does not seriously threaten the other. It does not appear that the individual interests sought to be protected by criminal statutes of limitation are to any significant degree in conflict with the interests of society.

The only possible conflict of interest would seem to be a conflict with society's interest in retaliation for criminal acts—for its own sake, and for its possible deterrent effect. An interest in retaliation for its own sake should surely be overbalanced by the concern for the individual which is central to our system of government. Even if the validity of the controversial but widely-held deterrence theory of criminal law is admitted *arguendo*, the criminal limitation statutes do not appear to have decreased the deterrent power of the penal statutes. If they had, surely there would have been a marked trend toward repealing the limitation statutes or increasing the limitation periods provided. There has been no such trend; experience in the forty-eight states which have had limitation statutes, in most cases for many years, has apparently convinced their legislatures that the statutes are desirable and should be retained. In addition, if statutes of limitation applicable to civil actions, where only money is ordinarily involved, are readily accepted, limitation statutes applicable to criminal proceedings, where a person's liberty is at stake, should be at least equally acceptable.

Unfortunately there has been little discussion of these statutes and the criteria to be applied in setting the limitation periods, which would ideally provide for "the assurance of a maximum degree of availability and reliability of evidence consonant with an adequate allowance of time for investigation and prosecution."³⁵ The current statutes are not the best that could be drafted. Nevertheless, until further scientific information about the factors affecting the availability and reliability of evidence and the time needed for investigation and prosecution becomes available, the statutes seem to be serving a useful purpose in protecting the interests of society and of the individual.

35. Note, *supra* note 10, at 651.

It is therefore suggested that the legislature be encouraged to enact a criminal statute of limitations for the State of Wyoming, with provisions similar to those adopted in the majority of the states.³⁶ Future attention should be given to amending the law by changing the limitation periods as relevant scientific information becomes available.

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36. *See* accompanying table.

APPENDIX A

LIMITATION PERIODS (IN YEARS) FOR CRIMINAL PROSECUTIONS

	CAPITAL CRIMES	MURDER	ARSON	FORGERY	COUNTERFEITING	CONVERSION OF PUBLIC FUNDS	(OTHER) FELONIES	MADE-MEANS	MINOR MISDEMEANORS	ADULTRY	FALSIFICATION OF PUBLIC RECORDS	ACCEPTANCE OF BRIBE BY PUBLIC OFFICIAL	KIDNAPPING	TREASON	RAPE	BURGLARY	ROBBERY	LARCENY	EXTORTION	SEDUCTION	GAMBLING	EMBEZZLEMENT
Alabama	0	0	0	0	0	6	3	1	1/6													
Alaska	0 ^a					0				3												
Arizona	0					0																
Arkansas	0					0	3	1														
California	0		0	0	0	3	1	1/6		0	0	6										
Colorado	5					5	1						0	5								
Connecticut	3	0				2	2							3								
Delaware	0					2	2															
Florida	0					2	2															
Georgia	7 ^b	0				4	2															
Hawaii	0	0 ^a				2	2						0	0	0	0	0	0	0			
Idaho	0					3	1															
Illinois	0 ^a	0	0			3	1 1/2		1/6				0	0								
Indiana	0	0	5			5	2	1/6					0	0						4	5	5
Iowa						3	3	1		1 1/2 ^c				1 1/2								
Kansas	0					2	2	1/6						0								
Kentucky						0	1	1/2														
Louisiana	0					6 ^d	2	1/2														
						and																
						4																
Maine	0 ^a					6	6							0								
Maryland							1															
Massachusetts	0					6															10	
Michigan	0					6															10	
Minnesota	0					3																
Mississippi	0 ^a	0	0	0	0	2									0	0	0	0				
Missouri	0 ^b					3	1															5

Montana	0 ^a	5	1				
Nebraska	0	0	0	3	1½	1	0
Nevada	0	4	4	3	1		4 4 4 3
New Hampshire	0	0	0	6	1		0 0 0 0
New Jersey	0			5			3
New Mexico	10 ^e			3 ^t	2	1	
				and			
				6			
New York	0	5	2	5	2	0	
North Carolina				2 ^g			2 ^k
North Dakota	0	3	2				
Ohio				3			
Oklahoma	0	3				7	
Oregon	0 ^a	3	2				
Pennsylvania	5	5	5	6 ^h	2	2	5 5 6
Rhode Island	0	0	0	3	3		
South Dakota	0			3 ⁱ	3	3	
				and			
				10			
Tennessee	0 ^b	2 ^l	1	and			
				4			
						0	
Texas	0	5	10	5	3	2	1 5 5 5 5 ^l
Utah	0			0	4	3	2
Vermont	0	0	0	6	3	3	6 6 6
Virginia ^u							5 ^m 2
Washington					8		
West Virginia ^o							8 ^m
Wisconsin	0				6	3	

^aManslaughter also. ^bAlso crimes punished by life imprisonment. ^cAll sexual crimes. ^d6 years for felonies punishable by sentences at hard labor; 4 years for other felonies. ^eAlso felonies in the first degree. ^f6 years for second-degree felonies; 3 years for third and fourth-degree felonies. ^gUnless malicious. ^hBut not more than 2 years after accused left office. ⁱ10 years after commission of the crime, but not more than 3 years after its discovery. ^j2 years for felonies punishable by sentences of 5 years or less; 4 years or less; 4 years for other felonies. ^kIf five dollars or less involved. ^lFelony theft. ^mPetit larceny. ⁿNo limitation on prosecution for desertion, 2 years for abortion. ^o3 years for perjury.

APPENDIX B

- Ala. Code tit. 15, §§ 219-26 (1958).
 Alaska Stat. § 11.40.020 (1962).
 Ariz. Rev. Stat. Ann. § 13-106 (Supp. May 1969).
 Ark. Stat. Ann. §§ 43-1601 to -1605 (1964 Repl.).
 Cal. Penal Code §§ 799-803.
 Colo. Rev. Stat. Ann. § 39-1-3 (1963).
 Conn. Gen. Stat. Ann. § 54-193 (1958).
 Del. Code Ann. tit. 11, §§ 2901-03 (1953).
 Fla. Stat. Ann. § 932.05 (1944).
 Ga. Code Ann. § 27-601 (1953).
 Hawaii Rev. Stat. §§ 707-1, -2 (1968).
 Idaho Code Ann. §§ 19-401, -404, -405 (1948); §§ 19-402, -403 (Supp. 1969).
 Ill. Stat. Ann. ch. 38, §§ 3-5 to -8 (1964).
 Ind. Stat. Ann. §§ 9-301 to -305 (1956 Repl.).
 Iowa Code Ann. §§ 752.1-6 (1950).
 Kan. Stat. Ann. §§ 62-501 to -505 (1964).
 Ky. Rev. Stat. § 431.090 (1962).
 La. Crim. Proc. Code arts. 578-82 (West 1967).
 Me. Rev. Stat. Ann. tit. 15, § 452 (1964).
 Md. Code Ann. art. 57, §§ 11, 12 (1968 Repl.).
 Mass. Ann. Laws ch. 277, § 63 (1968).
 Mich. Stat. Ann. § 28.964 (1954).
 Minn. Stat. Ann. § 628.26 (1947).
 Miss. Code Ann. § 2437 (1957).
 Mo. Stat. Ann. §§ 541.190-230 (1953).
 Mont. Rev. Codes Ann. §§ 94-5701 to -5706 (1947).
 Neb. Rev. Stat. § 29-110 (1964).
 Nev. Rev. Stat. §§ 171.080-100 (1967).
 N. H. Rev. Stat. Ann. § 603:1 (Supp. 1969).
 N. J. Stat. Ann. §§ 2A:159-1 to -4 (1953).
 N. M. Stat. Ann. § 40A-1-8 (1964 Repl.).
 N. Y. Crim. Proc. Code §§ 141-44a (McKinney 1958).
 N. C. Gen. Stat. Ann. § 15-1 (1965 Repl.).
 N. D. Cent. Code Ann. §§ 29-04-01 to -05 (1960).
 N. J. Stat. Ann. §§ 2A:159-1 to -4 (1953).
 Ohio Rev. Code Ann. § 1.18 (1964).
 Okla. Stat. Ann. tit. 22, §§ 151-53 (Supp. 1967).
 Ore. Rev. Stat. §§ 131.110-30 (1967).
 Pa. Stat. Ann. tit. 19, §§ 211-14 (1964).
 R. I. Gen. Laws Ann. § 12-12-17 (1956).
 S. D. Comp. Laws Ann. §§ 23-8-1 to -6 (1967).
 Tenn. Code Ann. §§ 40-201 to -204 (1955).
 Tex. Crim. Proc. Code Ann. arts. 12.01-05 (1966).
 Utah Code Ann. §§ 77-9-1 to -6 (1953).
 Vt. Stat. Ann. tit. 13, §§ 4501-06 (1958).
 Va. Code Ann. §§ 18.1-42, 19.1-8 (1950).
 Wash. Rev. Code Ann. §§ 9.79.110, 10.01.020 (1961).
 W. Va. Code Ann. § 61-11-9 (1966).
 Wis. Stat. Ann. § 939.74 (1958).