



1-1-1997

Puzzling Purposes of Statutes of Limitation, The

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The Puzzling Purposes of Statutes of Limitation*

Tyler T. Ochoa** and Andrew J. Wistrich***

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I. INTRODUCTION

One hundred years ago, Oliver Wendell Holmes, Jr. asked, "What is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"¹ A century later, we are still searching for a satisfactory answer to that question. The purpose of this Article is to press that inquiry further.

The law of limitation of actions is the set of legislatively and judicially created legal rules²—including the classification of claims, the duration of limitation periods, the applicable principles of accrual and tolling, and the like—that determine whether a claim is time-barred.³ With few exceptions,⁴ the policies on which limitation of actions is based rarely have been the object of serious study.⁵ This lack of attention is surprising. Statutes of limitation are an important feature of the legal landscape. Virtually every country has them.⁶ Their direct antecedents can be traced back for centuries,⁷ and some sorts of time limits have been enforced for thousands of years.⁸ Today, they are ubiquitous; California alone has thousands of them.⁹

The limitation system is the product of the interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely, on their sub-

1. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

2. We use the term "rule" in the broad sense to include not just true rules, but also standards, guidelines, and the like. See Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-62 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 959-68 (1995).

3. For convenience, we sometimes refer to this set of rules as the "limitation system." We prefer this term to the term "statute of limitations" because statutes are only one source of the rules governing limitation of actions.

4. See Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130 (1955); see also 1 CALVIN W. CORMAN, *LIMITATION OF ACTIONS* § 1.1, at 11-17 (1991).

5. See MODEL PENAL CODE § 1.06 cmt. 1, at 86 (1985) (noting that "[l]ittle attention has been directed toward the evaluation of the objectives of limitation provisions" in the criminal context); Holmes, *supra* note 1, at 476 (describing statutes of limitation and prescription as "rules which, so far as I know, never have been explained or theorized about in any adequate way").

6. See *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("Statutes of limitation . . . are found and approved in all systems of enlightened jurisprudence.").

7. See 4 Hen. 7, ch. 24 (1487) (Eng.) (enacting the first English statute of limitation for real property actions). Later versions grouped real property actions and personal actions into categories depending on the character of the right sued upon. See *The Act of Limitation with a Proviso*, 32 Hen. 8, ch. 2 (1540) (Eng.); 21 Jam. I, ch. 16 (1623) (Eng.). The 1623 statute provided the model upon which most American statutes of limitation are based. See *Wood*, 101 U.S. at 139 ("[T]he English statute of limitations of the 21st of James I, . . . was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country.").

8. See, e.g., WILLIAM D. FERGUSON, *THE STATUTE OF LIMITATIONS SAVINGS STATUTES* 7 (1978) ("Statutes of limitation relating to real property may be traced to ancient Greece or beyond."); RUDOLF SOHM, *THE INSTITUTES HISTORY AND SYSTEM OF ROMAN PRIVATE LAW* 283 (Ledlie trans., 3d ed. 1970) ("Emperors Honorius and Theodosios . . . moved by obvious considerations of convenience, enacted in 424 A.D. that all actions should be barred within a certain period.").

9. See generally *Special Project: California Statutes of Limitation*, 25 SW. U. L. REV. 744 (1995) (collecting over 32,000 statutes imposing time limits affecting procedural and substantive rights, many of which are true statutes of limitations or analogous thereto).

stantive merits. A thorough understanding of both sets of policies is valuable for all participants in the legal system. When uncertainty exists about which limitation rule is applicable or when the applicable rule is unclear, advocates who want to make the strongest possible argument ought to have both sets of policies in mind. So, too, should judges who are called upon to apply, and in some instances to create, the rules of the limitation system in deciding particular cases. Finally, legislators designing or modifying a limitation system need to consider these policies to ensure that their legislative choices are sensible ones. This Article describes the two sets of policies and explores their implications.¹⁰

II. EVOLUTION OF JUDICIAL EXPRESSION

The statutes constituting the framework of California's limitation system were initially enacted in 1850¹¹ and were codified in the Code of Civil Procedure in 1872.¹² The limited legislative history¹³ sheds little light on the legislature's views regarding the purposes of limitation of actions in general.¹⁴ By contrast, the narrow purposes of particular limitation statutes, especially those enacted during recent decades, are more easily discerned.¹⁵ Given the absence of a clear statement of legislative intent concerning statutes of limitation in general, and the important role courts play in designing the rules of the limitation system, it is perhaps not surprising that the judiciary has attempted to fill the gap.

10. For convenience, we will refer to allegedly injured parties or potential plaintiffs simply as "plaintiffs" or "victims," and to alleged wrongdoers or potential defendants simply as "defendants" or "wrongdoers." Similarly, we sometimes will use the term "punishment" when "imposition of civil liability" would technically be more accurate.

11. See 1850 Cal. Stat. ch. 127, at 343-46. Although we have concentrated our attention on the law of California, this should not limit the generality of our analysis. While there are some differences, the basic nature and features of the law of limitation of actions vary little from state to state. Moreover, decisions of the United States Supreme Court have influenced the summaries of the policies of limitation of actions throughout the nation, and we have incorporated these decisions into our analysis.

12. See generally William Wirt Blume, *Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History*, 17 HASTINGS L.J. 701 (1966).

13. The original California statute of limitations was based on the Field Code. See *Bollinger v. National Fire Ins. Co.*, 25 Cal. 2d 399, 408, 154 P.2d 399, 404 (1944). The Field Code derived its approach to the subject of limitation of actions from the English Limitation Act of 1623. See Mary E. Miller, *Barbed Wire in the Borderland: Statute of Limitation Choices for Wrongful Discharge Claims*, 23 SAN DIEGO L. REV. 833, 835 n.7 (1986) ("The amended New York Code of 1849 (Field Code) substituted code definitions for the common law forms of action specified in the former statute of limitations and derived from the Limitations Act [of 1623].").

14. See Miller, *supra* note 13, at 835 ("Regarding both English law and the early American statutes, the intent of the enacting legislatures is not readily apparent."). Indeed, one scholar has suggested that attempts to discern the purpose of the English Limitations Act of 1623, from which most modern American limitation systems are derived, are futile. Patrick J. Kelley, *Statutes of Limitations in the Era of Compensation Systems: Workmen's Compensation Limitations Provisions for Accidental Injury Claims*, 1974 WASH. U. L.Q. 541, 547 n.23.

15. See, e.g., Michael F. Boyle & Leslie M. Hastings, *California Code of Civil Procedure Sections 337.1 and 337.15: Defective Construction Defect Statutes*, 21 PAC. L.J. 235, 243-49 (1990).

Courts have summarized the policies favoring limitation of actions in a variety of ways. One of the earliest judicial summaries to gain popularity in California was the following:

Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose, by giving security and stability to human affairs; important public policy lies at their foundation. They stimulate . . . activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar.¹⁶

Later, a standard summary was:

The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. . . . These statutes are declared to be 'among the most beneficial to be found in our books.' 'They rest upon sound policy, and tend to the peace and welfare of society;' . . . The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.¹⁷

Another frequently-quoted summary, which has proved influential, is:

Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and the

16. *Shain v. Sresovich*, 104 Cal. 402, 406, 38 P. 51, 52-53 (1894) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); *accord Lilly-Brckett Co. v. Sonnemann*, 157 Cal. 192, 197, 106 P. 715, 717 (1910); *Nichols v. Randall*, 136 Cal. 426, 432, 69 P. 26, 28 (1902).

17. *Pashley v. Pacific Elec. Co.*, 25 Cal. 2d 226, 228-29, 153 P.2d 325, 326 (1944) (quoting 1 HORACE G. WOOD, *A TREATISE ON THE LIMITATION OF ACTIONS* 8-9 (4th ed. 1916)); *accord Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 169, 180 P.2d 900, 903 (1947).

right to be free of stale claims in time comes to prevail over the right to prosecute them.¹⁸

More recently, the California Supreme Court summarized the purposes of limitation of actions as follows:

The fundamental purpose of the statute [of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims.¹⁹

At least four aspects of these judicial summaries of the policies promoted by limitation of actions are noteworthy. First, although there is some agreement about what the purposes of the limitation system are, there is considerable variation in the policies courts mention or emphasize. This variance has two dimensions: substantive and temporal.

The policies selected by a court for emphasis in an opinion are influenced, in part, by the result the court intends to reach and by the facts which support that result.²⁰ For example, cases that favor plaintiffs often stress the purpose of statutes of limitation is to encourage the claimant to act diligently and to refrain from intentionally delaying the filing of suit after notice of a claim has been received, and find the delay in filing was not the result of the plaintiff's conduct.²¹ Similarly, cases that favor defendants commonly emphasize the value of repose and the importance of minimizing the deterioration of evidence.²²

18. *Wood v. Elling Corp.*, 20 Cal. 3d 353, 362, 572 P.2d 755, 760, 142 Cal. Rptr. 696, 701 (1977) (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348 (1944)); *accord* *Lackner v. LaCroix*, 25 Cal. 3d 747, 751, 602 P.2d 393, 395, 159 Cal. Rptr. 693, 695 (1979).

19. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1112, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662-63 (1988) (citing *Davies v. Krasna*, 14 Cal. 3d 502, 512, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975)).

20. *See* LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 2-3 (1993) (noting that judicial opinions are, in part, attempts to legitimize a result and to persuade others of its appropriateness, rather than merely to explain the basis for the decision reached).

21. *See, e.g., Pashley*, 25 Cal. 2d at 228-29, 153 P.2d at 326 (noting that statutes of limitation are "intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof"). Of course, if the court believes the plaintiff has not been diligent, it may cite this purpose as a reason for denying relief. *See, e.g., Jolly*, 44 Cal. 3d at 1112, 751 P.2d at 928, 245 Cal. Rptr. at 663 ("A second policy underlying the statute is to require plaintiffs to diligently pursue their claims . . . and those failing to act with reasonable dispatch will be barred.").

22. *See, e.g., Wood*, 20 Cal. 3d at 362, 572 P.2d at 760, 142 Cal. Rptr. at 701 (declining to apply the doctrine of equitable tolling because "the right to be free of stale claims in time comes to prevail over the right to prosecute them"). A court, however, may also cite this purpose if it believes the defendant is not entitled to repose because of his or her conduct. *See, e.g., Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 787, 598 P.2d 45, 53, 157 Cal. Rptr. 392, 400 (1979) (recognizing that "[s]tatutes of limitation have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims," but concluding that the defendants were not entitled to repose because their conduct was continuing).

The summaries of policies contained in judicial opinions also have varied over time. In general, as the rules regarding limitation of actions have shifted to reflect a preference for discovery-based accrual rather than event-based accrual,²³ the summaries of the purposes of limitation of actions favored by the courts have undergone a parallel migration. The judicial policy summaries currently in vogue place relatively greater emphasis on the plaintiff's knowledge of the claim and the lack of intentional delay, and relatively less emphasis on the value of repose and other adverse consequences of deferred filing.²⁴ This shift has resulted from an increasing concern with what the California Supreme Court has called "the practical needs of prospective plaintiffs."²⁵

A second characteristic of judicial summaries of policies supporting limitation of actions is that they are underinclusive. There are many more policies promoted by a limitation system than are routinely acknowledged by the courts. In particular, at the present time, there may be a judicial tendency to underestimate the number and importance of the policies promoted by limitation of actions. This means, among other things, that there is no comprehensive judicial summary of the policies promoted by limitation of actions that may be consulted to assist the courts in resolving difficult cases.

A third feature of judicial summaries of limitation of action policies is that they use vague and overlapping terms. For example, courts frequently say that one of the policies is to avoid the litigation of "stale" claims.²⁶ In this context, "stale" could mean any of the following: (a) evidence relevant to deciding the claim has deteriorated; (b) prevailing legal and cultural standards have changed since the underlying events occurred; (c) the defendant has altered his or her position and would be prejudiced by assertion of the claim; or (d) a very long period of time has elapsed between the underlying events and the filing of suit. Concepts such as "staleness" need to be dissected if they are to be fully understood, and if the relative force of the policies supporting and opposing limitation of actions is to be assessed accurately.

23. See generally Stephen V. O'Neal, Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CAL. L. REV. 106 (1980). Event-based accrual measures the limitation period from the occurrence of a specific event (either the allegedly wrongful conduct or the resulting injury), regardless of the plaintiff's knowledge, whereas discovery-based accrual measures the limitation period from the time the plaintiff reasonably could have discovered the injury and its cause. See generally CORMAN, *supra* note 4, § 6.1, at 370; Jolly, 44 Cal. 3d at 1109, 751 P.2d at 926, 245 Cal. Rptr. at 661.

24. See Jolly, 44 Cal. 3d at 1112, 751 P.2d at 928, 245 Cal. Rptr. at 662-63 (acknowledging that "the fundamental purpose of the statute is to give defendants reasonable repose," but immediately adding that "[a] second policy underlying the statute is to require plaintiffs to diligently pursue their claims"); see also *Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.*, 39 Cal. 3d 57, 62, 702 P.2d 197, 200, 216 Cal. Rptr. 115, 118 (1985) ("The purpose of any limitation statute is to require 'diligent prosecution of known claims . . .'" (emphasis added)).

25. *Davies*, 14 Cal. 3d at 512, 535 P.2d at 1168, 121 Cal. Rptr. at 712.

26. See, e.g., *Wyatt*, 24 Cal. 3d at 787, 598 P.2d at 53, 157 Cal. Rptr. at 400; *Pashley*, 25 Cal. 2d at 228-29, 153 P.2d at 326.

Finally, judicial summaries of the purposes of limitation of actions are not explicitly based upon any substantive analysis of what role, if any, limitation of actions does or should play in the legal system. This is hardly surprising because courts are ill-suited for such a task. Courts are masters of the microscope, not the telescope or the wide-angle lens. They focus, in-depth, on one case at a time. The nature of adjudication causes them to give greater emphasis to short-term effects than to long-term consequences, and institutional constraints make it difficult for courts to transcend the limits on their perspective.²⁷ In addition, the role played by the courts in designing the limitation system is, at least as a matter of theory, less important than and subordinate to the role played by the legislature.²⁸ As a consequence, however, courts decide close cases and establish some of the rules comprising the limitation system without the benefit of an adequate theoretical basis for doing so. This might not be a serious failing if the legislature thoroughly reassessed the role of the limitation system on a periodic basis. There is no indication, however, that it does.²⁹ Instead, legislative modification of the limitation system in California has largely been limited to occasional and highly selective tinkering, while the basic structure and content of the principal statutes of limitation have remained remarkably stable.³⁰

Because of these characteristics of judicial summaries, it is worthwhile to develop a more comprehensive and balanced description of the policies favoring and disfavoring limitation of actions. Such a description should inform critical thinking about each aspect of the limitation system.

27. See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 33-56 (1977).

28. See *Valley Circle Estates v. VTN Consol., Inc.*, 33 Cal. 3d 604, 615, 659 P.2d 1160, 1167, 189 Cal. Rptr. 871, 878 (1983) ("Statutes of limitation are products of legislative authority and control."). Whether this theory reflects actual practice, however, is questionable. Upon closer examination, the supposedly interstitial role of the courts in developing the rules of the limitation system turns out to be more substantial than classical theory regarding the relative roles of the judicial and legislative branches suggests. See, e.g., *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 192, 491 P.2d 421, 431, 98 Cal. Rptr. 837, 847 (1971) (asserting that "[l]egislative silence . . . may indicate that the Legislature has chosen to defer to judicial experience" in formulating rules of accrual); *Bollinger v. National Fire Ins. Co.*, 25 Cal. 2d 399, 410, 154 P.2d 399, 405 (1944) ("In any event this court is not powerless to formulate rules of procedure where justice demands it.").

29. See *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments*] ("So firmly have statutes of limitations become imbedded in our law in the course of centuries that legislatures seldom reconsider them in the light of the various functions that they actually perform . . .").

30. See *Miller*, *supra* note 13, at 837 ("The California scheme remains largely unchanged from that enacted by the first state legislature in 1850 . . ."). As the California Legislature recently acknowledged with respect to the subject of criminal statutes of limitation:

It is the finding of the Legislature that since its enactment in 1872, California's basic three-year statute of limitations for felonies has been subjected to piecemeal amendment, with no comprehensive examination of the underlying rationale for the period of limitations, nor its continued suitability as applied to specific crimes or categories of crimes.

1981 Cal. Stat. ch. 909, sec. 3, at 3443 (enacting CAL. PENAL CODE § 800).

III. POLICIES FAVORING LIMITATION OF ACTIONS

A. Promote Repose

It is often said that the principal purpose of limiting the time within which actions may be filed is to promote repose.³¹ It is seldom explained, however, what the term “repose” means. In the context of limitation of actions, “repose” includes at least four distinct but overlapping concepts: (a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims. These four aspects are so tightly intertwined that courts have seldom attempted to separate them. Since some of the aspects of repose are more problematic than others, however, it makes sense to consider them separately.

1. Allow Peace of Mind

One aspect of repose is peace of mind.³² The concept is that at some point the slate should be wiped clean, and wrongdoers—or those who are merely uncertain about whether they have committed a wrong—should be relieved of the fear that they will be called to account for past misconduct after some definite period of time has elapsed. The rationale is that it is unfair to subject an individual to the threat of being sued indefinitely.³³

The theme of promoting peace of mind through limitation of actions can be traced back hundreds of years, and has its roots in the concept of amnesty.³⁴ It draws

31. See, e.g., *Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 935, 873 P.2d 613, 618, 30 Cal. Rptr. 2d 440, 445 (1994) (“[T]he primary interest served by statutes of limitations is that of repose.”); *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662-63 (1988) (“[T]he fundamental purpose of the statute [of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims.”); *Wyatt*, 24 Cal. 3d at 787, 598 P.2d at 53, 157 Cal. Rptr. at 400 (“[S]tatutes of limitation have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims . . .”).

32. See 13 OXFORD ENGLISH DICTIONARY 653 (2d ed. 1989) (defining “repose” as, inter alia, “relief or respite from . . . trouble or excitement,” “[a] state of quiet or peaceful inaction or of freedom from disturbing influences,” and “peace of mind”); see also WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1926 (1986) (defining “repose” as “freedom from something that disturbs or excites: calm, peace, tranquility”).

33. See *David A. v. Superior Court (Jane D.)*, 20 Cal. App. 4th 281, 285, 24 Cal. Rptr. 2d 537, 540 (1993) (“[A] statute of limitations grants prospective defendants relief from the burden of indefinite exposure to stale claims.”).

34. See BLACK’S LAW DICTIONARY 82 (6th ed. 1990) (defining “amnesty” as “[a] sovereign act of forgiveness for past acts, granted by a government to all persons (or to certain classes of persons) who have been guilty of crime or delict”). Some early statutes of limitation concerning real property claims prohibited suit on claims arising before a fixed date, usually 20 or 30 years earlier. Often the cutoff date was linked to an important historical event heralding the beginning of a new era, such as the transfer of power from one monarch to another. See, e.g., 3 Edw. 1, ch. 39 (1329) (Eng.). See generally HENRY THOMAS BANNING, A CONCISE TREATISE ON THE STATUTE LAW OF LIMITATION OF ACTIONS 2 (London, Steven & Haynes 2d ed. 1892); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 81 (Cambridge, Mass. The University Press 2d ed.

support from important themes in Western culture,³⁵ and from Christianity in particular,³⁶ such as forgiveness and faith in the ability of people to reform. It is believed that such an approach encourages reform by wrongdoers, and enables those who have changed their ways for the better to remain secure in the knowledge the new lives they have worked hard to create will not be forfeited on account of past transgressions.³⁷

The value of peace of mind to the potential defendant depends upon several factors, including his or her: (a) awareness of the existence of a possible claim; (b) assessment of the merits of the claim; (c) perception of the likelihood that the claim will be filed; (d) prediction of the magnitude of an adverse outcome; (e) tolerance for risk; and (f) susceptibility to feelings of remorse. A person who is unaware that he or she has committed a potential wrong will neither worry about being sued nor worry about losing if he or she is sued. Similarly, a person who is aware that a potential claim exists, but who is confident that he or she is innocent and will easily defeat the claim, has only the burden of potential litigation to fear, rather than the possibility of an adverse judgment. Thus, the benefits of peace of mind are perhaps most valuable for the person who is highly risk-averse, who believes himself or herself to be guilty, or who is unsure of his or her guilt.

In assessing the validity and weight of this purpose, therefore, it is necessary to ask how much value should be placed on the desire of wrongdoers, or of persons who are uncertain whether they are wrongdoers, for freedom from worry about being called to account for past misdeeds. Currently, society appears to place relatively little value on such considerations. For some, allowing peace of mind for the guilty, or possibly guilty, is simply to indulge their social irresponsibility.³⁸ On this view,

1898).

35. For example, see VICTOR HUGO, *LES MISERABLES* (1862), in which the protagonist, Jean Valjean, is imprisoned for stealing a loaf of bread. Valjean escapes from prison and attempts to steal two silver candlesticks from a bishop, who forgives him. Transformed by the bishop's kindness, Valjean becomes an honest and respected citizen, but he cannot achieve peace of mind because of the continuous pursuit of the relentless Inspector Javert. *Id.*

The anxiety caused by being subjected to a continuous threat is also illustrated by the story of Damocles, who was seated at a banquet with a sword suspended over his head by a single hair. See 4 OXFORD ENGLISH DICTIONARY, *supra* note 32, at 231 (also defining the phrase "Sword of Damocles" as "an imminent danger, which may at any moment descend upon one").

36. See *Ephesians* 4:31-32 ("Let all bitterness, and wrath, and anger, and clamor, and evil speaking, be put away from you, with all malice: And be ye kind one to another, tenderhearted, forgiving one another, even as God for Christ's sake hath forgiven you."); see also *Matthew* 18:21-35 ("Lord, how often shall my brother sin against me, and I forgive him? As many as seven times?" Jesus said to him, 'I do not say to you seven times, but seventy times seven.'").

37. But see Holmes, *supra* note 1, at 476 ("[W]hy is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation."). Holmes answered his own rhetorical question by pointing out that it is precisely because the potential defendant's expectation of repose increases over time that the importance of protecting those settled expectations also increases. See *infra* Part III.A.2. (discussing the policy of avoiding disruption of settled expectations).

38. See, e.g., Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2466 (1994) ("Thieves deserve no repose from the rightful owner's claim.").

the cost of undercompensating victims and underdetering wrongdoers by a strict application of the statute of limitations is too high.

Obviously, enforcing limitation of actions at all risks some undercompensation of victims. It is questionable, however, whether preventing peace of mind is an effective deterrent to wrongdoing. To start with, if a person is undeterred by the risk of ruinous civil liability, sometimes accompanied by harsh criminal penalties, it is hardly likely that the marginal increment of deterrence added by a longer limitation period would make a discernible difference. Moreover, the worst of wrongdoers who commit the most egregious and offensive wrongs are probably the least risk-averse and probably feel the least guilt or remorse. They will be the least troubled by the lingering possibility that they may be apprehended, publicly disgraced, or stripped of any ill-gotten gains. It is the negligent or unintentional wrongdoer, who accepts more completely the mores of the community, who may be expected to suffer most greatly under the self-inflicted lash of conscience and fear of public reproof. The effect of long limitation periods, then, may be to impose most of the burden of denial of peace of mind upon the least culpable offenders.

Preventing peace of mind also does not adequately distinguish between the innocent and the guilty. While some may benefit more than others from the promotion of peace of mind, almost everyone benefits to some degree. Every person, whether innocent or not, is a potential defendant. No one is immune from suit, ill-founded though the claims may be. Even the most confident or the most righteous defendant may find litigating an unfounded claim distracting, time-consuming and expensive;³⁹ and for the ordinary individual, the financial and emotional burden of potential litigation cannot be underestimated. In addition, our system of justice is sufficiently imperfect that even the innocent sometimes have reason to fear an adverse outcome. Thus, promoting peace of mind benefits all members of society, including the innocent and the risk-averse, not just those who actually have committed a legal wrong.

The class of those benefitting from peace of mind is not limited to potential defendants. Witnesses also may have their peace of mind disrupted by long-outstanding claims. Those who have witnessed an occurrence involving potential wrongdoing are faced with the possibility that they may be called to testify. For some, the prospect of testifying causes only minor annoyance; for others, it is anticipated with great dread. Relatively few people, and almost none who have testified previously, relish the thought.

Does the purpose of promoting "peace of mind" apply to corporations or other entities, as well as to individuals? Certainly corporations themselves cannot obtain "peace of mind" in any ordinary sense of that term. Although a corporation or other business entity may obtain advantages from the limitation of actions against it,

39. See *General Motors Corp. v. Superior Court (Maraska)*, 65 Cal. 2d 88, 91, 416 P.2d 492, 494, 52 Cal. Rptr. 460, 462 (1976) (recognizing that "statutes [of limitation] also protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time").

psychological tranquility is not among them. A legal entity, however, is in part simply a convenient way of referring to those persons that comprise it, such as its shareholders, managers and employees.⁴⁰ Understood in this way, limitation of actions provides the employees and managers of corporations and other business entities with peace of mind. This benefit should not be lightly disregarded. Even if a corporation (or its insurer) ultimately will be able to pay the judgment, the manager or employee whose act or omission is at issue may find the threat of corporate liability nearly as worrisome as the risk of personal liability.

There are limits, however, to the extent to which peace of mind may be attained through a limitation system. First, the limitation bar can only prevent a suit from being won, not from being filed. As presently constituted, the limitation system affords a possible defense to a claim, but it does not grant immunity from the assertion of a claim. Moreover, it is likely that even a defendant with a meritorious limitation of actions defense will be required to litigate that issue along with the merits of the plaintiff's claim during pretrial proceedings, and perhaps even at trial. On the other hand, although a statute of limitations cannot prevent the assertion of a claim, it can, and no doubt often does, discourage some plaintiffs from filing claims after the limitation period has expired. Its effectiveness in doing so depends on how strictly the limitation period is applied: if there are relatively few exceptions, and they are difficult to satisfy, all but the most tenacious or most seriously wronged litigants will be deterred; but if there are many exceptions, and they are relatively easy to establish, many more litigants will be tempted to sue despite the expiration of the limitation period.

Second, a defendant cannot attain true repose until all possible claims by all possible claimants arising from an event are barred. This may require decades to occur, because most limitation periods can be extended by discovery-based accrual or by one of several tolling doctrines. Taken together, delayed accrual and tolling may prolong the life of a claim indefinitely, and in most cases there is no absolute limit on the duration of a limitation period. In recent years, however, the California Legislature has responded to the possibility of indefinite tolling by enacting a few so-called "statutes of repose." The effect of such statutes is to subject certain actions to two limitation periods: a shorter period measured from discovery, which may be tolled; and a longer period measured from the occurrence of an event, which either cannot be tolled, or which can be tolled only for limited reasons.⁴¹ As the name

40. Cf. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 4 (1986) (noting that "[bankruptcy] law historically has . . . allowed for some sort of financial fresh start for individuals" rather than for corporations, but that "[w]hen the unit involved is a corporation, the 'debtor' is always shorthand terminology for something else—shareholders, managers, workers or whatever—and we should realize that this something else is what we are talking about").

41. See, e.g., CAL. CIV. PROC. CODE § 337.15 (West 1982) (requiring an action based upon a latent construction defect to be commenced within 10 years of the substantial completion of the development or improvement); *id.* § 340.5 (West 1982) (requiring a medical malpractice action to be commenced "within three years after the date of injury or one year after the plaintiff discovers . . . the injury, whichever occurs first"); *id.* §

implies, such statutes provide relatively greater repose than ordinary statutes of limitation, but their effectiveness in doing so depends on the number of exceptions that are permitted, and the ease with which those exceptions may be established.

2. Avoid Disrupting Settled Expectations

A second aspect of repose is respect for expectations that have arisen over time.⁴² Regardless of how the status quo was established, human beings eventually come to accept it, to rely upon it, and to order their affairs in accordance with it.⁴³ A person may have obtained an asset mistakenly, or even wrongly, but as the years pass he or she makes investments and other decisions based on the assumption that he or she will continue to own it.⁴⁴ At some point, the psychological—and perhaps even moral—balance begins to tip in favor of the defendant.⁴⁵ As Oliver Wendell Holmes, Jr., explained:

The foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. . . . A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.⁴⁶

340.6 (West 1982) (requiring legal malpractice actions to be commenced “within one year after the plaintiff discovers . . . the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first”).

42. Cf. 2 SUTHERLAND ON STATUTORY CONSTRUCTION § 41.05 (4th ed. 1992) (“One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated.”).

43. There are, of course, limits to the force of this principle. For example, when the wrong is great or is inflicted maliciously, a new state of affairs may never be accepted as the status quo by those who are disadvantaged by it. Cf. CAL. PENAL CODE § 799 (West Supp. 1997) (stating that criminal prosecution for murder may be commenced at any time).

44. Obviously, this principle carries relatively greater force when the defendant is an unintentional, rather than an intentional, wrongdoer. This distinction helps explain, for example, why the cause of action for fraud is subject to the discovery rule of accrual and why courts have consistently recognized that fraudulent concealment tolls the statute. See generally CAL. CIV. PROC. CODE § 338(d) (West 1982); John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933).

45. See Patrick J. Kelley, *The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience*, 24 WAYNE L. REV. 1641, 1644 (1978). Kelley stated:

Ordinarily, one wronged by another’s conduct will seek legal redress fairly soon after the injury. Because of this common pattern of behavior the accused wrongdoer may reasonably expect that he will not be sued long after the event. He may then argue that a long-delayed suit is a wrong *to him*, regardless of its substantive merits.

Id.; see also *id.* at 1645 (“The claimant’s inaction has lulled the defendant into a false sense of security. A long-delayed suit dashes the expectations raised by society and by the claimant’s own conduct. The lawsuit is an unfair surprise.”).

46. Holmes, *supra* note 1, at 477.

This passage suggests a different way of looking at limitation of actions: that rights are gained by the defendant, rather than lost by the claimant, because of the passage of time.⁴⁷ Under this view, at some point the parties will be viewed as competitors for an asset instead of victim and wrongdoer. The defendant will be regarded as possessing a legitimate interest in the maintenance of the current status quo, and the injury to the plaintiff will be balanced against the injury that the defendant would suffer if the claim were permitted to proceed.

One of the purposes of a limitation system is to protect this interest in maintaining a status quo that has become entrenched because of the passage of time, rather than always leaving open the possibility of returning to an earlier status quo.⁴⁸ This purpose rests on the recognition that it may be more unjust to permit an old claim to be revived than it would be to extinguish it.⁴⁹

California courts have alluded to this policy as one of the justifications for limitation of actions. As the California Supreme Court has stated: "Limitations statutes afford repose by giving security and stability to human affairs."⁵⁰ Similarly, the court has mentioned avoiding "surprise" as among the reasons why old claims

47. Holmes's view is best illustrated by the doctrine of adverse possession, which provides that occupancy of land for the period of time prescribed by the applicable statute of limitation is sufficient to confer title to the land on the occupant. *See, e.g.*, CAL. CIV. CODE § 1007 (West 1982).

48. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("[T]here comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely . . . to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.").

49. *See* JEREMY S. WILLIAMS, *LIMITATION OF ACTIONS IN CANADA* 4 (1972) ("[A]fter some time span, allowing a claim to be brought would create a fresh injury rather than redress the old injury."). This principle has been acknowledged for centuries. *See, e.g.*, *A'Court v. Cross*, 130 Eng. Rep. 540, 541 (K.B. 1825) ("Long dormant claims have often more of cruelty than of justice in them."). One court noted:

The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith of which, the plans in life, habits and experiences of himself and his family may have been . . . unalterably formed and established.

Cholmondeley v. Clinton, 37 Eng. Rep. 527, 577 (K.B. 1820).

50. *Gutierrez v. Mofid*, 39 Cal. 3d 892, 899, 705 P.2d 886, 890, 218 Cal. Rptr. 313, 317 (1985); *accord* *Valley Circle Estates v. VTN Consol., Inc.*, 33 Cal. 3d 604, 615, 659 P.2d 1160, 1167, 189 Cal. Rptr. 871, 878 (1983). This expression of the principle originated in *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and was first cited by the California Supreme Court in *Shain v. Sresovich*, 104 Cal. 402, 406, 38 P. 51, 52-53 (1894).

should be barred,⁵¹ and has expressed the notion that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."⁵²

3. *Reduce Uncertainty*

A third aspect of repose is the reduction of uncertainty.⁵³ One of the major costs associated with the passage of time is uncertainty.⁵⁴ It is widely believed that most people are risk-averse, and that as a consequence, uncertainty creates for them opportunity costs that greater certainty could reduce.⁵⁵ Regardless of the merits of the plaintiff's claim, it may be contrary to the interests of society as a whole to discourage even culpable defendants from allocating their resources optimally for long periods of time.⁵⁶ As the California Supreme Court has acknowledged, "the subsidiary aim of the statute of limitations [is] promptly to resolve disputes in order that commercial and other activities can continue unencumbered by the threat of litigation."⁵⁷

The opportunity costs of uncertainty, though hidden, are real. Unasserted potential claims may prevent or hinder prospective defendants from engaging in business transactions, such as financings or mergers, until the risk of liability has been resolved. Such uncertainty also may limit a potential defendant's ability to allocate resources most efficiently. Threatened claims or contingent liabilities may inhibit investment in new ventures, even if the claims are not presently the subject of

51. See *Wood v. Elling Corp.*, 20 Cal. 3d 353, 362, 572 P.2d 755, 760, 142 Cal. Rptr. 696, 701 (1977) ("Statutes of limitation . . . are designed to promote justice by *preventing surprises* through the revival of claims that have been allowed to slumber until evidence has been lost . . .") (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)) (emphasis added); see also *Pashley v. Pacific Elec. Co.*, 25 Cal. 2d 226, 229, 153 P.2d 325, 326 (1944) ("The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.") (quoting 1 *WOOD*, *supra* note 17, at 8-9); *California Sav. & Loan Soc'y v. Culver*, 127 Cal. 107, 110, 59 P. 292, 293 (1899) ("Statutes of limitation are intended to prevent stale claims from springing up after the lapse of long periods of time, to the surprise of parties or their representatives . . .").

52. *Wood*, 20 Cal. 3d at 362, 572 P.2d at 760, 142 Cal. Rptr. at 701 (quoting *Order of R.R. Telegraphers*, 321 U.S. at 348-49); accord *Addison v. State*, 21 Cal. 3d 313, 317, 578 P.2d 941, 943, 146 Cal. Rptr. 224, 226 (1978).

53. See, e.g., *Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.*, 39 Cal. 3d 57, 62, 702 P.2d 197, 200, 216 Cal. Rptr. 115, 118 (1985) ("The purpose of any limitations statute is to require 'diligent prosecution of known claims, thereby providing necessary finality and predictability in legal affairs . . .'"); 1 CALVIN W. CORMAN, *LIMITATION OF ACTIONS* § 1.1, at 16 (1991) ("Certainty and finality in the administration of affairs is promoted.") (quoting *Kaiser Found. Hosp.*, 39 Cal. 3d at 62, 702 P.2d at 200, 216 Cal. Rptr. at 118).

54. See Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667, 668 (1986) [hereinafter Epstein, *Temporal Dimension in Property*].

55. *Id.*

56. *Id.* at 672 ("A sound system of rights resolves [disputes] early in the process to reduce the legal uncertainty in subsequent decisions on investment and consumption.").

57. *Elkins v. Derby*, 12 Cal. 3d 410, 417 n.4, 525 P.2d 81, 86 n.4, 115 Cal. Rptr. 641, 646 n.4 (1974); see *Developments*, *supra* note 29, at 1185 ("In ordinary private civil litigation, the public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse.").

pending litigation. Potential defendants may feel compelled to put assets aside to satisfy contingent claims. Whether such consequences are socially beneficial depends upon the circumstances, but there is no denying that they impose a cost.

Furthermore, there is no denying that those who are employed by, or who seek to do business with, a potential defendant will bear a portion of the cost of uncertainty. The economic interdependence of individuals in modern life gives rise to a social interest in the stability of persons and firms, namely, the "protection of the interest which all persons who deal with a given individual have in the stability and security of his economic and personal affairs."⁵⁸ As one commentator has explained:

All business dealings of any consequence are apt to depend upon the financial stability of the parties; and even relations which may be considered of small importance are posited upon the continued availability of the people involved. Nearly all legal actions affect either the economic status or the personal freedom of the defendant; and some affect both. Accordingly, the public has an interest in the speedy appearance of actions against him.

This social interest in the state of a given person's affairs, translated into a purpose of statutes of limitations, includes, necessarily, the purposes which relate solely to the position of the individual defendant. Stability for him is stability for those with whom he deals. At the same time its scope is wider than that of any of the individual purposes ascribed to the statutes. The social purpose is not limited, as are the others, by concern whether a particular claim against an individual defendant is assumed to be "good" or "bad"; the disruption is the same with either. And it makes no difference whether the person directly affected knew of the claim against him, except as his knowledge, or lack of it, possibly may be reflected in the "front" which attends his dealings with others.⁵⁹

The significance of this rationale is that fairness to third parties—not merely to the plaintiff or to the defendant—may be affected by untimely claims. For example, suppose a corporation markets a drug that is discovered twenty years later to have caused harmful, long-term side effects. Suppose further that the corporation would be bankrupted by the resulting liability. There is no denying the legitimacy of the victims' claims for compensation. On the other hand, during those twenty years, thousands of people may have invested in the corporation, hundreds of people may have accepted jobs with it, dozens of lenders may have extended credit to it, and scores of firms may have entered business partnerships with it. As a result of the corporation's liability, those investments may be forfeited, those jobs may be lost, those loans may not be repaid, and those business partnerships may collapse. While there

58. Callahan, *supra* note 4, at 138.

59. *Id.* at 136-37.

may be justice in the destruction of the corporate defendant, as time passes, the investors, employees, lenders and business partners acquire reliance interests that may be disrupted by, and that must be weighed against, the victims' claims to compensation.⁶⁰

Plaintiffs also are adversely affected by the uncertainty caused by delay. Suppose that two parties are involved in a dispute regarding a past transaction for which liability has not yet been assigned or quantified.

In such a situation, the plaintiff has only a contingent asset—the claim—the value of which must be discounted by the uncertainty of recovery. The resources of the defendant are subject to a corresponding possibility of confiscation to pay the plaintiff's demand. Looking at the parties as though they had joint but indeterminate ownership of the assets available to meet the claim, it can be seen that at least a portion of the value of the assets is effectively frozen.⁶¹

In these circumstances, the freedom of both parties to plan for the future is constrained.⁶²

However, there may be less to this policy than first appears. The use of insurance to limit and quantify the amount of assets that must be set aside to satisfy potential claims is widespread.⁶³ In addition, when the defendant is aware of the existence of a potential claim, the defendant can reduce the uncertainty by attempting to resolve the claim promptly, either through negotiation or by filing a declaratory judgment action.⁶⁴

4. *Reduce Protective Measures and Associated Costs*

The fourth aspect of repose, closely related to the third, is the reduction of direct costs associated with uncertainty. When faced with uncertainty, those who are risk-averse take protective measures to decrease the likelihood and magnitude of a nega-

60. This rationale is inconsistent with a persistent theme of limitations law: that the statute of limitations is a personal privilege that may be waived without regard to any public interest it may incidentally promote. *See, e.g., Tebbets v. Fidelity & Cas. Co.*, 155 Cal. 137, 139, 9 P. 501, 502 (1909) (describing statutes of limitation as "statutes of repose, carrying with them, not a right protected by a rule of public policy, but a mere personal right for the benefit of the individual, which may be waived").

61. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* § 6.3, at 299 (4th ed. 1992).

62. Statutes of limitation also benefit the bona fide purchaser of goods or real property. "Both by making him secure in his possession after a certain time and by allowing him to rely on the length of time in his predecessor's position, legislatures seek to promote freedom of trade in goods and of alienation of land." *Developments*, *supra* note 29, at 1186.

63. Of course, not all risks are insurable; but even for those that are, the use of insurance imposes costs that can be reduced by means of a limitation system. *See* notes 65-75 and accompanying text.

64. *See infra* notes 141-43 and accompanying text.

tive outcome. In the absence of uncertainty about whether they will be sued, those who are risk-averse would not make these investments, or would make more limited investments. Statutes of limitation, by reducing uncertainty, can help individuals and businesses reduce the out-of-pocket costs associated with uncertainty, and allow those resources to be allocated to more socially beneficial uses.

One common protective measure is the acquisition of insurance coverage. It has been estimated that in about ten percent of reported product liability cases, more than ten years had elapsed between product sale and product-related injury.⁶⁵ The cost and availability of insurance may be adversely affected by such long "tails" of liability.⁶⁶ Three considerations may make insuring against older claims more costly. First, the longer the "tail" period, the more difficult it is for an insurer to predict the number of claims that will be filed, so insurers typically charge very high rates for long tail periods.⁶⁷ Second, the costs of such long-deferred claims are difficult to estimate with accuracy because their future value may be heavily influenced by inflation rates.⁶⁸ Third, it is more difficult to diversify the risk of insuring against potential future liability if manufacturers purchase insurance coverage than if consumers purchase their own coverage directly, especially if the applicable legal standard is subject to change.⁶⁹ Attempts to compensate for these types of uncertainty have resulted in higher rates, unavailability of coverage, or changes in the nature of coverage offered from "occurrence" policies to "claims made" policies in some markets. This, in turn, has forced or encouraged some firms to risk bankruptcy by "going bare." The result may be undercompensation of victims, underdeterrence of wrongdoers, and sub-optimal incentives to prevent losses.⁷⁰ In extreme instances, the cost of liability insurance may even cause some firms and individuals to adopt overly-cautious behavior or to cease doing business altogether.⁷¹

65. Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 813 (1983). The same study estimated that in more than 50% of reported cases, injury occurred within two years of manufacture. *Id.* Another study estimated that for all goods, 83.1% of injuries occurred within one year of manufacture, and only 2.8% occurred more than 10 years after manufacture; but that for capital goods, only 38.3% of injuries occurred within one year, and 16.5% occurred more than 10 years after manufacture. Michael M. Martin, *A Statute of Repose for Product Liability Claims*, 50 FORDHAM L. REV. 745, 752-54 (1982).

66. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1575-76 (1987). The term "tail" refers to the shape of a graph with product-liability claims paid on the vertical axis and years from manufacture on the horizontal axis. Because the majority of claims are paid within one or two years from manufacture, and a smaller percentage of claims are paid many years in the future, the resulting graph is shaped like a tail. See Martin, *supra* note 65, at 746 n.13.

67. See Michael J. Byrne, Comment, *Let Truth Be Their Devise: Hargett v. Holland and the Professional Malpractice Statute of Repose*, 73 N.C. L. REV. 2209, 2224 n.111 (1995).

68. See JO ANN FELIX, A LAWYER'S GUIDE TO LEGAL MALPRACTICE INSURANCE 13-14 (1982).

69. See Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 540 (1984).

70. *Id.*

71. For example, it has been argued that drug manufacturers have been deterred from developing new vaccines due to the cost of liability insurance. See, e.g., *Brown v. Superior Court (Abbott Labs.)*, 44 Cal. 3d 1049, 1064, 751 P.2d 470, 479, 245 Cal. Rptr. 412, 421 (1988) (stating that "[t]he possibility that the cost of insurance and of defending against lawsuits will diminish the availability and increase the price of pharmaceuticals is far from

The California Legislature has occasionally acknowledged the goal of reducing insurance premiums in enacting statutes of limitation. For example, the legislature enacted § 340.5 of the Code of Civil Procedure in 1970, and amended it in 1975, in response to a perceived "crisis" in the cost and availability of medical malpractice insurance.⁷² Similar concerns prompted the 1977 enactment of Code of Civil Procedure § 340.6, applicable to legal malpractice claims.⁷³

Despite scholarly support and legislative and executive pronouncements, not everyone accepts the notion that limitation of actions rules that supposedly are too generous to plaintiffs have increased the cost or decreased the availability of insurance.⁷⁴ At least one court has scoffed at the idea that insurance rates could be reduced by modifying the statute of limitations, and described the likely significance of such measures as "more fanciful than real."⁷⁵ Regardless of whether there was or is an insurance crisis or a "long tail" problem, however, it is likely that limitation of actions rules have had some effect on the cost and availability of insurance. It is also likely that any such effect is far more modest than the effect produced by the substantive rules of liability.

Another common protective measure against uncertainty is the retention of personal and business records for substantial periods of time, so that evidence of transactions that may be disputed in the future remains available. Statutes of limitation can help reduce the cost and burden of keeping records for long periods of time. With a fixed and ascertainable limitation period, it is clear when records may safely be destroyed. Without a clear statute of limitations, potential defendants may choose instead to incur the cost of additional storage and pass it on to their customers. That

theoretical," and collecting examples).

72. See 1975 Cal. Stat., 2d Extra. Sess. ch. 2, sec. 11, at 4407 (amending CAL. CIV. PROC. CODE § 340.5) ("There is a crisis in health care in California because of the inability of many physicians and surgeons to secure malpractice insurance which may cause many of them to leave the private practice of medicine. To help solve this problem, it is imperative that this act take effect immediately."); see also 1975 Cal. Stat., 2d Extra. Sess. at 3947 (noting the proclamation of Governor Brown convening the legislature in extraordinary session, stating "[i]t is critical that the Legislature enact laws which will . . . reduce the costs which underlie these high [malpractice] insurance premiums" and asking the legislature to consider, among other things, "setting a reasonable statute of limitations for the filing of [medical] malpractice claims"); Paul E. Caprioglio, Comment, *A Four Year Statute of Limitations for Medical Malpractice Cases: Will Plaintiff's Case Be Barred?*, 2 PAC. L.J. 663, 668 (1971) (describing § 340.5 as "new legislation designed to reduce the premiums of malpractice insurance for the medical profession"); *Review of Selected 1975 California Legislation*, 7 PAC. L.J. 544, 544-46 (1976) (describing the malpractice crisis and response).

73. See *Southland Mechanical Constructors Corp. v. Nixen*, 119 Cal. App. 3d 417, 429, 173 Cal. Rptr. 917, 923 (1981) (noting that "in several of the committee reports it is stated that the purpose of Assembly Bill No. 298 was to reduce the costs of legal malpractice insurance"), *disapproved in part on other grounds*, *Laird v. Blacker*, 2 Cal. 4th 606, 828 P.2d 691, 7 Cal. Rptr. 2d 550 (1992); see also *id.* at 428, 173 Cal. Rptr. at 922 (noting that "[t]he bill as eventually enacted retains much of the wording as Mallen's proposed statute"); Ronald E. Mallen, *A Statute of Limitations for Lawyers*, 52 CAL. ST. BUS. J. 22, 22 (1971) (describing increase in premiums and decline in the number of companies providing legal malpractice insurance and proposing a remedial statute).

74. See, e.g., *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1001 (Ala. 1982) (describing the so-called "long tail" problem as one which "has not been documented").

75. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 683 (Utah 1985).

cost burden is imposed on all members of society for the benefit of a small group, namely, the relatively small subset of plaintiffs who either are not diligent or whose loss does not manifest itself for a lengthy period of time. Although in recent years the costs of information storage have declined, the aggregate cost to society remains sufficiently large to merit consideration of such costs in formulating limitation policy.⁷⁶

B. Minimize Deterioration of Evidence

Another of the principal policies underlying statutes of limitation is the policy of avoiding deterioration of evidence. As the California Supreme Court stated:

It is fundamental that the principal purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available. . . . The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend.⁷⁷

Like the policy of promoting repose, however, avoiding deterioration of evidence serves several distinct but overlapping purposes: (a) to ensure accuracy in fact-finding; (b) to prevent the assertion of fraudulent claims; (c) to reduce the costs of litigation; and (d) to preserve the integrity of the legal system. Each of these four purposes will be considered in turn.

1. Ensure Accurate Fact-Finding

The most important reason for avoiding deterioration of evidence is that the deterioration or loss of evidence makes the accurate and just adjudication of claims

76. As a leading treatise notes:

One of the mundane realities of modern business life is the expense involved in the physical storage of documents. Cataloging, packaging, and providing security for stored documents is a substantial undertaking. Large business organizations may generate tens of millions of pages of documents each month. This inundation of paper may overwhelm even the most orderly of document control systems.

JANICE S. GORELICH ET AL., *DESTRUCTION OF EVIDENCE* §10.2, at 310 (1989).

77. *Addison v. State*, 21 Cal. 3d 313, 317, 578 P.2d 941, 942-43, 146 Cal. Rptr. 224, 226 (1978); *see Barrington v. A.H. Robins Co.*, 39 Cal. 3d 146, 152, 702 P.2d 563, 566, 216 Cal. Rptr. 405, 408 (1985) ("[S]tatutes [of limitation] were enacted to promote the trial of the case before evidence is lost or destroyed, and before witnesses become unavailable or their memories dim."); *Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.*, 39 Cal. 3d 57, 61, 702 P.2d 197, 200, 216 Cal. Rptr. 115, 118 (1985) ("The purpose of any limitation statute is to require 'diligent prosecution of known claims, thereby . . . ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh.'"); *Wood v. Elling Corp.*, 20 Cal. 3d 353, 362, 572 P.2d 755, 760, 142 Cal. Rptr. 696, 701 (1977) ("Statutes of limitations . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348 (1944)).

less likely.⁷⁸ The United States Supreme Court summed up this rationale for limitation of actions memorably when it stated:

The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.⁷⁹

This justification of the limitation system rests on three premises. The first is that the minimization of error in adjudication is a goal of the legal system. The second is that, on balance, evidence deteriorates with the passage of time. The third is that the effects of such deterioration on the accuracy of the legal system can be avoided by barring all cases commenced after the limitation period has expired.

The first premise is sound. Avoiding inaccurate fact-finding is an important goal of our legal system.⁸⁰ "The greater the level of accuracy, the fewer innocent individuals are sanctioned and the more guilty are sanctioned."⁸¹ This is important for at least two reasons. First, punishing an innocent defendant with civil liability is no less unjust than denying compensation to a deserving victim.⁸² Shifting a plaintiff's

78. See, e.g., *California Sav. & Loan Soc'y v. Culver*, 127 Cal. 107, 110, 59 P. 292, 293 (1899) ("Statutes of limitation are intended to prevent stale claims from springing up after the lapse of long periods of time . . . when loss of papers, deaths of witnesses, and worn-out recollections make the presentation of the actual facts in the case impossible or extremely difficult."); *Los Angeles County v. Security First Nat'l Bank*, 84 Cal. App. 2d 575, 580, 191 P.2d 78, 82 (1948) ("Statutes of limitation are designed to prevent the resurgence of stale claims after the lapse of long periods of time as a result of which loss of papers, disappearance of witnesses, [and] feeble recollections, make ineffectual or extremely difficult a fair presentation of the case.").

79. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); see *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (asserting that statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"); *Bell v. Morrison*, 26 U.S. 351, 360 (1828) (noting that statutes of limitation "afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses").

80. See Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J. L. & ECON. 1, 1 (1994) ("The degree of accuracy is a central concern of adjudication."); Daniel R. Ortiz, *Neoactuarialism: Comment on Kaplow (1)*, 23 J. LEGAL STUD. 403, 403 (1994) ("Accuracy is a central, if not the central, value of adjudication."); see also Stephen McG. Bundy, *Valuing Accuracy—Filling Out the Framework: Comment on Kaplow (2)*, 23 J. LEGAL STUD. 411, 433 (1994) ("Accuracy is a central aspiration of any procedural system, but it cannot be the only aspiration."). See generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994).

81. Kaplow & Shavell, *supra* note 80, at 347.

82. See, e.g., GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 79-80 (1996) (arguing that the debate between Abraham and God regarding the destruction of Sodom and Gomorrah shows that "even God is bound by the principle that it is unjust to punish the innocent").

loss to an innocent defendant merely substitutes one victim for another. Second, inaccurate adjudication decreases deterrence. If an individual is about as likely to be punished regardless of whether he or she commits a wrong that will result in some personal benefit, there is little incentive to refrain from wrongdoing.

There is some justification, however, for questioning the importance of accuracy as a goal.⁸³ To start with, the value of accuracy may depend on the context. For example, in criminal cases there may be sound reasons to prefer certain types of inaccurate outcomes over others.⁸⁴ Accuracy may also be more socially desirable in some types of civil cases than in others.⁸⁵ Moreover, from the perspective of legal realists, accuracy is almost always an unobtainable ideal.⁸⁶ To some, this suggests that we ought not worry too much about accuracy and that we should view adjudication simply as a method of resolving disputes.⁸⁷ To others, it suggests that it is even more urgent that we not further increase inaccuracy by basing decisions on less than the best possible information.⁸⁸

On balance, however, even though greater accuracy comes at a cost, it remains an important objective in virtually all cases. If our goal were simply to resolve controversies, that could be accomplished quickly and inexpensively by flipping a coin. Such decisions, however, would lack legitimacy.⁸⁹ They also would fail to implement substantive law policy because, if the coin were fair, the decisions would be wrong approximately fifty percent of the time.⁹⁰ We go to the trouble and expense

83. Cf. Holmes, *supra* note 1, at 466 (describing the loss or deterioration of evidence as a "secondary matter").

84. See *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring). The Court noted: In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.

Id.; see also Kaplow & Shavell, *supra* note 80, at 361.

85. See Bundy, *supra* note 80, at 431 (suggesting that accuracy may be more important in individual civil rights, tort, and employment claims pitting individuals against organizations because defendants in such cases "have only a hazy sense of how much harm they are doing").

86. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 14-16 (1949) (explaining that "facts are guesses").

87. See Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 *LAW & CONTEMP. PROBS.* 243, 244 (1988) ("Of course, the principal purpose of the legal process is not to obtain answers, but to resolve disputes.").

88. See FRANK, *supra* note 86, at 36 ("[T]he unattainability of the ideal [of justice] is no excuse for shirking the effort to obtain the best available.").

89. See Judith Resnik, *Tiers*, 57 *S. CAL. L. REV.* 837, 840-41 (1984) (describing the outrage that resulted when a judge flipped a coin to determine whether a convicted defendant would serve 20 or 30 days in jail).

90. See Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 *U. CHI. L. REV.* 1175, 1181 (1986) [hereinafter Epstein, *Temporal Dimension in Tort Law*]. Epstein noted:

If factual determinations are less than 100 percent reliable, there is a loss in making social objectives operational, whether the objective is compensation or deterrence, liberty or efficiency. . . . If the factual determinations are only 50 percent correct, then there is no reason for the rule at all, because the effect upon primary conduct is at best random

of discovery and trial because we believe that the process produces results that will be accepted as legitimate and will usually be correct.

The second premise also appears to be amply supported. Certainly, it is widely believed that evidence deteriorates as time passes,⁹¹ and this belief is supported by our common experience and intuition. Therefore, reducing the lapse of time between the event and filing (or, perhaps more important, between the event and adjudication) is almost certainly worthwhile.⁹² In assessing the weight of the second premise, however, it is necessary to ask how rapidly and how consistently evidence deteriorates over time.

The rate at which evidence deteriorates is neither uniform nor easily measured. There is, however, some empirical data regarding the rate at which memories deteriorate that sheds light on this issue. In general, "forgetting tends to occur very rapidly during the initial period after learning and . . . the rate of forgetting declines significantly thereafter."⁹³ More specifically, it has been estimated that human beings recall about sixty percent of what they learn after twenty minutes, and less than forty percent after nine hours.⁹⁴ The rate of deterioration slows so rapidly, however, that after thirty days about twenty-five percent is still remembered.⁹⁵

The initial steepness of the memory degradation curve suggests that measures to decrease the lapse of time between event and adjudication reach a point of diminishing return very rapidly. After just one day, sixty to seventy percent of what was observed is forgotten. The difference in what is recalled between one year and four years, on the other hand, is comparatively slight. If we assume that limitation periods

Id.

91. See *id.* ("With the passage of time, the evidence available regarding a given legal issue necessarily becomes stale."); *id.* at 1182 ("The longer the period between operative fact and legal judgment, the more likely it is that error will creep in: memories will fade, evidence will disappear or become unreliable."); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 466 (1973) ("Court delay increases error costs . . . because evidence decays, over time, increasing the probability of an erroneous decision."); Peter V. Letsou, Comment, *A Time-Dependent Model of Products Liability*, 53 U. CHI. L. REV. 209, 227 (1986) ("[T]he passage of time magnifies uncertainty and evidentiary problems.").

92. Striving to reduce deterioration of evidence by limitation of actions is also warranted by the existence of two other types of errors that can never be eliminated entirely. The first type is errors of law, some of which will occur regardless of the quality of the evidence presented on factual issues. The second type is mistaken determinations of fact attributable not to poor evidence, but rather to human fallibility. Because these two types of errors inevitably reduce the accuracy of outcomes even when the evidence is fresh, it is important that the deterioration of evidence be kept to a minimum so that the improvement of the results generated by the legal system over random decisions remains as large as possible.

93. RICHARD H. ETTINGER ET AL., *PSYCHOLOGY: SCIENCE, BEHAVIOR, AND LIFE* 269 (3d ed. 1994).

94. *Id.* at 250.

95. *Id.* There also may be considerable variation in the amount of recall, depending upon a variety of factors other than the passage of time. One author has concluded that the ability to recall a face depends upon a variety of factors in addition to the passage of time, including the duration of exposure, the unusualness of the facial features, and the degree of retroactive interference with the image. Though "delay intervals even as long as weeks or months do not automatically reduce recognition accuracy," the author concludes that there is little deterioration until about three months, but substantial deterioration by eleven months. See Hadyn D. Ellis, *Practical Aspects of Face Memory*, in *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* 12, 24-25 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

of a few minutes, hours or days are too short to be practical, the question then becomes whether it is worth depriving a plaintiff of a claim because of his or her inability or unwillingness to sue before the memory of witnesses has declined from, say, twenty-five percent to twenty percent. The answer, of course, depends in part on the importance of what is lost. The difficulty is that there is no generally applicable standard by which we can measure how much detail is necessary to determine factual issues accurately.

Changes in society and technology play a role in determining the rate at which evidence deteriorates. For example, there is greater mobility in society today than in the past, meaning that witnesses are relatively more likely to have relocated than they were 100 years ago. On the other hand, people tend to live longer today, and due to more systematic record keeping and intensive government regulation, people tend to be easier to find. Moreover, because the storage of records is less expensive than it used to be, it is likely that records are kept for a longer period.⁹⁶ Some of these effects, of course, may also be the result of changes in the law of limitation of actions. By adopting longer limitation periods or changing from event-based accrual to discovery-based accrual, legislatures and courts may have stimulated changes in recordkeeping behavior, resulting in the retention of records for a longer period of time.⁹⁷

The validity of the second premise also depends on the extent to which deterioration of evidence is consistent. Although the premise that evidence deteriorates with the passage of time is more likely to be true than false, it is not always true. There are old cases in which the evidence may be perfectly adequate, such as a claim based almost entirely upon documents that happen to have been preserved. Moreover, evidence sometimes improves with the passage of time. For example, it has been suggested that, in tort cases involving toxic substances, encouraging early filing actually diminishes the accuracy of fact-finding because it forces a decision on liability and damages before all of the harmful effects may be discernible.⁹⁸ This effect is exacerbated by the single judgment rule, which provides that a plaintiff must bring a single action for all injuries sustained as a result of a single tort.⁹⁹ Some courts have justified exceptions to the single judgment rule on the ground that "evidence relating to the central issues in a latent disease case—the existence of the

96. Cf. JEREMY RIFKIN, *TIME WARS* 182 (1982) (arguing that, in the computer age, "[i]nformation can be preserved against the ravages of time. It does not rot and decay; it does not get used up"). We cannot be certain, however, that the durability of electronic storage can be assured.

97. The importance of these trends may be affected by changes in other aspects of the legal system. During the 1600s, for example, parties were prohibited from testifying in their own cases. WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 193-97 (3d ed. 1944). Because this rule artificially reduced the number of available witnesses, the overall quality of information regarding a claim was even more vulnerable to the death or unavailability of a witness than is true today. See Kelley, *supra* note 45, at 1646.

98. See generally Michael D. Green, *The Paradox of Statutes of Limitation in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 989-1003 (1988).

99. *Id.* at 1002; see, e.g., *Miller v. Lakeside Village Condominium Ass'n*, 1 Cal. App. 4th 1611, 1622, 2 Cal. Rptr. 2d 796, 802 (1991).

disease, its proximate cause, and the resultant damage—'tends to develop, rather than disappear, as time passes.'"¹⁰⁰ The problem, however, is more complex than this view suggests. Evidence of the existence and extent of a disease or condition may improve with time because the disease may not have been detectable by the plaintiff at an early date. Evidence regarding proximate cause, on the other hand, is subject to competing influences. Evidence of a toxic agent's capacity to cause disease improves with time; but evidence concerning each individual plaintiff's exposure to the toxic agent deteriorates over time.¹⁰¹ Moreover, as time passes, other conditions may intrude upon the causal chain and make the allocation of causation and damages more, rather than less, difficult. Obviously, the more time that passes, the more likely it is that other causes will intrude.¹⁰² This effect, however, may be partially offset by improvements in scientific knowledge and detection technology, which may make it easier to demonstrate exposure and to distinguish among known causes despite the passage of time.¹⁰³

Similarly, evidence regarding remedies sometimes improves as time passes.¹⁰⁴ It is generally more difficult to predict the future than to reconstruct the past. In a personal injury case, the extent of the plaintiff's impairment will be an important question. The answer to this question may be a matter of speculation after just one year but may be perfectly clear after three years.¹⁰⁵ Likewise, projecting the amount of profits a business would have obtained during the period Year-5 through Year-10 may be more accurately accomplished during Year-4 than during Year-1. While we tend to think of changes in the evidence regarding liability as being more significant, and to downplay the importance of changes in the evidence regarding damages, they are arguably of equal importance from the perspectives of deterrence and compensation.¹⁰⁶ The effectiveness of the legal system may be compromised not simply

100. *Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1026 (Md. 1983) (quoting *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982)); cf. *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 322-27, 164 Cal. Rptr. 591, 594-97 (1980) (permitting exception to single judgment rule in case involving latent disease).

101. See Green, *supra* note 98, at 998-99.

102. The problem of supervening causes has been advanced as one justification for the 10-year statute of repose for latent defects in improvements to real property. See CAL. CIV. PROC. CODE § 337.15 (West 1982); Michael F. Boyle & Leslie M. Hastings, *California Code of Civil Procedure Sections 337.1 and 337.15: Defective Construction Defect Statutes*, 21 PAC. L.J. 235, 245 & n.49 (1990).

103. Cf. Green, *supra* note 98, at 1000 n.147.

104. Cf. *Pierpont Inn, Inc. v. State*, 70 Cal. 2d 282, 290, 449 P.2d 737, 742-43, 74 Cal. Rptr. 521, 526-27 (1969) (asserting that the purpose of notice of claim statutes "is best served if the entire sequence of events giving rise to the injury is regarded as the occurrence from which the damage arose for damages can be assessed accurately only when the sequence is completed and the total injury taken into account"). But see *Davies v. Krasna*, 14 Cal. 3d 502, 515, 535 P.2d 1161, 1169, 121 Cal. Rptr. 705, 713 (1975) ("To delay the running of the period of limitation until defendant's acts furnished plaintiff with a more certain proof of damages would contravene the principle that victims of legal wrong should make reasonable efforts to avoid incurring further damage.").

105. See Green, *supra* note 98, at 1001-03.

106. See Posner, *supra* note 91, at 401 (defining the cost of errors as "the product of two factors, the probability of error and the cost if an error occurs").

by exonerating wrongdoers or by condemning the innocent, but also by imposing on wrongdoers (and awarding to victims) an amount of damages that is either too small or too large. There is no reason to believe, however, that either plaintiffs or defendants are systematically disadvantaged by the deterioration or improvement of evidence of damages over time. Injuries, for example, may turn out to be either more severe or less severe than initially projected.

In short, it may be that evidence merely changes, rather than deteriorates, over time. This has significant implications for the justification of limitation of actions as a means of improving accuracy in adjudication. Even assuming that, broadly speaking, evidence tends to deteriorate over time, there are nontrivial classes of cases in which a countervailing force is at work. If the principal goal of the limitation system is to avoid inaccurate fact-finding resulting from the deterioration of evidence, then some cases may need to be treated differently. This can be accomplished either by taking differences regarding the deterioration of evidence into account in creating a classification scheme, or by permitting judicial discretion to depart from the limitation system in individual cases.

The limitation system relies in part on classification of claims to compensate for differences regarding the deterioration of evidence. Arguably, some types of cases are more likely to rely upon documentary evidence (which is relatively enduring) than upon eyewitness testimony (which is relatively transient). As to the former, it is tempting to conclude that longer limitation periods might be appropriate since the risk of deterioration of evidence is low.¹⁰⁷ Although it is possible to generalize to some degree about the type of evidence that will be relevant to a claim, such generalizations will not always be valid, either as to a class of claims or as to particular claims within a class. To the extent that such generalizations are unsound, limitation of actions will fail to promote accurate fact-finding. Absent empirical data, therefore, such generalizations are risky.

The third premise underlying this justification for limitation systems—that limitation of actions will improve accuracy by eliminating claims that are filed after a fixed period of time—is subject to question. Limitation of actions is a rather blunt instrument for ensuring accuracy. Unless one makes the implausible assumption that all claims filed after the limitation period has expired lack merit, a statute of limitation will bar meritorious claims as well as unmeritorious ones. Therefore, in determining the accuracy of the legal system as a whole, some percentage of the cases in which the defendant prevailed on the ground of limitation of actions should be included among the percentage of inaccurate or substantively incorrect outcomes.¹⁰⁸

107. This intuition probably explains the difference between the four-year period for actions based on written contracts and the two-year period for actions based on oral contracts. Compare CAL. CIV. PROC. CODE § 337 (West 1982) (providing four-year period for a contract founded upon an instrument in writing) with *id.* § 339 (West Supp. 1997) (providing two-year period for contract not founded upon an instrument in writing).

108. This consequence of statutes of limitation also has implications for other policies underlying limitation of actions, such as the policies of encouraging the prompt enforcement of the substantive law and reducing the number of unmeritorious claims filed. See *infra* Parts III.E., G.2. (discussing these other policies underlying

This has led one scholar to conclude that the policy of avoiding deterioration of evidence is an insufficient justification for statutes of limitation:

If it is assumed that a plaintiff's claim is "good," the defendant will be no worse off no matter how much time has elapsed; he couldn't have defended successfully in the beginning. Statutes of limitations probably are designed to bar "good" as well as "bad" claims; but the purpose in barring the "good" is something other than protection against failure of evidence.¹⁰⁹

Moreover, the extent to which a limitation system can reduce the deterioration of evidence prior to the time of trial is limited. Although a statute of limitation can limit the time within which a suit may be filed, and thereby encourage the plaintiff to file within that period, at that point the role of limitation of actions ends. Because the parties can take steps to preserve the remaining evidence, the rate at which evidence deteriorates after the filing of a complaint is diminished, but some deterioration still takes place. If the principal concern is with the quality of evidence available for presentation to the trier of fact, an attempt should be made to minimize the period between the events at issue and the time of adjudication, rather than the period between the events at issue and the commencement of the action.¹¹⁰

Although the discussion of this policy has concentrated on assessing the effect of deterioration of evidence on the accuracy of adjudication, it should be recognized that the overwhelming majority of cases are settled or resolved on motion prior to trial,¹¹¹ and that deterioration also may adversely affect the likelihood and fairness of settlements. Other things being equal, uncertainty regarding the probable outcome of adjudication makes settlement less likely.¹¹² Thus, the ability of the parties to reach a settlement will be reduced whenever the effect of deterioration of evidence is to increase, rather than to decrease, uncertainty regarding the likely outcome. If the quality of evidence has improved with the passage of time, on the other hand, settlement may be encouraged. Deterioration of evidence also may promote settlement when the deterioration disproportionately affects one party to the detriment of the other. For example, if the only witness favorable to the defendant dies during a lengthy pre-filing delay, making a verdict for the plaintiff almost inevitable, the

limitation of actions).

109. Callahan, *supra* note 4, at 134 (citation omitted).

110. Currently, California law allows three years after filing in which to serve the defendant and five years after filing in which to bring an action to trial. See CAL. CIV. PROC. CODE §§ 583.210, 583.310 (West Supp. 1997). For most cases, however, these periods are drastically reduced under applicable fast-track rules. See *infra* notes 137-38 and accompanying text.

111. See, e.g., Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986) (estimating that parties resolve 22% of cases by trial, motion, or arbitration); Robert I. Weil, *This Judge for Hire*, CAL. LAW., Aug. 1992, at 41, 42 (estimating that out of every 100 cases filed, 67 settle, 30 are decided on motion, and only three are tried).

112. See Posner, *supra* note 91, at 423 (explaining that "a reduction in the variance between the parties' estimates of the probability of prevailing and the true probability will [generally] increase the settlement rate").

parties' predictions of the likely outcome will be about the same. In this situation, however, even though the likelihood of settlement will be increased, the fairness of the settlement will be compromised in the same way that the fairness or accuracy of adjudication is compromised by deterioration of evidence.

2. *Prevent Fraud*

Because the deterioration of evidence may make it more difficult to decide claims correctly, limiting the time within which actions can be filed may help to check the temptation to resort to fraud in filing or litigating claims.¹¹³ This purpose rests on the premise that the longer the gap in time between the events at issue and trial on the merits, the more vulnerable the defendant is to spurious claims. It has two aspects: first, to prevent fraudulent claims from succeeding; and second, to prevent the use of fraudulent evidence in support of nonfraudulent claims. The class of non-fraudulent claims includes both meritorious claims and unmeritorious claims asserted in good faith.

It is possible that the deterioration of evidence may place fraudulent and genuine claims on a relatively equal footing. If the plaintiff files suit after many years, when all of the witnesses to the events on which the claim is based have died except the plaintiff and the defendant, and if the deceased witnesses would have favored the defendant, then clearly the defendant's position has been weakened. The defendant now has one witness (himself or herself) instead of five (himself or herself and four others) to rebut the plaintiff's testimony. Assuming that the plaintiff and the defendant are equally credible,¹¹⁴ then the plaintiff's chances of success are about fifty percent. The effect may be to transform a plainly fraudulent claim into one that possesses a realistic hope of success. In addition, as evidence deteriorates, witnesses gain freedom in how they characterize or relate past events because there is less evidence remaining to constrain them. This freedom increases the likelihood that claims, whether meritorious or not, may be decided on the basis of testimony that is either fraudulent or mistaken. It is difficult to support such generalizations, however, because there is substantial variation from one case to the next. In some instances, for example, the deterioration of evidence will adversely affect the plaintiff, either

113. See *Pashley v. Pacific Elec. Co.*, 25 Cal. 2d 226, 231, 153 P.2d 325, 328 (1944) ("[T]he very purpose of the statute of limitations [is] to prevent fraud and not to make it secure and successful."); *Ilse v. Burgess*, 28 Cal. App. 2d 654, 657, 83 P.2d 527, 529 (1938) ("The underlying purpose of the statute of limitations is to prevent stale claims which may be prosecuted fraudulently when the debtor is unable, from lapse of time, to make his defense."); *Sing v. Barker*, 122 Cal. App. 93, 100, 10 P.2d 92, 95 (1932) ("Statutes of limitation . . . militate against perjury and fraud."); 1 WOOD, *supra* note 17, at 8 ("[T]he object of [statutes of limitation] is to prevent fraudulent and stale actions from springing up after a great lapse of time.") (citation omitted); see also *Schwartz v. Heyden Newport Chem. Corp.*, 188 N.E.2d 142, 145 (N.Y. 1963) ("[P]erhaps the possibility of feigned cases against unprepared defendants and the difficulties of proof in meritorious cases led to a decision that society is best served by complete repose after a certain number of years even at the sacrifice of a few unfortunate cases.").

114. This assumption rests, in turn, on the questionable (and, if true, disturbing) assumption that the trier of fact will find an honest defendant and a lying plaintiff equally credible.

because the plaintiff's evidence has decayed but the defendant's evidence has not, or because the plaintiff bears the burden of persuasion and is more likely to lose if there is uncertainty regarding the merits of a claim.

This policy seems a questionable ground on which to base limitation of actions. There is always some risk of fraud. There is no reason, however, to believe that plaintiffs are more likely than defendants to fabricate evidence or to lie on the witness stand.¹¹⁵ The problem of fraudulent claims also correlates poorly with the passage of time. Except in special circumstances (such as when a plaintiff relies on an alleged agreement with the decedent), there is no reason to assume that the evidence favorable to the defendant will deteriorate more rapidly than the evidence favorable to the plaintiff. Other measures, such as the statute of frauds and the parol evidence rule, could be employed to help ensure that evidence is of a substantial and reliable character before it is introduced. These measures, if well designed and meaningfully enforced,¹¹⁶ could be more precisely tuned to addressing the risk of litigation-related fraud when circumstances warrant judicial intervention.

3. Reduce Litigation Costs

Another policy served by limitation of actions is the reduction of transaction costs associated with lawsuits that are filed, both for the parties involved and for the legal system as a whole. This policy rests on the premise that, because of the deterioration of evidence, it is more costly to litigate claims based on remote events than it is to litigate claims based on recent events.¹¹⁷

The validity of this assumption depends upon the type of claim, the type of evidence, and the circumstances of each case. On the one hand, it may be more time-consuming and expensive to locate witnesses, assemble the relevant documents and reconstruct what happened if the events are remote in time. In addition, disputes over collateral issues, such as possible liability for spoliation of evidence and whether

115. See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1189 n.127 ("The danger that plaintiffs will waste resources asserting frivolous or extortionate claims seems not greatly different from the danger that defendants will waste resources by setting up frivolous or extortionate defenses."). Indeed, it is possible that more people would be willing to lie when they are subjected to pressure, such as being sued, than would be willing to initiate fraudulent litigation.

116. One difficulty is that many of these devices have been relaxed in order to permit litigants to present facts more fully. See, e.g., *Masterson v. Sine*, 68 Cal. 2d 222, 225-28, 436 P.2d 561, 563-65, 65 Cal. Rptr. 545, 547-49 (1968) (permitting introduction of parol evidence to prove alleged collateral agreement); *Sunset-Sternau Food Co. v. Bonzi*, 60 Cal. 2d 834, 838 n.3, 389 P.2d 133, 136 n.3, 36 Cal. Rptr. 741, 744 n.3 (1964) ("The commentators almost unanimously urge that considerations of policy indicate a restricted application of the statute of frauds, if not its total abolition."). This development parallels a similar relaxation in the strictness with which courts have applied limitation of actions.

117. See Danzon, *supra* note 69, at 534 ("[D]elay leads to decay of evidence, blurs the chain of causation, adds multiple defendants, and hence increases litigation expense."); Epstein, *Temporal Dimension in Tort Law*, *supra* note 90, at 1182 ("The passage of time is positively correlated with both of the costs just identified: the expense of litigation and the error rate."); Letsou, *supra* note 91, at 227 ("[A]ny liability rule—whether strict liability or negligence—becomes more costly and difficult to enforce over time.") (emphasis omitted).

adverse inferences may be drawn from the loss or destruction of evidence, are more likely to arise. On the other hand, if witnesses have disappeared or died, there will be fewer witnesses to depose during discovery or to examine at trial.¹¹⁸ If documents have been lost or destroyed, there will be fewer documents to be collected and analyzed during discovery or to be introduced into evidence at trial. While this may tend to reduce litigation costs to some extent, it is more likely that litigation costs, measured either in dollars or time, are increased by the passage of time. Experience suggests that many litigants will respond to the loss of evidence by investing more resources in an attempt to remedy the deficiency.¹¹⁹ Thus, to the extent that statutes of limitation encourage plaintiffs to file claims promptly, they probably do result in a net reduction in litigation costs.¹²⁰

4. Preserve the Integrity of the Legal System

Sometimes perception is nearly as important as reality.¹²¹ Courts do not want to be, and do not want to be perceived to be, haphazard guessers about facts. Not only would this be demeaning to the legal system, but it would breed disrespect for the political system as well. If it were widely believed that judicial decisions are no more accurate than tossing a coin, courts would lose their legitimacy as a forum for the resolution of disputes, and disputants would seek their remedies elsewhere.¹²² Thus, if society believes that evidence deteriorates over time, and that erroneous decisions are more likely to occur if the gap in time between underlying events and adjudication is lengthy, then statutes of limitation enhance the legitimacy of the legal system by promoting the appearance of rational decisionmaking.

118. Taking this notion to its logical extreme, one author has suggested that the passage of time could result in highly efficient litigation:

"I would think," said Alice, "that everybody involved in the case must have died years ago. How can you have a trial when nobody is left who remembers what happened?"

"No problem at all," said Tweedledum.

"Contrariwise," added Tweedledee. "It's when you have witnesses around that there's trouble. They're likely to surprise you by remembering something at the last minute they hadn't thought of before. When they're all dead, there's no chance of any surprises, which makes things much neater and fairer."

"If I had my way," Tweedledum remarked, "I would make it against the law to have a trial while anyone was still alive who might remember something about the case."

PETER F. SLOSS, *ALICE'S ADVENTURES IN JURISPRUDENTIA* 22 (1982).

119. See generally Kaplow & Shavell, *supra* note 80, at 342, 384 (noting that parties have incentives to present excessive evidence in adjudication).

120. See 1 CORMAN, *supra* note 53, § 1.1, at 16 ("Judicial efficiency is the reward when these statutes [of limitation] produce speedy and fair adjudication of the rights of the parties.").

121. See generally Offutt v. United States, 348 U.S. 11, 14 (1954) ("Justice must satisfy the appearance of justice.").

122. There is empirical support for the proposition that beliefs about the accuracy of a procedure are an important determinant of whether the procedure is perceived as fair or conducive to just outcomes. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 120 (1990).

An analogy to sporting events is useful. Consider, for example, the practice of stopping play in a baseball game that has been interrupted by rain or overtaken by darkness. These conditions increase the role played by chance, and narrow the gap between the skilled and unskilled.¹²³ At some point, the conditions may interfere with the way in which the game is supposed to be played to the point that the contest is no longer viewed as legitimate and is not worth playing at all. It may be preferable to let the result of the first five innings stand instead of completing the game under circumstances when extraneous factors, rather than the relative strengths of the opposing teams, may determine the outcome. This same insight is part of the basis for limitation of actions. One crucial difference, however, is that baseball games are either postponed or decided on the basis of the first five innings, whereas litigation called on account of limitation is abandoned without resolution on the merits.

Minimizing deterioration of evidence may also help to reduce the role of prejudice and other forms of systematic bias in the legal system. If abundant evidence is available, the trier of fact has less need to resort to questionable assumptions about human behavior that are based upon stereotypes, prejudices, or biases in an effort to reach a decision, and reliance on such assumptions becomes both more difficult to justify and easier to detect.¹²⁴ Reducing the role of prejudice and bias in decision-making helps ensure the actual and apparent legitimacy of the decisions reached.

Not surprisingly, courts have not expressly used these rationales as a justification for limitation of actions. There are, however, judicial indications that statutes of limitation serve to protect courts and juries from having to make decisions based on inadequate evidence.¹²⁵ While these judicial expressions may reflect an implicit concern with preserving the appearance of justice, many appear to be concerned only with the burden on the legal system of making such determinations.¹²⁶

The suggestion that the convenience of the legal system or the trier of fact is a relevant consideration has been criticized.¹²⁷ One problem with such a rationale is

123. See Epstein, *Past and Future Temporal Dimension*, *supra* note 54, at 676.

124. See Bundy, *supra* note 80, at 429 ("Normally, for example, one would expect that rules which permit a more complete and balanced factual record, such as discovery rules, would permit the drawing of finer distinctions and make it more difficult for tribunals to justify discriminatory decisions.").

125. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (explaining that statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence") (emphasis added); *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 n.4 (1965). The *Burnett* Court stated:

Forasmuch as the Time of Limitation appointed for suing . . . extend, and be so far and long Time past, that it is above the Remembrance of any living Man, truly to try and know the perfect Certainty of such Things, as hath or shall come in Trial . . . to the great Danger of Mens Consciences that have or shall be impanelled in any Jury for the Trial of the same . . .

Burnett, 380 U.S. at 428 n.4 (quoting The Act of Limitation with a Proviso, 1540, 32 Hen. 8, ch. 2 (Eng.)).

126. See, e.g., *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) ("Statutes of limitation . . . are practical and pragmatic devices to spare the courts from litigation of stale claims . . .").

127. See *United States v. Curtiss Aeroplane Co.*, 147 F.2d 639, 642 (2d Cir. 1945). In *Curtiss Aeroplane*, Judge Learned Hand stated:

It cannot be that statutes of limitations are in any degree for the purpose of relieving courts of the trial

that it seems inconsistent with the approach of the legal system in general. Normally, a court does not ask whether the quality of the evidence is sufficient for it to reach a decision. Instead, cases are decided on the basis of whatever evidence the parties present. As a result, many decisions are made on the basis of incomplete, flawed, or otherwise unsatisfactory evidence. For example, if a suit is filed in a timely manner but a key witness dies before his or her testimony is preserved, the legal system does not simply abdicate its responsibility to resolve the claim. Although one side may suffer more than the other, the case proceeds.¹²⁸ It is not clear why the approach should differ just because the passage of time is involved, unless the conduct of one side or the other caused the evidence to deteriorate. Perhaps the normal corrective mechanisms, including the burden of proof, permitting adverse inferences to be drawn from the intentional destruction of relevant evidence, or imposing tort liability for the intentional destruction of evidence, are sufficient to address the problem, and at a lower social cost than barring the plaintiff's claim.

C. Place Defendants and Plaintiffs on an Equal Footing

One of the most powerful policies supporting limitation of actions is the concern that the passage of time will not only result in the deterioration of evidence, but that it will also allow the plaintiff to gain an unfair advantage over the defendant. Many cases have recognized that one of the purposes of a limitation system is to avoid making it unreasonably difficult for defendants to answer the claims against them.¹²⁹ Statutes of limitation serve this purpose by requiring timely notice to potential defendants,¹³⁰ thereby giving both parties an equal opportunity to gather evidence while

of issues which have become hard to decide by loss of evidence. Courts are maintained to settle disputes no matter how parties may embroil themselves; it would be a strange doctrine which forbade people to deal with their affairs as they wished lest the judges become unduly vexed.

Id.

128. Distinguishing between bench and jury trials may be necessary in this context. A dearth of evidence may make it more difficult for jurors to agree upon a verdict, and thus increase the likelihood of a mistrial.

129. *See, e.g., Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 935, 873 P.2d 613, 618, 30 Cal. Rptr. 2d 440, 445 (1994) ("Such statutes [of limitation] . . . mitigate the difficulties faced by defendants in defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation, may present unfair handicaps."); *Addison v. State*, 21 Cal. 3d 313, 317, 578 P.2d 941, 943, 146 Cal. Rptr. 224, 226 (1978) ("The statutes [of limitation], accordingly, serve a distinct public purpose, preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend.").

130. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims . . .").

facts are still fresh.¹³¹ “The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation.”¹³²

This policy is not identical to the policy of avoiding the resolution of cases on the basis of evidence which has deteriorated so badly that it no longer supplies an adequate basis for adjudication. Instead, this policy rests on the premise that delay usually works to the disadvantage of the defendant rather than the plaintiff because the plaintiff can take steps to preserve evidence favorable to his or her case while evidence that favors the defendant deteriorates. In an extreme situation, the plaintiff conceivably could engage in “time shopping” and delay filing suit until the time that is most advantageous for himself or herself and least advantageous for the defendant.¹³³ Permitting the plaintiff a one-sided option to delay before commencing suit allows the plaintiff to speculate on the extent to which evidence will deteriorate, as well as about whether that deterioration will adversely affect one side more than the other.

A distinct basis underlying this purpose is the assumption that the cost of mounting a defense is increased by the passage of time, regardless of whether a defense on the merits is ultimately successful.¹³⁴ Discovery can be made more expensive by the cost of tracking down dispersed witnesses, searching for and retrieving old documents, and reviving faded memories. Thus, by delaying the filing of a lawsuit, the plaintiff may cause the defendant to incur an unnecessarily high level of litigation costs.

The empirical basis for the premise that delay imposes greater disadvantages on the defendant than on the plaintiff is, at best, uncertain. The premise rests on the assumption that the plaintiff is aware of the existence of the potential claim but that the defendant is not, and that the plaintiff is therefore responsible for the delay. There may indeed be cases in which the defendant has little or no indication that he or she

131. See *Davies v. Krasna*, 14 Cal. 3d 502, 512, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975) (“The fundamental purpose of such statutes [of limitation] is to protect potential defendants by affording them an opportunity to gather evidence while facts are still fresh.”); *Elkins v. Derby*, 12 Cal. 3d 410, 412, 525 P.2d 81, 83, 115 Cal. Rptr. 641, 643 (1974) (“[T]he fundamental purpose of the limitations statute . . . is to ensure timely notice to an adverse party so that he can assemble a defense while the facts are still fresh.”). As one opinion noted:

Once an action is filed and a defendant is served, he is then armed with notice of plaintiff’s claim and may protect his interests by means which were generally unavailable to him before filing. For example, he may institute discovery processes in order to preserve evidence which might be destroyed, [or] may locate material witnesses and take depositions if appropriate.

General Motors Corp. v. Superior Court (Maraska), 65 Cal. 2d 88, 91, 416 P.2d 492, 494-95, 52 Cal. Rptr. 460, 462-63 (1966).

132. *Gutierrez v. Mofid*, 39 Cal. 3d 892, 898, 705 P.2d 886, 890, 218 Cal. Rptr. 313, 317 (1985) (quoting *Wood v. Elling Corp.*, 20 Cal. 3d 353, 362, 572 P.2d 755, 760, 142 Cal. Rptr. 696, 701 (1977)).

133. See *Berns v. Board of Supervisors*, 315 S.E.2d 856, 859 (Va. 1984) (“Defendants could find themselves at the mercy of unscrupulous plaintiffs, who hoard evidence that supports their position while waiting for their prospective opponents to discard evidence that would help make a defense.”).

134. Cf. *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 787, 598 P.2d 45, 53, 157 Cal. Rptr. 392, 400 (1979) (“Statutes of limitations have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims.”).

did something wrong and, therefore, no reason to preserve or gather evidence when it is available, while a plaintiff who suffered injury as a result of the wrong and does not engage in hundreds or thousands of transactions of the same type may have a better recollection of the circumstances and a greater incentive to preserve and gather evidence before it deteriorates. But even when this assumption is true, the notion that a plaintiff may lie in wait, secretly gathering evidence for years in order to obtain a tactical advantage, seems fanciful.¹³⁵ The possibility cannot be overlooked, however, because California law gives the plaintiff up to three years after filing a complaint in which to serve the defendant,¹³⁶ and permits the plaintiff to substitute new parties for fictitiously named defendants within the three-year period, even though the party to be added did not receive actual notice of the claims against it within the limitation period.¹³⁷ Thus, the filing of a complaint in California does not necessarily ensure that the defendant will promptly be placed on notice of the potential claims against him or her.

Until recently, these provisions may have undermined the policy of placing defendants on an equal footing by encouraging plaintiffs to engage in the type of manipulation regarding the deterioration of evidence that the limitation system seeks to avoid. The enactment of fast-track rules, however, has substantially eliminated the problem by drastically reducing the time in which the plaintiff must serve the defendant in routine cases.¹³⁸ While most fast-track rules permit an exception upon a showing of good cause,¹³⁹ it is likely that outright manipulation occurs only in a small percentage of cases that, although they may result in unfairness to a particular defendant, may appropriately be disregarded for the purposes of establishing general limitation policy.¹⁴⁰

In addition, there is no reason to assume that as a general rule plaintiffs will be aware of potential claims but defendants will not. Either party or both may be aware or unaware of the existence of a potential claim, and the equities of the situation differ depending upon which permutation is considered.

135. It is conceivable, but also unlikely, that a plaintiff might delay for other reasons, such as to maximize the amount of monetary relief awarded, if, for example, the statutory prejudgment interest rate exceeds the market interest rate.

136. See CAL. CIV. PROC. CODE § 583.210 (West Supp. 1997) ("The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant.").

137. *Id.* § 474 (West 1979). See generally, James E. Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51 (1977).

138. See, e.g., L.A. COUNTY SUPER. CT. R. 7.7(a)(1) ("All complaints shall be served within 60 days of the filing date . . .").

139. See, e.g., *id.*

140. Although it is likely that only a few defendants are affected directly, a much larger number may be affected indirectly by changing their behavior to protect against the remote possibility that they may be ambushed in this manner. For example, potential defendants may keep records or maintain insurance policies for excessively long periods of time, to their detriment as well as the detriment of society. See *supra* notes 65-76 and accompanying text.

If both parties are unaware of the existence of a potential claim (which may occur, for example, when the harm caused by the wrong is latent), then neither the plaintiff nor the defendant will realize that evidence should be preserved, and both will be equally vulnerable to the deterioration of evidence through the passage of time. Moreover, because the plaintiff usually bears the burden of proof on the majority of issues, it seems more likely that, on balance, deterioration of evidence would hurt the plaintiff more than it would hurt the defendant.

If, on the other hand, both parties are aware of the existence of a potential claim, then both parties can act to preserve and gather evidence while the facts are still fresh. Both parties also have an equal opportunity to initiate litigation, because if the alleged wrongdoer is extremely concerned about the deterioration of evidence, he or she may seek a declaratory judgment to ensure that the matter is resolved while the evidence is still fresh.¹⁴¹ Of course, a wrongdoer might be reluctant to pursue declaratory relief for a variety of reasons. Among other considerations, commencing an action for declaratory relief may force a victim who is otherwise disinclined to pursue a potential claim to file a counterclaim.¹⁴² Placing the victim in a position where he or she has no alternative but to fight may overcome the victim's psychological reluctance to take formal action, thereby unleashing a claim that otherwise might not have been asserted. If the victim were allowed an unlimited time to sue, the wrongdoer would be faced with the unsavory choice of initiating litigation against himself or herself or facing perpetual uncertainty. In this situation, therefore, limitation of actions properly places the burden of going forward on the party seeking to alter the status quo. The limitation period gives the plaintiff a reasonable time within which to decide if the potential benefits of litigation outweigh its potential costs, after which the possibility of litigation is foreclosed in order to promote the other interests sought to be served by the limitation system. By reducing the need for declaratory judgment actions, statutes of limitation may reduce the number of unnecessary filings and prevent some small disputes from escalating into full-blown litigation. This benefit may be offset by other factors, however, such as the number of actions that are filed prematurely, before any significant injury has occurred, in order to preserve the right to pursue a cause of action in the event of subsequent harm.

Finally, the defendant may be aware of the existence of a potential claim while the plaintiff is not. For example, a defendant may learn that a product is defective before a particular plaintiff does because of the defendant's experience with previous customers. Because the wrongdoer may take steps to preserve evidence, the prejudice

141. See 28 U.S.C.A. § 2201 (West 1994); CAL. CIV. PROC. CODE § 1060 (West Supp. 1997).

142. See FED. R. CIV. P. 13(a) (requiring the pleading of all counterclaims arising out of the same transaction or occurrence); see also CAL. CIV. PROC. CODE § 426.30 (West 1973) (providing that related causes of action that are not asserted are barred in a subsequent action). In California, the term "counterclaim" has been abolished, and responsive pleadings seeking affirmative relief are referred to as "cross-complaints." CAL. CIV. PROC. CODE § 428.80 (West 1973).

he or she suffers by virtue of delay is diminished in this situation. The wrongdoer also has a stronger motive to avoid filing a declaratory judgment action because the wrongdoer will not want to alert the victim to the existence of a wrong of which the victim is not aware, or which may never result in any cognizable harm to the victim. It is questionable, however, whether society has an interest in protecting the wrongdoer's ability to remain silent in the hope that his or her victim will not become aware of the potential claim until after it is time-barred. In any case, it is clear that the rationale underlying the policy of placing the defendant and the plaintiff on equal footing is most persuasive when only the plaintiff is aware of the existence of a potential claim.

The policy of placing plaintiffs and defendants on an equal footing has been influential in shaping the limitation system. For example, some of the doctrines used to toll the limitation period, such as equitable tolling¹⁴³ or relation back of amendments,¹⁴⁴ depend in part upon a showing that the plaintiff has in some effective manner placed the defendant on notice of the claim, providing the defendant with a fair opportunity to protect his or her interests by collecting relevant evidence shortly after the events at issue. Conversely, if the defendant is aware that the plaintiff has a potential claim, but the plaintiff is not, then often either the discovery rule of accrual¹⁴⁵ or the doctrine of fraudulent concealment¹⁴⁶ can be used to effectively toll the limitation period until the plaintiff becomes aware of the potential claim.

The widespread adoption of the discovery rule of accrual has led to an increased emphasis on this policy in recent years. Indeed, some courts have expressed the view that since the principal purpose of statutes of limitation is to place the defendant on

143. The doctrine of equitable tolling tolls the limitation period of a civil action when the plaintiff's timely commencement of a previous action or administrative proceeding is sufficient to place the defendant on notice of a potential claim. *See, e.g., Elkins*, 12 Cal. 3d at 417-18, 525 P.2d at 86, 115 Cal. Rptr. at 646 ("Defendants' interest in being promptly apprised of claims against them in order that they may gather and preserve evidence is fully satisfied when prospective tort plaintiffs file [workers] compensation claims within one year of the date of their injuries.").

144. The doctrine of relation back permits the plaintiff to amend the complaint to add claims or parties after the limitation period has expired, if the initial complaint was sufficient to place the defendant on notice. *See, e.g., FED. R. CIV. P. 15(c)*. In California, however, relation back is permitted even if the defendant added by the amendment was not placed on notice. For example, the California Supreme Court stated:

An amended complaint relates back to the original complaint, and thus avoids the statute of limitations as a bar against named parties substituted for fictional defendants, if it: (1) rests on the same general set of facts as the original complaint; and (2) refers to the same accident and same injuries as the original complaint.

Barrington v. A.H. Robins Co., 39 Cal. 3d 146, 151, 702 P.2d 563, 565, 216 Cal. Rptr. 405, 407 (1985) (citing *Smeltzley v. Nicholson Mfg. Co.*, 18 Cal. 3d 932, 936-37, 559 P.2d 624, 626-27, 136 Cal. Rptr. 269, 271-72 (1977)).

145. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 190, 491 P.2d 421, 430, 98 Cal. Rptr. 837, 846 (1971) (explaining that if the discovery rule applies, "the cause of action does not accrue until the plaintiff knows, or should know, all material facts essential to show the elements of that cause of action").

146. *See, e.g., Pashley v. Pacific Elec. Co.*, 25 Cal. 2d 226, 229, 153 P.2d 325, 327 (1944) ("[W]hen the defendant is guilty of fraudulent concealment of the cause of action the statute is deemed not to become operative until the aggrieved party discovers the existence of the cause of action.").

an equal footing with the plaintiff, the statute may be disregarded whenever the defendant has actual notice of a potential claim.¹⁴⁷ This view, which appears to be gaining broader acceptance, finds its clearest expression in *Ateeq v. Najor*,¹⁴⁸ in which the court stated:

[W]hen a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied.¹⁴⁹

The notion that notifying the defendant of the existence of a potential claim should be treated as the equivalent of filing a complaint for purposes of limitation of actions is problematic. For one thing, such an approach reduces clarity concerning when the limitation period ceases to run. There is little room for debate about whether a complaint has been filed, but the timing and adequacy of notice frequently may be a matter of legitimate dispute. More fundamentally, this approach ignores the other purposes of limitation of actions, such as promoting repose and accuracy in fact-finding.¹⁵⁰ All that is accomplished by actual notice is placing the defendant and the plaintiff on an equal footing with regard to the collection and preservation of evidence. Although this is desirable, it should not necessarily be viewed as sufficient.

D. Promote Cultural Values of Diligence

Another important policy underlying limitation of actions is to encourage plaintiffs to diligently pursue their claims.¹⁵¹ There is disagreement, however, concerning the rationale for this policy. Some courts have suggested that this policy is merely a

147. See, e.g., *Addison*, 21 Cal. 3d at 318, 578 P.2d at 943, 146 Cal. Rptr. at 226 ("[D]efendant can claim no substantial prejudice, having received timely notice of possible tort liability upon filing of the compensation claim, and having ample opportunity to gather defense evidence in the event a court action ultimately is filed."); *Elkins*, 12 Cal. 3d at 412, 525 P.2d at 83, 115 Cal. Rptr. at 643 ("[T]he fundamental purpose of the limitations statute . . . is to ensure timely notice to an adverse party so that he can assemble a defense while the facts are still fresh. The filing of a compensation claim accomplishes this purpose and the tolling of the statute does not frustrate it."); see also *Crown, Cork & Seal, Co. v. Parker*, 462 U.S. 345, 353 (1983) ("The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise.").

148. 15 Cal. App. 4th 1351, 19 Cal. Rptr. 2d 320 (1993).

149. *Ateeq*, 15 Cal. App. 4th at 1356, 19 Cal. Rptr. 2d at 323 (quoting *New York Cent. & Hudson River R.R. Co. v. Kinney*, 260 U.S. 340, 346 (1922) (Holmes, J.)).

150. Another problem, of course, is that the court in *Ateeq* did not explain what it meant by the phrase "a liberal rule." It is unclear whether the court meant that the limitations rules should be disregarded entirely, or merely that they should be applied in favor of the plaintiff in doubtful cases.

151. See, e.g., *Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 935, 873 P.2d 613, 617, 30 Cal. Rptr. 2d 440, 445 (1994) ("Such statutes [of limitation] ensure that plaintiffs proceed diligently with their claims."); *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1112, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 663 (1988) ("A second policy underlying the statute [of limitation] is to require plaintiffs to diligently pursue their claims.").

means of implementing other policies underlying limitation of actions, such as avoiding deterioration of evidence or promoting repose.¹⁵² Indeed, one commentator has argued that this is the only legitimate rationale for requiring plaintiffs to act diligently:

This explanation for statutes of limitation can only be justified as an instrument for furthering one or more of the purposes set forth above. Unless the indolence of the plaintiff has somehow threatened the quality of the evidence available at trial or intruded upon a potential defendant's repose, no purpose, other than generally punishing the slothful, is served by barring the claim. It would be curious indeed for a defendant to defend a contract action by conceding that he had breached the contract, but asserting that the plaintiff should not recover because she was a lazy slob.¹⁵³

This argument, however, overlooks the fact that limitation of actions also satisfies certain psychological, cultural and moral imperatives. One such imperative is the deeply ingrained notion that people should act promptly. This is expressed in the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights."¹⁵⁴ It is also expressed in long-standing Christian religious beliefs that time is the property of God and that it is a sin to waste time through delay or inefficiency.¹⁵⁵ As a society, we dislike procrastination and do not respect those who wait until the last minute to do what could have been done earlier. This attitude is displayed in a variety of popular sayings, such as "the early bird catches the worm" and "never put off until tomorrow what you can do today."¹⁵⁶

Another such imperative is the idea that society should put the past behind and move on with the future.¹⁵⁷ At least in our Western culture, "[w]e do not easily

152. See, e.g., *Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.*, 39 Cal. 3d 57, 62, 702 P.2d 197, 200, 216 Cal. Rptr. 115, 118 (1985) ("The purpose of any limitations statute is to require 'diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs, and ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh.'") (quoting *Kaiser Found. Hosp. v. Workers Compensation Appeals Bd.*, 19 Cal. 3d 329, 336, 562 P.2d 1037, 1040, 137 Cal. Rptr. 878, 881 (1977)); cf. *Wood v. Elling Corp.*, 20 Cal. 3d 353, 362, 572 P.2d 755, 760, 142 Cal. Rptr. 696, 701 (1977) ("Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been *allowed to slumber* until evidence has been lost, memories have faded, and witnesses have disappeared.") (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348 (1944)) (emphasis added).

153. Green, *supra* note 98, at 981.

154. 1 JOHN POMEROY, A TREATISE ON EQUITABLE JURISPRUDENCE § 418 (1918); cf. CAL. CIV. CODE § 3527 (West 1970) ("The law helps the vigilant, *before* those who sleep on their rights.") (emphasis added).

155. See RIFKIN, *supra* note 96, at 95-97.

156. See MICHAEL O'MALLEY, KEEPING WATCH 1-54 (1990).

157. See RIFKIN, *supra* note 96, at 185 ("Time being a premium, less and less is given over to making good on prior promises and more and more is given over to facilitating new options and agreements."); Resnik, *supra* note 89, at 85 (describing one of the policies favoring the finality of judicial decisions as a recognition that "practically, both the system and the litigants must be able to turn attention and energies elsewhere").

tolerate loose ends and are uncomfortable suspending an activity or an event in limbo for long periods."¹⁵⁸ The future brings both problems and opportunities. If we are to solve those problems and take advantage of those opportunities, it makes sense to concentrate our attention on them, rather than dwelling on mistakes or wrongs that happened long ago. This attitude is reflected in the popular sayings "let bygones be bygones" and "there's no use crying over spilled milk."

Because it serves these cultural mores, the law of limitation of actions possesses normative overtones.¹⁵⁹ For this reason, we are less troubled about the loss of a claim if the plaintiff has been lax in enforcing it. Our attitude is that "[i]f a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example."¹⁶⁰ Some cases go so far as to suggest that the plaintiff should be punished for his or her delay, and that the role of limitation of actions is to implement the punishment by cutting off the plaintiff's ability to recover on a claim.¹⁶¹ The notion of limitation of actions as punishment has enjoyed renewed favor in recent years,¹⁶² so much so that one scholar has complained that "statutes of limitations are today viewed as punitive, as opposed to protective. Their primary purpose is considered to be punishment for the slumbering plaintiff and not protection for yesterday's wrongdoer."¹⁶³

It also can be argued that by punishing a few plaintiffs, the limitation system benefits numerous others. Late filing has disadvantages for plaintiffs as well as for defendants. Suppose, for example, that a plaintiff waits ten or twenty years before bringing suit. Unless the plaintiff has been lying in wait for the most advantageous

158. RIFKIN, *supra* note 96, at 60; see EDWARD T. HALL, *THE DANCE OF LIFE* 32 (1983) ("We Americans are driving to achieve what psychologists call 'closure.' Uncompleted tasks will not let go, they are somehow immoral, wasteful, and threatening to the integrity of our social fabric.").

159. See, e.g., *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) ("Limitations periods are intended . . . to prevent plaintiffs from sleeping on their rights.") (citation omitted); *Kensinger v. Abbott Labs.*, 171 Cal. App. 3d 376, 384, 217 Cal. Rptr. 313, 318 (1985) ("The purpose of statutes of limitations is to prevent assertion of claims which have become stale due to plaintiff's neglect or inattentiveness."), *disapproved in part on other grounds*, *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988).

160. See Holmes, *supra* note 1, at 476.

161. See, e.g., *Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 175, 180 P.2d 900, 906 (1947) (stating that statutes of limitation "stimulate . . . activity and punish negligence") (quoting *Wood*, 101 U.S. at 139); *accord* *Shain v. Sresovich*, 104 Cal. 402, 406, 38 P. 51, 52 (1894); see also *Liberty Mut. Ins. Co. v. Fales*, 8 Cal. 3d 712, 721, 505 P.2d 213, 219, 106 Cal. Rptr. 21, 27 (1973) ("statutes of limitation only operate against those who, through neglect or otherwise, fail to bring a timely claim."); *Pashley v. Pacific Elec. Co.*, 25 Cal. 2d 226, 228-29, 153 P.2d 325, 326 (1944) ("The statute of limitations . . . is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof.") (quoting 1 *WOOD*, *supra* note 17, at 8-9).

162. See, e.g., *Jolly*, 44 Cal. 3d at 1112, 751 P.2d at 928, 245 Cal. Rptr. at 663 (1988) ("Because a plaintiff is under a duty to reasonably investigate . . . those failing to act with reasonable dispatch will be barred.").

163. Nathan Kahan, *Statutes of Limitations Problems in Cases of Insidious Diseases: The Development of the Discovery Rule*, 2 J. PROD. LIAB. 127, 136 (1978); cf. Holmes, *supra* note 1, at 477 ("It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another.").

time to sue—an unlikely prospect, at least in most cases¹⁶⁴—the plaintiff's evidence will have deteriorated to some extent and perhaps as badly as the defendant's. Since the plaintiff bears the burden of proof on most issues, any degradation in the quality of evidence generally operates to the plaintiff's disadvantage.¹⁶⁵ In addition, the jury may be suspicious of the merits of the plaintiff's claim because it remained unasserted for so long.¹⁶⁶ The jury may take the delay to indicate either that the claim has no merit, or that it is of such minimal importance that it is not worthy of serious consideration. Finally, even if the plaintiff is successful, receipt of any recovery is deferred, thereby reducing its value to the plaintiff.¹⁶⁷ These factors operate to weaken and reduce the value of the plaintiff's claim over time, regardless of the limitation period.¹⁶⁸ Assuming that plaintiffs, like most people, tend to procrastinate, limitation of actions may benefit plaintiffs by giving them an incentive to sue while their claims are still fresh and, therefore, at least marginally, more likely to succeed or to yield a greater recovery.¹⁶⁹ Although some plaintiffs lose their claims as a result of the limitations bar, others are stimulated to seek redress promptly, to their emotional¹⁷⁰ and financial benefit.

Promoting diligence and early filing, however, may have unintended negative consequences. The impending expiration of the limitation period may cause a plaintiff to file sooner than would be optimal. For example, a plaintiff may file an action before any injury has occurred in order to preserve the plaintiff's rights in case a contingent or speculative consequence of an alleged wrongdoing comes to pass. Premature filing can also inhibit efforts at consensual resolution of disputes.¹⁷¹

If the purpose is to punish dilatory plaintiffs, moreover, limitation of actions is a poorly chosen instrument. For every plaintiff denied just compensation for an injury because he or she sued too late, there is a defendant who receives a windfall.

164. See *supra* notes 135-40 and accompanying text.

165. See *supra* text accompanying notes 140-41.

166. See Kelley, *supra* note 45, at 1645 ("[T]he late claimant's motives are suspect. Those impelled to redress a felt wrong bring suit soon after the injury. The late claimant, by contrast, is likely to be motivated by malice or simple greed rather than by a desire for justice.").

167. This is not always true. Delay alone may not always result in a net reduction in the value of the plaintiff's claim. If prejudgment interest is available at a rate equal to or higher than the market rate, the value of the judgment will be either unchanged or improved by the passage of time. In addition, the plaintiff's out-of-pocket investment in litigation costs will be deferred. Thus, if litigation is postponed the plaintiff may earn a return on both the potential judgment and the amount he or she would have invested in litigation costs. Other factors, however, such as deterioration of evidence and concerns about collectibility of a favorable judgment, make this a dubious strategy.

168. To the extent that these factors weaken the plaintiff's claim, they also undermine the implementation of substantive law policy by making what would have been a successful claim unsuccessful or less successful. See *infra* notes 175-76 and accompanying text.

169. See 1 CORMAN, *supra* note 53, § 1.1, at 13 ("The plaintiff is induced not to neglect valid claims.").

170. Like defendants, plaintiffs also have an interest in "repose," in the sense that if one is aware of a claim, he or she is likely to worry about the prospect of litigation and to speculate about how the claim will be resolved.

171. Of course, if such efforts appear promising to both parties, they can enter into an agreement to toll the limitations period so that the necessity of filing does not disrupt their negotiations.

A more efficient method of punishment would be to allow the dilatory plaintiff to recover from the defendant, and then to confiscate the compensation awarded for the public good, after the defendant had internalized the costs of his or her wrongful conduct. Of course, if the plaintiff was aware in advance that his or her award would be confiscated, the plaintiff would no longer have any incentive to sue. It might be necessary, therefore, to limit any such confiscation to a portion of the plaintiff's award.

The policy of encouraging diligence supports the plaintiff in cases in which there is serious doubt regarding the plaintiff's awareness of the claim. In theory, it should not matter why the statutory deadline was missed, unless the reason is one recognized as a basis for tolling the limitation period. The rationale behind this policy, however, suggests that the plaintiff must have had actual or constructive knowledge of the existence of the potential claim before the plaintiff's claim should be barred.¹⁷² When the plaintiff lacks such knowledge, the statute of limitations provides no incentive for diligence.

E. Encourage the Prompt Enforcement of Substantive Law

Arguably, "the central purpose of law is to guide behavior."¹⁷³ To the extent that the enforcement of substantive law has a deterrent, rather than a compensatory, purpose, prompt enforcement results in greater deterrence of wrongdoing for three reasons. First, punishment closer in time to the offense is more effective in deterring wrongdoing than delayed punishment, other things being equal. Second, any delay in imposing sanctions allows the wrongdoer to commit additional wrongs before the deterrent effect of punishment is felt. Third, the incremental value of deterrence obtained by the pursuit of old claims is likely to be minimal. If the wrongdoer has not continued his or her wrongdoing, then he or she has reformed and punishment will not improve his or her conduct. If the wrongdoer has continued his or her wrongdoing, then there are more recent wrongs for which he or she could more easily and inexpensively be punished.¹⁷⁴

The legal system relies heavily on the private enforcement of civil obligations by the victims themselves. Consequently, statutes of limitation may help to promote the deterrent effect of the substantive law by encouraging the prompt enforcement of claims.¹⁷⁵ This effect, however, must be balanced against the reduction in deterrence caused by limitation of actions. The deterrent effect of a substantive law rule

172. See, e.g., *Kensinger*, 171 Cal. App. 3d at 384, 217 Cal. Rptr. at 318 ("Where the plaintiff is unaware that her legal rights have been infringed, however, it would be palpably unjust to declare a cause of action untimely.").

173. Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 426-27 (1982) [hereinafter Munzer, *Retroactive Legislation*].

174. Cf. MODEL PENAL CODE § 1.06 cmt. 1, at 86 (1985).

175. See *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868) ("The policy of these statutes is to encourage promptitude in the prosecution of remedies.").

depends on the level of enforcement, the accuracy of adjudication, the severity of punishment, and the promptness with which punishment is imposed. Although encouraging the prompt enforcement of claims increases the level of deterrence by increasing the present value of punishment of a given severity to the wrongdoer, extinguishing valid claims decreases the level of enforcement or reduces the accuracy of adjudication by increasing the probability that the wrongdoer will escape punishment altogether. The net effect of these competing influences on deterrence is difficult, if not impossible, to quantify.

Consideration of the effect of limitations rules on deterrence also requires recognition that it is often sufficient simply to announce a substantive law rule to ensure that the overwhelming majority of persons and entities respect it. This is in part because of widespread acceptance of our political institutions as providers of norms governing behavior. On the other hand, it can be argued that the widespread compliance with substantive law rules may be the product of a history of effective deterrence through civil litigation.

A related but slightly different point is that focusing attention and resources on old cases hinders the ability of the common law to adjust rapidly to changing societal conditions. As a result, the law changes less quickly than it should if resources are to be allocated optimally in the long run.¹⁷⁶ By encouraging the prompt enforcement of the substantive law, limitation of actions may help society recognize and reassess the impact of its laws in a more efficient manner.

F. Avoid Retrospective Application of Contemporary Standards

As time passes, circumstances change. During the past few decades, there have been especially rapid changes in scientific knowledge and cultural values.¹⁷⁷ In less than a century, for example, California has been transformed from a relatively undeveloped rural state to a densely populated, multi-cultural, highly complex industrial power. Similarly, law changes and evolves with the passage of time. Conduct accepted or even encouraged ten or twenty years ago is no longer tolerated today. If the time of adjudication is too remote from the time at which the relevant events occurred, then the standards against which the defendant's conduct is measured may be substantially different than he or she could have anticipated. Statutes of limitation may therefore serve, in part, to prevent the application of contemporary legal and moral standards to conduct that occurred in the distant past.

The rationale underlying this policy is that it is unfair to retroactively judge past behavior by present standards, at least when there has been a meaningful change in

176. See Posner, *supra* note 91, at 446 ("[C]ourt delay increases error costs because the adaptation of legal rules to altered circumstances is retarded . . .").

177. Cf. ARNOLD TOYNBEE, EXPERIENCES 181 (1969) ("The pace has been accelerating constantly since the earliest date from which any record of human affairs has survived.").

those standards.¹⁷⁸ Although retroactive application of common-law rules is normal,¹⁷⁹ and not unconstitutional,¹⁸⁰ nevertheless there is something that strikes most people as unfair about changing the legal consequences of conduct after the conduct has occurred.¹⁸¹ Among other things, it is notoriously difficult, if not impossible, for judges and juries to put present-day standards out of their minds and to avoid second-guessing the actions or omissions of others with the benefit of hindsight.¹⁸² Measuring past conduct by contemporary standards also fails to promote deterrence because "making liability depend on elements not known to the parties when they choose their actions cannot affect their behavior."¹⁸³

These concerns have not been offered by a California court as a justification for limitation of actions. It is, however, well-established in California that "a change in the law, either by statute or by case law, does not revive claims otherwise barred by the statute of limitations."¹⁸⁴ By refusing to hear cases that the statute of limitations has barred, the courts implicitly recognize that it might be unfair to apply new rules of law to circumstances that occurred long ago, even if they are willing to apply the decision retroactively to cases that are still pending. Similarly, the retrospective application of contemporary social attitudes to past conduct may fairly be included within the scope of those circumstances that may render a claim "stale." Avoiding

178. See *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483, 1497 (1994) ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.") (internal quotes omitted) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 14 (1982) ("In our zeal to punish abuses discovered today, we must be cautious not to overlook the prevailing moral and business standards of the time involved.").

179. See generally Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 374-75 (1977).

180. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976) (rejecting due process challenge to retroactive imposition of civil liability); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798) (holding that the Ex Post Facto Clause applies only to criminal prosecutions).

181. See EDMOND CAHN, *THE MORAL DECISION* 253 (1955) ("We must not accuse anyone of an act violating some standard of behavior unless he [or she] could have ascertained the existence and meaning of the standard before he [or she] committed the act."); Munzer, *Retroactive Legislation*, *supra* note 173, at 427 ("[R]etroactive lawmaking violates what is often called the rule of law, namely, an entitlement of persons to guide their behavior by impartial rules that are publicly fixed in advance."); Schwartz, *supra* note 65, at 818 ("[W]holly justified expectations are not frustrated . . . as long as the liability rule to which the actor is subjected was at least somewhat foreseeable at the time of his conduct.").

182. Cf. BERNARD BAILYN, *ON THE TEACHING AND WRITING OF HISTORY* 55 (1994) (explaining that one of the most difficult problems faced by a historian is that "you, as historian, as [distinct from the] participants, know how it all came out").

183. Kaplow & Shavell, *supra* note 80, at 198.

184. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1116, 751 P.2d 923, 931, 245 Cal. Rptr. 658, 665 (1988); see *Monroe v. Trustees of Cal. State Colleges*, 6 Cal. 3d 399, 406, 491 P.2d 1105, 1109, 99 Cal. Rptr. 129, 133 (1971) ("The normal 'retroactivity' of most civil decisions has never been thought to supersede the operation of the statute of limitations so as to revive old claims which were not pursued because of a previously prevailing contrary rule of law."); *Bellah v. Greenson*, 81 Cal. App. 3d 614, 623, 146 Cal. Rptr. 535, 540 (1978) ("[I]t is settled that the retroactive operation of a judicial decision will not revive a cause of action previously barred by the statute of limitations.").

the litigation of "stale" claims is, of course, a frequently mentioned justification for the barring of untimely claims.¹⁸⁵

In assessing the weight this policy should receive, it is noteworthy that retroactivity does not always disadvantage the defendant. Sometimes contemporary standards are more favorable to defendants than are past standards. In many ways, society is less judgmental than it used to be, and it no longer condemns certain conduct that previously was a source of criminal or civil liability.¹⁸⁶

G. Reduce the Volume of Litigation

1. Reduce the Overall Number of Claims Filed

In this era of increasing court filings and shrinking government budgets, there is a desire to reduce the volume of litigation that is processed through the legal system. The limitations system is one mechanism that could be used to accomplish this result.¹⁸⁷ Very short limitation periods could be expected to reduce the number of lawsuits by deterring many of those who have missed the limitation period from filing suit. This reduction would be partially offset by an increase in the number of "protective" suits filed by plaintiffs who are unsure about the existence of a possible claim and who want to make certain that their rights to present that possible claim in the future are not lost by delay. On balance, though, the limitations system probably does, and probably could be used even more extensively to, reduce the number of lawsuits that are filed.

It is questionable, however, whether using statutes of limitation in this manner is an effective way of reducing the overall volume of litigation. To start with, statutes of limitation do not prevent untimely claims from being filed; they simply reduce the incentive to file by providing a defense. The effectiveness of this defense in reducing the number of untimely filings depends on the plaintiff's assessment of the futility of pursuing the claim, which in turn depends on both the certainty and the severity of the sanction. While the sanction is certainly severe (the defense of limitation, if successful, completely bars the plaintiff's claim), there are currently so many

185. See, e.g., *Jolly*, 44 Cal. 3d at 1112, 751 P.2d at 927-28, 245 Cal. Rptr. at 662-63 (stating that "the fundamental purpose of the statute [of limitations] is . . . to protect parties from defending stale claims"); *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 787, 592 P.2d 45, 53, 157 Cal. Rptr. 392, 400 (1979) (explaining that "[s]tatutes of limitation have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims").

186. See MARY MIDGLEY, CAN'T WE MAKE MORAL JUDGEMENTS 3 (1993) (criticizing the presently fashionable "duty of toleration," and arguing that society can and should make moral judgments).

187. Cf. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). The court explained: 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 They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.

Id.

exceptions to limitation of actions that many prospective plaintiffs will be tempted to file anyway. There is little or no sanction for filing an unsuccessful claim; indeed, at least one court has held that because limitation of actions is an affirmative defense that may be waived,¹⁸⁸ a claim filed after the limitation period has expired cannot be considered a frivolous claim.¹⁸⁹ Therefore, the only cost to the plaintiff is the time, energy and money expended in pursuing a possibly untimely claim. These costs can be substantial, but if the plaintiff is represented on a contingent fee basis, the financial burden may be minimal.

Another consideration is that, given the complexity of existing limitation rules and the manner in which they have evolved, it has become increasingly difficult to dispose of time-barred claims as a threshold or preliminary matter (that is, by demurrer or summary judgment) rather than at trial.¹⁹⁰ While this difficulty may increase the cost to the plaintiff of pursuing an untimely claim, it also reduces the probability that the defendant will prevail on a limitation defense, thereby increasing the plaintiff's chance of recovery. This difficulty also means that the legal system spends considerable time and resources in determining which claims are barred and which are not. Consequently, any reduction in the overall quantity of litigation that may be accomplished through the limitation system is likely to be small, and the net resulting savings in judicial resources is likely to be modest.

Even more questionable is whether the desire to reduce the volume of claims processed by the legal system has anything to do with limitation policy as such. While reducing the number of claims is a potentially valid societal goal,¹⁹¹ it should be pursued, if at all, by modifying the applicable substantive rules that facilitate or encourage the pursuit of claims in the first place. If society believes that too many lawsuits are being filed, consideration should be given to reducing the number of wrongs that are actionable, erecting additional barriers to success (such as changing the elements of claims or imposing higher burdens of proof), or reducing the reward for prevailing (by capping damage awards, for example). Alternatively, the costs of

188. See, e.g., *Minton v. Cavaney*, 56 Cal. 2d 576, 581, 362 P.2d 473, 476, 15 Cal. Rptr. 641, 644 (1965); *Brownrigg v. DeFrees*, 196 Cal. 534, 541, 238 P. 714, 716 (1925).

189. See *Currie v. Schon*, 704 F. Supp. 698, 702 (E.D. La. 1989) ("Prescription will not bar judicial enforcement of an obligation unless affirmatively pleaded by the defendant . . . Hence, we would never impose sanctions on a plaintiff who seeks to enforce an alleged extant right, albeit that enforcement may be barred if the defendant chooses to plead prescription."). In civil law jurisdictions such as Louisiana, "statutes of prescription, like statutes of limitations, bar the sought-for remedy and terminate access to the courts for enforcement of the existing right." 1 CORMAN, *supra* note 53, § 1.1, at 6; see *Lackner v. LaCroix*, 25 Cal. 3d 747, 752, 602 P.2d 393, 396, 159 Cal. Rptr. 693, 696 (1996) (holding that a successful statute of limitations defense "is not a favorable termination for purposes of a subsequent malicious prosecution action").

190. See, e.g., *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 1325, 44 Cal. Rptr. 2d 305, 308 (1995) ("The resolution of a statute of limitations defense is typically a factual question for the trier of fact.").

191. In theory, reducing the amount of litigation would be beneficial to society because it would reduce the quantity of resources expended on transactions that simply reallocate wealth, including both litigation costs and liability insurance premiums, and therefore increase the quantity of resources available for the production of goods and services.

litigation might be increased. Filing fees could be raised, or the number of lawyers could be reduced so that hiring an attorney to pursue a claim would become more expensive. Marginal litigation could be discouraged by shifting responsibility for payment of attorney's fees incurred by all parties to the losing side. Such measures have their advantages and disadvantages, and are not necessarily desirable, but they all possess the advantage of addressing the perceived problem directly, rather than indirectly through the limitation system.

2. Reduce the Number of Unmeritorious Claims Filed

It has been suggested that one purpose of statutes of limitation is to help reduce the number of unmeritorious¹⁹² or inconsequential claims¹⁹³ that are filed. This purpose is based on the belief that long-delayed claims are more likely to be without merit than promptly-filed claims. This belief, in turn, is based on the assumption that a person possessing a well-founded claim and the ability to sue will file early to obtain the expected redress as soon as possible.¹⁹⁴

This rationale has intuitive appeal. It relies heavily on principles of self-selection: presumably, the strongest and most sincerely held grievances will be presented first, while the weaker and less-troubling claims will be prosecuted later. A lengthy delay suggests that the matter is not a pressing one from the plaintiff's point of view, at least when the plaintiff is aware of the existence of a potential claim. Moreover, one who has delayed bringing suit is probably less likely to resort to self-help measures if the claim is denied.

The lack of an empirical basis for this assumption, however, leaves it open to question. It is arguable, for example, that unmeritorious claims may be relatively more likely to be filed early, when anger and frustration, rather than reason, guide

192. An unmeritorious claim may be defined as a claim that ultimately will not prevail if adjudicated on the merits.

193. See THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 157 (2d ed. Law. Co-op. Pub. Co. 1936) (1929) (stating that the English Limitation Act of 1623 was intended in part to screen out inconsequential claims).

194. See *Barclay v. Blackington*, 127 Cal. 189, 196, 50 P. 834, 836 (1899) (holding that "[s]tatutes of limitations . . . are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue") (quoting *United States v. Wiley*, 78 U.S. 508, 513-14 (1870)); accord *Douglas v. Douglas*, 103 Cal. App. 2d 29, 34-35, 228 P. 603, 606-07 (1951); see also *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868) (Statutes of limitation "are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist."); *Seybold v. Magnolia Land Co.*, 376 So. 2d 1083, 1086 (Ala. 1979) (same); 1 CORMAN, *supra* note 53, § 1.1, at 13 (stating that "[w]hen no attempt is made in a reasonable time to enforce a demand, it is likely that a judicial presumption will arise against the original validity of the claim or its continued existence"); Green, *supra* note 98, at 1003 n.164 (explaining that "[t]he assumption underlying this claim is that those with meritorious claims will be anxious to pursue them and will therefore file suit promptly"); *id.* at 989-91 n.113 (describing the "traditional" conception that the percentage of meritorious cases decreases over time).

decisionmaking.¹⁹⁵ Later, when cost and benefit considerations may be more dispassionately assessed, an unmeritorious claim may be relatively less likely to be asserted.

In addition, failure to pursue a claim promptly does not necessarily mean that the claim is without merit. Other explanations are plausible. First, the plaintiff may have suffered from some incapacity, less serious than those recognized as grounds for tolling the limitation period, that rendered prompt pursuit of the claim difficult or unattractive. For example, a meritorious claim may have been temporarily ignored because of other, more pressing issues, such as a death in the family or the loss of a job. Second, the plaintiff may have been unsure of or mistaken about the actual circumstances, such as incorrectly believing that the defendant's conduct was not wrongful, incorrectly attributing the harm to a cause other than defendant's wrongdoing, or incorrectly believing that the harm caused was far less serious than it actually was. Third, the plaintiff may have been intimidated by the prospect of participating in the legal process. For example, the plaintiff might have been concerned with the risk of counterclaims or liability for the defendant's costs or fees, or may simply have feared that litigation would be an emotional ordeal. Fourth, the plaintiff may have been ignorant of the applicable limitation rules and, as a result, may not have consulted counsel promptly. Fifth, the plaintiff may have been unable to afford a lawyer, or unable to find a lawyer who would accept the claim on a contingent-fee basis, for a substantial period of time. Sixth, the plaintiff may have received poor advice from counsel or others. Seventh, the plaintiff may have believed that the defendant was insolvent and that pursuing the claim would not be worth the effort, and may have filed suit only after learning that his or her assessment of the defendant's solvency was incorrect, or that the defendant's financial condition has improved in the interim. Eighth, the plaintiff may have received assurances that the defendant would correct the problem without formal action, or may have elected to pursue the possibility of a prefiling settlement.

None of these circumstances indicate that the plaintiff currently lacks a belief that he or she has a valid claim against the defendant. In addition, there are already financial disincentives to pursuing plainly unmeritorious claims. Since the plaintiff must pay his or her costs and attorney's fees, or an attorney must agree to take the case on a contingent-fee basis, the number of plainly unmeritorious claims that plaintiffs pursue should be small. These disincentives may not work properly if there is an oversupply of attorneys, if the plaintiff misleads counsel about the circumstances of his or her claim, if the plaintiff is not required to internalize some of the costs of pursuing an unsuccessful claim,¹⁹⁶ or if there is a structural imbalance, such

195. Cf. MODEL PENAL CODE § 1.06 cmt. 1, at 86 (1985) (noting that the desire for revenge or retribution wanes with the passage of time).

196. A plaintiff who is allowed to proceed in forma pauperis and pro se may not internalize the costs of pursuing or losing a lawsuit to a sufficient degree to experience any disincentive for filing unmeritorious claims. Some so-called vexatious litigants fall into this category.

as the one that some have argued exists in the context of federal securities litigation.¹⁹⁷ Even in these circumstances, however, there is no reason to assume that the percentage of unmeritorious claims is greater for long-delayed claims than for timely-filed ones. Perhaps for this reason, some courts have rejected this policy as a justification for limitation of actions.¹⁹⁸

3. *Reduce the Number of Disfavored Claims Filed*

One way to discourage or prevent people from filing certain types of claims is to shorten the limitations period so that more claims will be forfeited inadvertently. Thus, in some cases, a short limitation period may simply indicate a political or legislative hostility to certain types of claims. For example, in 1905 the California Legislature shortened the period for wrongful death and personal injury claims from two years to one year.¹⁹⁹ It is probable that this change was made in response to a large increase in the number of such claims as a result of the increasing mechanization of industry following the Industrial Revolution.

This seems a dubious purpose to be pursued through a limitation system. If certain claims are disfavored, then the substantive law should be changed either to restrict their availability, or to eliminate them altogether. If pursued overtly, however, such changes might be politically unpopular or provoke controversy or outrage. An amendment to the relevant statute of limitation, by contrast, is usually less likely to provoke notice or debate. It is therefore probable that limitation of actions is sometimes used to achieve indirectly what could not be achieved directly.

Statutes of limitation may also be used to reduce the number of claims filed against certain classes of defendants who, because of special need or legislative clout, are able to obtain special protection for themselves. For example, protection of poor defendants is said to be one of the policies on which the English Limitation Act of 1623 was based.²⁰⁰ This specific purpose has long been abandoned, but contemporary statutes of limitation include special provisions protecting those involved in constructing improvements to real property,²⁰¹ as well as certain professionals, such as physicians²⁰² and lawyers.²⁰³ While differing limitation periods for certain types of cases may be justified in some instances, there is the lingering suspicion that some

197. See generally Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

198. See, e.g., *McCarthy v. White*, 21 Cal. 495, 503 (1863) ("It was formerly held that statutes of this nature proceeded upon a presumption of payment . . . This view is now exploded, and the statute is universally regarded as one of repose.").

199. 1905 Cal. Stat. ch. 258, sec. 2, at 231-32 (amending CAL. CIV. PROC. CODE § 340(3)).

200. PLUCKNETT, *supra* note 193, at 157; see *A'Court v. Cross*, 130 Eng. Rep. 540, 541-42 (K.B. 1825) ("Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge.").

201. See CAL. CIV. PROC. CODE § 337.15 (West 1982).

202. See *id.* § 340.5 (West 1982).

203. See *id.* § 340.6 (West 1982).

of the existing classifications are the product of political favoritism rather than rational distinctions made on the basis of empirical evidence.

IV. POLICIES DISFAVORING LIMITATION OF ACTIONS

A. *Promote Adjudication of Claims upon Their Substantive Merits*

The principal purpose disfavoring limitation of actions is “the ‘strong public policy’ that seeks to dispose of litigation on the merits rather than on procedural grounds.”²⁰⁴ This objective has been most clearly expressed in the analogous context of dismissals for failure to prosecute.²⁰⁵ In such cases, the California Supreme Court has frequently stated that “[i]t is the policy of the law to favor, whenever possible, a hearing on the merits.”²⁰⁶ Likewise, the legislature has recognized the importance of this policy:

Except as otherwise provided by statute or by rule of court adopted pursuant to statute, . . . the policy favoring trial or other disposition of an action on the merits . . . [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action²⁰⁷

Because statutes of limitation serve many of the same purposes as statutes governing dismissals for failure to prosecute,²⁰⁸ the same policy has also been recognized in cases involving statutes of limitation.²⁰⁹ It may carry slightly less weight in the

204. *Barrington v. A.H. Robins Co.*, 39 Cal. 3d 146, 152, 702 P.2d 563, 566, 216 Cal. Rptr. 405, 408 (1985) (citation omitted).

205. See CAL. CIV. PROC. CODE §§ 583.110-.430 (West Supp. 1997). These sections contain the substance of former §§ 581a and 583. See 1984 Cal. Stat. ch. 1705, sec. 5, at 6176 (enacting CAL. CIV. PROC. CODE §§ 583.110-.430).

206. *Shamblin v. Brattain*, 44 Cal. 3d 474, 478, 749 P.2d 339, 341, 243 Cal. Rptr. 902, 905 (1988); *accord* *Weitz v. Yankosky*, 63 Cal. 2d 849, 854, 409 P.2d 700, 704, 48 Cal. Rptr. 620, 624 (1966); *Waybright v. Anderson*, 200 Cal. 374, 377, 253 P. 148, 149 (1927); see *Lyons v. Wickhorst*, 42 Cal. 3d 911, 916, 727 P.2d 1019, 1021, 231 Cal. Rptr. 738, 740 (1986) (“The courts have long recognized a policy favoring a trial on the merits.”); *Hocharian v. Superior Court (Perez)*, 28 Cal. 3d 714, 724, 621 P.2d 829, 831, 170 Cal. Rptr. 790, 795 (1981) (“The court must also keep in mind the strong public policy that litigation be disposed of on the merits wherever possible.”); *Berri v. Rogero*, 168 Cal. 736, 740, 145 P. 95, 97 (1914) (“The policy of the law is to have every litigated case tried upon its merits.”).

207. CAL. CIV. PROC. CODE § 583.130 (West Supp. 1997).

208. See, e.g., *Barrington*, 39 Cal. 3d at 152, 702 P.2d at 566, 216 Cal. Rptr. at 408 (“Both [former] section 581a and the statute of limitations were designed to move suits expeditiously toward trial.”); *General Motors Corp. v. Superior Court (Maraska)*, 65 Cal. 2d 88, 91, 416 P.2d 492, 494, 52 Cal. Rptr. 460, 462 (1966) (“The purposes served by this section are somewhat analogous to those underlying statutes of limitation.”).

209. See, e.g., *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662 (1988) (reasoning that “[t]he foregoing is fully consistent with the policy of deciding cases on the merits as well as the policies underlying the statute of limitations”); *Steketee v. Lintz, Williams & Rothberg*, 38 Cal. 3d 46, 56-57, 694 P.2d 1153, 1158, 210 Cal. Rptr. 781, 786 (1985) (noting the “strong public policy that litigation be disposed

context of limitation of actions, however, because after the complaint is filed and served, the defendant can take steps to protect himself or herself from some of the consequences of the passage of time.²¹⁰

There are several reasons for valuing the adjudication of claims, whether valid or invalid, on their merits. First, the fundamental reason for having a legal system is to resolve disputes on their merits under the substantive law.²¹¹ Procedural rules are necessary to maintain order and to promote efficiency within the legal system. However necessary such rules may be, they are not the legal system's reason for being. Rather, they are subordinate to the more fundamental purposes of the substantive law.²¹² Consequently, deciding an issue on some ground other than the substantive merits seems to miss the point. "No one . . . feels satisfied when a decision announced is based on what seems to be a legal technicality instead of on the real issue."²¹³

A second reason for valuing adjudication of even unmeritorious claims on their merits is that doing so comports with fundamental notions of fairness and due process of law.²¹⁴ "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."²¹⁵ Thus, "on any scale, the barrier to any hearing at all seems a more drastic imposition on justice than potential harm to the quality of the fact-finding process once in court."²¹⁶

Third, allowing all litigants their "day in court" promotes the dignitary value of the legal process. It is frustrating and demeaning not to be allowed to be heard when

of on the merits wherever possible") (quoting *Hocharian v. Superior Court* (Perez), 28 Cal. 3d 724, 621 P.2d 829, 834, 170 Cal. Rptr. 790, 795 (1981)).

210. See *General Motors Corp.*, 65 Cal. 2d at 91, 416 P.2d at 494, 52 Cal. Rptr. at 462 ("[Former] section 583 would appear to involve policy considerations somewhat less crucial than those safeguarded by statutes of limitation.").

211. Cf. JAMES ET AL., *supra* note 61, § 1.1, at 2 ("In its day-to-day application, the law of procedure implements substantive law.").

212. See *Elkins v. Derby*, 12 Cal. 3d 410, 420, 525 P.2d 81, 88, 115 Cal. Rptr. 641, 648 (1974) ("A procedural practice is neither sacred nor immutable. It must be able to withstand the charge that it is inequitable, burdensome or dysfunctional."); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) (stating that "the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than a mistress") (quoting *In re Coles*, 1 K.B. 1, 4 (1907)).

213. SOLAN, *supra* note 20, at 27; see ROBERT E. KEETON, JUDGING 99 (1990) (noting that decisionmakers prefer to make decisions "squarely on [the] substantive merits").

214. See, e.g., *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his [or her] claim on the merits."); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) ("The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns . . ."); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *Addison v. State*, 21 Cal. 3d 313, 320-21, 578 P.2d 941, 945, 146 Cal. Rptr. 224, 228 (1978) (noting that "the policy of the law of this state . . . favors avoiding forfeitures and allowing good faith litigants their day in court"); JAMES ET AL., *supra* note 61, § 6.7, at 311 ("Another characteristic American value is the right to have one's say, specifically, to have one's 'day in court.'").

215. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

216. O'Neal, *supra* note 23, at 119.

a person believes that he or she possesses a valid complaint. Creating such feelings of frustration and powerlessness causes disaffection with the legal system, and possibly with the political system as well. As one commentator has argued:

[N]o democratic political theory can ignore the sense of injustice that smolders in the psyche of the victim of injustice. If democracy means anything morally, it signifies that the lives of all citizens matter, and that their sense of their rights must prevail. Everyone deserves a hearing at the very least²¹⁷

On this view, "the trial is an end in itself in the same way that religious rituals and artistic performances are not means to ulterior purposes but are intrinsically valuable."²¹⁸

The consequences of impairing the dignitary value of participation in the legal process may not be equally distributed. "The legal assertion of a claim is a political event, sometimes a significant one, even if the claim is rejected. In our tradition it is thus a function in fact if not in concept for the courts to be forums for political grievance."²¹⁹ As one scholar has noted:

The fact that courts make policy conditions the political process in the United States. It opens another avenue for seeking favorable decisions for those who are unsuccessful with the legislature or the executive. If a group fails to capture or hold a legislative majority, and if it fails to elect its man as chief executive of the state or nation, it may nevertheless seek to alter public policy through litigation.²²⁰

For this reason, being deprived of the ability to have a claim heard on its merits may be particularly damaging and painful for the underprivileged or the unpopular, just

217. JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 35 (1990).

218. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 93; see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (2d ed. 1988) (explaining that there is "intrinsic value in the due process right to be heard" because "[w]hatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her"); Resnik, *supra* note 89, at 854 ("The state confirms individuals' worth by employing its ritual in response to claims of wrongdoing.").

219. Geoffrey C. Hazzard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 711 (1969); see Morris B. Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247, 259 (1972) ("Both voting and access to the courts are forms of enfranchisement, of participation in the political process.").

220. HERBERT JACOB, *JUSTICE IN AMERICA* 41 (3d ed. 1978); see Thomas E. Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 281 (1968) ("For minorities or the disenfranchised, litigation may provide the sole opportunity to influence policy.").

as some have argued that exclusion from jury service is more painful and alienating for those in the minority than for those in the majority.²²¹

Fourth, there is a societal interest in promoting the resolution of disputes through officially sanctioned mechanisms and in avoiding recourse to violence.²²² The legal system exists in part to channel disputes into a resolution system regulated by the government, thereby minimizing the desire that disputants might otherwise feel to resort to unauthorized private remedies such as self-help. Allowing people who believe that they have been wronged an opportunity to be formally heard is a way of lessening the impulse toward violence. It gives them a chance to vent their anger and frustration before an audience that is at least willing to hear their side of the story, even if it is not actually persuaded by what they have said. "Just as the members of a club will stop paying dues when the benefits of membership cease, so plaintiffs will be tempted to stop paying the 'dues' of [their] obedience when society refuses to provide the 'membership benefits' of protection of their fundamental rights."²²³

Finally, the availability of a court is comforting and reassuring.

Some dim awareness that courts are available as a last resort to protect one's entitlements, including, to some extent, one's claim to fair and just treatment, must certainly in our society in its present stage of evolution, make a significant contribution to whatever sense of security people feel in entering into relationships with others—relationships often involving personal exposure or dependency of one sort or another. . . . [By contrast,] suspicion that certain others cannot count upon effective judicial access can hardly help biasing the shape of transactions, relationships, and attitudes that arise between oneself and . . . others.²²⁴

For example, if a manufacturer understands that its customers will not learn of latent defects early enough to sue, the manufacturer might be less than optimally encouraged to conduct adequate research into the long-term consequences of such defects.

At first glance, limitation of actions would seem to be fundamentally at odds with the policy favoring adjudication of claims on their merits. By denying parties

221. Edward A. Villalobos, *Grand Jury Discrimination and the Mexican American*, 5 LOY. U. L. REV. 87, 121-22 (1972).

222. See, e.g., *Weeks v. Roberts*, 68 Cal. 2d 802, 806, 442 P.2d 361, 364, 69 Cal. Rptr. 305, 308 (1968) ("[C]ourts exist primarily to afford a forum for the settlement of litigable matters between disputing parties. Over a long and bitter history this peaceful method of adjudication has replaced other and primitive, and indeed physical, means of resolution") (quoting *Vecki v. Sorenson*, 171 Cal. App. 2d 390, 393, 340 P.2d 1020, 1021 (1959) (citation omitted)).

223. Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1690 n.31 (1983); see JOHN RAWLS, *A THEORY OF JUSTICE* 261 (1971) ("A just system must generate its own support . . . [and] an effective desire to act in accordance with its rules for reasons of justice.").

224. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 536, 537.

recourse to the legal system for resolution of their claims, limitation of actions could increase societal disaffection with government and with the legal system, at least to some extent. On the other hand, if the legal system produces inaccurate results or outcomes that approximate random dispositions, it may sacrifice some of its legitimacy and attractiveness, thereby encouraging some to attempt to resolve their disputes outside of the legal system. As one group of scholars has concluded:

The civil judicial system is passive in the sense that it operates only on the initiative of one of the parties. And it can be effective only so long as most people seek resolution of their disputes within the system. As soon as resort is had to different techniques, the ability of the courts to operate as a viable force is dispelled. Reliance on the system will only be reality so long as the courts' ability to resolve disputes expeditiously is respected, and the results reached are highly regarded.²²⁵

By attempting to ensure accuracy in adjudication, limitation of actions helps to preserve the legal system as a reliable and objective means for resolving disputes.

It is important to remember, however, that litigation is not always the best way to solve societal problems (although at this time in our history it may be the most familiar way). Depending upon the form it takes, alternative dispute resolution may be better for litigants and the legal system than litigation. Negotiated settlements sometimes result in outcomes that are better for both parties than a decision the legal system could achieve, although both mediation and other forms of alternative dispute resolution, such as arbitration, may be structured in ways that favor certain interests at the expense of others.²²⁶ Similarly, a rise in the incidence of self-help is not necessarily a bad thing, depending upon the manner in which it is manifested. Consumer boycotts and negative publicity campaigns are neither less effective nor less desirable simply because they are extrajudicial. Such measures possess deterrent effect, educate others, and may help to prevent future harm, although they rarely result in compensation to those already injured. Consequently, in assessing the impact of limitation of actions on social welfare, care should be taken not to overestimate the importance of traditional litigation as a means of resolving disputes or accomplishing socially desirable objectives.

225. William H. Levit et al., *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 924 (1971).

226. See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1358 (1994) ("In both adjudication and mediation, minorities received less when they were claimants and paid more when they were respondents compared to nonminority parties. This disparity was more extreme in cases that were mediated.") (citations omitted). See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

B. Vindicate Meritorious Claims

Another policy disfavoring limitation of actions is the desire to vindicate meritorious claims. The desire to provide redress for a perceived injustice is instinctive and powerful.²²⁷ People need to receive just treatment and to ensure that just treatment is received by others. This desire is expressed in the legal maxim "[f]or every wrong there is a remedy."²²⁸

The loss of a valid claim violates our sense of justice for at least four reasons. First, the loss of a valid claim imposes a substantial cost on the plaintiff. A plaintiff whose claim is barred will not obtain redress for his or her injury through the legal system. Sometimes this means that the plaintiff's loss will not be compensated at all. "Failure to provide compensation where morally it is held due" is a form of injustice.²²⁹ Indeed, injustice may be defined, in part, as "the refusal to recognize valid claims."²³⁰

Second, barring a claim as untimely deprives the plaintiff of the satisfaction of vengeance. Although we tend to regard it principally as a concern of the criminal law, retribution is one form of justice.²³¹ However much we like to believe that we have progressed beyond the primitive desire for revenge, there is no denying that it forms part of the motivation for the filing of some civil lawsuits.

Third, the passage of time, by itself, seems irrelevant to the just resolution of a claim. Even courts have conceded that statutes of limitation "are by definition arbitrary."²³² As we have seen, there are various reasons why the passage of time may be relevant as a practical matter, although not all of the practical concerns point in the same direction. Putting practical concerns aside, however, the passage of time would appear to have little, if anything, to do with whether a plaintiff deserves compensation, whether a defendant deserves punishment, or whether potential wrongdoers require deterrence. On these questions, time is neutral; its passage does not affect the moral standing of either party unless the plaintiff has not been diligent and the defendant has been prejudiced. The hierarchy of cultural values expressed in

227. See EDMOND N. CAHN, *THE SENSE OF INJUSTICE* 24-25 (1949) (stating that "the human animal is predisposed to fight injustice"); ELIZABETH H. WOLGAST, *THE GRAMMAR OF JUSTICE* 147 (1987) ("[I]njustice is intolerable and therefore must be answered."); *id.* at 162 ("It is . . . not tolerable or acceptable that the innocent should suffer and the wicked not pay for their misdeeds.").

228. CAL. CIV. CODE § 3523 (West 1970).

229. H.L.A. HART, *THE CONCEPT OF LAW* 160 (1961); see Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 450 (1990) (arguing that if the law is to satisfy the requirements of corrective justice, "victims must be made whole (compensated)").

230. SHKLAR, *supra* note 217, at 18-19.

231. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4-5 (1955) ("The state of affairs where the wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him."); see also *Leviticus* 24:17-22 ("And if a man cause a blemish in his neighbor, as he hath done, so shall it be done to him: breach for breach, eye for eye, tooth for tooth; as he hath caused a blemish in a man, so shall it be rendered unto him.").

232. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

the equitable maxim *qui prior est tempore, potior est jure*, that is, "where there are equal equities, the first in time shall prevail,"²³³ suggests that temporal considerations are a disfavored basis for the allocation of rights, because time should be the deciding factor only when the claims of the parties are otherwise equally just.

Fourth, the loss of a valid claim on the ground of limitation of actions (or on any other procedural ground) impairs the implementation of substantive law policy. It results in the underenforcement of the substantive law by allowing some wrongdoers to escape liability for reasons unrelated to the objectives of the substantive law. Not only will some wrongdoers fail to receive their "just deserts," but they will also be underdeterred from future wrongdoing because they were not required to compensate their victims for the harm caused and to suffer the punishment of civil liability. Others who are instructed by their examples will also be less than optimally deterred from violating the substantive law rules. As a consequence, the substantive law rules will be followed less often than they would have been had the victims' claims not been barred by the limitation system. This, in turn, means that socially destructive conduct may not be adequately discouraged.

This view, however, fails to recognize that there are also social costs if a limitation period does not bar a long-delayed claim. From a purely economic point of view, the statute of limitations should bar a claim only when the sum of all costs incurred if the claim is not barred (including the risk of inaccurate adjudication, the costs of record-keeping and insurance premiums, the psychological harm to potential defendants, the disruption of the reliance interests of nonparties, and the like) outweigh the sum of all costs of not implementing the substantive law in what is probably a relatively small subset of cases. If this cost-benefit analysis has been properly calibrated, then the loss of a valid claim is an unfortunate, but necessary, consequence of a trade-off that has been made to maximize social welfare.²³⁴

Moreover, there are several reasons why limitation of actions ought to be applied in the same fashion to both apparently valid and apparently invalid claims, regardless of whether the policy of the substantive law will be frustrated by implementation of the limitations bar. First, to apply limitations law differently depending upon the merits of a claim would violate one of the central tenets of the limitation system: that the defendant should not be required to prove the lack of merit of the plaintiff's claim because the plaintiff's delay in filing the claim may have impaired the defendant's ability to do so.²³⁵ In other words, if the merits are to be considered in determining

233. 1 POMEROY, *supra* note 154, at § 414.

234. See *Gentile v. Alermatt*, 363 A.2d 1, 21 (Conn. 1975) ("Individual rights and remedies must at times and of necessity give way to the interests and needs of society.").

235. Cf. CAL. CIV. PROC. CODE § 597 (West Supp. 1997).

When the answer pleads that the action is barred by the statute of limitations, . . . or sets up *any other defense not involving the merits of the plaintiff's cause of action* but constituting a bar or ground of abatement to the prosecution thereof, the court may, either upon its own motion or upon the motion of any party, proceed to the trial of the special defense or defenses before the trial of any other issue in the case

whether the action is time-barred, the defendant would be subjected to the very prejudice that limitation of actions is designed to avoid. The result is circular and self-defeating, provided that one accepts the notion that the limitation system should exist at all.

Second, if courts are to avoid subjecting every defendant with a colorable statute of limitations defense to a full trial on the merits, some preliminary assessment of the merits would have to be made. Even when the claim is timely, however, a preliminary inquiry into the merits may be both unreliable and prejudicial to the defendant. In *Eisen v. Carlisle & Jacquelin*,²³⁶ for example, the United States Supreme Court rejected the use of a preliminary assessment of the merits in determining whether to certify a class action, saying:

[A] preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.²³⁷

When limitation of actions is an issue, the risk of unfairness is even greater. The preliminary determination of the merits may have to be made on the basis of evidence that has deteriorated, making it potentially even more unreliable than preliminary assessments of the merits in other situations. In addition, making such preliminary determinations would be inefficient. Courts would be required to determine the merits twice: once to decide if the claim is time-barred, and again to decide whether the plaintiff is entitled to relief.

A third reason why limitation of actions ought to be applied in the same manner to both meritorious and unmeritorious claims is that the very existence of the limitation system presumes that some meritorious claims will be barred.²³⁸ In practical terms, a limitation system that barred only unmeritorious claims would be

Id. (emphasis added).

236. 417 U.S. 156 (1974).

237. *Eisen*, 417 U.S. at 178. But see *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims."); Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 369 (1996) (arguing that courts should be permitted to consider the merits in determining whether to certify class actions for monetary relief).

238. See *California Sav. & Loan Soc'y v. Culver*, 127 Cal. 107, 111, 59 P. 292, 293 (1899) ("It is important to keep clearly in mind the double aspect of statutes of limitations—First, as an obstacle to just claims; and secondly, as an aid to just defenses which have been rendered uncertain by the moldering effects of time.") (emphasis added); see also *Chase Sec. Corp.*, 325 U.S. at 314 ("Statutes of limitation . . . are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim."); *Shepherd v. Thompson*, 122 U.S. 231, 236 (1887) ("The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost.").

redundant, barring only those claims that could be successfully, although perhaps not always easily, defeated on substantive law grounds. The only difference resulting from adding the complexity of limitations would be another issue to be litigated and the possibility that a limitations defense would sometimes enable a defendant to defeat a claim against him or her without a trial on the merits. That possibility, however, has been eroded in recent years by the widespread adoption of discovery-based accrual,²³⁹ since the time of discovery is usually a question of fact.²⁴⁰ If the courts were to consider the merits in resolving the limitation issue, the ability to resolve the issue early in the litigation, on demurrer or on a motion for summary judgment, would be further reduced.

In theory, the substantive law and limitation of actions could overlap substantially without either system being deprived of all of its value. Suppose, for example, that a relatively higher percentage of untimely claims are unmeritorious, or that the limitation system provides an extremely effective incentive that encourages the timely filing of nearly all meritorious claims. Under these conditions, although the outcome of most cases would be the same, the number of claims actually litigated might be smaller if the limitation system was retained. In addition, the limitation system might be viewed as a type of safeguard, a second method of screening out unmeritorious claims (a few of which will prevail if litigated, because no system of determining the merits is error-free). However, as we have seen, the failure to pursue a claim promptly does not necessarily mean that the claim is without merit, and the addition of a complex system of limitations does not appear to be a very reliable or cost-effective way of correcting the errors inherent in the application of the substantive law.

One of the factors that makes the policy of adjudicating claims on the merits such a powerful countervailing force to the policies favoring limitation of actions is the tendency of the courts to focus upon the meritorious claims that the limitation period bars—rather than all barred claims, some of which are presumably not valid—in evaluating the functioning of the limitation system in a particular case. What accounts for this tendency? Perhaps it is assumed that if the claim were unmeritorious (at least in the sense that it had no realistic hope of succeeding), the plaintiff (or the attorney handling the case on a contingent-fee basis) would not bother pursuing the claim. In addition, one or more elements of the claim, or the fact that the plaintiff has suffered some loss, may be indisputable on the evidence that has been preserved. This generates sympathy for the plaintiff, especially when he or she

239. See *Davies v. Krasna*, 14 Cal. 3d 502, 512, 535 P.2d 1161, 1168, 121 Cal. Rptr. 705, 712 (1975) ("Our law has evolved . . . to a point where the limitations clock only begins to run on certain causes of action when the injured party discovers or should have discovered the facts supporting liability.").

240. Cf. *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1112, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 663 (1988) (holding that "resolution of the statute of limitations issue is normally a question of fact"); *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 1325, 44 Cal. Rptr. 2d 305, 308 (1995) ("The resolution of a statute of limitations defense is typically a factual question for the trier of fact.").

appears to be innocent of carelessness or wrongdoing. A defendant against whom there is at least some evidence seems a worthy candidate for setting matters right.

It is apparent from the language of judicial opinions that in deciding limitation of action issues, courts are sometimes influenced by indications that the plaintiff's claim has merit.²⁴¹ As a result, it is customary for the plaintiff to present the merits of the claim in the strongest possible light when limitation issues arise in the course of litigation. The plaintiff hopes to persuade the court that what is being lost is not merely the right to adjudicate a claim that may or may not be valid, but the loss of a valid claim. To respond to this tactic effectively, the defendant is forced to demonstrate that the claim is without merit by showing that his or her conduct was not blameworthy, that the plaintiff was at fault, or that the loss suffered was not severe. This places the defendant in the unfortunate position of defending against the claim on the merits in the course of litigating a limitations issue, even though one of the principal purposes of limitations law is to avoid forcing defendants to defend themselves when the evidence concerning the claim has deteriorated.

Although many judges and some juries may be sufficiently disciplined in their decisionmaking to avoid this problem, this consequence may be unavoidable to some extent.²⁴² The fact of the matter is that we do regret the loss of some claims (namely meritorious ones) more than we regret the loss of others.²⁴³ If a meritorious claim is barred, everyone but the defendant loses. The plaintiff is unable to obtain compensation for his or her injury, and society is damaged by the failure to implement the substantive law appropriately. Thus, the loss of valid claims is an important consideration in structuring the limitation system as a whole. As a theoretical matter, however, the contention that the plaintiff possesses a valid claim, and will be denied a remedy if the claim is time-barred, should be irrelevant in deciding an individual case.²⁴⁴ If too many claims are being barred, perhaps the entire system should be changed or scrapped. But placing a thumb on the scales of justice in particular cases

241. See, e.g., *California Sav. & Loan Soc'y*, 127 Cal. at 110, 59 P. at 293 ("Statutes of limitation . . . are not intended as defenses to just demands of comparatively recent origin."); accord *Los Angeles County v. Security First Nat'l Bank*, 84 Cal. App. 2d 575, 580, 191 P.2d 78, 82 (1948).

242. See Jack B. Weinstein & Karen S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Actions*, 163 F.R.D. 369, 382 (1995) (stating that requiring the court to ignore the merits may be futile because it may be based on "an unrealistic conception of the judge's role—and his or her mental processes—in the prosecution and resolution of litigation. Even when a decision on the ultimate merits of the case is not imminent, the trier is continually estimating the strength of the case.").

243. Not only do we regret the loss of meritorious claims more than we regret the loss of unmeritorious claims, but we also regret the loss of some types of claims more than others. The more significant the right, the more severe the injury, or the more egregious the wrong, the more reluctant courts are to bar a claim.

244. See *Lackner v. LaCroix*, 25 Cal. 3d 747, 751-52, 602 P.2d 393, 395, 159 Cal. Rptr. 693, 695 (1979) ("Thus the purpose served by dismissal on limitations grounds is in no way dependent on nor reflective of the merits—or lack thereof—in the underlying action.") (citation omitted).

seems underhanded, as well as unfair to other plaintiffs with meritorious claims who fail to receive such dispensation.²⁴⁵

V. CONCLUSION

The foregoing discussion of the policies favoring and disfavoring limitation of actions displays the central problem of any limitation system. To put it simply, how should society's interest in an orderly legal system that resolves claims promptly be balanced against its interests in compensation, retribution and deterrence? Neither the legislature nor the judiciary has answered that question clearly.

The courts are ambivalent about limitation of actions. Sometimes courts say that "[t]he policy behind the statute of limitations is equally as meritorious a consideration as is the policy of trying cases upon their merits."²⁴⁶ On the other hand, courts sometimes say that the statute of limitations is a "disfavored" defense that must give way to the policy favoring a hearing on the merits.²⁴⁷

The legislature also appears ambivalent about limitation of actions. What other explanation could there be for the legislative tolerance of pervasive judicial bending and shaping of the supposedly strict and fixed legislative limitation rules? This latitude, which is most evident in such areas as accrual²⁴⁸ and tolling,²⁴⁹ suggests a

245. But see generally Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975) (arguing that the manipulation of procedural rules to achieve results that are consistent with the substantive law is desirable and should be encouraged).

246. *Scherer v. Mark*, 64 Cal. App. 3d 834, 844, 135 Cal. Rptr. 90, 95 (1976); see *Krusesky v. Baugh*, 138 Cal. App. 3d 562, 566, 188 Cal. Rptr. 57, 59 (1988) ("The policy behind statutes of limitations is as meritorious as the policy of trying cases on their merits.") (citing *Braham v. Sorenson*, 119 Cal. App. 3d 367, 373, 174 Cal. Rptr. 39, 42 (1981)).

247. See, e.g., *Barrington v. A.H. Robins Co.*, 39 Cal. 3d 146, 152, 702 P.2d 563, 566, 216 Cal. Rptr. 405, 408 (1985) ("Because of this strong public policy [that claims should be resolved on substantive rather than procedural grounds] the statute of limitations is said to be a disfavored defense, to be strictly construed so as to avoid a forfeiture of rights.") (quoting 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 227, at 1085 (2d ed. 1971)); *Bollinger v. National Fire Ins. Co.*, 25 Cal. 2d 399, 410, 154 P.2d 399, 405 (1944) ("[T]his court . . . has shown itself ready to adapt rules of procedure to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits.").

248. See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 192, 491 P.2d 421, 431, 98 Cal. Rptr. 837, 847 (1971).

Problems of the commencement, running, and tolling of limitation periods come frequently and regularly to the appellate courts, and the judiciary develops a kind of expertise in this area. On the other hand, many legislators are not attorneys, and even those who are, do not encounter problems of limitations and accruals of actions in their daily legislative duties. Legislative silence in the present case may indicate that the Legislature has chose to defer to judicial expertise and to repose with the judiciary the rendition of rules for the accrual of causes of action.

Id.

249. See *Bollinger*, 25 Cal. 2d at 410, 154 P.2d at 405 ("In any event this court is not powerless to formulate rules of procedure where justice demands it."); *id.* at 409, 154 P.2d at 405 ("Even the English statute had to be supplemented by judicial construction and applied beyond its literal language to accomplish its purpose.").

legislative preference that some other branch of government wrestle with the difficult problems inherent in applying limitation of actions in particular cases.²⁵⁰

Scholarly commentators share this ambivalence. Perhaps nowhere is this as evident as in the work of the 19th century limitation scholar Horace G. Wood. After extolling the virtues of statutes of limitations at length, Wood makes about as hedged a statement regarding them as could be imagined:

[L]aws of limitation are to be encouraged; yet, as they are acts which take away existing rights, they should always be construed with reasonable strictness, and in favor of the rights sought to be defeated thereby, so far as is consistent with their letter and spirit.²⁵¹

There are several reasons for this ambivalence. First, the disparate policies on which limitation of actions is based sometimes point in different directions. Promoting repose might require that a claim be barred, but avoiding deterioration of evidence might not. Further, as we have seen, even a single policy as apparently straightforward as avoiding deterioration of evidence can turn out, upon close examination, to be more complicated when applied to particular cases.²⁵²

Second, each type of claim created by the substantive law arises in a different context and possesses different characteristics. Consequently, a particular policy, such as promoting repose or avoiding deterioration of evidence, may weigh more heavily with respect to one type of claim than with respect to others. As one commentator has explained, "the statute [of limitations] itself is not a single piece of legislation dealing with a single thing."²⁵³ In some areas of the law, the "one size fits all" approach of statutes of limitations works smoothly, but that is not always true.

Third, statutes of limitation "are by definition arbitrary."²⁵⁴ Arbitrariness makes us uncomfortable.²⁵⁵ Among other things, the digital, on or off quality of limitation of actions contrasts sharply with the analog, gradual nature of the evils it seeks to prevent. Evidence does not deteriorate overnight, and society's interest in promoting repose is only marginally greater on day two than it was on day one. The theory of the limitation system is that we may eschew attempting to measure the relevant phenomena directly, and that instead we may use an indirect (and rather crude) bright-line measure of the phenomena—namely, the passage of time—as a proxy or

250. On the other hand, legislative deference to the judiciary also possesses salutary aspects. It permits the courts some desirable flexibility to mitigate the hardship that would result from the overly strict application of statutes of limitations in special cases. It also allows courts to employ their expertise in formulating rules of procedural character.

251. See 1 WOOD, *supra* note 17, at 10.

252. See *supra* notes 77-112 and accompanying text.

253. Callahan, *supra* note 4, at 132.

254. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

255. See FLETCHER, *supra* note 82, at 31 ("Arbitrariness in the definition of the laws violates our essential expectations in living under the rule of law.").

rule of thumb. This is sometimes a sensible approach,²⁵⁶ but the severity of the consequences flowing from the seemingly arbitrary rule makes its arbitrariness all the more troubling.

Fourth, like other long-term benefits, the advantages of a limitation system are remote and difficult to quantify. By contrast, the short-term consequences of denying compensation to an injured plaintiff are immediate and disturbing. Not surprisingly, therefore, there is a tendency to discount the long-term benefits and to focus attention on ameliorating the unpleasant short-term consequences. In this respect, limitation of actions poses one of the general problems underlying our entire legal system, that is, the trade-off between orderly procedure and desirable outcomes in particular cases. Some have argued that courts should strongly resist the pressure to focus on individual outcomes. As one scholar has explained, "[s]ometimes the preoccupation with the merits of individual cases obscures the need to insist that procedural rules apply even if they may frustrate a full airing of the merits of an individual case because they promote system-wide improvements in accuracy."²⁵⁷ Others have argued precisely the opposite.²⁵⁸ The opposing argument, however, is problematic: taken to their logical extreme, the policies disfavoring limitation of actions weigh not only against applying limitation rules to bar particular claims, but also against having a limitation system at all. Indeed, they weigh against enforcing *any* procedural rule that would have the effect of impairing a party's prospects for success on the merits.

Fifth, the limitations system implicates unresolved and perhaps unresolvable tensions that pervade the legal system. How do we weigh the relative values of compensating the wronged and exonerating the innocent? How should we balance individual interests against the welfare of society as a whole? The answers to such questions are as elusive in this context as in any other.

Is a limitation system worth having? On balance, we think that it is; and the continued existence of statutes of limitation in "all enlightened systems of juris-

256. Sometimes general rules are preferable, even though they are imperfect and result in unfortunate outcomes in a subset of cases, at least as long as the subset of cases is not too large, and the consequences for those affected are not too severe. See David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 350 (1978) (stating that "the cost and uncertainty of making case-by-case inquiries into competing considerations may justify categorical exceptions that are in some respects overinclusive").

257. Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 755 (1989); see *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319 (1988) (Scalia, J., concurring) ("The principle that 'mere technicalities' should not stand in the way of deciding a case on the merits is more a prescription for ignoring the Federal Rules than a useful guide to their construction and application."); Robert S. Summers, *Evaluating and Improving Legal Processes: A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 39 (1974) (asking attorneys to "[c]onsider how often laymen seem ready to dismiss procedural rules as 'mere technicalities' even though these are the very rules which must secure most process values").

258. See Clark, *supra* note 212, at 297 ("[T]he court ought not to be so far bound and tied by rules, which are after all intended only as general rules of procedure, as to be compelled to do what will cause injustice in the particular case . . .") (quoting *In re Coles*, 1 K.B. 1, 4 (1907)).

prudence”²⁵⁹ suggests a widely shared belief that limitation of actions still has an important role to play in the orderly functioning of society. Some type of time limit makes sense. It is still true, as John Marshall recognized nearly two centuries ago, that a claim that could be “brought at any distance of time . . . would be utterly repugnant to the genius of our laws.”²⁶⁰

If we are to realize the benefits of a limitation system, however, we must be willing to accept the fact that some valid claims will be barred, and that some claims, whether valid or invalid, will not receive the catharsis of a hearing on the merits. As one court has explained:

The application of the statute of limitations combined with the inexorable passage of one year results in a summary judgment preventing assertion of what may well have been a meritorious claim. This consequence, however, similar to that which frequently follows imposition of any rule possessing a fixed duration, is the price of the orderly and timely processing of litigation.²⁶¹

If we are unwilling to accept that price, we should reconsider whether we want to have a limitation system at all. If our overriding concern is adjudicating claims on their merits, or vindicating valid claims, then perhaps we should drastically alter or even abandon our limitation system. Ultimately, if those purposes are allowed to trump all countervailing considerations, then the law of limitation of actions will be incoherent and incapable of implementing the purposes justifying its existence. Favoring those policies over the policies underlying limitation of actions across the board deprives the limitation system of any useful purpose.

If, on the other hand, we decide to preserve our existing system of limitation of actions, even in a modified form, then it should operate on a principled, rather than an ad hoc, basis. The number of statutes should be reduced, general principles of limitation ought to be stated more clearly, and the rules should be applied with consistency. Certainly the applicable limitations rule ought not to be brushed aside on the ground that limitations is a “disfavored” defense.²⁶² Otherwise, we might as well admit that a more individualized system, such as laches, would suit us better.

259. See *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (“Statutes of limitation are vital to the welfare of society. . . . They are found and approved in all systems of enlightened jurisprudence.”).

260. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.). But see CAL. PENAL CODE § 799 (West Supp. 1997) (establishing that criminal prosecution for murder may be commenced at any time).

261. *Sanchez v. South Hoover Hosp.*, 18 Cal. 3d 93, 103, 553 P.2d 1129, 1136, 132 Cal. Rptr. 657, 664 (1976); see *Aetna Cas. & Sur. Co. v. Superior Court (Lane)*, 233 Cal. App. 2d 333, 340, 43 Cal. Rptr. 476, 480 (1965) (“[S]uch statutes [of limitation] are intended to set controversies at rest by foreclosing consideration thereafter as to the merits of the claim. To reject a strict application of the law in favor of ‘broad principles of justice and equity’ would make a statute of limitations meaningless.”).

262. Cf. *Shepherd v. Thompson*, 122 U.S. 231, 236 (1887) (“The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.”) (quoting *Clementson v. Williams*, 12 U.S. (8 Cranch) 72, 74 (1814)).

In either case, it is clear that the law of limitation is ripe for legislative re-examination. The current patchwork of overlapping classifications and innumerable exceptions provides only the illusion of repose and may cost society more in terms of time, money and judicial resources, not to mention frustration and the appearance of unequal treatment, than is justified by the intangible benefits that it actually manages to provide.²⁶³ While we believe the goals of the limitation system are worthy, the benefits that it seeks to foster can only be achieved by a system of rules that operates with greater certainty, and with fewer transaction costs, than our present system.

It is probably futile to attempt to isolate a single purpose from among those listed that sensibly could be assigned a greater general importance than all of the others.²⁶⁴ Statutes of limitations promote a variety of overlapping and inconsistent policies. This may be because of the disparate legal contexts in which they operate, or it may be because, like postmodern architecture, our legal system has evolved into a complex juxtaposition of seemingly incompatible theories,²⁶⁵ and the limitation system merely reflects and contributes to that diversity. By describing the variety of purposes served by limitation of actions, we hope to encourage legislators, courts, and scholars to reconsider how well those purposes are being served, and to strike a balance between competing policies that will better serve our legal system. How that balance is struck will have significant allocative consequences, not just between victims and wrongdoers but for society as a whole.²⁶⁶ While suggestions for comprehensive reform are beyond the scope of this Article, any such effort should be undertaken in light of the policies that the limitation system attempts to serve.

As Justice Robert H. Jackson once observed, “[s]tatutes of limitations always have vexed the philosophical mind.”²⁶⁷ Because of their nature and the conflicting policies they attempt to balance, we see no reason to predict that they will soon cease to do so.

263. For example, it has been noted that mistakes regarding statutes of limitation are a leading cause of legal malpractice claims. See 3 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 29.14, at 677 (4th ed. 1996) (“The most common error of the attorney engaged in litigation is the failure to file the client’s claim or cause of action within the time required by a statute of limitations.”); *id.* § 22.3, at 5 (noting that “[t]he most frequently alleged error in a legal malpractice action is the failure of the attorney to comply with a time limitation”).

264. *But see* Callahan, *supra* note 4, at 137 (arguing that “the protection of the social interest in individual stability is the purpose which most nearly accords with the apparent scope of the statutes”).

265. See FLETCHER, *supra* note 82, at 188-89 (observing “that modern legal cultures are torn in conflicting directions by irreconcilable premises”); BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 642 (1993) (“As the century draws toward its close, jurisprudence is fragmented as never before in our history.”).

266. See JAMES ET AL., *supra* note 61, § 6.6, at 310 (“[P]roviding speedy and efficient justice works to the greater benefit of some sectors of society than to others. If civil justice were dramatically improved in its expeditiousness, some political interests would suffer.”).

267. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313 (1945).