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Making Sense out of the California Criminal Statute of Limitations

BY GERALD F. UELMEN*

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 limitation, nor its continued suitability as applied to specific crimes or categories of crimes. In the estimation of the Legislature it is therefore desirable for the California Law Revision Commission, on a priority basis, to undertake an in-depth study of the rationales for the statutes of limitations for various felonies and the justification for the revision of the period of limitations for specific crimes or categories of crime, and to make recommendations to the Legislature based on the study.

1981 Cal. Stat. c. 909, §3.

The purpose of this report is to assist the California Law Revision Commission in the monumental task of defining the appropriate considerations that justify the duration of a statute of limitations for specific crimes or categories of crime. The legislative assessment of the inadequacy of the present law is certainly warranted. The current statutes, summarized in Appendix I, resemble a patch-work quilt riddled with inconsistencies. The legislative mandate, however, goes beyond

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simply eliminating these inconsistencies. A comprehensive framework is needed to respond appropriately to the pattern of *ad hoc* legislation which currently prevails. No less than eleven legislative enactments have modified the felony statute of limitations since 1969. Many of these enactments were responses to widely publicized cases in which the statute of limitations was successfully asserted as a bar to prosecution. While responding to public outcry is certainly a legitimate legislative function, the response should also be consistent with rational principles. When legislation is perceived as an arbitrary "knee-jerk" reaction, its moral force is lost.

After reviewing the legislative history of the California criminal statute of limitations from its 1851 origin to the present day, this article will analyze each of the factors that might be offered to justify a short limitations period: the staleness factor, the motivation factor and the repose factor. This will be followed by an analysis of the factors offered to justify a long limitations period or no limitations period at all: the concealment factor, the investigation factor and the seriousness factor. The attempt to relate these factors to particular crimes or categories of crime will be aided by survey responses obtained from California prosecutors, defense lawyers, and superior court judges. The respondents were asked to relate specific crimes from the list appearing in Appendix III to the various factors offered to justify shorter or longer statutory periods, and to evaluate whether the current limitations period for each of these crimes is too short or too long. The responses add a dimension of practical experience to our task. The twenty-six prosecutors responding had an average of twelve years experience as prosecutors. The twenty-five defense attorneys responding included thirteen private defense lawyers, with an average of eighteen years experience, and twelve public defenders, with an average of twelve years experience. The seven judges responding had averaged nine years on the bench. After surveying the upward trend of statutes of limitations in other jurisdictions, this article will turn to the task of identifying the inconsistencies in the current California statutes, and suggest a framework for future legislation based in large part on the recommendations of the Model Penal Code.

LEGISLATIVE HISTORY OF THE CALIFORNIA STATUTE OF LIMITATIONS

The basic structure of the California statute of limitations was established by the second session of the state legislature in 1851 with a relatively simple enactment:

Section 96. There shall be no limitation of time within which a

prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

Section 97. An indictment for any other felony than murder must be found within three years after its commission.

Section 98. An indictment for any misdemeanor must be found within one year after its commission.

Section 99. If when the offense is committed the defendant be out of the State, the indictment may be found within the term herein limited after his coming within the State, and no time during which defendant is not an inhabitant of, or usually resident within the State, shall be a part of the limitation.

Section 100. An indictment is found within the meaning of this Title, when it is duly presented by the Grand Jury in open court, and there received and filed.¹

These provisions were carried over intact into the Penal Code enacted in 1872, where they appeared as sections 799-803. The subsequent history of each these Penal Code sections certainly substantiates the legislative finding that "piecemeal amendment" has occurred.

A. No Limitation

Penal Code section 799, originating with section 96 of the 1851 statute, still enumerates the offenses for which no limitation of time is imposed for commencement of prosecution. The offenses of embezzlement of public monies and falsification of public records were added in 1891.² At that time, embezzlement of public moneys and falsification of public records were felonies punishable by one to ten years in the state prison, as well as by disqualification from holding any state office.³ Under the determinate sentencing law adopted in 1976, the punishment may vary depending upon whether an embezzlement of public money is prosecuted under Penal Code section 424 (two, three or four years imprisonment) or Penal Code section 514 (16 months, two or three years imprisonment).⁴ Falsification of public records is punishable by either one year in the county jail, or sixteen months, two or three years in the state prison under either Penal Code section 473 or Government Code section 6201. If the offense is committed by the official custodian of the record, Government Code section 6200 sets a four year maximum.

1. 1851 Cal. Stat., c. 29, §§96-100, at 222.

2. 1891 Cal. Stat., c. 141, at §1, at 192.

3. CAL. PENAL CODE §§424, 514; 1880 Cal. Stat. c. 42, at 7, c. 88, at 39.

4. 1976 Cal. Stat. c. 1139, §§197, 230, at 5118, 5127. Since no penalty is specified in Penal Code section 514, Penal Code section 18 applies, which imposes a sentence of sixteen months, two or three years.

After the various forms of common-law theft offenses were consolidated by Penal Code section 484,⁵ the question arose whether a theft of public funds by false pretenses would also be subject to Penal Code section 799, and thus subject to prosecution at any time. In *People v. Darling*,⁶ the court answered this question in the negative by holding that section 799 is strictly limited to thefts in which the traditional elements of embezzlement are present, involving a breach of a fiduciary trust.

The crime of kidnapping in violation of Penal Code section 209 was added to Section 799 in 1970.⁷ Penal Code Section 209 applies to kidnapping for ransom, extortion or robbery. In 1970, kidnapping was punishable by death or life imprisonment without possibility of parole if the victim suffered bodily harm, and life imprisonment with possibility of parole in other cases.⁸ In 1977, section 209 was amended to eliminate the death penalty.⁹

B. Three Year Limitation

Penal Code section 800, originating with section 97 of the 1851 statute, established a limitation of three years after commission for all felonies not enumerated in section 799. The section now includes two additional categories of exceptions that have grown with increased frequency in recent years: felonies for which the three year limitations period commences upon discovery of the crime, rather than upon commission, and felonies for which a limitation period of six years after the commission is established. The residual limitations period, for all offenses not enumerated in section 799 and not named in either category of exceptions, remains three years after commission of the crime.

C. Three Years After Discovery

The concept of having the statute of limitations commence upon discovery of the crime first was introduced into the California Penal Code in 1969. Senate Bill 1154, introduced by then Senator George Deukmejian, amended Penal Code section 800 to provide that "an indictment for grand theft shall be found, an information filed, or case certified to the superior court within three years after its discovery."¹⁰ As originally introduced, the proposal was limited to grand theft by

5. 1927 Cal. Stat. c. 619, §1, at 1046.

6. 230 Cal. App. 2d 615, 41 Cal. Rptr. 219 (1964).

7. 1970 Cal. Stat. c. 704, §1, at 1333.

8. 1951 Cal. Stat. c. 1749, §1, at 4167.

9. 1977 Cal. Stat. c. 316, §15, at 1262.

10. 1969 Cal. Stat. c. 1171, §1, at 2266.

false pretenses, but a later amendment extended the provision to include all forms of grand theft.¹¹ Once the three years after discovery concept was established in the statutory scheme, California legislators frequently utilized the concept in subsequent legislation. The following offenses were added to section 800:

1. Forgery in violation of Penal Code section 470, added in 1970.¹²
2. Voluntary manslaughter and involuntary manslaughter in violation of Penal Code section 192, added in 1971.¹³
3. Fraudulent claims against the government, perjury, filing false affidavits, and conduct by public officials and public administrators amounting to a conflict of interest in violation of Government Code section 1090 and 27443, respectively, added in 1972.¹⁴
4. Offering false evidence or preparing false evidence, in violation of Penal Code sections 132 or 134, added in 1975.¹⁵
5. Fraud in the offer, purchase or sale of securities in violation of Corporations Code section 25541, and other violations of the Corporate Securities Law punishable under Corporations Code section 25540, added in 1978.¹⁶
6. Felony welfare fraud in violation of section 11483 of the Welfare and Institutions Code, added in 1981.¹⁷
7. Felony Medi-Cal fraud in violation of section 14107 of the Welfare and Institutions Code, added in 1982.¹⁸

D. Six Year Limitation

The enumeration of certain offenses subject to a limitation of six years after commission began in 1941, when Penal Code section 800 was amended to provide that a prosecution for the acceptance of a

11. Senate Bill 1154 (April 8, 1969) (Amended in Senate, May 29, 1969).

12. 1970 Cal. Stat. c. 704, §2, at 1333.

13. 1971 Cal. Stat. c. 954, §1, at 1860.

14. 1972 Cal. Stat. c. 1046, §2, at 1923. This same legislative enactment made the offense of conflict of interest by a public administrator a felony/misdemeanor "wobbler," rather than a straight misdemeanor. *Id.* This legislation was introduced by Assemblyman Beverly in the wake of a widely publicized scandal involving the sale of estate property by the public administrator of Los Angeles County. Assembly Bill 1057 (March 14, 1972); see *In re Kristovch*, 18 Cal. 3d 468, 556 P.2d 771, 134 Cal. Rptr. 409 (1976).

15. 1975 Cal. Stat. c. 1047, §1, at 2466. This addition was part of a bill that specified the use of false evidence as grounds for a writ of habeas corpus under Penal Code section 1473. *Id.* c. 1047, §2, at 2466. The bill apparently was motivated by a widely publicized case in which an innocent man had been convicted by the use of a forged fingerprint. Criminal Prosecution of the officer involved had been barred by the statute of limitations. See Moranta, "The Fingerprint that Lied," COAST MAGAZINE, Dec. 1974, at 62-70.

16. 1978 Cal. Stat. c. 663, §8, at 2133. The maximum penalty for violations of section 25540 was reduced from ten years to three years in 1976, with a misdemeanor alternative remaining intact. 1976 Cal. Stat. c. 1139, §10, at 5066.

17. 1981 Cal. Stat. c. 1017, §1, at 3925.

18. 1982 Cal. Stat. c. 533, §1, at 39.

bribe by a public official or a public employee, a felony, must commence within six years after commission of the offense.¹⁹ At the time of this enactment, four different sections of the Penal Code designated the acceptance of bribes by public officials as felonies: section 68, applicable to executive officers; section 86, applicable to legislators; section 93, applicable to judicial officers; and section 165, applicable to city and county officials. With the exception of section 93, these offenses were all punishable by fourteen years imprisonment and forfeiture of office under the 1872 Code. Judicial officers, for some unexplained reason, faced a maximum penalty of ten years, rather than fourteen. The punishment is currently set at two, three and four years for all four offenses under the Determinate Sentencing Law.²⁰ Related offenses involving acceptance of "emolument, gratuity or reward" carry misdemeanor penalties, and are thus excluded from the applicability of the section 800 six year limitation. These offenses are governed by the one year limitation of section 801.²¹

In 1981, three different bills amending Penal Code section 800 were enacted by the legislature, adding a variety of rape related offenses to the six year limitations period. One year earlier, the section had been amended to provide a five year limitations period for violations of section 288 of the Penal Code, which punishes lewd acts with a child under age fourteen by a prison term of three, six or eight years.²² In 1980, widespread publicity was given to the case of the "College Terrace" rapist in Palo Alto, California. Melvin Carter confessed to seventy rapes in six counties over a ten year period. Many of the rapes were within the statute of limitations, and Carter eventually pled guilty to thirteen counts of rape and is now serving a twenty-five year prison sentence. The victim of a rape which occurred more than three years earlier strenuously objected that her case could not be prosecuted.²³

On January 1, 1981, Assemblyman Byron D. Sher, who represents Palo Alto, introduced Assembly Bill 30 which would have added rape in violation of Penal Code section 261 to the five year category established for section 288 one year earlier. By subsequent amendment, the period for both offenses was extended to six years, and the bill was "double joined"²⁴ with two Senate Bills adding Penal Code sections 264.1, 289, subdivisions (c), (d) and (f) of section 286, and subdivisions

19. 1941 Cal. Stat. c. 1113, §1, at 2816.

20. 1976 Cal. Stat. c. 1139, §§104, 109, 111, 128, at 5089, 5090, 5091, 5096.

21. CAL. PENAL CODE §§70, 94.

22. 1980 Cal. Stat. c. 1307, §2, at 4422.

23. *See* Peninsula Times Tribune, Jan. 23, 1981, at B-1, col. 1; Interview with Thomas J. Nolan, Jr. (March 7, 1983). (Notes on file with the author).

24. "Double Joining" is a legislative device used to establish the priority of conflicting bills enacted during the same legislative session. *See* *People v. Henderson*, 107 Cal. App. 3d 475, 494,

(c), (d) and (f) of section 288a to the six year limitations period.²⁵ These Penal Code sections establish the following offenses and penalties:

- Section 261 — Rape: three, six or eight years.
- Section 264.1 — Rape Acting in Concert: five, seven or nine years.
- Section 286(c) — Sodomy by force or with person under age 14: three, six or eight years.
- Section 286(d) — Sodomy Acting in Concert: five, seven or nine years.
- Section 286(f) — Sodomy with Unconscious Victim: up to one year in county jail or sixteen months, two or three years.
- Section 288a(c) — Oral Copulation by force or with persons under age 14: three, six or eight years.
- Section 288a(d) — Oral Copulation Acting in Concert: five, seven or nine years.
- Section 288a(f) — Oral Copulation with Unconscious Victim: up to one year in county jail or sixteen months, two or three years.
- Section 289(a) — Rape by Foreign Object: three, six or eight years.
- Section 289(b) — Rape by Foreign Object of a person who is incapable, through lunacy or other unsoundness of mind, of giving legal consent: felony/misdemeanor, punishable by a maximum of three years imprisonment.²⁶

E. One Year Limitation for Misdemeanors

The one year statute of limitations for misdemeanors first created in section 98 of the 1851 statute remains intact in section 801 of the present Penal Code. Some confusion as to the appropriate statute of limitations was created by the category of crimes known as "wobblers," which can be punished as either a misdemeanor or a felony, depending on the discretion of the judge. Penal Code section 17(b)(4) and (5) provide that these offenses are misdemeanors "for all purposes" when the complaint specifies that the offense is a misdemeanor or when the magistrate determines that it is a misdemeanor at or before the preliminary hearing. Relying upon this language, the court in *Keener v. Municipal*

166 Cal. Rptr. 20, 32 (1980); *In Re Thierry S.*, 19 Cal. 3d 727, 739-40, 566 P.2d 610, 616, 139 Cal. Rptr. 708, 714 (1977).

25. 1981 Cal. Stat. c. 895, c. 901, c. 909.

26. 1981 Cal. Stat. c. 896, §3, at 3416.

*Court of Alameda County*²⁷ held that prosecution was barred by the statute of limitations when a charge of battery on a police officer, filed as a felony, was reduced to a misdemeanor at the preliminary hearing, and the charge had been filed more than one year after its commission. One year later, the legislature changed this result by amending section 801 to provide:

(b) For an offense for which a misdemeanor complaint may be filed or that may be tried as a misdemeanor, pursuant to paragraphs (4) and (5) of subdivision (b) of section 17, respectively, a complaint shall be filed within the time specified in section 800 for such offense.²⁸

F. Tolling of Statute of Limitations

Section 99 of the original Statute of Limitations enacted in 1851 did not clearly toll the statute for any period of absence from the state. The section permitted tolling if the offense was *committed* while the defendant was outside the state. Then, as now, those who were outside the state at the time a crime was committed could be prosecuted in California under the circumstances delineated in Penal Code section 27.²⁹ Section 99 also excluded from the limitation period any time the defendant was not "an inhabitant of, or usually resident within the state." While it might be debated whether every "absence" would be excluded by this language, any ambiguity was resolved by a 1951 amendment to Penal Code section 802, which now provides that, "no time during which the defendant is not within this State, is a part of any limitation of the time for commencing criminal action."³⁰ California courts have held that facts showing the defendant's absence from the state must be alleged in the accusatory pleading to avoid a dismissal if a period in excess of that allowed by the statute of limitations has elapsed since the offense was committed.³¹

27. 91 Cal. App. 3d 213, 154 Cal. Rptr. 107 (1979).

28. 1980 Cal. Stat. c. 1093, §1, at 3506.

29. CAL. PENAL CODE §27:

(a) The following persons are liable to punishment under the laws of this state:

1. All Persons who commit, in whole or in part, any crime within this state;
2. All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state;

3. All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.

(b) Perjury, in violation of §118, is punishable also when committed outside of California to the extent provided in §118.

30. 1951 Cal. Stat. c. 1674, §23, at 3834.

31. *People v. Crosby*, 58 Cal. 2d 713, 724-25, 375 P.2d 839, 846, 25 Cal. Rptr. 847, 854 (1962); *Ex Parte McGee*, 29 Cal. App. 2d 648, 649, 85 P.2d 135, 136 (1939).

G. Commencement of Prosecution

When the original statute of limitations was adopted in 1851, all prosecutions were initiated by indictment. Each section, therefore, specified that an indictment must be found within the limitations period. Section 100 provided that an indictment was "found" when it was presented by the Grand Jury in open court, received and filed. That provision still appears as Penal Code section 803. In 1880, when the Penal Code was amended to permit prosecution by information,³² each section of the statute of limitations was amended to provide that an indictment must be found or an information filed within the limitations period.³³ In 1935, a statute was enacted permitting a defendant to enter a plea of guilty or *nolo contendere* to a felony complaint in the municipal court, whereupon the magistrate would certify the case to the superior court for sentencing.³⁴ In these cases, neither an indictment nor an information would ever be filed. To encompass this possibility, the felony statute of limitations was amended to add "or a case certified to the superior court" to the alternatives for commencement of prosecution.³⁵ Similarly, the 1933 provision for initiating a misdemeanor prosecution by "complaint" necessitated an amendment of the misdemeanor statute of limitations to provide for that alternative to initiate prosecution.³⁶

Since a pleading in superior court was necessary to commence prosecution of felonies for purposes of the statute of limitations, and the delays necessitated by a preliminary hearing created the risk that the statutory period might run before an information was filed in superior court, prosecutors frequently resorted to the use of grand jury indictments when the statute of limitations was dangerously close. A crisis was created, however, by the decision of the California Supreme Court in *Hawkins v. Superior Court*.³⁷ Relying on the equal protection clause of the California Constitution, the court held that a defendant indicted by the Grand Jury has a right to a post-indictment preliminary hearing before the indictment is filed. The legislature responded to this crisis by creating a bifurcation of the felony statute of limitations in Penal Code section 800. The alternative that currently is in effect provides that "an indictment shall be found, or an arrest warrant issued by the

32. See *Hurtado v. California*, 110 U.S. 516, 517-18 (1884) (description of the legislative history of the amendment). The court held that the due process clause of the fourteenth amendment does not require states to initiate criminal prosecutions by Grand Jury indictment. *Id.* at 538.

33. 1880 Cal. Stat. c. 47, §8, at 12.

34. 1935 Cal. Stat. c. 141, §2 at 493 (enacting CAL. PENAL CODE §859a).

35. *Id.* c. 193, §1, at 856.

36. 1933 Cal. Stat. c. 648, §1, at 1678.

37. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

municipal or, where appropriate, the justice court" within the limitations period.³⁸ A new section, Penal Code section 802.5, was also enacted to provide:

The time limitations provided in this chapter for the commencement of a criminal action shall be tolled upon the issuance of an arrest warrant or the finding of an indictment, and no time during which a criminal action is pending is a part of any limitation of time for recommencing that criminal action in the event of a prior dismissal of that action, subject to the provisions of section 1387.³⁹

An alternative version, reverting back to the requirement that prosecution must commence when an indictment is returned, an information is filed, or a case is certified to the superior court, was also enacted. This provision will take effect when "a decision of a court of appeal or of the California Supreme Court becomes final, or an amendment to the California Constitution takes effect, whichever occurs first which decision or amendment provides that a person charged by indictment with a felony is not entitled to a preliminary hearing."⁴⁰ Proposals to amend the constitution to overrule *Hawkins* have not met with any success in the legislature, but efforts have been reported to effect a constitutional amendment through the initiative process.⁴¹

FACTORS SUPPORTING A SHORT PERIOD OF LIMITATIONS

Three factors, frequently cited in cases and legal literature as justifications for the statute of limitations in criminal cases, support a short period of limitations when they are applicable, as opposed to a long limitations period or no limitation at all. These factors will be characterized as the staleness factor, the motivation factor, and the repose factor.

A. *The Staleness Factor*

The statute of limitations is often viewed as a means of protecting an accused both from having to face charges based on evidence that may be unreliable, and from losing access to the evidentiary means to defend against an accusation of crime. "With the passage of time, memory becomes less reliable, witnesses may die or become otherwise unavailable; and physical evidence becomes more difficult to obtain, more difficult to identify, and more likely to become contaminated."⁴²

38. 1981 Cal. Stat. c. 1017, §1.5, at 3926.

39. *Id.* c. 1017, §3, at 3927.

40. *Id.* c. 1017, §4, at 3928.

41. Cox, "Criminal Justice Officials Approve Speedy Trial Act," L.A. Daily Journal, Feb. 17, 1983. Part I, at 1.

42. MODEL PENAL CODE §1.07 advisory committee comment (Tent. Draft No. 5).

The statute of limitations may not be the only protection available against these risks. In recent years, the constitutional right to due process of law has occasionally been utilized by courts to grant relief to a defendant when delays in the investigation or prosecution of the case have prejudiced the defendant's ability to defend himself, or when the prosecution was responsible for the destruction or loss of vital evidence.

In *United States v. Marion*,⁴³ the Supreme Court rejected a claim that the sixth amendment right to speedy trial had any application to delays prior to the institution of formal charges, noting the traditional role of the statute of limitations in preventing prejudice resulting from the passage of time between the commission of a crime and the filing of charges.⁴⁴ The Court left open the possibility, however, that if delay caused substantial prejudice to a defendant's right to a fair trial and if that delay was an intentional device to gain tactical advantage for the prosecution, the due process clause might require dismissal of the charges.⁴⁵ Six years later, in *United States v. Lovasco*,⁴⁶ the Supreme Court made that clear that proof of actual prejudice was a necessary element of a due process claim but that this proof would not in itself justify relief without considering the reasons for the delay. The Court offered little guidance, however, as to what reasons for delay would be unacceptable, noting that few defendants had succeeded in establishing that a delay resulted in actual prejudice.⁴⁷

When evidence essential to the defense is lost or destroyed by the state, due process may also require dismissal of charges. In *People v.*

43. 404 U.S. 307 (1971).

44. The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States v. Ewell*, [383 U.S. 116] at 122, "the applicable statute of limitations . . . is the primary guarantee against bringing overly stale criminal charges." Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defense." *Public Schools v. Walker*, 9 Wall 282 (1870). These statutes provide predictability by specifying a time limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. As this Court observed in *Toussie v. United States*, 397 U.S. 112, 114-15 (1970): "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function.

Id. at 322-23.

45. *Id.* at 324.

46. 431 U.S. 783 (1977), rehearing denied, 434 U.S. 881 (1977).

47. 431 U.S. at 796-97.

Hitch, the California Supreme Court held that the state has a duty to preserve material evidence and to take reasonable measures to ensure adequate preservation of the evidence.⁴⁸ This rationale has been applied to negligent as well as intentional loss of evidence,⁴⁹ but it still only protects the defendant when the loss of evidence is attributable to state authorities. The concept of due process, therefore, cannot be viewed as an adequate substitute for the statute of limitations in meeting the concerns embodied in the staleness factor.

The staleness factor may be difficult to relate to specific offenses. The degree of risk will be determined by the kind of evidence, rather than the nature of the crime. The survey of prosecutors, defense lawyers, and judges discussed in this article attempted to ascertain whether certain types of crimes are more frequently proved by evidence that becomes less reliable with the passage of time, and whether specific types of crimes create a greater risk that exculpatory evidence may be lost with the passage of time. The respondents were asked to select up to six crimes from a list of twenty-four, that present the greatest risks of preserving reliable evidence or losing exculpatory evidence. (See Appendix III for a complete list of the crimes included.) The responses were remarkably consistent among judges, prosecutors and defense lawyers. With respect to evidence becoming less reliable, the crimes most frequently selected appear in Table 1.

TABLE 1

<u>Crimes</u>	<u>Prosecutors (%)</u>	<u>Defense</u>	
		<u>Lawyers (%)</u>	<u>Judges (%)</u>
1. Child Molesting	80	68	84
2. Rape	48	84	100
3. Robbery	48	56	70
4. Sale of Narcotics	28	52	42
5. Conspiracy	32	48	14

With the exception of conspiracy, which is proven most frequently through the testimony of co-conspirators, and child molesting, where the age of the victim presents particular problems of reliability, the crimes on this list are those in which an eye witness identification is crucial to the prosecutor's case. The effect of the passage of time on the reliability of eye witness identification has been well documented in recent studies. Some research suggests that the passage of time assumes less significance as more time passes, since loss of memory is most acute

48. 12 Cal. 3d 641, 652-53, 527 P.2d 361, 367, 117 Cal. Rptr. 9, 17 (1974).

49. *People v. Swearingen*, 84 Cal. App. 3d 570, 574, 75, 148 Cal. Rptr. 755, 757 (1978).

in the period immediately following the event, while long term memory loss is a more gradual process.⁵⁰ Where an extremely long period of time elapses between the commission of a crime and an identification of the perpetrator by the victim, the admissibility of the identification can be challenged on due process grounds. In *Neil v. Biggers*,⁵¹ the Supreme Court included "the length of time between the crime and the confrontation" among the factors to be considered in assessing the reliability of an identification procedure. The issue of whether passage of time alone would justify suppression of identification testimony, however, has seldom been addressed by courts. In *United States v. Walus*,⁵² the government sought to revoke the defendant's citizenship on the grounds that he concealed his role in prison camp atrocities as a member of the German Gestapo during World War II. He was identified from photographs thirty-five years after the events took place. The court noted that "[t]he long time span between the incidents and the viewings of this exhibit in the mid-1970's would itself require scrutiny of the identifications, even if they were made under 'laboratory conditions.'"⁵³ As previously noted, however, due process principles cannot provide the same degree of protection that the statute of limitations provides against the risk of unreliable identifications long after the event.

With respect to the loss of exculpatory evidence, prosecutors tended to identify the same crimes as those that they considered to be more frequently proved by evidence that becomes less reliable as time passes. Defense lawyers, however, placed some different crimes high on the list. The results appear in Table 2.

50. See LOFTUS, EYEWITNESS TESTIMONY, (1980); YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY, (1980); Ellis, Davis & Shepherd, "Experimental Studies of Face Identification," 3 J. OF CRIM. DEFENSE 219 (1977); Levin & Trapp, "The Psychology of Criminal Identification: The Gap From Wade to Kirby," 212 U. PA. L. REV. 1078 (1973); Uelman, "Testing the Assumptions of *Neil v. Biggers*: An Experiment in Eyewitness Identification," 16 CRIM. L. BULL. 358 (1980).

51. 409 U.S. 188, 199 (1972).

52. 616 F.2d 283 (7th Cir. 1980).

53. *Id.* at 293; see also Nesselson & Lubet, "Eyewitness Identification in War Crimes Trials" 2 CARDOZO L. REV. 71 (1980).

TABLE 2

<u>Crime</u>	<u>Prosecutors (%)</u>	<u>Defense</u>	
		<u>Lawyers (%)</u>	<u>Judges (%)</u>
1. Rape	48	68	70
2. Child Molesting	60	40	28
3. Robbery	48	44	56
4. Murder	36	44	42
5. Burglary	20	44	14
6. Sale of Narcotics	32	36	28
7. Conspiracy	20	36	28

While it is difficult to identify common elements to these offenses, three possibilities come to mind, and all were mentioned in questionnaire responses by defense lawyers with some frequency. First, just as the prosecution of many of these crimes depends on eye witness identification, the defense may rely upon evidence of another person's identification as the perpetrator, which is similarly affected by the passage of time. Second, the defense that frequently is offered to many of these crimes is an alibi—the accused was at another location at the time of the crime. The passage of time makes alibi witnesses more difficult to locate and also makes those witnesses less certain of specific times that may be crucial in a case. Third, some of these crimes, especially murder, frequently require the presentation of evidence regarding the defendant's state of mind at the time that the crime was committed, either as evidence of "diminished capacity" or as part of an insanity defense. The testimony of psychiatrists and other experts becomes less credible when they examined the defendant long after the events took place.

B. The Motivation Factor

The Statute of Limitations may be viewed as a "deadline" to motivate efficient police work and insure against bureaucratic delays in investigating crime. Viewed in this light, the statute imposes a "priority" upon police and prosecutors to insure the prompt investigation of crimes that have a shorter limitations period. It has been suggested that this motivation is unnecessary because the police and prosecutors are already so overburdened and subjected to such public pressure that they are compelled to prioritize and give prompt attention to those crimes about which the public is most concerned.⁵⁴ A recent study of general police investigative techniques lends corroboration to the view that the statute of limitations may be a negligible factor in motivating

54. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 633 (1954).

police investigative activity.⁵⁵ An intensive study of the Kansas City, Missouri, Police Department undertaken by Rand Corporation researchers ascertained the percentage of all reported crimes that actually received the attention of detectives during a six month period. The results, shown in Table 3, present a graphic picture of police investigative priorities.⁵⁶

TABLE 3
PERCENTAGE OF REPORTED CASES
WORKED ON BY DETECTIVES

<u>Type of Incident</u>	<u>Percent</u>
Homicide	100.0
Rape	100.0
Suicide	100.0
Forgery/counterfeit	90.4
Kidnapping	73.3
Arson	70.4
Auto theft	65.5
Aggravated assault	64.4
Robbery	62.6
Fraud/embezzlement	59.6
Felony sex crimes	59.0
Common assault	41.8
Nonresidential burglary	36.3
Dead body	35.7
Residential burglary	30.0
Larceny	18.4
Vandalism	6.8
Lost property	0.9
All above types together	32.4

The researchers found that investigators chose the cases on which they would work "by considering both the seriousness of the crime and whether sufficient leads are present to indicate that the chances of clearing the crime are high."⁵⁷ Thus, a majority of the cases on which investigators chose to work were cleared by arrest. Most of these cases were handled in the course of a single day. Only a few types of crimes involved sustained investigative activity including homicide, rape, safe burglary, commercial robbery, and forgery/counterfeiting. The Missouri statute of limitations is very similar to the California counterpart,

55. GREENWOOD, CHAIKEN & PETERSILIA, *THE CRIMINAL INVESTIGATION PROCESS* (D.C. Heath & Co., 1977).

56. *Id.* at 110 (refer to Table 8-3).

57. *Id.*

with a general three year period for felonies, one year for misdemeanors, and no limitation for murder or aggravated robberies.⁵⁸ The conclusions of the Rand researchers strongly suggest that neither an increase nor a reduction in the statute of limitations would significantly affect the allocation of general investigative resources by the police.⁵⁹ The motivation factor may have some significance, however, with respect to specialized investigative activities.

In the survey of prosecutors, defense lawyers, and judges undertaken in connection with this article, the respondents were asked to identify up to six crimes from the list of twenty-four in Appendix III that "are most susceptible to bureaucratic delays in investigative activity." The crimes most frequently identified appear in Table 4.

TABLE 4

<u>Crime</u>	<u>Prosecutors (%)</u>	<u>Defense Lawyers (%)</u>	<u>Judges (%)</u>
1. Corporate Securities Fraud	64	44	14
2. Conflict of Interest	36	48	28
3. Embezzlement of Public Funds	40	36	14
4. Fraudulent Claims Against Government	36	32	14
5. Payment of Bribe	24	36	56
6. Receipt of Bribe	28	32	70
7. Grand Theft	28	24	0

This list is composed of what, generally, are perceived to be "white collar" crimes. These crimes are frequently investigated by highly specialized investigators assigned to special agencies or task forces. The list also includes many of the offenses for which the statute of limitations commences upon discovery of the crime, because the crime is

58. Mo. CODE, Title 38, c. 556, §556.036.

59. The investigator's daily routine cannot be characterized as devoted primarily to piecing together clues for the purpose of solving crimes. For the most part he operates in a reactive mode, responding to externally generated events that require an action on his part. Administrative activities, service to the public, and other work not related to cases consumes nearly half of his time.

A large number of incidents come to his attention, but many of them receive little or no work and simply sit on his desk constituting part of his caseload. If an arrest has already been made, or it is apparent from the crime report that a limited amount of work will result in an arrest, then the case is pursued and most of the work involves post-arrest processing, writing reports, documenting evidence, and the like. A small number of cases are pursued simply because of their seriousness or importance, but it does not appear that the chances of clearance are enhanced in proportion to the amount of work.

GREENWOOD, *supra* note 55, at 118.

often concealed. The "Concealment Factor" will be discussed at greater length, but the "Motivation Factor" may lead to the conclusion that suspension of the statute of limitations until the crime is discovered may be a better way to deal with concealed crimes than a longer statute of limitations. This has particular significance for the crimes of embezzlement of public funds and falsification of public records, both of which are presently subject to no limitation, and for the receipt of a bribe, currently subject to the six year limitation.

C. *The Repose Factor*

A thoughtful statement of the repose factor was contained in a response to the survey questionnaire by a California public defender:

After some period of time, victim, defendant and society adjust to the commission of a crime. I don't want to bear enmity beyond that time, nor to live in a society that bears enmity beyond that time, sufficient to penalize the defendant. Furthermore, today's problems are sufficient — I don't have the energy to attend to the things that plagued me years ago.

Although agreement with this sentiment may be strongly affected by differing views of the purpose of the criminal law—deterrence, incapacitation, rehabilitation, or retribution—every one of these purposes leaves room for a repose factor.

If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing *pro tanto* the necessity for imposition of the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for recent offenses committed within the period of limitations. As time goes by, the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten.⁶⁰

The length of time that must lapse before punishment is no longer appropriate may be different for every crime. To a large extent, this length of time will be consistent with the response to the seriousness factor, in which an attempt is made to identify crimes for which *no* repose should be offered. Ultimately, society makes a judgment of how long it should "bear enmity" for a crime by setting the term of years for which that offense should be punished. It would be quite inconsistent to say, simply on the basis of the repose factor, that prosecution for a crime should be barred three years after commission, when those who are apprehended at the time of commission are regularly sentenced to ten years in prison. Thus, it was probably not just coincidence that the

60. MODEL PENAL CODE, *supra* note 42, §1.07, at 16.

one year statute of limitations for misdemeanors is the same as the one year maximum sentence for misdemeanors in California.⁶¹ The maximum penalty for felonies varies widely, from a maximum of three years when an offense is simply declared to be a felony,⁶² to a maximum of death or life imprisonment without possibility of parole for first degree murder when special circumstances are alleged or proven.⁶³ A statute of limitations shorter than the maximum penalty might be justified by the staleness factor or the motivation factor, but it cannot be justified by the repose factor. The appropriateness of a statutory period that exceeds the maximum penalty is considered in connection with the seriousness factor.

FACTORS SUPPORTING A LONG PERIOD OF LIMITATIONS

Three justifications have been offered in case law and legal literature for a longer statute of limitations, or in some instances for no statute of limitations at all. These factors will be characterized as the concealment factor, the investigation factor, and the seriousness factor.

A. The Concealment Factor

The very nature of certain crimes makes their detection especially difficult. A longer statute of limitations might be justified for this type of crime to insure that the perpetrators do not escape punishment simply by successfully concealing their criminal activity. This is the apparent motivation for exempting embezzlement of public funds and falsification of public records in section 799 of the California Penal Code from a statute of limitations. As noted by the court in *People v. Darling*:⁶⁴

an obvious reason for excepting from a statute of limitations the offense of embezzlement of public funds as distinguished from other forms of theft thereof is that ordinarily the situation giving rise to the embezzler's theft protects him in keeping his crime a secret. This conclusion is corroborated by the fact that the offense of falsifying public records, which arises out of a comparable situation retarding detection, also is excepted from the subject statute. No reason appears for having enlarged the scope of these exceptions to encompass modes of stealing public funds other than that included within the common law offense of embezzlement."⁶⁵

This reasoning is "obvious," however, only when the choice is between

61. CAL. PENAL CODE §19a.

62. *Id.*

63. *Id.* §190, 190.1-190.5.

64. 230 Cal. App. 2d 615, 41 Cal. Rptr. 219 (1964).

65. *Id.* at 621, 41 Cal. Rptr. at 222.

applying a statute of limitations or not applying one at all. If a third alternative is considered, suspending the statute of limitations until the crime is discovered, a different treatment of the crimes of embezzlement of public funds and falsification of public records may be needed. In 1891, the California Legislature did not have the sophistication to create this third choice. As previously noted, the concept of suspending the statute of limitations until discovery of the crime was not utilized by the Legislature until 1969.

The survey requested respondents to identify up to six crimes that are most likely to be concealed. The crimes most frequently listed appear in Table 5.

TABLE 5

<u>Crime</u>	<u>Prosecutors (%)</u>	<u>Defense</u>	
		<u>Lawyers (%)</u>	<u>Judges (%)</u>
1. Payment of Bribe	72	72	56
2. Receipt of Bribe	68	76	56
3. Embezzlement of Public Funds	76	68	84
4. Corporate Securities Fraud	48	60	56
5. Falsifying Public Records	44	40	28
6. Fraudulent Claims Against Government	44	36	70
7. Child Molesting	48	16	28

Several additional observations about the responses to this question are pertinent. First, not a single prosecutor, defense lawyer, or judge listed voluntary or involuntary manslaughter as a crime that is likely to be concealed. Both of these offenses are currently included among the offenses for which the three year limitations period commences upon discovery of the crime. Second, relatively few of the respondents included conspiracy in their response (20% of prosecutors, 24% of defense lawyers, and 28% of judges). This may reflect the adequacy of present law in dealing with the problem of conspiracy. Conspiracy is treated as a continuing crime, and the statute of limitations does not begin to run until its primary object is completed.⁶⁶ Courts have been reluctant to treat concealment as one of the primary objects of a conspiracy, however, because this would automatically extend the statute of limitations

66. *People v. Williams*, 97 Cal. App. 3d 382, 390, 158 Cal. Rptr. 778, 782 (1979).

until the conspiracy was discovered.⁶⁷ Third, one prosecutor noted that many defendants charged with concealed crimes are public office holders, and a longer statute of limitations increases the risk of politically motivated prosecutions. Finally, the similarity between the offenses identified as most likely to be concealed, those identified as most susceptible to bureaucratic delays, and those requiring lengthier investigative activity, should be noted. While the concealment factor can be accommodated by suspending the limitations period until discovery, the motivation and investigation factors cannot, because the investigation of a crime cannot commence until it has been discovered. In addition, these two latter factors point in opposite directions in terms of the appropriate duration of the limitations period.

The survey questionnaire noted that suspension of the limitations period until discovery of the crime, or "tolling" the limitation during a demonstrated period of concealment, are alternatives to a longer period of limitations for concealed crimes. Respondents were asked to comment on the perceived advantages or disadvantages of these alternatives. Most prosecutors indicated a preference for suspending the statute until discovery of the crime, suggesting that the burden of affirmatively proving concealment is difficult to meet. Several prosecutors suggested that the statute of limitations should not begin to run for *any* crime until it has been discovered. A minority opted for a longer statute of limitations for normally concealed crimes, objecting to having to show "diligence" in discovering the crime. In *People v. Swinney*,⁶⁸ a California appellate court held that the victim's reasonable diligence is the issue and official diligence becomes an issue only when suspicion arrives at the door of the officials responsible for the suspect's apprehension and prosecution. Furthermore, the court held that "discovery" by the victim means discovery that a criminal agency was responsible for a loss; mere awareness of a loss would not start the statute running.

Less agreement was found among defense lawyers and judges, who were evenly divided among a longer limitations period, commencement of the statute of limitations at discovery, and tolling of the statute. Several judges and defense attorneys saw practical problems with tolling, since the issue of affirmative concealment could hardly be litigated without litigating the guilt of the defendant. If the issue was not re-

67. *People v. Diedrich*, 31 Cal. 3d 263, 595 P.2d 104, 155 Cal. Rptr. 670 (1982); *People v. Saling*, 7 Cal. 3d 844, 500 P.2d 610, 103 Cal. Rptr. 698 (1972); *People v. Leach*, 16 Cal. 3d 419, 541 P.2d 296, 124 Cal. Rptr. 752 (1975); *People v. Zamora*, 18 Cal. 3d 538, 557 P.2d 75, 134 Cal. Rptr. 784 (1976).

68. 46 Cal. App. 3d 332, 120 Cal. Rptr. 148 (1975).

solved until trial, one purpose of the statute of limitations would be defeated: avoiding the burden of a trial for long past offenses. Those who opposed a longer statute noted the risk of investigative delays and delayed prosecutions motivated by revenge or political considerations.

B. The Investigation Factor

The nature of some crimes may require longer investigation to identify the perpetrators. Even after the perpetrators have been identified, legitimate reasons may exist for investigative activity to continue. As outlined by the United States Supreme Court in *United States v. Lovasco*,⁶⁹ these reasons include the need to identify additional participants in a criminal enterprise, the need to bolster weaker elements of a case with additional evidence, and the need to fully explore possible alternatives to criminal prosecution.⁷⁰

The survey questionnaire asked the respondents to identify up to six crimes from the list of twenty-four that require lengthier investigative activity before prosecution is commenced. The crimes most frequently selected appear in Table 6.

TABLE 6

<u>Crime</u>	<u>Prosecution (%)</u>	<u>Defense Lawyers (%)</u>	<u>Judges (%)</u>
1. Corporate Securities Fraud	64	76	100
2. Embezzlement of Public Funds	68	64	70
3. Fraudulent Claims Against Government	56	32	42
4. Conspiracy	48	36	42
5. Receipt of Bribe	44	48	42
6. Payment of Bribe	40	48	28
7. Conflict of Interest	40	36	28
8. Falsifying Public Records	32	40	14

The correlation between these crimes and those identified for the motivation and concealment factors has already been noted. A com-

69. 431 U.S. 783, rehearing denied, 434 U.S. 881 (1977).

70. *Id.* at 792-95; see Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975) (additional reasons for investigative delays).

parison of Tables 4 and 6 reveals that the same crimes which require lengthy investigative activity are most susceptible to bureaucratic delay.

C. The Seriousness Factor

The lapse of the statute of limitations operates as a statutory grant of "amnesty" to an offender. Viewed in this light, it may be desirable to withhold amnesty from some crimes that are regarded as particularly serious. This is the other side of the coin already identified as the repose factor. The seriousness of the crime can be a rational consideration in setting the duration of a limitations period regardless of whether the purpose of criminal law is deterrence, incapacitation, or rehabilitation.⁷¹ For example, the following arguments may be made: (a) the more serious the offense, the greater the need for deterrence and the less desirable the possibility of escape from punishment after a short period of limitation, or (b) the more serious the offense, the greater the likelihood that the perpetrator is a continuing danger to society, and thus the greater the need to incapacitate the perpetrator when he is caught, or (c) the more serious the offense, the less likely the perpetrator will reform of his own accord, and thus the greater the need for compulsory treatment when he is apprehended. It is also true that when the charge is more serious, more is at stake for the defendant and the defendant's need for the procedural protection that a limitations period affords is correspondingly greater. If the purpose of criminal law is retribution, of course, the seriousness factor would be a paramount consideration.

The survey questionnaire asked the respondents to identify up to six crimes which they regarded as so serious that they should not be subject to any statute of limitations. The crimes most frequently selected appear in Table 7.

TABLE 7

Crime	Prosecutors (%)	Defense	Judges (%)
		Lawyers (%)	
1. Murder	88	76	56
2. Kidnapping	64	20	14
3. Voluntary Manslaughter	52	12	14
4. Rape	48	12	28
5. Forcible Sodomy/ Oral Copulation	40	8	0

71. MODEL PENAL CODE, *supra* note 42, §1.07, at 20.

The broad consensus that prosecution for the crime of murder should not be barred by a statute of limitations is consistent with the judgment of every state legislature except one. Only New Mexico, which imposes a fifteen year limitation, includes murder among the crimes which may be barred.⁷² The universality of this judgment reflects a number of unique aspects about the crime of murder. Prevailing police practice demands that a file never be closed on an unsolved murder case. Moreover, murder is the only crime punishable by death in the vast majority of jurisdictions that have a death penalty. "There are other crimes of comparable gravity but these crimes are less likely to present equal obstacles to the prompt discovery of evidence or to have a comparably long and continuous impact on the sense of general security within the community."⁷³

The crimes most frequently selected as so serious that no statute of limitations should be imposed include the crimes that carry the heaviest penalties under the California Penal Code. Murder in the first degree is punishable by death, life imprisonment without possibility of parole, or twenty-five years to life. Second degree murder is punishable by fifteen years to life.⁷⁴ Kidnapping for ransom, reward, extortion or robbery is punishable by life imprisonment, without possibility of parole if the victim is harmed.⁷⁵ This correlation is not surprising, since the judgment of the crimes that are so serious that punishment should never be barred by lapse of time is very similar to the judgment of the amount of punishment that is appropriate.

The single exception to this pattern is the inclusion of voluntary manslaughter by a majority of prosecutors. The punishment for voluntary manslaughter⁷⁶ is less than the penalty for child molesting⁷⁷ or arson of an inhabited structure.⁷⁸ Other crimes carrying the same penalty as voluntary manslaughter were much further down on the prosecutors' list, including mayhem⁷⁹ (identified by 16% of prosecutors, 8% of defense lawyers, and no judges) and burglary,⁸⁰ (identified by a single prosecutor and no defense lawyers or judges). The judgment to include voluntary manslaughter with murder may reflect the close relationship between these two crimes and the anomaly of barring prosecution of a lesser included offense while permitting unlimited prosecution

72. N.M. STAT ANN., §30-1-8 (criminal offenses).

73. MODEL PENAL CODE, *supra* note 42, §1.07, at 17.

74. CAL. PENAL CODE §190.

75. *Id.* §209.

76. *Id.* §193 (two, four, or six years).

77. *Id.* §288 (three, six or eight years).

78. *Id.* §450 (three, five or seven years).

79. *Id.* §203.

80. *Id.* §459.

of the greater offense. As a practical matter, the ultimate decision of whether a homicide is a murder or a manslaughter frequently involves an assessment of the defendant's mental state that must be left to a jury. Thus, a murder prosecution that is delayed beyond the limitations period for voluntary manslaughter may result in the complete acquittal of the defendant, rather than in conviction for the lesser included offense.⁸¹

MODERN TRENDS IN OTHER JURISDICTIONS

The movement in the duration of statutes of limitations in other jurisdictions can be summarized in one word: *up*. In 1954, the University of Pennsylvania Law Review prepared a chart showing the statutory period for a selected list of crimes in every American jurisdiction. (See Appendix II) That chart, revealed that twelve states had no statute of limitations for most felonies. Among those states having a statute of limitations, the average statutory period for felonies was four years, with sixteen states establishing the usual period at three years, and fourteen states setting this period at five or six years. As part of this study, the limitation periods *currently* in effect in each state for the same crimes was ascertained. This information is shaded in parentheses in Appendix II when different from the 1954 figures. Since the 1954 study, the statutes of limitations in thirty states have been revised.

Five of these states have enacted general increases in the limitations on felonies: Arizona (five to seven years), Delaware (two to five years), Florida (two to three years), New Mexico (three to five years), and South Dakota (three to seven years). With rare exceptions, the only reductions in the statutory periods have been the creation of a limitations period in jurisdictions that previously had *no* limitation. Three states that previously had no statute of limitations enacted a general limitation of six years (Louisiana, Maryland, and Ohio). Increases in the statute of limitations for individual crimes have been most frequent for rape, with eight states increasing the statutory period for that crime. Today, the average statutory period is still four years, but the number of states setting the usual period at five or six and even seven years has grown to nineteen. The general statute of limitations for federal offenses was increased from three years to five years in 1954.⁸² In the midst of the massive revision of the federal criminal code, the Federal Criminal Code Commission proposed that the five year limitations pe-

81. See *People v. Picetti*, 124 Cal. 361, 362, P. 156, 157 (1899).

82. Ch. 1214, §10, 68 Stat. 1142; renumbered Sept. 26, 1961, as 75 Stat. 648 Pub. L. No. 87-299; 18 U.S.C. §3282.

riod be continued.⁸³

STRIKING A BALANCE: CATEGORIZING THE SERIOUSNESS FACTOR

Many of the factors offered to justify a shorter limitations period directly conflict with the factors offered to justify a longer period. The crimes most susceptible to bureaucratic delay (the motivation factor) require the longest investigations (the investigation factor). Weighing the importance of the repose and the seriousness factors may turn on whether the purpose of criminal law is retribution, rehabilitation, deterrence or incapacitation. As the drafters of the Model Penal Code concluded, "[t]o the extent that length of periods of limitation can be rationalized at all they, like penalty provisions, must be viewed as compromises reflecting the multiple and sometimes conflicting aims of the criminal law."⁸⁴

The significance of the purpose of criminal law was certainly borne out in the survey results. Respondents were asked to enter a plus or a minus to indicate whether they thought the limitations period should be increased or decreased for each crime listed in Appendix III. Prosecutors generally were in favor of increasing the limitations period, with a clear majority favoring an increase for the crimes of payment of a bribe and robbery. Very few prosecutors suggested reducing any periods except for the crimes of embezzlement of public funds and falsifying public records. Defense lawyers were consistent in opposing any increases and calling for a decrease in a number of crimes. A majority favored reduction of the limitations period for forcible sodomy or oral copulation and for kidnapping. Close to a majority of defense lawyers wanted reductions for rape, embezzlement of public funds, and falsifying public records.

Except for the factors of seriousness and repose, most of the rationales for the duration of a statute of limitations do not lend themselves to categorization by crime. To some extent, the concerns that are implicit in the concealment factor, the staleness factor, and the motivation/investigation factors can be accommodated by special statutory exceptions to the general limitations period. This format, which is suggested by the Model Penal Code, could be easily adapted to California law. The Model Penal Code creates three categories of felony limitations:

- (1) A prosecution for murder may be commenced at any time.

83. S. 1, Ch. 5, §511; *See* Sen. Jud. Comm. Rep.; Working Papers, Federal Criminal Code Commission, pp 281-98.

84. MODEL PENAL CODE, *supra* note 42, §1.07, at 20.

- (2) A prosecution for a felony of the first degree must be commenced within six years after it is committed.
- (3) A prosecution for any other felony must be commenced within three years after it is committed.⁸⁵

This classification scheme recognizes that the most significant crime-specific variable to be considered is the seriousness of the crime. The Model Penal Code also recognizes that the judgment as to the seriousness of a crime is no different than the judgment made in setting the maximum sentence for the crime. Nevertheless, very few crimes in the Model Penal Code that are first degree felonies punishable by life imprisonment.

This approach could be readily adapted to California without accepting the judgment of the Model Penal Code on which crimes should be without limitation, or which crimes should be subject to a six year limitation. One possible adaption appears in Appendix IV, a proposed draft.

The statute of limitations in New York is similar to the statute recommended by the Model Penal Code. The limitations period is defined by reference to the maximum penalty for the crimes affected. The New York statute allows prosecution of a Class A felony to be commenced at any time, while prosecution of all other felonies must commence within five years after commission.⁸⁶ Class A felonies are punishable by life imprisonment in New York, and these felonies currently include murder, attempted murder, first degree kidnapping, first degree conspiracy, first degree drug sales, and first degree arson.⁸⁷ Other states that have adopted the Model Penal Code in its entirety have made substantial modifications in the basic structure of the limitations section. New Jersey has adopted a general limitation of five years after commission for all crimes except murder, which is subject to no limitation, and a laundry list of offenses ordinarily committed by public officials, subject to a limitation of seven years after commission.⁸⁸ In Pennsylvania, a three-tiered structure has been adopted, with no limitation for murder, a five year limitation for six specified first degree felonies⁸⁹ and a two year limitation for any other offense.⁹⁰ In 1980, the statute was amended to allow prosecution for voluntary manslaughter to be commenced at any time.⁹¹

85. *Id.* §1.06.

86. N.Y. CRIM. PROC. LAW, §30.10.

87. PRACTICE COMMENTARY, 11A MCKINNEY'S CONSOL. LAWS OF N.Y. ANN., CPL §30.10.

88. N.J. STAT. ANN. §2C: 1-6.

89. PA. CONS. STAT. ANN. First degree felonies are punishable by a maximum term of ten years in Pennsylvania. 18 PA. CONS. STAT. 106(b)(3). The six offenses enumerated are arson, burglary, forgery, perjury, robbery and involuntary deviate sexual intercourse. *Id.*

90. *Id.* §108; 42 PA. CONS. STAT. ANN. §5552.

91. 42 PA. CONS. STAT. ANN. §5501.

A. No Limitation

The drafters of the Model Penal Code chose not to impose a statute of limitations for the crime of murder because of the gravity of the offense and the impact of the crime on the community. The Advisory Committee further noted the common police practice of never closing the files on an unsolved murder case.⁹² At the time this draft was adopted, however, the position of the Model Code on the death penalty was unresolved. The draft now provides for imposition of the death penalty for only one crime: murder. The judgment that a crime should be punishable by death is the ultimate determination of its seriousness. No reason appears why any crime that is punishable by death should be excepted from the treatment traditionally accorded the crime of murder. In California, this would mean expanding the list to all capital crimes including: first degree murder,⁹³ treason,⁹⁴ procuring execution by perjury,⁹⁵ train wrecking resulting in death,⁹⁶ assault with a deadly weapon by a life term prisoner,⁹⁷ and making defective war materials which cause death.⁹⁸ It is doubtful that any of these crimes have less impact on the sense of general security in the community than murder. While suitability of capital punishment for particular crimes may be debated, once the judgment that a crime should be punishable by death is made, prosecution of those crimes should not be barred by a statute of limitations. If the line is drawn at capital offenses, then kidnapping, embezzlement of public funds, and falsification of public records would be eliminated from the current list of offenses subject to no limitation. No logical reason supports the continued inclusion of kidnapping among offenses with no limitation, except the seriousness of the life imprisonment penalty that the crime carries. If, however, kidnapping remains within the category of offenses subject to no limitations, then inclusion of all crimes punishable by life imprisonment is supported by the rationale of seriousness of the penalty. Continuing as no limitation crimes the embezzlement of public funds and falsification of public records, however, does not make sense if the possibility of concealing these crimes is accommodated elsewhere in the code. In terms of seriousness as reflected in the three year maximum penalty, these crimes certainly are out of place in the company of capital offenses.

92. MODEL PENAL CODE, *supra* note 42, §1.07, at 17.

93. CAL. PENAL CODE §190.

94. *Id.* §37.

95. *Id.* §128.

96. *Id.* §102.

97. *Id.* §4500.

98. CAL. MIL. & VET. CODE §1672.

B. Six Year Limitation

The Model Penal Code assessment of the crimes that should be regarded as serious enough to qualify for the six year limitations period can also be modified. The California Penal Code now has a "laundry list" of serious felonies in Penal Code section 1192.7, added by Proposition Eight on June 9, 1982. Plea bargaining is precluded for these felonies. In addition, these felonies are also utilized for sentence enhancement purposes under Penal Code section 667. This list of felonies should not be used to categorize the offenses that are subject to a longer statute of limitations, although the list may embody a popular judgment of which felonies the public believes are serious. This would add a wide variety of disparate crimes not presently subject to the six year limitation, and would include any felony in which great bodily injury was inflicted or a firearm was used, thus making the availability of the six year limitation's period turn on the sentence enhancements that were pleaded by the prosecution. The list of felonies added by Proposition 8 includes categories of crimes not defined elsewhere in the code, such as "burglary of a residence." The list cannot be amended or modified except by further initiative or by a two thirds vote of the membership of both houses of the California Legislature. Instead, the crimes subject to the longer limitations period should be categorized in terms of the maximum sentence prescribed for the crime. For example, the statute could read: "A prosecution for an offense punishable by imprisonment in the state prison for nine years or more must be commenced within six years after it is committed." If a nine year maximum were established, the six year limitation would include violations of Penal Code section 451 (arson causing bodily injury); Penal Code sections 12308-12309 (explosion of destructive device with intent to murder, or causing bodily injury); and Penal Code section 664 (attempting a crime punishable by life imprisonment). If an eight year maximum were used, the six year limitation would include all crimes presently covered by the six year statute, with the exception of Penal Code sections 286(f) (acceptance of a bribe by a public official) and 288a(f) (sodomy or oral copulation of an unconscious victim). Inclusion of Penal Code section 245(c) (assault with a firearm upon a peace officer or fireman engaged in performance of duties) would also expand the serious felonies list.

ACCOMMODATING THE OTHER FACTORS

The Model Penal Code includes a number of exceptions to the general limitations determined by the seriousness of the crime. These ex-

ceptions are designed to accommodate the concerns embodied in the concealment factor, the motivation/investigation factor, and the staleness factor. Each of these provisions would be readily adaptable to California law.

A. Accommodating the Concealment Factor

The current provisions of California law reflect a concern that criminals might escape prosecution by concealing their crimes until after the statute of limitations has run. California law lists fifteen specific offenses for which the statute begins to run upon discovery. Other crimes, such as embezzlement of public money, falsification of public records, and acceptance of a bribe by a public official, are subjected to a longer statute of limitations for the same reason. Most of these crimes have one of two elements in common. They involve either a fraud or breach of fiduciary duty, or misconduct by a public officer. In either event, the perpetrator is in a unique position to conceal his crime. While there is motivation for the concealment of *all* crime, ordinarily it is desirable to start the period of limitations at the time of commission. When specific types of crimes present an opportunity for prolonged concealment, however, different treatment is warranted. The Model Penal Code provides for these two exceptions with the following provisions:

- (a) A prosecution for any offense a material element of which is either fraud or a breach of fiduciary obligation may be commenced within one year after discovery of the offense by an aggrieved party or by a person who has legal capacity to represent an aggrieved party or a legal duty to report such offense and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.
- (b) A prosecution for any offense based upon misconduct in office by a public officer or employee may be commenced within one year after discovery of the offense by a person having a duty to report such offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.⁹⁹

The proviso that the period of limitations otherwise applicable cannot be extended more than three years would prevent indefinite suspension of the statute, and thus accommodate concern for the staleness factor. As a practical matter, since most of these offenses would ordinarily be subject to the three year limitations period, a six year ceiling would be imposed under the Model Penal Code.

The requirement that prosecution be commenced within one year of

99. MODEL PENAL CODE, *supra* note 42, §1.07(3).

the discovery of the crime would only apply if the normal three year limitation has expired. This, in turn, is a reasonable accommodation for the motivation factor. The New York Criminal Procedure Law, enacted in 1970, included a provision closely patterned after this section of the Model Penal Code. The New York statute provides as follows:

3. Notwithstanding the provisions of subdivision two, the periods of limitation for the commencement of criminal actions are extended as follows in the indicated circumstances:

(a) A prosecution for larceny committed by a person in violation of a fiduciary duty may be commenced within one year after the facts constituting such offense are discovered or, in the exercise of reasonable diligence, should have been discovered by the aggrieved party or by a person under a legal duty to represent him who is not himself implicated in the commission of the offense.

(b) A prosecution for any offense involving misconduct in public office by a public servant may be commenced at any time during the defendant's service in such office or within five years after the termination of such service; provided however, that in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two.¹⁰⁰

Notably, a maximum limitation on the extension permitted was deleted from paragraph (a), while paragraph (b) was modified by having the statute begin to run not from discovery of the offense, but from the office holder's departure from office. Commentators explained the necessity of the latter change by noting the inherent probability that misconduct by public officials will remain concealed until the offender leaves office.¹⁰¹

In *People v. Glowa*,¹⁰² a New York court upheld the constitutionality of this provision against a claim that the provision denied public office holders equal treatment under the law. The court held that special treatment of office holders was justified by the rationale expressed in the practice commentary:

Because of the inherent nature of the circumstances under which such offenses are committed, their commission is often not discovered until the incumbent public servant has left office.¹⁰³

Pennsylvania also modified the Model Penal Code provision relating to offenses committed by public officers. As originally adopted, the

100. N.Y. CRIM. PROC. LAW §30.10.

101. PRACTICE COMMENTARY, MCKINNEY'S CONSOL. LAWS OF N.Y., ANN. CPL §30.10.

102. 384 N.Y.S.2d 673 (Sup. Ct. 1967).

103. *Id.* at 676.

provision permitted prosecution at any time while the defendant is in office or within two years thereafter, with a maximum extension of the normal limitations of up to three additional years.¹⁰⁴ In 1978, the provision was amended to extend the period to five years after the defendant leaves office, with a maximum extension of eight years longer than the normal limitation.¹⁰⁵

The New York and Pennsylvania modifications of the Model Penal Code provision create a substantial risk to public office holders that prosecution may be motivated by political retaliation for long forgotten offenses. These modifications provide no accommodation to motivate prompt investigation upon discovery of the offense. On the other hand, paragraph (b) of the Model Penal Code may be unrealistic in employing discovery of the offense as the trigger, since the only person in a position to report the crime may be under the control of the office holder, or even a participant in the offense. Paragraph (b) should be modified to repeat the language of paragraph (a), which triggers the statute upon discovery by a person having a duty to report the offense "and who is himself not a party to the offense." A clause should also be inserted to allow the prosecution to be commenced within one year of the termination of service in office, subject to the three year ceiling on extensions. These modifications have been incorporated in the draft attached as Appendix IV.

B. Accommodating the Motivation/Investigation Factor

By permitting prosecution of some offenses three years after discovery, the present California statute of limitations allows the indefinite suspension of the statute until discovery. If discovery of an offense is delayed, prompt investigation of the offense should be given highest priority. Thus, the Model Penal Code requires commencement of prosecution within one year under circumstances when the normal period of limitations has been extended. One year seems adequate to complete these types of investigations. Since by definition these situations involve criminal conduct completed more than three years and as much as six years earlier, the risks encompassed by the staleness factor certainly justify a requirement that the investigation be promptly completed.

C. Accommodating the Staleness Factor

While this article has concluded that the staleness factor is not crime

104. 18 PA. CON. STAT. ANN. Section 108 (1972).

105. 18 PA. CON. STAT. ANN. §108 (Supp. 1982).

specific, certain categories of crimes present unique risks of staleness since by their nature, they are susceptible to fraudulent prosecution. The Model Penal Code deals with these crimes individually because of the unique drafting problems that were anticipated.¹⁰⁶ The Model Code provides that no prosecution of rape and related offenses may be commenced unless notice is given to officials within six months of the occurrence or, if an incompetent is involved, within six months after a competent person learns of the offense.¹⁰⁷ The Model Code also provides that no prosecution of a theft by a spouse or by members of the household may be commenced unless a complaint is made within six months after the victim learns of the offense and the probable identity of the offender.¹⁰⁸ In both of these situations, the statute of limitations may, for all practical purposes, be reduced to six months, provided that knowledge of the offense comes to the attention of the victim.

Since the California Penal Code contains no requirement of prompt complaint for specific substantive offenses, some provision that takes this factor into consideration should be incorporated into the statute of limitations. The provision could take one of two forms. First, a common element pervading the offenses that require a prompt complaint is the proof of a lack of consent by the victim. Requiring the victim complain promptly within a shorter period of time than the three or six year period encompassed in the statute of limitations does not seem to be an unreasonable requirement. The six month period established by the Model Penal Code also appears reasonable, so long as exceptions are recognized for incompetent victims and victims who do not discover the offense.

106. MODEL PENAL CODE, *supra* note 42, §1.07, at 22. Finally, should special short periods of limitation be prescribed for offenses which by their nature are likely to be the subject of fraudulent prosecutions? Some provision of this sort is needed. The choice is whether to include it in a general section or to deal with each situation specifically in the section defining the offense by requiring, for example, that the victim of the offense make a complaint within a certain period of time. Since the number of such situations may be numerous and since the specific needs may vary from offense to offense, facility in drafting and in use of the code will be furthered if specific provisions of this sort are included with the substantive offense rather than in a general section. That has been the assumption to date. See: Section 207.4, Rape and related Offenses, Sub-Section (5): Prompt Complaint; Corroboration, providing that no prosecution may be commenced unless notice is given to officials within six months of occurrence; or, if an incompetent is involved, within six months after a competent person learns of the offense; Section 206.13, Theft by Spouse; Other Members of Household: Servants, Sub-Section (4): Necessity of Prompt Complaint, providing that no prosecution may be commenced unless complaint within six months after victim learns of the offense and the probable identity of the offender. In both of these situations the statute of limitations may for all practical purposes be reduced to six months, provided of course that the knowledge of the offense comes to the attention of the victim. If upon completion of the substantive portions of the code it appears that such provisions are numerous and that they are capable of generalization, it may be worthwhile to consider adding them to the general provisions. *Id.*

107. *See id.* §207.4(5).

108. *See id.* §206.13(4).

Alternatively, the statute could enumerate the offenses in which a prompt complaint is required. An enumeration of Penal Code sections 261 (rape), 286 (sodomy), 288a (oral copulation), and 289 (rape by a foreign object), would appear warranted. These sections also are enumerated in the definition of consent contained in Penal Code section 261.6.

Both alternatives are presented in section (4) of the draft in Appendix IV. The language is based on section 207.4(5) of the Model Penal Code, requiring prompt complaint for rape and related offenses. Even if the perpetrator remained unidentified, the section would permit the normal limitations period to apply, so long as prompt complaint was made.

Under neither alternative of the proposed prompt complaint requirement do the crimes of child molestation in violation of California Penal Code section 288, or unlawful sexual intercourse with a female under age eighteen in violation of California Penal Code section 261.5, apply. Lack of consent by the victim is not an element of either offense, nor is consent an affirmative defense. Thus, the problem encountered in the Pennsylvania enactment of a prompt complaint requirement will be avoided. When Pennsylvania adopted the Model Penal Code in 1972, a prompt complaint requirement was enacted to apply to *all* sexual offenses, including statutory rape and corruption of a minor.¹⁰⁹ In 1976, a case arose in which a fifteen year old girl was seduced by her stepfather. Although she immediately reported the incident to her mother, the mother disbelieved her and sent the girl to live with an aunt and uncle. The girl also related the incident to them, but no action was taken to report the incident to authorities until one year later, when the mother filed an unrelated assault complaint against the stepfather. Based on these facts, the Pennsylvania Superior Court held that the charges had to be dismissed under the prompt complaint statute.¹¹⁰ After this case was submitted to the appellate court, the Pennsylvania Legislature repealed the prompt complaint statute before the opinion was even announced.¹¹¹

One other accommodation to the staleness factor is advisable. Even if a crime is concealed or the statute is tolled for some other reason, an indefinite suspension of any limitation period does not appear desirable, especially when the limitations period is already as long as six years. The normal retention period for documents and records has elapsed, and the risk that essential witnesses are unavailable becomes

109. 18 PA. CON. STAT. ANN. §3105 (1972).

110. *Commonwealth v. Shade*, 363 A.2d 1187 (Pa. Super. 1976).

111. 18 PA. CON. STAT. ANN. §3105 (1976); *Commonwealth*, 363 A.2d at 1191.

too substantial. Thus, the Model Penal Code puts a "cap" on the exceptions to the normal limitations period of three additional years. Arguably, this permits a defendant to avoid prosecution by concealing his crime as long as he succeeds three years beyond the normal limitations period. This argument has apparently persuaded many states to permit indefinite suspension of the statute. This overlooks the following considerations:

- (1) The public has an interest in having legal disputes accurately resolved on the basis of evidence that is not stale.
- (2) The factual issues involving tolling or suspension of the statute may themselves have to be litigated on the basis of stale evidence.
- (3) Any affirmative acts of concealment delay commencement of the limitations period to the extent that they are part of a "continuing crime."¹¹²
- (4) If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing *pro tanto* the necessity for imposing the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for recent offenses committed within the period of limitation.¹¹³
- (5) Blackmail based upon a threat to prosecute or disclose evidence to enforcement officials is made less possible. After some defined period of time, a person ought to be allowed to live without fear of prosecution.¹¹⁴

These considerations justify an accommodation for the staleness factor, placing an absolute limit of three years beyond the normal limitation period when exceptions or tolling provisions apply.

COMMENCEMENT OF PROSECUTIONS

As previously noted, the California Penal Code currently has two alternative provisions determining when prosecution is commenced for purposes of the statute of limitations. The provision now in effect requires the filing of an indictment or the issuance of an arrest warrant. In the event that *Hawkins v. Superior Court*¹¹⁵ is abrogated, California will revert to the previous requirement that an indictment or an information be filed, or that a case certified to the superior court before the prosecution is deemed to have commenced.

The Model Penal Code provides that a prosecution is commenced by either indictment or issuance of a warrant, but requires that the war-

112. See *People v. Swinney*, 46 Cal. App. 3d 332, 340, 120 Cal. Rptr. 148, 1533 (1975).

113. MODEL PENAL CODE, *supra* note 42, §1.07, at 16.

114. *Ib.*

115. See *supra* note 37 and accompanying text.

rant be executed without unreasonable delay. The reason for this qualification was explained in the following commentary:

There is a danger that a warrant may be issued and allowed to lie around without diligent effort to execute it. See e.g. *State v. Bowman*, 106 Kan. 430 (1920) (warrant issued but at direction of county attorney, the sheriff made no effort to serve it for five months). The draft requires that the warrant be executed within a reasonable time. This was the conclusion of the Kansas court in *State v. Bowman*, supra. In determining what is reasonable, factors such as the inability to find the accused, the fact that the accused is in prison, and others too numerous to specify in a statute may be taken into account.¹¹⁶

Creating a "condition subsequent" to the commencement of prosecution, however, injects unnecessary uncertainty into the law. The diligence of serving of the warrant will be a hotly contested issue in virtually every case in which the limitations period expired after issuance of the warrant but before its service, and the defendant may be highly motivated to avoid service of the warrant. A preferable solution would be to permit the issuance of the warrant to commence prosecution, and leave any question of delay in executing the warrant to be resolved as a constitutional claim of denial of the right to a speedy trial.¹¹⁷ This could create potential for substantial abuse, however, if "John Doe" warrants¹¹⁸ were permitted to circumvent the statute of limitations. The problem is avoided in the proposed draft, however, by requiring that the arrest warrant name the defendant to commence prosecution for the purpose of the statute of limitations.¹¹⁹

TOLLING PROVISIONS

The current California provision for tolling the statute of limitations,

116. MODEL PENAL CODE, *supra* note 42, §1.07, at 24-26.

117. See *Jones v. Superior Court*, 3 Cal. 2d 733, 46 P.2d 147 (1970). The court held that a nineteen month delay in the execution of an arrest warrant deprived the defendant of the right to a speedy trial. Federal courts analyze a delay in arrest in terms of a denial of the right to due process. *Id.*; see also, e.g., *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965). Whether a delay is analyzed in terms of the right to a speedy trial or the right to due process can make a significant difference. *Id.*; cf., *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, — U.S. — (May 23, 1983). The Court declared that issuance of an arrest warrant to commence prosecution makes the constitutional right to speedy trial clearly applicable. *Id.*

118. CAL. PENAL CODE §815 (permits the issuance of a warrant designating the defendant "by any name" if the name of the defendant is unknown to the magistrate); *People v. Montoya*, 255 Cal. App. 2d 137, 63 Cal. Rptr. 75 (1967) (the court held that a warrant must still meet the constitutional requirement of a "particular description."). A warrant describing the defendant as "John Doe, white male adult," was declared void as "too general a description." *Id.*

119. Cf. CAL. PENAL CODE §§959(4), 989 (permits the indictment of a defendant by other than his true name, if his true name is unknown). This procedure has been used to indict a defendant by his first name when a physical description is available. See *People v. McCrae*, 218 Cal. App. 2d 725, 32 Cal. Rptr. 500 (1963); *People v. Ervin*, 189 Cal. App. 2d 283, 11 Cal. Rptr. 203 (1961).

Penal Code section 802, excludes any time the defendant is outside the state, for whatever reason, from the statutory period. If a defendant has changed his identity and concealed himself in another city, but did not cross the state border, the statute would not be tolled.¹²⁰ If the defendant is drafted into the armed services and sent overseas, the statute would be tolled. To permit tolling without reference to the purpose of the absence, and to preclude tolling simply because a fugitive from justice stays within the state borders makes little sense. Both of these anomalies would be corrected by paragraph (6)(a) of Model Penal Code, which has been included in the draft in Appendix IV. This provision is based upon the theory that deliberate impediments to an investigation warrant the tolling of the statute. Many other jurisdictions require that absence be "with a purpose to avoid detection," therefore ample case law has construed the language of the Model Code.¹²¹

An additional tolling provision from the Model Penal Code is included as paragraph (6)(b) of the draft in Appendix IV. This provision simply excludes from the limitations period any length of time in which a prosecution for the same conduct is pending. Thus, if an indictment or information is dismissed for a technical defect and the double jeopardy clause or a statute would not preclude reprosecution, the statute of limitations will not have run during the pendency of the prosecution. A similar tolling provision is now included in Penal Code section 802.5, but this provision only permits recommencing the same "criminal action" that was dismissed, which is an unnecessarily narrow concession. Section 802.5 is also a temporary measure which will be automatically repealed if *Hawkins v. Superior Court* is abrogated.¹²² No reason exists to explain why a tolling provision similar to the one embodied in the Model Penal Code should not become a permanent part of the California Penal Code. The "same conduct" standard is designed to give maximum flexibility to the prosecution while protecting the defendant against enhancement of the charges after the statute has run.

The draft is broader than current statutes in that it provides that the statute does not run during the time that a prosecution is pending for the same conduct. It is sometimes said that the tolling only applies to a subsequent prosecution for the same offense. See 90 A.L.R.

120. *Ex parte Vice*, 5 Cal. App. 153, 158, 89 P. 983, 988 (1907).

121. *Donnell v. United States*, 229 F.2d 560 (5th Cir. 1956); *Taylor v. State*, 292 N.W. 233 (Neb. 1940); *State v. Williams*, 69 A.2d 299 (Del. 1949); *People v. Guariglia*, 65 N.Y.S. 2d 96 (1946); Annot., 124 A.L.R. 1049 (1940). The language in Penal Code section 802 permitting charges to be brought although the defendant was outside the state at the time of the offense is unnecessary, since Penal Code section 27 clearly applies. Penal Code section 27(a)3 states: "All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein."

122. See *supra* note 37.

452, 461. If this means a violation of the same statute based upon the same facts, it is too narrow, since the dismissal may have been based upon a substantial variation between the previous allegations and the proof. Other statutes require that the subsequent prosecution be for an offense arising out of the same transaction. See N.M. Stats. Ann. sec. 41-9-3 (1953): “. . . provided that the offense last charged is based upon, or grows out of, the same transaction upon which the first indictment was founded.” The test of the same conduct, involving as it does some flexibility of definition, states a principle that should meet the reasonable needs of prosecution, while affording the defendant fair protection against an enlargement of the charges after running of the statute.¹²³

RETROACTIVITY OF CHANGES

The changes suggested in the proposed draft based upon the Model Penal Code will have the effect of increasing the limitations period for some crimes and shortening the period for others. This result raises the issue of whether changes in the length of limitation periods can apply retroactively to crimes committed before adoption of the changes.

With respect to a shortened period, there is no constitutional obstacle either to giving retroactive effect or to denying it. Retroactivity would confer a benefit on the defendant not presently available. Whether that benefit is conferred would simply be a question of legislative intent. The legislature could provide that the shortening of the limitations period for any offense will not apply to crimes committed prior to the effective date of the change.¹²⁴ Legislative intent should be clearly stated to avoid judicial confusion and inconsistency. The most sensible approach would be to allow any shortened period to apply retroactively. Since the legislative enactment embodies a judgment that the lapse of time should bar prosecution, to deny the benefits of this judgment to those who committed offenses prior to enactment, while conferring the benefits upon subsequent offenders, is incongruous. The result is particularly unfair because it could lead to the prosecution of offenders whose crimes preceded the barred crimes of more recent offenders.

The constitutionality of retroactive application of extended periods of limitation frequently has been litigated, both in California and elsewhere. The leading case on this issue is *Falter v. United States*,¹²⁵ in which Judge Learned Hand said the statute could be extended “while

123. MODEL PENAL CODE, *supra* note 42, §1.07, at 27-28.

124. *Cf. Bradley v. United States*, 410 U.S. 605, 611 (1973); *Warden v. Marrero*, 417 U.S. 653, 659 (1974).

125. 23 F.2d 420 (2nd Cir. 1928), *cert. den.* 277 U.S. 590 (1928).

the chase is on." As long as the original period has not expired, an extension of the period would not violate the constitutional prohibition of *ex post facto* laws.

California courts have employed the same distinction in applying the *ex post facto* prohibition of article I, section 9 of the California Constitution. In *Sobiek v. Superior Court*,¹²⁶ the court held that a prosecution for forgery was barred despite the 1970 amendment of Penal Code section 800 providing that the three year statute of limitations for forgery commences upon discovery, rather than at commission. Although the forgery had been discovered within the previous three year period, the crime had been committed more than three years prior to enactment of the amendment. Thus, the court concluded, "[t]he statute of limitations having run prior to the amendment extending it, application of the amendment to petitioner's situation would constitute application of *ex post facto* legislation."¹²⁷

When the previous period of limitations has not expired at the time that an amendment extending the statute of limitations is enacted, California courts have applied the extension to crimes committed prior to the amendment. In *People v. Eitzen*,¹²⁸ a former deputy sheriff was charged with embezzlement of property entrusted to his care during a period of employment from November 11, 1966, to September 23, 1969. Allegedly, the loss was not discovered until October 7, 1972, and an information was filed on April 9, 1973. An amendment of Penal Code section 800 provided a limitations period for grand theft that ran from the time that the offense was discovered. Since the amendment was enacted November 10, 1969, the previous limitation of three years after commission had not yet run at the time of the amendment, and the court held that the new statutory period would apply.¹²⁹

CONCLUSION

A variety of factors have been advanced to justify a short statute of limitations, including the staleness of evidence, the need for repose, and the need to motivate prompt investigation. A countervailing set of factors, which could justify a longer statutory period or no limitation at all, include the preclusion of amnesty for serious crimes, the need for lengthier investigations of complex crimes, and the preclusion of avoiding prosecution by concealment of the crime. An analysis of these factors, including the survey responses of judges, prosecutors, and defense

126. 28 Cal. App. 3d 846, 106 Cal. Rptr. 516 (1972).

127. *Id.* at 851, 106 Cal. Rptr. at 519.

128. 43 Cal. App. 3d 253, 117 Cal. Rptr. 772 (1974).

129. *Accord* *People v. Swinney*, 46 Cal. App. 3d 332, 120 Cal. Rptr. 148 (1975).

lawyers, supports the conclusion that, with the exception of seriousness and repose, these factors are not crime specific. Their applicability depends more upon the particular circumstances of a case and the evidence used than upon the nature of the crime itself. The repose factor is closely related to the seriousness factor since the residuum of community outrage over a crime directly relates to its seriousness. Therefore, the principal determinant of the appropriate duration of a statute of limitations should be the seriousness of the crime.

A workable model for gauging the duration of the statute of limitations by the seriousness of the offense can be found in the Model Penal Code, which has been used in New York and Pennsylvania. The Code permits accommodation of the ordinary statutory period when factors such as concealment or staleness become significant. While this accommodation injects some uncertainty into the law by creating issues that can be litigated, these issues may be litigated in any case, if not to determine the applicability of the statute of limitations, then to test the constitutionality of the prosecution under the due process clause.

The Model Penal Code can be readily adapted to California law, even though California does not categorize felonies by levels of seriousness, as does the Model Penal Code. Ultimately, the legislature will engage in the same process of categorization by establishing the maximum penalty for an offense under the California Determinate Sentencing Law. An attempt to adapt the approach of the Model Penal Code to make sense out of the California criminal statute of limitations appears as Appendix IV of this article.

APPENDIX I

CURRENT CALIFORNIA STATUTES OF LIMITATIONS

California felonies presently fall into one of four categories with respect to the Statute of Limitations. The date each offense was added to a particular category is indicated in parentheses.

A. *No Limitation* - Penal Code §799

- Penal Code §187 - Murder (1872)
- Penal Code §424 - Embezzlement of Public Moneys (1891)
- Gov't. Code §6200 et seq. - Falsification of Public Records (1891)
- Penal Code §209 - Kidnapping (1970)

B. *Six Years After Commission of Crime* - Penal Code §800(b)


- Penal Code §§68, 85, 93, 165;
 - Elec. Code §29160 - Acceptance of bribe by public Official (1941)
 - Penal Code §261 - Rape (1981)
 - Penal Code §264.1 - Rape Acting in Concert (1981)
 - Penal Code §286(c) - Sodomy by force or with Person under 14 (1981)
 - Penal Code §286(d) - Sodomy Acting in Concert (1981)
 - Penal Code §286(f) - Sodomy with Unconscious Victim (1981)
 - Penal Code §288 - Lewd Acts with Person under 14 (1981)
 - Penal Code §288a(c) - Oral Copulation by force or with Person Under 14 (1981)
 - Penal Code §288a(d) - Oral Copulation Acting in Concert (1981)
 - Penal Code §288a(f) - Oral Copulation with Unconscious Victim (1981)
 - Penal Code §289 - Rape by foreign object (1981)
- C. *Three Years After Discovery of Crime* - Penal Code §800(c)
- Penal Code §487 - Grand Theft (1969)
 - Penal Code §470 - Forgery (1970)
 - Penal Code §192(1) - Voluntary Manslaughter (1971)
 - Penal Code §192(2) - Involuntary Manslaughter (1971)
 - Penal Code §72 - Fraudulent Claim Against Government (1972)
 - Penal Code §118 - Perjury (1972)
 - Penal Code §118a - False Affidavit (1972)
 - Gov't. Code §1090 - Conflict of Interest by Public Official (1972)
 - Gov't. Code §27443 - Conflict of Interest by Public Administrator (1972)
 - Penal Code §132 - Offering False Evidence (1975)
 - Penal Code §134 - Preparing False Evidence (1975)
 - Corp. Code §25540 - All violations of Corporate Securities Law (1978)

- | | |
|---------------------------|---|
| Corp. Code §25541 | - Fraud in offer, purchase or sale of Securities (1978) |
| Welf. & Inst. Code §11483 | - Welfare Fraud (1981) |
| Welf. & Inst. Code §14107 | - Medi-Cal Fraud (1982) |

- D. *Three Years After Commission of Crime* - Penal Code §800(a)
All felonies not specified above.

California misdemeanors are all subject to a Statute of Limitations of one year after commission. Penal Code §801(a). If an offense may be punished as either a felony or a misdemeanor, the felony Statute of Limitations applies. Penal Code §801(b).

APPENDIX II
CRIMINAL STATUTES OF LIMITATIONS
IN THE UNITED STATES
LIMITATION OF PROSECUTIONS IN YEARS

STATE AND STATUTE	TREASON	MURDER 1st & 2nd	MANSLAUGHTER	ARSON	RAPE	BURGLARY	FORGERY	ROBBERY	KIDNAPPING	COUNTERFEITING	EMBEZZLEMENT
 - DENOTES CHANGE IN LIMITATION PERIOD SINCE 1954											
Alabama §15-3-1	0	0	0	0	0	0	0	0	0	0	6
Alaska §12.10.010	5	0	5	5	5	5	3	5	5	3	5
Arizona §13-107 Crim Code	7	0	0	7	7	7	7	7	7	7	7
Arkansas §43-1601 & -1602	0	0	0	3	0	3	3	3	3	3	3
California Pen Cod §§799, 800, 801	3	0	3†	3	6	3	3†	3	0	3	3
Colorado §16-5-401	0	0	3	3	3	3	0	3	0	3	3
Connecticut §54-193	5	0	5	5	5	5	5	5	5	5	5
Delaware Title 11 §205	5	0	5	5	5	5	5†	5	5	5	5
Florida Title 44 §775.15	3	0	3	3	0	3	3	3	4	3	3
Georgia Title 27 §27-601 (30 P.C.)	7	0	4	4	4	4	4	4	4	4	4
Hawaii Title 37 §701-108 ✓		0	3†	3	6	3	3	6	6	6	3
Idaho Title 19 §19-401, 402, 403	3	0	3	3	3	3	3	3	3	3	3
Illinois Chapter 38 §3-5	0	0	0	0	3	3	0	3	3	3	3
Indiana §35-41-4-2	0	0	5	5†	5†	5	5	5†	0	5	5
Iowa Chap 802 §803.1 Cod Crim Pro	3	0	3	3	3	3	3	3	3	3	3
Kansas Crim Code Title 31 §21-3106	0	0	2	2	2	2	2	2	2	2	2
Kentucky Pen Cod §500.050	0	0	0	0	0	0	0	0	0	0	0
Louisiana Title 17 Chap 1 Art. 571,2	0	0	6	6	6	6	4	6	6	4	4
Maine Title 17-A §8A	0	0	6	6	6	6	4	6	6	6	6
Maryland Gen Laws Chap 277 §63	6	0†	6	6	6	6	6	10†	6	6	6
Massachusetts Gen Law Chap 277 §63	6	0	6	6	6	6	6	10†	6	6	6
Michigan Title 28 §28.964	6	0	6	6	6	6	6	6	10	6	6
Minnesota Min Stat §628.26	3	0	3	3	3	3	3	3	3	3	3
Mississippi Title 99 Chap 1 §99-1-5	2	0	2	2	2	2	2	2	2	2	2
Missouri Title 38 Chap 556 §556.036	0	0	3	3	3	3	3		3	3	3

(copied from University of Pennsylvania Law Review)

	BRIBERY	PERJURY	CONSPIRACY	CONVERSION OF PUBLIC REVENUE	UNLAWFUL TAKING OF PROPERTY OF ANOTHER	FALSE PRETENSES	FELONY FALSIFICATION OF PUBLIC RECORDS	MISDEMEANORS	NOTES
AL	3	3	1	6	30 days	3		1	
AS	5	5	5		5				As to Forgery & Counterfeiting-1 year after discovery but not > 3 years after Commission of Offense §12.10.020
AZ	7	7	7	0	7		0	1	Class 2-6 Felonies (Limitation Period) = 7 yrs.
AK	3	3	3	0	3			1	No statute of Lim on Prosecution for Capital Offense.
CA	6	3†	3	0	3	3	0	1	†Prosecution may be brought w/i 3 years after discovery of offense. ‡If not for Bribery of Public Official then 3 Yrs.
CO	3†	3	3		3			1½	Penalty Offenses - 6M † if Public Official + 3 yrs.
CT	5	5	5	5	5			1	
DE	5	5	5	5†	5		5†	A-3 B-2	†If offense involves forgery, fraud or breach of fiduciary duty then statute of Lim 2 years after discovery but not greater than 3 years after 1st limitation period runs.
FL	3	3	3	3	3		3	1°-2 2°-1	If felony in 1st degree Statute of Limitation = 4 yrs.
GA	4	4	4	4	4		4	2	Where punishment is death or perpetual imprisonment statute of Lim = 7 years excluding murder.
HI	3	3	3	3	3	3	3	2	Felony A-6 years other 3. If fraud, involved, then 1 yr after discovery > 3 years after initial period. Misconduct in office +2 > 3 years.
ID	3	3	3	3	3	3	3	1	†For Hawaii no crime listed for arson but it may come under criminal destruction of property no substantive offenses listed
IL	3	3	3	3	3	3	3	6M	Limitation extension §3-6 misconduct in office 1 year after discovery even if Lim. has run but > 3 years beyond expiration of 1st period.
IN	5	5	5	5	5	5	5	2	†No limit if rape, robbery or arson & injury threat of harm - then crime is class A
IA	3	3	3	3	3	3	3	1	Pursuant to §302.5 if offense involves fraud then Lim. period can run additional time + 1 yr > 3 years after original period lapses.
KS	2	2	2	2	2	2	2	2	
KY	0	0	0	0	0	0	0	1	
LA	4	4	4	4	4	4	4	2	Felony punishable by hard labor-Limitation period-6 yrs felony no necessarily punishable by hard labor - 4 yrs.
ME	6	6	†	6	6		6	6	†Conspiracy - 1 grade < the grade of most serious crime of which the conspiracy & charge is associated with
MD	6	6	6	6	10†	6	6	1	†Armed robbery, theft with fear assault & intent to rob or murder = 10 yrs enhancement of armed or threat of fear in crime.
MA	6	6	6	6	6	6	6	6	†With weapon or with threat of harm if not then Limitation period is 6 yrs. includes assault, with intent to rob or murder = 10 yrs Lim per.
MI	6	6	6†	6	6	6	6	6	† 10 year Limitation period applies to extortion, conspiracy to or assault with intent to commit murder.
MN	3†	3	3	3	3	3	3	3	† pursuant to §609.42(1) bribery of public official 6 yrs limitation period
MS	2	2	2	2	2	2	2	2	But if person flees or abscond from justice or absents themselves from state then prosecution is never barred.
MO	3	3	3†	3	3	3	3	1	†Conspiracy is maximum class B felony.

LIMITATION OF PROSECUTIONS

STATE AND STATUTE	CRIME*										
	TREASON	MURDER 1st & 2nd	MANSLAUGHTER	ARSON	RAPE	BURGLARY	FORGERY	ROBBERY	KIDNAPPING	COUNTERFEITING	EMBEZZLEMENT
Montana Title 45 §45-1-205 Crim Cd	5	0	5	5	5	5	5	5	5	5	5
Nebraska Cd Crim Pro Art I §29-110	0	0	3	0	0	3	0	3	3	3	3
Nevada Title 14 §171.080 & .085	3	0	3	4	4	4	4	4	3	3	3
New Hampshire Title 62 Chap 625 §625.8	6	0	6	6	6	6	6†	6	6	6	6
New Jersey Title 2C §2C.1-6	5	0	5	5	5	5	5	5	5	5	5
New Mexico Chap 30 Crim Off §30-1-8	5	15	5	5	15	5	5	15	15	6	5
New York Title C Art 30 §30.10	5	0	5	0	5	5	5	5	0	5	5
North Carolina Cd Crim Pro Ch 15 Art 1 §15-1	0	0	0	0	0	0	0	0	0	0	0
North Dakota Ch 2904 §29-04-01, -03	3	0	3	3	3	3	3	3	3	3	3
Ohio Title 29 §2901.13	6	0	6	6	6	6	6	6	6	6	6
Oklahoma Title 22 Ch 3 §151 Crim Pro	3	0	3	3	3	3	3	3	3	3	3†
Oregon Title 14 Ch 131 §131.125 Rev Stat	3	0	0	3	3	3	3	3	3	3	3
Pennsylvania 18 Pa. C.S. A §108	5	0	0†	5	5	5	5	5	5	5	5
Rhode Island §12-21-2†	0	0	0	0	0	0	0	0	0	0	0
South Carolina†	0	0	0	0	0	0	0	0	0	0	0
South Dakota Title 23A SDCL §23A-42-1	0	0	0	0	7	7	7	7	0	7	7
Tennessee 40 TCA §40-201	4	0	4	4	0	4	4	4	4	4	4
Texas V.A.C Crim Proc §12.01	3	0	0	5	3	5	3	5	3	10	3
Utah Crim Cod §75-1-301 & 302, 303	4	0	4	4	4	4	4	4	4	4	4†
Vermont §4501 Crimes & Crim Pro.	3	0	3	6	3	6	6	6	0	3	6
Virginia Cod Crim Pro §19.2-243‡	0	0	0	0	0	0	0	0	0	0	0
Washington Title 9A Wa. Crim Cd Ch 9A.04 §9A.04-080	3	0	3	0†	3	3	3	3	3	3	3
West Virginia §61-11-9	0	0	0	0	0	0	0	0	0	0	0
Wisconsin Wis Crim Cod §939.74	6	0	6	6	6	6	6	6	6	6	11†
Wyoming†	0	0	0	0	0	0	0	0	0	0	0

	BRIBERY	PERJURY	CONSPIRACY	CONVERSION OF PUBLIC REVENUE	UNLAWFUL TAKING OF PROPERTY OF ANOTHER	FALSE PRETENSES	FELONY FALSIFICATION OF PUBLIC RECORDS	MISDEMEANORS	NOTES
MT	5	5	5†	5	5	5	5	1	†Conspiracy to commit a misdemeanor has 1 yr limitation period. Conspiracy to commit murder has no limitation per.
NE	3	3	3	3	3	3	3	1½	
NV	3	3	3	3	4	3	3	2 or 1†	† Pursuant to §171.090 2 yrs if gross misdemeanor, 1 yr if not
NH	6†	6†	6†	6†	6†	6	6†	1	†If charged offense involves fraud or misdemeanor in office then statute of limitation + 1 yr + 2 yr if statute has run.
NJ	7†	5	5	5	5	5	5	1	†Also 7 years for compensation for passed official behavior. Gifts for public service or attempt or conspiracy to commit these offenses.
NM	5	5	5	6	6	5	6	2	
NY	5	5	5	5	5	5	5	2	
NC	0	0	0	0	0	0	0	2†	†Misdemeanor statute of limitation is Cd Crim Pro Ch. 15 Art. 1 §15-1. There is no other statute of limitation in North Carolina.
ND	3	3	3†	3	3	3	3	2	†If conspiracy involves misdemeanor then limitation on conspiracy charge is 2 years.
OH	6	6	6	6	6	6	6	2	Extends provision of 1 yr after Lim period runs if fraud involved if public or official commits offense + 2 yrs after discovery
OK	7	3	3	3	3	3	3	3	†7 years if embezzlement of public funds.
OR	3	3	3	3	3	3	3	2	If fraud or breach of fiduciary duty and limitations period runs then + 1 yr > an additional 3 yrs. If misconduct in office + 2 yrs > additional 3 yrs.
PA	5	5	5	5	5	5	5	2	†No limitation period if vol manslaughter otherwise 5 yrs.
RI	0	0	0	0	0	0	0	2	†Statute of limitation for misdemeanor.
SC	0	0	0	0	0	0	0	0	†No limitation on prosecution whether felony or misdemeanor.
SD	7	7	†	7	7	7	7	7	†Limitations period for conspiracy depends on crime charged in conjunction with conspiracy. Conspiracy to murder has no limitation.
TN	4	2†	2	4	4	4	4	1	†Limitation on prosecution for attempt to suborn perjury.
TX	3	3	3	3	10	3	3	2	Misconduct in office + 2 > 3 yrs after original
UT	4	4	4	4	4	4	0	2	†If embezzlement of public monies no limitation on prosecution if offense involves fraud + 1 yr after discovery > 3 yrs after original per.
VT	3	3	3	3	6	3	3	3	† If arson results and death-no limitation on prosecution.
VA	0	3	0	0	5†	0	0	1*	†If petit larceny. * §19-2-8 Cod Crim Pro; §19-2-243-when prosecution must be brought after p/c arises.
WA	3	3	3	3	3	3	3	2/1	†Arson with death otherwise 10 yrs limitation period if imprisonment results for conviction for offense in public office-10 yr.
WV	0	3	0†	0	3†	0	0	1	†Conspiracy to commit perjury-3 yr limitation period; †if petit larceny-if not no limitation period.
WI	6	6	6	6	6	6	6	3†	†Adultery limitation period=3 yrs; †if not embezzlement of public funds then 6 yr limitation period.
WY	0	0	0	0	0	0	0	0	†No limitation on any prosecution-no statute provided.

APPENDIX III
Responses to Survey by Prosecutors (P), Defense Lawyers
(D), and Judges (J)

<u>Crime</u>	<u>Current</u>	<u>Too Short</u>			<u>Too Long</u>		
		<u>(%)</u>			<u>(%)</u>		
	<u>S/L</u>	<u>P</u>	<u>D</u>	<u>J</u>	<u>P</u>	<u>D</u>	<u>J</u>
ARSON	3	44	4	28	0	4	0
PAYMENT OF BRIBE	3	52	8	42	0	8	0
RECEIPT OF BRIBE	6	16	12	28	16	32	28
BURGLARY	3	36	0	0	0	8	0
CHILD MOLESTING ¹	6 ¹	-	-	-	-	-	-
CONFLICT OF INTEREST	3 ³	24	0	0	4	8	0
COUNTERFEITING	3	24	0	14	0	8	0
CONSPIRACY	3	36	0	56	0	12	0
EMBEZZLEMENT OF PUBLIC FUNDS	0	8	0	0	24	48	0
FALSIFYING PUBLIC RECORDS	0	4	0	0	24	48	0
FRAUDULENT CLAIMS AGAINST GOVERNMENT	3 ³	20	4	14	0	8	0
FORGERY	3	24	0	0	0	8	0
GRAND THEFT ²	3 ³	40	0	14	0	12	0
KIDNAPPING	0	0	0	0	4	52	0
MURDER	0	0	0	0	0	20	0
MANSLAUGHTER-VOL.	3 ³	48	8	14	0	4	0
MANSLAUGHTER-INVOL.	3 ³	44	8	0	0	4	0
MAYHEM	3	36	8	0	0	8	0
PERJURY	3 ³	20	4	14	0	8	0
RAPE	6	36	8	0	8	48	14
FORCIBLE SODOMY/ORAL COPULATION	6	36	8	0	8	52	14
ROBBERY	3	56	8	0	0	8	0
CORPORATE SECURITIES FRAUD	3 ³	24	4	28	0	4	0
SALES OF NARCOTICS	3	24	0	0	0	24	0

¹ On the questionnaire circulated, the statute of limitations for child molesting was erroneously listed as 3 years, thus invalidating the results for this item on the survey.

² Grand Theft includes Embezzlement of private funds, False Pretenses and Larceny. See Cal.Pen.Code §484.

³ Statute of limitations commences to run three years after discovery of crime.

APPENDIX IV
PROPOSED DRAFT

California Penal Code §800

Time Limitations

- (1) A prosecution for an offense punishable by death (life imprisonment) may be commenced at any time.
- (2) Prosecutions for other offenses are subject to the following periods of limitation:
 - (a) A prosecution for an offense punishable by imprisonment in the state prison for nine (eight) years or more must be commenced within six years after it is committed.
 - (b) A prosecution for any other felony must be commenced within three years after it is committed.
- (3) Even if the period prescribed in subsection (2) has expired:
 - (a) A prosecution for any offense a material element of which is either fraud or a breach of fiduciary obligation may be commenced within one year after discovery of the offense by an aggrieved party or by a person who has legal capacity to represent an aggrieved party or a legal duty to report such offense and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.
 - (b) A prosecution for any offense based upon misconduct in office by a public officer, employee or appointee may be commenced within one year after termination of the defendant's service in such office or within one year after discovery of the offense by a person having a duty to report such offense and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.
- (4) No prosecution for (any offense a material element of which is lack of consent by the victim) (any violation of Sections 261, 286, 288a or 289 of the Penal Code) may be commenced unless the offense was brought to the notice of public authority by complaint or otherwise within 6 months after its commission (or discovery) or, where the victim was less than 16 years old or otherwise incompetent to make complaint, within 6 months after a parent, guardian or other competent person specially interested in the victim, learns of the offense.
- (5) A prosecution is commenced either when an indictment is returned or when an arrest warrant naming the defendant is issued.
- (6) The period of limitation does not run:

- (a) during any time when the accused, with a purpose to avoid detection, apprehension or prosecution, is outside the state or is absent from his usual place of abode within the state, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; or
- (b) during any time when a prosecution against the accused for the same conduct is pending in this state.