

STATUTES OF LIMITATION IN CRIMINAL LAW: THE PERJURY DILEMMA

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In recent years, unnumbered hundreds of persons called before congressional committees, grand juries, and other like inquisitorial bodies have declined to answer questions as to their present or past connections with the Communist Party or its "front" organizations, on the ground that their answers, if truthfully given, would tend to incriminate them.¹ In availing themselves of the privilege against self-incrimination they have, as an alternative to possible prosecution, chosen to expose themselves to a large measure of public scorn, as well as to the loss of a variety of other privileges with which the ordinary law-abiding citizen is invested.²

It is no part of the purpose of this article to recross the ground covered by Dean Erwin N. Griswold's non-technical but masterly exposition of the importance of the privilege against self-incrimination in our national tradition of individual liberty, and of the misconceptions which today in too many quarters follow from its use.³ Suffice it to say that the writer would, as did Dean Griswold,⁴ assume for purposes of his thesis that in at least some undetermined proportion of the cases where the privilege has been claimed, the witness has been completely innocent of any conscious wrong-doing, and indeed of any wrong-doing at all in a legal sense, and yet has honestly and justifiably believed that the consequences of truthful answering might be even more severe than the social and economic consequences of being branded a "Fifth Amendment Communist." For how can he tell but that his own very truthful answers will be used as links to forge a chain of evidence to convict him of the crime of perjury. Assume, contrary to the verdicts of the juries and only for purposes of illustration, that Alger Hiss and William W. Remington were totally truthful in their testimony before grand juries; by the very act of speaking they brought themselves to conviction and imprisonment. Had they chosen to remain silent under the Fifth Amendment as did so

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¹ It would seem appropriate to assume for present purposes that the reader is at least generally familiar with the scope which the courts have accorded to the language "nor shall be compelled in any criminal case to be a witness against himself" in the Fifth Amendment to the Constitution of the United States, and to similar constitutional language governing the several states.

² The variety of such privileges lost through informal social pressures will spring readily to mind. For an illustration of loss of privilege enforced by legislative sanction, see New York City Charter, §903, as interpreted and applied in *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E. 2d 373 (1954), *rehearing denied but remittitur amended as to appellant Slochower to specify federal questions presented and passed upon*, 307 N.Y. 806, 121 N.E. 2d 629 (1954), *probable jurisdiction on appeal noted*, — U.S. —, 99 L. Ed. 276 (1955).

³ GRISWOLD, *THE 5TH AMENDMENT TODAY*, (1955.)

⁴ GRISWOLD, *op. cit. supra* note 3, at 10-14.

many others against whom similar charges of communist affiliation and activities were made, they would not have gone to Lewisburg Penitentiary. The lesson cannot be lost on others faced with the same dilemma. In other words, may it not be that the rash of Fifth Amendment claimants which has become such a prominent feature of our times is at least in part due to the recently adopted policy of our legislative and prosecuting officials of instituting perjury prosecutions as a means of punishing those charged with anti-social conduct when the statute of limitations bars direct prosecution for the conduct itself? This possibility, with all its regrettable implications, has prompted the present inquiry into the nature of criminal statutes of limitations, and the propriety—moral and legal—of evading them by the device of perjury prosecution.

For one who, despite some law teaching experience, regards himself as a practical and practising lawyer, rather than as a legal scholar, a venture into the field of statutes of limitations cannot be undertaken without considerable misgiving. On their face, statutes of limitations seem simple. For example:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.⁵

Or, to take a civil statute:

Actions to be commenced within two years. The following actions must be commenced within two years after the cause of action has accrued:

1. An action to recover damages for assault, battery, false imprisonment, malicious prosecution or malpractice.
2. An action upon a statute for a forfeiture or penalty to the people of the state.⁶

Yet this apparent simplicity is deceptive. Treating of statutes of limitations generally, in a case which itself dealt with a statute applicable to civil actions, the Supreme Court of the United States has had this to say of them:

Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a "right" a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation

⁵ 18 U.S.C. 3282, as amended Sept. 1, 1954, c. 1214, §10(a), 68 Stat. 1145. Prior to the amendment the term of the statute was three years.

⁶ N.Y. CIVIL PRACTICE ACT, §50.

as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.⁷

It is against this background of admitted uncertainty in many areas of interpretation and application of statutes of limitations that this inquiry into the use of perjury prosecutions to evade them must be undertaken.

First, in order to isolate the problem, let us imagine a crude situation, unclouded by any overtones of danger to internal security. Suppose a prosecutor develops evidence tending to show that ten years ago John Doe committed a burglary. The statute of limitations has run on the offense, so that no indictment is possible. But the prosecutor knows that a legislative committee is holding public hearings on the possible amendment of the law relating to burglary. The prosecutor prevails upon the committee to summon Doe before it, and ask him about the burglary, in aid of its inquiry. Doe, on being questioned, cannot claim a constitutional privilege against self-incrimination, since even if he committed the burglary the statute of limitations protects him against incrimination on account of it.⁸ He has little chance of arguing that the questions addressed to him are not "material" to a subject proper for legislative inquiry. He must answer "yes" or "no." If the former, he stands as a confessed, even though amnestied, burglar—hardly a welcome consequence, whether he committed the crime or not. And if he answers "no," he runs the risk of being prosecuted, not for burglary, but for saying falsely under oath that he had committed no burglary.⁹ Upon the trial of the perjury indictment the basic question, apart from procedural distinctions, will be exactly the same as it would be had he been tried on the outlawed substantive charge—that is, whether he did commit the burglary. In effect, the protection of the statute of limitations is withdrawn from him, after it has ostensibly become complete.

Or is it withdrawn? That is the question for discussion. Admittedly there has been developed no generally accepted doctrine that a person who has committed a crime is free to lie under oath with impunity about his criminal activity once the statute of limitations has run. Admittedly such a doctrine would run counter to a profound public policy which demands assurance of protection for the integrity of legislative and judicial fact-

⁷ Chase Securities Corp. v. Donaldson, 325 U.S. 304, 313 (1945) (footnotes omitted).

⁸ Cf. United States v. Rosen, 174 F. 2d 187 (2d Cir. 1949), where the claim of privilege was allowed on the ground that the "setting" in which the claimant was interrogated gave the claimant reasonable ground to fear that the acts with respect to which he was asked to testify formed some part of a conspiracy which had "continued to exist and to be carried out ever since or at least to a date not now affected by any statute of limitations." No such element is present in the case assumed in the text.

⁹ This is an intentionally non-technical way of putting the meaning of perjury statutes generally. This is not the place to draw fine distinctions between the abstract truth of the accused's statements and the accused's belief in their truth, or other similar niceties which have come to gloss the perjury statutes.

finding procedures. And yet almost equally, there is something repulsive about conferring amnesty—through the statute of limitations—with one governmental hand, and with the other withdrawing it through an engineered inquest designed for nothing more or less than to bring about the witness's punishment for his old crime. Whether it is technically so or not, the device sounds of entrapment; it sounds of double jeopardy; it sounds, if not of *ex post facto* legislation, at least of governmental activity equally repugnant to the constitutional spirit; it sounds of deprivation of due process of law. It offends the moral sense of many people.

Basically, we are confronted with a clash of deep-rooted policies. Before seeking to resolve the conflict, let us consider the nature of statutes of limitations, and the extent to which the considerations of public policy affecting the limitation of prosecutions differ from those affecting limitation statutes in civil cases.

Regarding civil statutes, a further quotation from Justice Jackson's opinion in *Chase Securities Corp. v. Donaldson*¹⁰ may be helpful:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.¹¹

An earlier Supreme Court emphasized a different facet of the rationalization of the civil statutes of limitations:

They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they

¹⁰ See note 7 *supra*.

¹¹ See note 7 *supra* at 314.

thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth.¹²

And the same thought was expressed even more succinctly two years later:

Statutes of limitation are indeed statutes of repose. They are enacted upon the presumption that one having a well founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is, therefore, defined and allowed.¹³

In the light of these disquisitions on the history and purposes of civil statutes of limitations, it is not difficult to predict the answer given by the courts to the question whether the Fourteenth Amendment, or any other provision of the Constitution, would be offended by legislative action repealing or changing a civil statute in terms which have the effect of recreating rights of action already barred.

The question came before the Supreme Court squarely in *Campbell v. Holt*.¹⁴ There action was brought on a claim after repeal of a statute of limitations which had earlier effectively barred the claim. The court found a distinction between actions in the nature of actions on personal debts, and actions to recover real and personal property. As to the latter the court said, by way of dictum:

It may, therefore, very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the Statute of Limitations by a legislative Act passed after the bar has become perfect, such Act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing Act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the Act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law.¹⁵

But "to remove the bar which the Statute of Limitations enables a debtor to interpose to prevent the payment of his debt stands on very

¹² *Riddlesbarger v. Hartford Insurance Co.*, 7 Wall. 386, 390 (1869). The question before the court was whether a condition in an insurance policy, requiring actions on claims to be instituted within one year after the loss, was void as contravening the policy of the local statute of limitations.

¹³ *United States v. Wiley*, 78 U.S. 11 Wall. 508, 514 (1871), holding that the Civil War, by suspending the *ability* (as distinct from the *right*) of the United States to sue a Virginia marshal on his bond, removed the basis of the presumption and accordingly *pro tanto* suspended the running of the statute of limitations.

¹⁴ 115 U.S. 620 (1885).

¹⁵ See note 14 *supra* at 623.

different ground."¹⁶ "We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the Legislature from repealing that law, because its effect is to make him fulfill his honest obligations."¹⁷

So the law, at least so far as the federal courts and federal constitution go, has continued to stand. The doctrine of *Campbell v. Holt* has come in for much criticism,¹⁸ and in 1945 the Supreme Court undertook to review it. Upon this reconsideration, in *Chase Securities Corp. v. Donaldson*,¹⁹ the court reaffirmed its original view:

This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. . . .

The essential holding in *Campbell v. Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.²⁰

The classic statement of the essential difference between these civil statutes, which as matter of legislative policy may (so long as they do not affect vested property rights) be raised or lowered at will, and the statutes limiting the time for criminal prosecutions, is to be found in Wharton.²¹ It reads as follows:

While, as will be hereafter seen, courts look with disfavor

¹⁶ See note 14 *supra* at 624.

¹⁷ See note 14 *supra* at 629.

¹⁸ See, e.g., 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (2d ed. 1904) §798, p. 1288; 1 WOOD, LIMITATIONS (4th ed. 1916) §11, pp. 47-49; 24 COLUM. L. REV. 803 (1924); 10 CORNELL L.Q. 212 (1925); 2 GEO. WASH. L. REV. 100 (1933); ROTTSCHAFFER, CONSTITUTIONAL LAW §252, pp. 548-49 (1939).

¹⁹ See note 7 *supra*.

²⁰ See note 7 *supra* at 314-316.

²¹ 1 WHARTON, CRIMINAL PROCEDURE §367 (10th ed. 1918). Substantially quoted, with approval, in *People v. Lord*, 12 Hun 282, 288-89 (1877).

on prosecutions that have been unduly delayed¹ there is, at common law, no absolute limitation which prevents the prosecution of offenses after a specified time has arrived. Statutes to this effect have been passed in England and in the United States, which we now proceed to consider. We should at first observe that a mistake is sometimes made in applying to statutes of limitation in criminal suits the construction that has been given to statutes of limitation in civil suits. The two classes of statutes, however, are essentially different. In civil suits the statute is interposed by the legislature as an impartial arbiter between two contending parties. In the construction of the statute, therefore, there is no intendment to be made in favor of either party. Neither grants the right to the other; there is therefore no grantor against whom the ordinary presumptions of construction are to be made. But it is otherwise when a statute of limitation is granted by the State. Here the State is the grantor, surrendering by act of grace its rights to prosecute, and declaring the offense to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense; that the offender shall be at liberty to return to his country, and resume his immunities as a citizen; and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.² Independently of these views, it must be remembered that delay in instituting prosecutions is not only productive of expense to the State, but of peril to public justice in the attenuation and distortion, even by mere natural lapse of memory, of testimony. It is the policy of the law that prosecutions should be prompt, and that statutes enforcing such promptitude should

¹ See, *infra*, §377.

² This is well exhibited by the famous metaphor by Lord Plunkett, of which it is said by Lord Brougham (*Works*, etc., Edinb. ed. of 1872, iv 341) that "it can not be too much admired for the perfect appropriateness of the figure, its striking and complete resemblance, as well as its raising before us an image previously familiar to the mind in all particulars except its connection with the subject for which it is so unexpectedly but naturally introduced." "Time," so runs this celebrated passage, "with his scythe in his hand, is ever mowing down the evidences of title, wherefore the wisdom of the law plants in his other hand the hour-glass, by which he metes out the periods of that possession that shall supply the place of the muniments his scythe has destroyed. . . ."

be vigorously maintained. They are not merely acts of grace, but checks imposed by the State upon itself, to exact vigilant activity from its subalterns, and to secure for criminal trials the best evidence that can be obtained.

In the many decisions which might be cited as authority for Wharton's conclusion that criminal statutes of limitation are to be liberally construed and administered in favor of defendants,²² there is undoubtedly some confusion of terminology,²³ but there is no uncertainty as to a number of important basic principles. A criminal statute of limitations does more than lift a remedy; it creates an absolute bar to prosecution.²⁴ The burden of proof lies on the state, not merely to establish that the acts charged were committed within the period of limitation, but also, if it so contends, to prove that the defendant fell within a statutory exception which had suspended the running of the statute as to him.²⁵ And most certain of all, the accused as to whose alleged criminal activity the statute of limitations has once run has a vested right in the immunity to prosecution thus created, which cannot constitutionally be withdrawn from him by subsequent act of the legislature.

The most thorough treatment of this last point is to be found in *Moore v. State*.²⁶ There the defendant was indicted in September 1879.

²² See, e.g., *United States v. Satz*, 109 F. Supp. 94 (N.D.N.Y. 1952); *United States v. Udell*, 109 F. Supp. 96 (D.Del. 1952); *United States v. Eliopoulos*, 45 F. Supp. 777 (D.N.J. 1942); *United States v. Scharton*, 285 U.S. 518 (1932); *People v. Warden of County Jail at Salem*, 242 App. Div. 282, 275 N.Y. Supp. 59 (3rd Dept. 1934); *Moore v. State*, 43 N.J.L. 203 (1881); *People v. Lord*, 12 Hun 282 (1877); *People v. Guariglia*, 187 Misc. 843, 65 N.Y.S. 2d 96, 100-1010, *aff'd* 272 App. Div. 784, 69 N.Y.S. 2d 759 (1947).

²³ Compare *People v. Brady*, 257 App. Div. 1000, 13 N.Y.S. 2d 789 (2d Dept. 1939): "The Statute of Limitations in criminal causes . . ., as in civil actions, is a statute of repose"; *State v. Steensland*, 33 Idaho 529, 195 Pac. 1080 (1921): "Statutes of Limitation in criminal cases differ from such statutes in civil cases, in that in civil cases they are statutes of repose, while in criminal cases they create a bar to the prosecution"; *Bridges v. United States*, 346 U.S. 212, 215-216 (1953): "The Wartime Suspension of Limitations Act creates an exception to a long-standing congressional 'policy of repose' that is fundamental to our society and our criminal law."

²⁴ *People v. Hines*, 284 N.Y. 93, 113, 29 N.E. 2d 483 (1940); *People v. Brady*, note 23 *supra*; *State v. Steensland*, note 23 *supra*; *People v. Guariglia*, note 22 *supra*.

²⁵ See annotation of *State v. Steensland*, note 23 *supra*, at 13 A.L.R. 1446. As the *Steensland* case shows, there is a conflict of authority as to whether the indictment must show on its face both that the offense was committed within the period of limitation and, if an exception is relied on, the existence of the exception which removes the bar of the statute. By the rule followed in many states, an indictment not disclosing these facts is insufficient and subject to dismissal on demurrer or motion. The contrary rule, reflected in *United States v. Cook*, 84 U.S. (17 Wall.) 167 (1872), would leave the burden on the state, but permit the prosecutor to establish the necessary facts, or the exception, at the trial.

²⁶ 43 N.J.L. 203 (1881).

At the time of his indictment the statute of limitations for the particular crime was five years, under an act of March 14, 1879. However, the alleged crime had been committed more than two years before March 14, 1879, at a time when the period of limitation, under a law of 1796, was two years; so that by the time of the amendment the applicable statute of limitations had run its full term.

Analyzing the nature of the right acquired by the defendant by virtue of the statute's having run on his act, the Court of Errors and Appeals said:

This [the Statute of Limitations], in effect, enacts that when the specified period shall have arrived, the right of the state to prosecute shall be gone, and the liability of the offender to be punished,—to be deprived of his liberty,—shall cease. Its terms not only strike down the right of action which the state had acquired by the offence, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect, its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the remedy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the state has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the same force regarding crimes, they annihilate the state's power to punish, and restore the offender's rights to their original *status*.²⁷

The court then considered the question: "does the legislature, by declaring that for the same cause [lapse of time] its own right to proceed against the life and liberty of the citizen has ceased, obliterate its own claim so absolutely that no after-enactment can restore it?"²⁸

It concludes that it does. Partly this rests on the Fourteenth Amendment, as in the case of local civil actions.²⁹ The lower court had said:

It seems to run into the absurd for a criminal to assert an indefeasible right as against the legislature, not to be tried or punished for his offense after a specified time, for such a claim, he says, assumes the semblance of an assertion that the criminal act was done in reliance on such an expectation.³⁰

To this the court replies:

It is a defence acquired, not the hope of one, which is in-

²⁷ See note 26 *supra* at 209-210.

²⁸ See note 26 *supra* at 210.

²⁹ See note 14 *supra*.

³⁰ See note 26 *supra* at 212.

defeasible. Until the fixed period has arrived, the statute is a mere regulation of the remedy, and like other such regulations, subject to legislative control; but afterwards, it is a defence, not of grace, but of right; not contingent, but absolute and vested; and, like other defences, not to be taken away by legislative enactment.³¹

Further, the court concludes that the amendment, if applied here, would be unconstitutional as *ex post facto*. After extensive historical analysis of the meaning of the term *ex post facto* the court continues:

The impolicy of keeping crimes, not of the deepest dye, punishable during the whole life of the offender, is sufficiently indicated by the common usage of civilized nations in fixing a period for the limitation of criminal prosecutions. The beneficent aims of such a usage are thwarted if the limitation be not absolute and irrevocable. The injustice and oppression of laws repealing the limitation, after persons have once relied upon its finality, must be apparent to all. The innocent, conscious of acts which, when only partially disclosed, may seem criminal, preserve the evidence of the whole truth until time has established the legal proof of innocence by barring prosecution. Then their vigilance relaxes and their evidence is lost. What more unjust, than that now the legislature should abate their protection, and leave them to the hazard of half-discovered facts? A guilty man, not wholly lost to honor and to hope, passes through the statutory period after his single offence, cowed by the constant dread of detection and disgrace. Then, relieved from danger, he returns to the path of rectitude, forms respectable associations, and gathers around him those who repose in his virtue and depend upon his fair fame. Now the law changes; the detective drags to light his long-buried crime; and innocent and guilty alike are overwhelmed in a common ruin. It was of grace that remission was granted; it is the spirit of injustice and oppression that withdraws it. To forbid the exercise of such power, the mandate of the constitution stands.³²

And in *Falter v. United States*,³³ Judge Learned Hand, in considering whether an extension of the statute of limitations was effective as against a defendant whose right had not become absolute under the earlier statute, observed:

Certainly it is one thing to revive a prosecution already dead,

³¹ See note 26 *supra* at 213.

³² See note 26 *supra* at 223, 224. See also *People v. Warden of County Jail at Salem*, 242 App. Div. 282, 275 N.Y. Supp. 59 (3rd Dept. 1934); *State v. Wolfe*, 61 S. Dak. 195, 247 N.W. 407; *People v. Brown*, 258 App. Div. 155, 263 N.Y. Supp. 267, (1st Dept. 1933); *Hill v. State*, 146 Tex. Cr. R. 333, 171 S.W. 2d 880, 882 (1943), *petition for certiorari dismissed* 320 U.S. 806 (1943); *Falter v. United States*, 23 F. 2d 420, 425-6 (2d Cir. 1928).

³³ See note 32 *supra*.

and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the state forgives it.

We may revert now to the burglary example outlined near the beginning of this article. Concededly the case there suggested is extreme, selected to expose the bones of the problem, to give an unmistakable illustration of the device of using a perjury prosecution to evade the statute of limitations. But the extremity of the illustration does not affect the problem it poses. The statute of limitations on criminal prosecutions has, as the foregoing citations demonstrate, a double function. In part it serves to protect the innocent against the danger of being prosecuted at a time when their resources for the procurement of evidence for their defense have wasted away. In equally important part it serves to amnesty the guilty—to convey the assurance of society that after a fixed time all will be forgiven. As usual, Learned Hand puts his finger on the point. Once the amnesty has become complete, its withdrawal shocks us. It is unfair and dishonest. If the withdrawal is sought to be accomplished by statutory means—repeal or extension of the limitation statute—the Constitution opposes and rejects it. Is the withdrawal nevertheless permissible when done by non-statutory means—by the spider asking the fly under oath whether he committed the burglary, and if he denies it then trying him in perjury on the issue of whether he did? A perjury prosecution, not being a “law,” obviously cannot be rejected as an *ex post facto* law under Article I, Section 9, of the Constitution. But is it for this reason any less a deprivation of due process of law? And is it any the less repugnant as in the nature of entrapment—the procurement of the commission of a crime by prosecuting authorities in order to secure a conviction?³⁴

Significantly, as a device the use of perjury prosecutions to evade the statute of limitations has only reached its flowering in a period when fear of a malign exterior force—international communism—has led many of our people, in official and private life alike, to ignore what many others regard as a violation of due process of law in the interests of internal security.

Notwithstanding the powerful need to maintain the integrity and

³⁴ Concededly, it does not meet the classic test of entrapment, as laid down by Judge Sanborn in *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921); and see *Sorrells v. United States*, 287 U.S. 435 (1932). But Judge Learned Hand thought the analogy persuasive enough in his dissenting opinion in the second *Remington* case. *United States v. Remington*, 208 F. 2d 567 (2d Cir. 1953), *cert. denied* 347 U.S. 913 (1954), through there he had the aid of the (to him) invalidity of the original grand jury proceedings.

efficiency of our judicial and legislative fact-finding processes, it seems to the writer that the conscience and imagination of the bar and judiciary cannot long remain satisfied with a set of legal dogmas which allow the type of subterfuge with which this article is concerned. It is not sufficient to say that a Hiss or a Remington was obviously guilty of having done the things that he was charged with having lied about, and that those things were heinous crimes. The theory of the statute of limitations, as eloquently expounded in passages quoted above, is that by reason of a policy "fundamental to our society and our criminal law"³⁵ citizens acquire vested rights not to be put on trial for matters occurring so long ago, however heinous,³⁶ and that it is unconscionable and unconstitutional to withdraw those vested rights. The unconscionability cannot be, and the unconstitutionality ought not to be, made to depend on the particular device picked as the means for securing the trial.

The problem is thorny, and there may be many alternative, or partial, solutions. So far as the writer is concerned, the only solution which makes sense—apart from stimulating the growth of responsibility on the part of our prosecuting authorities and our legislators—is the development by the courts of a constitutional doctrine that due process of law precludes prosecution of any person on account of testimony he gives with respect to matters which occurred so long before the proposed indictment that prosecution on account of those matters would be barred by the statute of limitations—regardless of whether the matters testified to do or do not appear to have involved past criminality.

Is this shocking? Is it nothing but a radical, half-baked scheme for chartering perjurers and frustrating congressional investigations? No. It is respectfully submitted that the proposal is a realistic application of the principle underlying the criminal statute of limitations—the principle that, human memory and the flux of human life being what they are, society does more justly by its members if it deliberately refrains from putting them to the test of showing what happened or did not happen, what they did or did not do, at points of time anterior to a fixed period. If it promises to let some criminals go unpunished, it does no more nor less than what the criminal statute of limitations was designed to do, and for the same reasons.

It is, of course, not our history that such sweeping doctrines arise fully formulated in any one case. Ours is a case-by-case system of development of constitutional law. It is, at least, gratifying to discover that one federal judge has recently given serious consideration to the problem.³⁷

³⁵ *Bridges v. United States*, note 23 *supra*.

³⁶ Statutes of limitations, it is true, do generally exclude from their operations crimes capital in nature, and frequently vary their terms for differing kinds of crimes. But those distinctions are made by the due process of legislative adoption, not by the uninhibited whims of ambitious prosecutors.

³⁷ The point was almost reached, but not quite, in *Bennett v. District Court of Tulsa County*, 81 Okla. Cr. 351, 162 P. 2d 561 (1945). There the grand jury

In *United States v. Laut*,³⁸ the defendant had testified before an immigration hearing officer on June 1, 1950, on various matters relating to his alleged membership in the Communist Party. On May 3, 1951, the defendant again testified, and on this occasion was asked whether the testimony he had given at the 1950 hearing was true. He answered that it was. In 1954 he was indicted for perjury in his 1951 testimony, the statute of limitations having run on his 1950 testimony.

Here would seem a clear evasion of the statute of limitations within the thrust of this article. Judge Bicks so held, and dismissed the count which predicated perjury on the reaffirmation of the 1950 testimony. In the course of his opinion (at this writing still unpublished) he observed:

Sustaining such procedure would permit dodging the Statute of Limitations at will. Any witness once questioned in detail could each three years simply be asked, again under oath, whether all statements at the previous hearing were true. Since each hearing would be within three years of its predecessor, he could not, without fear of perjury, contradict himself. Were each reassertion of an original statement's truth to constitute a new offense, the Government could thus prove a crime simply by showing an original untruth, no matter how ancient, plus its recollection and reassertion within three years of indictment. (Cf. *Fotie v. United States*, 137 F. 2d 831, 842 (8th Cir. 1943)). Such a result would be openly at war with the "theory", on which "Statutes of Limitations are founded, . . . that prosecutions should not be allowed to ferment endlessly in the files . . . to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability." (*United States v. Eliopoulos*, 45 F. Supp. 777, 781 (D.N.J. 1942); see also *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1944)).

No remedy to this defect is the fact that the Government—in 1951—might, for example, properly have asked, and prosecuted for falsely answering, "Are you now a member of the Communist Party?" or "Have you ever been one?" An answer as to 1951 membership might be, unlike present Count Two, proved or disproved primarily by overt acts within the statutory period. Similarly, even though in a naturalization proceeding past membership may be material ten years before petition (8 U.S.C. (1952) 1424(c)), the Government, by asking again for the truth of a past denial, may not in a perjury prosecution push evidence required to disprove such prior membership further and further beyond a witness' grasp.

which was misused to secure a perjury indictment as to matters barred by the statute of limitations was found to have been investigating beyond its jurisdiction, so that the alleged perjurious statements could not in any event meet the test of materiality applicable in perjury prosecutions.

³⁸ S.D.N.Y., No. C 144-102, decided January 25, 1955.

Perhaps Judge Bicks's decision will not survive on appeal;³⁹ but at least here is an opportunity for the courts to give beginning consideration to a problem which in the view of the writer demands urgent attention.

³⁹ The records of the District Court indicate that the United States promptly noted an appeal but shortly thereafter withdrew it.