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Lawyers regard loopholes with mixed emotions. There is always the temptation to cherish and defend pointless technicalities as amulets of the lawyer's magical arts. They are understandably revered by the legal wizard whose mastery over them permits the defeat of justice in the interests of a client's cause. Their defense, however, becomes more difficult as they blur the line between advocacy and pettifoggery.

The technical requirements of pleading the statute of limitations in criminal cases afford some splendid opportunities to use the statute to overturn otherwise successful prosecutions which were not, in fact, barred by limitations. Whatever admiration may be excited by such adroit use of these pleading rules must give way to a realization that such results are offensive to a legal system that seeks to resolve disputes according to rules of law, rather than procedural sleight of hand. The purpose of this article is to identify the technical requirements for pleading the statute of limitations in criminal cases, distinguish those requirements that serve a valid purpose from those that do not, and provide an analytical framework for the construction of pleading rules that further, rather than retard, the purposes of the limitations statutes themselves.

I. INTRODUCTORY ILLUSTRATION: *In re Demillo*

A useful starting point for a discussion of pleading the statute of limitations in criminal cases is the recent California Supreme Court decision of *In re Demillo,*[1] a unanimous opinion of one of the nation's leading courts, which illustrates the basic issues in this area yet reaches a questionable result. Petitioner Demillo pleaded guilty to an information charging him with a felony,[2] which was subject to California's general three-year stat-

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1. 14 Cal. 3d 598, 535 P.2d 1181, 121 Cal. Rptr. 727 (1975).

2. The felony charged was a violation of CAL. PENAL CODE § 288 (West 1970) (lewd or

ute of limitations.[3] Facing the prospect of deportation prompted by his felony conviction, Demillo filed in the California Supreme Court a petition for a writ of habeas corpus, seeking to overturn the conviction. The petition alleged merely that the offense to which he had pleaded guilty occurred more than three years prior to the filing of the information. The information itself was silent as to the time the offense was committed. Responding to the petition, the California Attorney General agreed that more than three years had elapsed between commission of the offense and filing of the information, but alleged that petitioner had been absent from the state during the critical period. Such absence from the state tolls the running of the statute of limitations.[4] Relying on the proposition that the "statute of limitations is jurisdictional in nature"[5] and "may therefore be raised at any time, before or after judgment,"[6] and the further proposition that "[a]n accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations,"[7] the court held that the trial court lacked jurisdiction in the matter, issued the writ, and discharged the petitioner. Jurisdiction was deemed absent because the information was filed beyond the limitations period and failed to allege facts tolling the statute.

There remained the problem of the Attorney General's offer to prove that the defendant was out of the state during the critical period. The court noted the existence of "some support for the proposition that if a criminal defendant fails to raise the statute of limitations defense at trial, the People should be permitted to cure the defect in collateral proceedings by offering new evidence on the issue of defendant's absence from the state."[8] It concluded, however, that this was an inappropriate case for the exercise of the court's discretionary power to receive new evidence on habeas corpus, since it would be required to make factual determinations regarding petitioner's earlier whereabouts.[9]

The court's decision presents several difficulties. The refusal to consider the Attorney General's evidence is itself astonishing.[10]

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lascivious acts upon the body of a child under 14).

3. CAL. PENAL CODE § 800 (West Supp. 1976).

4. CAL. PENAL CODE § 802 (West 1970).

5. 14 Cal. 3d at 601, 535 P.2d at 1183, 121 Cal. Rptr. at 727.

6. *Id.* (quoting People v. McGee, 1 Cal. 2d 611, 613, 36 P.2d 378, 379 (1934)).

7. *Id.* at 602, 535 P.2d at 1184, 121 Cal. Rptr. at 728 (quoting People v. Crosby, 58 Cal. 2d 713, 724, 375 P.2d 839, 846, 25 Cal. Rptr. 847, 854 (1962)).

8. *Id.* (citing 23 CALIF. L. REV. 525 (1935)).

9. *Id.* at 603, 535 P.2d at 1184, 121 Cal. Rptr. at 728.

10. Contrary to the court's implication, its common practice is to conduct evidentiary

But the decision to discharge Demillo is particularly disturbing if one goes beyond the face of the opinion. In his response to the petition, the Attorney General tendered affidavits of both prosecutor and defense counsel in the trial court proceedings. These affidavits showed that both counsel were fully aware of the statute of limitations problem, including the deficiency of the information in failing to allege compliance with the statute. The defense was also aware that the prosecution was prepared to present formidable evidence of facts tolling the statute. In light of this, defense counsel recommended the entry of a plea of guilty.[11] By failing to mention these affidavits, the court avoided the necessity of considering the validity of a judgment imposed following entry of a plea of guilty to an accusatory pleading known by the defendant to be defective.

The aspect of the decision that is most noteworthy, however, and that demands the most careful analysis, is the basic proposi-

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hearings when they are necessary. Evidentiary hearings are necessary when a habeas corpus petitioner alleges facts which, if true, entitle him to relief, and which are denied by respondent. In such a case, the petitioner can prevail only if he is given an opportunity to prove his allegations. The California Supreme Court customarily gives him such an opportunity by appointing a referee to conduct an evidentiary hearing. *See, e.g., In re* Rose, 62 Cal. 2d 384, 398 P.2d 428, 42 Cal. Rptr. 236 (1965); *In re* Imbler, 60 Cal. 2d 554, 387 P.2d 6, 35 Cal. Rptr. 293 (1963); Granucci, *Review of Criminal Convictions by Habeas Corpus in California,* 15 HASTINGS L.J. 189, 192 (1963). The refusal of the court to hold such a hearing in *Demillo* seems to be based on the assumption that the burden of proof in that case lay on respondent, and that there is some justification for denying respondent the opportunity to discharge that burden. The fact that the California Supreme Court frequently uses reference hearings to resolve factual disputes negates any such apparent justification. Moreover, the court fails to consider the fundamental rule that the burden is on a habeas corpus petitioner to prove any disputed factual allegations necessary to the establishment of his right to relief, *In re* Riddle, 57 Cal. 2d 848, 852, 372 P.2d 304, 306, 22 Cal. Rptr. 472, 474 (1962), and thus does not explain why the burden should be deemed in this case to shift to respondent.

The court's refusal to allow respondent to present evidence could have interesting collateral consequences. The professed reason for this refusal is the court's handicapped status in the role of fact finder. In California, habeas corpus petitions may be brought, as original matters, not only in the supreme court, but in the courts of appeal and superior courts. CAL. CONST. art. VI, §§ 4, 4(b), 5; CAL. PENAL CODE § 1475 (West 1970); Granucci, *supra* at 192. Since superior courts are well-equipped to take evidence and resolve factual disputes, the implication of the opinion is that had Demillo filed his petition in the appropriate superior court an evidentiary hearing would have ensued, with respondent being permitted to prove facts that defeat the petition. By going directly to the state supreme court, Demillo was able to avoid the establishment of embarrassing facts. The court is thus, however unwittingly, encouraging habeas corpus petitioners to bypass the superior court and file directly in the supreme court, in the hope that the latter will take the petition's allegations at face value, require respondent to disprove them, and use its status as a reviewing court as an excuse to refuse to hear respondent's evidence.

11. Return to Order to Show Cause, *In re* Demillo, Cal. Sup. Ct. 1/Crim. Nos. 18317, 18396, Exhibits O, P.

tion that a conviction may be vacated on collateral attack on the sole ground that the trial court pleadings failed to establish compliance with the statute of limitations—even though the prosecution may not in fact have been barred by limitations. Even those inured to the point of numbness to rules of criminal procedure that make truth irrelevant can hardly fail to be disturbed by one consequence of the opinion—the encouragement of what may be called "low-profile" pleading. For example, if a defendant in a criminal case knows that his prosecution is not in fact barred by limitations, but is confronted with an indictment or information that fails to negate prescription, his best course of conduct is clear: he should fail to raise the matter of time limitations at trial, when the prosecution would have the opportunity to remedy the pleading defect, and reserve the issue for collateral attack, in which he will succeed merely by pointing out the defect in the accusatory pleading.

This absurd result arises from application of two commonly accepted propositions: that the statute of limitations in criminal cases is "jurisdictional" in nature, and that an accusatory pleading must allege facts showing compliance with the statute.[12] Both of these propositions are debatable, but analysis will show that even if they are accepted, they do not require the result reached in *Demillo*. A necessary step in a comprehensive analysis of the problems posed by this case is a consideration of the validity of these two underlying propositions. Such a consideration begins with an examination of the nature, origin, and purposes of criminal statutes of limitations and the policies underlying technical pleading rules.

II. Nature, Origin, and Purposes of Criminal Limitations Statutes

Time limitations on the prosecution of criminal cases are entirely statutory. The common law accepted the doctrine that no lapse of time bars the king *(nullum tempus occurrit regi)*,[13] a doctrine that still largely prevails in England.[14] Limitations statutes originated in civil law jurisdictions and were given wide-

12. *See*, People v. McGee, 1 Cal. 2d 611, 36 P.2d 378 (1934) (noted in 23 Calif. L. Rev. 525 (1935), 33 Mich. L. Rev. 805 (1935), 8 S. Cal. L. Rev. 155 (1935), and 10 Wash. L. Rev. 109 (1935)); Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958); State v. Steensland, 33 Idaho 529, 195 P. 1080 (1921).

13. 2 J. Stephen, A History of the Criminal Law of England 1-2 (1883).

14. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. Pa. L. Rev. 630 (1954).

spread adoption in America during the colonial era, for reasons that remain obscure.[15] Currently, some form of general criminal statute of limitations is found in all but three American jurisdictions,[16] although five others have no limitations for felonies.[17]

Prescriptive periods in the United States vary from one to twenty years, the most common periods being three, five, or six years for felonies and one or two years for misdemeanors.[18] All jurisdictions but one place no time limitations on murder prosecutions,[19] and many exempt various other serious felonies as well.[20] Longer prescriptive periods are commonly provided for certain offenses not likely to be discovered during a short period.[21]

It is normally provided, either by a separate statute[22] or by the limitations statute itself,[23] that the statute is tolled during any period in which defendant is absent from the state[24] or is a fugitive from justice.[25] The wording of these statutes takes one of two general forms. It provides either that a prosecution "must" or "shall" be commenced within the designated period[26] or that "[n]o person shall be tried, prosecuted or punished" for any offense unless prosecution is commenced within the period.[27] Commencement of prosecution, for purposes of tolling the statute, is by the return of an indictment, in jurisdictions where criminal prosecutions must ordinarily be begun by indictment,[28] or by the filing of a complaint or information, in other jurisdictions.[29] Some statutes provide that the statute is tolled during the pendency of an indictment or information, even though such accusatory pleading is ultimately found to be invalid,[30] while others

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15. *Id.* at 631-32 & nn. 6-7.

16. Ohio, South Carolina, and Wyoming.

17. Kentucky, Maryland, North Carolina, Virginia, and West Virginia.

18. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 652-53 (1954).

19. *Id.* New Mexico provides a 10-year limitation for any capital or first-degree felony. N.M. STAT. ANN. § 40A-1-8 (1972).

20. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 652-53 (1954).

21. *Id.*

22. *E.g.*, CAL. PENAL CODE § 802 (West 1970).

23. *E.g.*, MASS. GEN. LAWS ANN. ch. 277, § 63 (West 1972).

24. *E.g.*, IOWA CODE ANN. § 752.5 (West 1950); OKLA. STAT. ANN. tit. 22, § 153 (West 1969).

25. *E.g.*, N.J. STAT. ANN. § 2A:159-2 (West 1971).

26. *E.g.*, N.Y. CRIM. PROC. LAW § 30.10 (McKinney 1971).

27. MO. ANN. STAT. § 541.190 (Vernon 1953).

28. *E.g.*, 18 U.S.C. § 3282 (1970).

29. *E.g.*, KAN. STAT. § 21-3106(5) (1974).

30. *E.g.*, N.Y. CRIM. PROC. LAW § 30.10(4)(b) (McKinney 1971).

have no such provision.[31]

The suggested purposes of criminal limitations statutes are manifold. Unfortunately, they are also entirely speculative. In view of the almost total absence of legislative history,[32] it is impossible to determine what actually motivated enactment of these statutes. We are thus forced to identify the purposes that the statutes in fact serve, and presume a legislative intent to serve them. Among the suggested purposes are to protect a defendant from having to defend when proofs of innocence have grown stale, to secure for criminal trials the best evidence that can be obtained, to notify the defendant that he can cease preserving proofs of his innocence, to discourage the public degradation attendant upon the publication of forgotten crimes, to exact vigilance and diligence from prosecutors and police, and to recognize that an absence of detectable recent criminal activity on the part of an individual tends to render pointless his prosecution and punishment for an ancient offense.[33] In connection with the last point, it may be suggested that the legislature has determined that prosecution after a certain date represents a misallocation of social resources and that the statute serves the function of preventing a prosecutor (perhaps responding to public pressure) from causing such misallocation. Basically, the purposes behind criminal limitations statutes fall into two general categories: the protection of the personal interests of the accused, and the protection of the interests of society by ensuring that social resources are not squandered on pointless punitive efforts.

III. JUDICIAL FORMULATION OF PLEADING REQUIREMENTS

It is axiomatic that pleading rules have two primary functions: (1) to further efficient and expeditious resolution of legal disputes, and (2) to further the public policies underlying the substantive and procedural legal principles that are applied through pleadings. Thus, judicial efforts to formulate rules for the pleading of limitations ought to be made with a view to providing rules that have two aims: to discover at the earliest possible time and within the least expenditure of judicial effort those prosecu-

31. *E.g.*, CAL. PENAL CODE §§ 800-02 (West 1970).

32. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632 (1954).

33. *See*, United States v. Marion, 404 U.S. 307, 323-25 (1971); F. WHARTON, CRIMINAL PLEADING AND PRACTICE 210-11 (8th ed. 1880); Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632-34 (1954).

tions that are time-barred, and to ensure that the policies behind limitations legislation are carried out. The decisions that have shaped limitations-pleading rules have usually considered one aim or the other; seldom have the courts sought to achieve both. That fact, together with a persistent want of analytical depth on the part of judges seeking to formulate workable rules, accounts for the present, rather mystifying state of the law.

A. Issues in Pleading the Statute of Limitations

The *Demillo* case raises four major issues with respect to the requirements of pleading the statute of limitations in criminal cases: (1) Must a valid accusatory pleading allege facts showing that the prosecution is not barred by limitations? (2) If so, should a defendant's failure to point out the defect in the accusatory pleading at the trial court level amount to a waiver of his right to rely on the statute of limitations? (3) Should a plea of guilty to a defective accusatory pleading amount to a waiver of a limitations defense? (4) May a conviction be set aside on collateral attack upon a showing that the accusatory pleading failed to negative prescription, without showing that the prosecution was in fact time-barred?

For the most part, the resolution of these issues is not clearly determined by statute[34] but has been left to the courts. Since time limitations are entirely statutory, and it is not suggested that an American jurisdiction is under a constitutional obligation to impose any particular period of criminal prescription,[35] resolution of limitations-pleading issues must be undertaken in the spirit of furthering legislative intent. As the courts have dealt with these issues, however, they have often reached results that have failed to fulfill the purposes behind both pleading rules and limitations statutes.

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34. A few jurisdictions have statutorily provided that an indictment or information is insufficient unless it shows that the prosecution is not barred by limitations. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 21.21(6) (Vernon 1966); WASH. REV. CODE ANN. § 10.37.050(5) (1961). Louisiana, on the other hand, expressly provides that the state shall not be required to allege facts showing that the time limitation has not expired, and that the issue of limitations may be raised at any time, but only once, and is to be tried by the court alone. LA. CODE CRIM. PRO. ANN. art. 577 (West 1967). An Indiana statute provides that a valid plea of guilty may be entered to a charge even if the limitations period has expired. IND. CODE ANN. § 35-41-4-2(4)(f) (Burns Supp. 1976) (effective July 1, 1977).

35. The due process clause of the fifth amendment, and presumably that of the fourteenth as well, may provide a constitutional barrier against a prosecution unreasonably delayed to the prejudice of the accused. *See* United States v. Marion, 404 U.S. 307, 324-25 (1971).

B. Judicial Resolution of the Issues

1. Must a valid pleading affirmatively demonstrate compliance with the statute of limitations?

a. Majority rule. A rather substantial majority of the courts have held that a valid accusatory pleading must allege facts negativing prescription.[36] The majority position is generally rested upon two propositions: that the statute of limitations should be liberally interpreted in favor of the accused, and that the statute constitutes a substantive bar to prosecution, rather than a mere statute of repose.[37] The principle of liberal construction seems to be derived from Wharton's seminal treatment of the subject:

> 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 . . . 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 right to prosecute, and declaring the offence 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 offence, 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 not 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 by the legislature of the fact that time, while it gradually wears out proofs of innocence, has

36. *See, e.g.*, State v. Williams, 45 Del. 16, 69 A.2d 299 (1949); Robinson v. State, 20 Fla. 804 (1884); Commonwealth v. Dickerson, 258 Ky. 446, 80 S.W.2d 540 (1935); People v. Gregory, 30 Mich. 371 (1874). *See* cases cited in note 12, *supra, and* Annot., 52 A.L.R.3d 922 (1973).

37. Both propositions are forcefully maintained in Waters v. United States, 328 F.2d 739 (10th Cir. 1964).

assigned to it fixed and positive periods in which it destroys proofs of guilt.[38]

Wharton's propositions are scarcely self-evident. We can allow that the terms of a grant should ordinarily be construed strictly against the grantor. But it does not follow that the legislature, in limiting the time in which wrongs to the state may be judicially redressed, should be regarded in the same light as a rapacious subdivider whose deed to a naive homeowner must be scrutinized as carefully as a contract of adhesion. Conversely, characterization of a statute of limitations as an act of "grace" seems accurate if that word is given its theological definition of unmerited favor. But to assume that the dispensation of grace endues the legislature with the divine quality of ungrudging generosity is to assume a bit too much. It seems entirely within the legislative province to approach limitations in a rather niggardly manner. Limitations are in derogation of the common law. They result in extinction of a valid public cause of action upon the expiration of an arbitrarily selected time period, without regard to whether such extinction furthers or retards justice in any individual case. They necessarily result in a number of guilty persons escaping punishment altogether, without necessarily sparing any innocent persons punishment. The numerous exceptions to general limitations suggest a legislative wariness of the very principle of limitation. The enactment of limitations statutes demonstrates a legislative judgment that they do more good than harm, but hardly shows an uncritical legislative embrace of the idea of barring prosecutions by time.

More supportive of the majority view, although no more self-evident from the language of the typical statute, is the proposition that the statute is intended to be a substantive bar to prosecution, rather than a mere statute of repose. If the statute is viewed as creating a mere technical defense, which a defendant will lose if he lacks the wit to raise it, then no apparent purpose would be served by requiring the prosecution to plead compliance with the statute. But if the legislature intended to create an absolute bar to a late prosecution, it could be plausibly maintained that the prosecutor has the duty of demonstrating, in his initial pleading, that the prosecution may be validly begun. The difficulty lies in inferring a legislative intent to create a substantive bar to prosecution.

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38. F. WHARTON, *supra* note 33, at 209-10.

A statute employing the typical wording, to the effect that a prosecution must be commenced within a designated period, says little on its face about whether the legislature intended to preclude the prosecution altogether or merely to give the accused a special defense.[39] But where the statute expressly states that no person shall be prosecuted, tried, or punished unless the prosecution is commenced within a certain period,[40] a legislative intent that there be no prosecution at all is strongly suggested. Only one case, however, has been found that rests its conclusion that the legislature intended a substantive bar, even in part, upon the fact that the relevant statute adopted the latter wording.[41]

b. Minority rule. The minority cases, holding that an accusatory pleading need not negate prescription, reach their conclusion either without analysis[42] or on the theory that limitations are a matter of defense, to be pleaded by the accused.[43] A related theory is that when limitations periods are imposed by a statute independent of the one defining the crime, they are to be regarded in the same light as any other exceptions imposed by independent statute; their inapplicability therefore need not be alleged in the indictment.[44] The minority view flows naturally, if not ineluctably, from a perception of the statute as providing a defense, rather than a bar, to prosecution.

c. Difficulties inherent in the setting in which the issue commonly arises. Recognition of a clean difference between majority and minority rules is impaired by the circumstance under which the pleading issue commonly arises. In a typical case, the accusation will allege the date of the commission of the offense[45] and will show on its face that the time between that date and commencement of the prosecution is longer than the limitations period. The question then arises whether the accusation must

39. By contrast, ME. REV. STAT. tit. 17-A, § 8 (1976) expressly refers to limitations as a "defense."

40. *E.g.*, MO. ANN. STAT. § 541.200 (Vernon 1953); NEB. REV. STAT. § 29-110 (1975); N.M. STAT. ANN. § 40A-1-8 (1953); 18 U.S.C. § 3282 (1970).

41. Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964).

42. *See, e.g.*, State v. Harvey, 169 Ark. 1074, 277 S.W. 869 (1925).

43. *See* Thompson v. State, 54 Miss. 740 (1877).

44. *See* United States v. Cook, 84 U.S. 168, 173-74 (1872); People v. Kohut, 30 N.Y.2d 183, 187, 282 N.E.2d 312, 314-15, 331 N.Y.S.2d 416, 420 (1972).

45. Although a number of statutes provide that an allegation as to the time of the commission of the crime may be omitted from the accusatory pleading unless time is of the essence of the offense charged, there is no good reason not to make an allegation of time, and prosecutors ordinarily do so. *See, e.g.*, ALA. CODE tit. 15 § 237 (1958); CAL. PENAL CODE § 955 (West 1970). *See* 42 C.J.S. *Indictments and Informations* § 124 (1944).

allege facts showing that the statute of limitations was tolled.[46] It is on this issue that most of the decisions have divided, the majority answering the question in the affirmative and the minority in the negative.[47]

To treat the issue as separate from that of whether an accusatory pleading must negative prescription is a *trompe l'oeil.* If a valid accusatory pleading must show that the prosecution is not time-barred, then it must in all cases show the date of commission of the offense and the date of prosecution and allege limitations-tolling facts if the time between the two dates is longer than the prescriptive period. A pleading silent as to the time the offense was committed would be insufficient on its face. Conversely, if an accusatory pleading is not required as a matter of course to negative prescription, it should not have to allege tolling facts merely because the pleading suggests that prosecution may be barred by lapse of time. The mere fact that an indictment or information gratuitously alleges the date of commission of the offense should make no difference to the proper resolution of the ultimate question of how the accusatory pleading must address the problem of limitations.

It is theoretically possible to argue that an accusatory pleading need not ordinarily negative prescription but must do so when prescription is suggested by juxtaposition of dates. No court appears to have made such an argument. But the sight of a pleading that shows that the offense charged was of ancient commission invites the thoughtless conclusion that the pleading is bad unless it gives facts that would rescue the prosecution from the bar of the statute. Some of the confusion exhibited by the courts in the pleading-limitations area may be explicable by the prevalence of such pleadings.

d. The preferred rule. The primary consequence of a rule requiring an accusatory pleading to set forth factual allegations negating the bar of the statute is that the limitations issue may be raised on the part of the accused by demurrer, motion to quash, or other attack on the facial sufficiency of the pleading.[48]

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46. Tolling of the statute is usually shown by demonstrating the accused's absence from or nonresidence in the jurisdiction, or his fugutive status during the critical period, or by showing that a prior accusatory pleading charging the same offense had been filed and set aside. *See* notes 24-25 and 30-31 and accompanying text *supra.*

47. Representative of the majority view are: People v. Swinney, 46 Cal. App. 3d 332, 120 Cal. Rptr. 148 (1975); People v. Munoz, 23 Ill. App. 3d 306, 319 N.E.2d 98 (1974). Minority cases include: State v. Rosen, 52 N.J. Super. 210, 145 A.2d 158 (1958); People v. Kohut, 30 N.Y.2d 183, 282 N.E.2d 312, 331 N.Y.S.2d 416 (1972).

48. *See, e.g.,* Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

This consequence is of considerable importance in determining whether accusatory pleadings should be required to negate prescription, in light of the posited dual purpose of pleading rules. A rule that permits and encourages the resolution of crucial issues prior to trial and on the basis of the pleadings obviously furthers the first objective of efficient and expeditious resolution of legal disputes. It is thus desirable to require an accusatory pleading to show that the action is not barred by limitations and permit it to be stricken if it does not. Where the prosecution is in fact barred by limitations, a determination of that issue on the pleadings saves a pointless trial.

The other purpose of a pleading rule is to further the policies underlying the statute of limitations. If one of those policies is to prevent prosecutions that are in fact barred by time, its corollary is to permit prosecutions that are in fact *not* barred by time. If local practice mandates outright dismissal of an accusatory pleading subject to facial attack, then a rule that rendered vulnerable to such attack a pleading that failed affirmatively to demonstrate timeliness of prosecution would result in the abortion of some valid prosecutions. The leading case for the minority view, *United States v. Cook*,[49] based its decision in part on fear of this result. But where the accusation may be amended, either as a matter of right or in the sound discretion of the trial court,[50] this objection disappears.

In the absence of an express provision governing the pleading of limitations, and in the absence of language to the effect that no person shall be prosecuted, tried, or punished after expiration of the limitations period, statutory language gives no clues as to whether the legislature intended the statute of limitations to be a matter of defense or a substantive bar to prosecution. Either position seems reasonable. If a court assumes a legislative intent to create a substantive bar, then all considerations point toward a rule requiring the pleading of nonprescription—unless local practice precludes the amendment of the accusatory pleading to

49. 84 U.S. 168, 179-80 (1872). The Court noted that to sustain a demurrer on grounds of failure to allege timeliness would deprive the prosecutor of his right to prove that defendant had fled the jurisdiction or was otherwise within the exception to the statute.

50. *See, e.g.*, People v. Crosby, 58 Cal. 2d 713, 375 P.2d 839, 25 Cal. Rptr. 847 (1962); Herman v. State, 247 Ind. 7, 210 N.E.2d 249 (1965), *cert. denied*, 384 U.S. 918 (1966); Wilkins v. State, 16 Md. App. 587, 300 A.2d 411 (Ct. Spec. App.), *aff'd*, 270 Md. 62, 310 A.2d 39 (1973), *cert. denied*, 415 U.S. 992 (1974). For a collection of decisions on the question of amendability in the statute of limitations context, *see* Annot., 14 A.L.R.3d 1297 (1967).

allege facts showing that the prosecution is not barred by time. But even if it is assumed that the legislature intended to make limitations a mere matter of defense, it is still preferable to require the accusatory pleading to show timeliness (assuming the amendability under local practice of defective pleadings). A rule that merely establishes the demurrability of an accusation that does not negative prescription still requires the matter to be raised by the defense, and is thus consistent with a legislative recognition of limitations as a matter of defense. And its efficacy in weeding out prosecutions instituted without an appreciation of their untimeliness serves a plainly worthwhile purpose. It is thus clearly the better view that the prosecution must allege facts showing that the action is not time-barred.

2. Should a defendant's failure to point out deficiencies in the pleadings at the trial court level waive his right to rely on the statute of limitations?

There is a considerable difference between the contention that an accusatory pleading is subject to facial attack at the trial court level for want of an allegation of nonprescription, and the assertion that the issue may be raised for the first time on direct or collateral attack. The policy considerations applicable at these stages of the proceedings are altogether different from those applicable at trial. The opportunity to avoid a useless trial has already fled, and the first purpose of a pleading rule requiring an allegation of timeliness—expeditious resolution of a limitations dispute—has not been furthered. The only policy basis for allowing a tardy raising of the issue of limitations would have to be found in the purposes underlying the limitations statute itself.

It will be recalled that these purposes are of two kinds—to protect defendant from prosecution and punishment, and to protect society by preventing resources from being misallocated to a prosecution that the legislature deems without point. After the trial is over, it is too late to save either the accused or the state the time, money, and energy expended in a trial. The only purpose of permitting the statute of limitations to be belatedly raised would be to prevent the imposition or continuation of punishment. If the legislature has conclusively presumed that even a guilty person is not in need of punishment after expiration of the limitations period,[51] then the legislative purpose of protecting an

51. Such a conclusive presumption would ill befit a reasonable legislature. Limita-

accused would be served by allowing the issue of limitations to be raised for the first time following trial.[52] But a valid *state* interest might also be served by such allowance. Punishment itself drains state resources, at least to the extent that it requires incarcerating a convict or supervising a probationer. A colorable argument could thus be made for judicial sufferance of belatedly raised limitations claims.[53]

The few cases dealing with the question have largely ignored policy considerations and proceeded upon a theory of "jurisdiction."[54] The essence of this theory is that the statute of limitations is "jurisdictional" in the sense that the running of the statute operates to deprive the court of the power to prosecute or punish the accused.[55] The theory is seemingly intended as a restatement of the view that the legislature intended the statute as a bar to both prosecution and punishment. If one perceives a legislative intent that there be no punishment after the running of the statute, even though prosecution has already occurred, it follows that a court is without power to impose punishment. The legislative policy of preventing such punishment is furthered by allowing this lack of power to be brought to judicial attention at

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tions statutes uniformly provide for exceptions, such as absence from the jurisdiction, which can indefinitely lengthen the limitations period. Furthermore, the statutes govern only the time in which the prosecution must be commenced, not the time in which trial must be had or punishment imposed. It is possible for trial to be legitimately delayed for six years, and perhaps much longer, following the filing of the accusatory pleading, *see* Barker v. Wingo, 407 U.S. 514 (1972), and for the imposition of punishment to be delayed even longer by appellant's enlargement during the appellate process. In a given case, therefore, periods vastly longer than that designated in a limitations statute may elapse between commission of the offense and imposition of punishment without offending the statute.

52. There is no reason to assume, however, that the legislature would have enacted a limitations statute whose sole purpose was the prevention of punishment, as opposed to prosecution.

53. Jurisdictions differ widely in permitting defendant to raise claims of any sort on direct or collateral attack when such claims could have been raised at trial. To recognize limitations issues as exceptions to a jurisdiction's general rule with respect to timeliness of defenses could be justified only for clear and compelling reasons.

54. *E.g.*, Waters v. United States, 328 F.2d 739 (10th Cir. 1964); *In re* Demillo, 14 Cal. 3d 598, 535 P.2d 1181, 121 Cal. Rptr. 725 (1975); People v. McGee, 1 Cal. 2d 611, 36 P.2d 378 (1934).

55. The jurisdictional theory is further developed in People v. Crosby, 58 Cal. 2d 713, 375 P.2d 839, 25 Cal. Rptr. 847 (1962); Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958); State v. Steensland, 33 Idaho 529, 195 P. 1080 (1921). The *Steensland* case does not make clear whether appellant explicitly raised the limitations defense at trial, although it does state that he failed to demur to the information. Since it reverses a conviction on limitations grounds despite the failure to interpose a proper demurrer, the case may be authority for the proposition that limitations can be raised initially on direct attack.

any time before the punishment has been fully administered.

Those courts that assert that the statute of limitations is "jurisdictional" may thus reach a sound result in certain cases, but use of the term impedes full consideration of questions of policy and presumed legislative intent. Review of a criminal conviction on direct attack is limited almost entirely to the face of the record on appeal.[56] For that reason, the trial court's actual jurisdiction may be impossible for an appellate court to determine. If compliance with the statute of limitations is essential to the trial court's jurisdiction, but no evidence bearing on limitations is given, the most that can be said is that the evidence fails to establish the trial court's jurisdiction. The appellate court has no acceptable choice in such circumstances but to reverse and remand for a new trial at which the jurisdictional question can be litigated. At the same time, if the facts proved at trial clearly establish or negate jurisdiction, the appellate court can determine whether there was in fact jurisdiction and base its ruling on that determination.[57] Under either of these circumstances, the pleadings are not clearly relevant to the question of jurisdiction. Further, if the trial court erroneously overruled a demurrer to an accusatory pleading that failed to negative prescription, but the prosecutor nonetheless proved facts showing compliance with the statute of limitations, it is difficult to see how the defect in the pleading, or the trial court's failure to recognize that defect, could justify reversal of the conviction.

3. Should a guilty plea to a defective pleading waive the defendant's statute of limitations defense?

The state of the pleadings becomes important when the defendant has pleaded guilty and the record is therefore barren of evidence bearing on the question of the running of the statute of limitations. If the accusatory pleading properly alleges facts showing that the prosecution is not barred by limitations, then the defendant's plea of guilty will be deemed an admission of those facts. This admission will fill the evidentiary void with

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56. *See, e.g.*, Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1929); Norwegian Plow Co. v. Bollman, 47 Neb. 186, 66 N.W. 292 (1896).

57. Waters v. United States, 328 F.2d 739 (10th Cir. 1964), is illustrative. On the basis of agreed facts, the court of appeals determined as a matter of law that the prosecution violated the statute of limitations. It accordingly reversed the conviction and directed the dismissal of the prosecution for want of jurisdiction, even though defendant raised the limitations issue for the first time on appeal.

respect to limitations facts in the same way that it relieves the prosecutor of the necessity of proving the commission of the offense charged. The difficult question arises when the defendant, without in any way raising the limitations issue, pleads guilty to an indictment or information that fails to negative prescription and seeks reversal on the basis of the failure of the accusatory pleading to establish jurisdiction in the trial court.

Assuming that an appeal from a conviction based on such a guilty plea will lie,[58] it is inescapable that the record fails to demonstrate the continuing power of the trial court to prosecute or punish for the offense charged. Whether this failure requires reversal of an otherwise valid judgment of conviction should be decided on the basis of the policy considerations alluded to earlier. To permit the defendant to raise the issue for the first time on appeal would violate any general policy encouraging the timely presentation of claims and would particularly thwart fulfillment of the pleading rule function of affording quick resolution of limitations issues. Therefore, a defendant's failure to raise the limitations issue at trial should work a forfeiture of any right to assert his personal interests to invoke a technical statute in order to escape punishment.

But there remains the state's independent interest in avoiding the costly imposition of punishment serving no useful purpose. A statutory construction ascribing to the legislature an intent absolutely to bar imposition of punishment in cases untimely prosecuted would justify permitting a defendant to raise the issue of timeliness for the first time on appeal. In the case of an appeal from a conviction based on a guilty plea to an indictment or information that does not show timeliness, the issue of whether the prosecution is time-barred cannot be fully determined on appeal. The appellate court is thus justified in reversing the conviction and remanding for further proceedings in which the limitations issue can be factually resolved.

If the limitations issue is seen as merely a defense, there is no policy consideration underlying the statute of limitations[59] that requires the conclusion that the entry of a plea of guilty necessarily amounts to a waiver of that defense. Illustrative is *State v. Tupa.*[60] Appellant had been charged with a crime subject

58. Some states restrict the appealability of convictions based on guilty pleas. *See, e.g.*, CAL. PENAL CODE § 1237.5 (West 1970); People v. Ribero, 4 Cal. 3d 55, 480 P.2d 308, 92 Cal. Rptr. 692 (1971).

59. See note 33 and accompanying text *supra.*

60. 194 Minn. 488, 260 N.W. 875 (1935).

to limitations. The information showed that the crime had been committed nine years before, the prescriptive period was three years, and the information did not allege facts showing appellant's absence from the jurisdiction. Appellant's demurrer to the information on the ground that it failed to negate prescription was overruled and a guilty plea was entered. On appeal, the Minnesota Supreme Court, adopting the majority rule requiring that the accusatory pleading show that the prosecution is not barred by time, reversed.[61] Defendant's timely assertion of the limitations defense was held to preclude a finding of waiver of the defense by entry of a guilty plea. The soundness of this result depends on the question of whether a guilty plea should be deemed a waiver of all defenses.[62] The result in *Tupa* has the salutary effect of permitting a defendant to preserve his limitations defense without the necessity of going through a trial on the merits—which would be a pointless exercise if his only defense is that of limitations.

But whether defenses in general, or certain defenses in particular, should be deemed preserved for appellate review by timely trial court assertion, notwithstanding entry of a guilty plea, is a matter for resolution according to local practice. Policy considerations peculiar to limitations-pleading issues focus on whether the defendant has raised the issue of limitations at or before trial and, if not, whether any fundamental policy of the statute requires that the defendant be allowed to do so at a later stage. These considerations do not speak directly to the question of whether a plea of guilty per se should be deemed a waiver of a right to rely on the statute of limitations.

4. Should a collateral attack be allowed on a pleading's failure to negative limitations without also showing that the prosecution was in fact barred?

The final and most difficult question raised by *Demillo* is

61. In addition to reversing the conviction, the court ordered appellant discharged from custody. *Id.* at 497, 260 N.W. at 879. This order is peculiar in that the prosecution might have been able to amend the information to allege facts showing that appellant was within an exception to the limitations statute. If the court meant to preclude any such amendment, the result would be absurd, since it would treat the failure of the information to negate prescription as conclusive proof of prescription.

62. It is generally held that a valid plea of guilty is a waiver of all nonjurisdictional defenses. *See, e.g.*, Weir v. United States, 92 F.2d 634 (7th Cir.), *cert. denied*, 302 U.S. 761 (1937); Brisson v. Warden of Conn. State Prison, 25 Conn. Supp. 202, 200 A.2d 250 (Super. Ct. 1964). Thus the issue would ordinarily be determined by whether the limitations defense is properly considered jurisdictional.

whether a conviction may be set aside on collateral attack on the sole ground that the accusatory pleading failed to allege facts negating prescription without any consideration of whether the prosecution was in fact barred by limitations. The California court's affirmative answer to this question demands close scrutiny.

Acceptance of the arguable propositions that the statute of limitations is jurisdictional and that its compliance must be alleged in the accusatory pleading does not establish the validity of the *Demillo* result. It establishes only that the jurisdiction of the trial court, and hence the validity of the conviction, is subject to question. When the question is raised on direct attack, the reviewing court's inability to resolve it definitively justifies a reversal of the conviction and a remand for the purpose of determining the jurisdictional facts.

When the issue is raised on collateral attack, however, quite different considerations apply. Collateral attack is not limited to the face of the record.[63] Thus an evidentiary hearing in a habeas corpus proceeding could be used to determine whether the statute of limitations had in fact run. The relevant factual questions are whether the time between the commission of the charged offense and the commencement of the prosecution was longer than the limitations period and, if so, whether the defendant was absent from the state during the interim for a period sufficient to have tolled the statute. These questions could be resolved in a habeas corpus proceeding, with the defendant petitioner carrying the burden of proof.[64]

Assuming, then, the desirability of an evidentiary hearing in conjunction with a collateral attack, what justification would lead a court to take the *Demillo* approach and deny such a factual inquiry? There is authority for the proposition that a judgment of conviction entered on a plea of guilty to an accusation that does not charge a crime is void and may be attacked collaterally.[65] If that proposition is accepted, the next question is whether an accusation that fails to allege facts negativing prescription fails

63. *See* Townsend v. Sain, 372 U.S. 293 (1963); Granucci, *supra* note 10, at 196. There is some indication that at the time of People v. McGee, 1 Cal. 2d 611, 36 P.2d 378 (1934), the scope of collateral attack was limited under California procedure to the face of the record. Granucci, *supra* note 10, at 195. This may account for the failure of the *McGee* court to consider the issue of whether the statute of limitations had in fact run in that case, since that issue could not have been conclusively resolved from the record.

64. *See, e.g., In re* Riddle, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962).

65. *See* L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 205 & n.36 (1947).

to charge a crime. If it sets forth the elements of an offense known to the law, an accusatory pleading manifestly does charge a crime: it identifies the crime, gives defendant notice of the charges against him, and provides a basis for ascertaining an authorized punishment for the offense. But if the statute of limitations is viewed as creating a substantive bar to prosecution, such an accusation fails to allege a currently prosecutable crime. Even so, this defect probably should not render a consequential judgment utterly void.

In states that accept the broad proposition that failure of an accusation to "charge a crime" voids a conviction entered upon a plea of guilty to that accusation, a colorable argument could be made that an accusation that does not negative prescription does not "charge a crime" and, therefore, that a conviction based thereon is void. To throw out a conviction on collateral attack on the sole ground of the want of such an allegation would not promote any of the policies underlying the statutes of limitations. While it might have a certain logical consistency, such an approach would plainly exalt form over substance. However, no such state has ever said that a court is utterly without jurisdiction to render a valid judgment simply because the accusatory pleading does not show that the prosecution was timely brought.

Other states, such as California, do not follow the rule that failure of the accusation to charge a crime renders void a conviction entered on a plea of guilty.[66] Thus, they are logically precluded from asserting the argument that an accusation "failing to charge a crime" because it does not negate prescription deprives the court of jurisdiction and consequently voids the conviction. Further, California has held that a defendant may enter a valid plea of guilty to a crime that is neither charged in the

66. The California rule has been stated as follows:

> The scope of inquiry upon habeas corpus into the sufficiency of an indictment or information is limited, for, although the petitioner may be discharged if the pleading totally fails to charge an offense known to the law, if there is attempted to be stated an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of the kind will not be examined into.

In re Jingles, 27 Cal. 2d 496, 499, 165 P.2d 12, 14-15 (1946).

The California court has also stated that, while the sufficiency of a complaint in an inferior court may be considered on habeas corpus, an indictment or information filed in a court of general jurisdiction will not, the jurisdiction of such a court being presumed. *Ex parte* Greenhall, 153 Cal. 767, 96 P. 804 (1908). California thus takes a properly liberal view of the requirements of a sufficient accusatory pleading when such a pleading is claimed on collateral attack to have failed to confer jurisdiction on the court.

accusatory pleading nor included in any offense that is so charged, if he does so pursuant to a plea bargain and the offense is reasonably related to defendant's charged conduct.[67] It has been held that when an accused pleads not guilty, the court lacks jurisdiction to convict him of an uncharged offense, since it has failed to give him notice of the possibility of his being so convicted. But one who knowingly enters a plea of guilty to a designated offense waives any claim of lack of notice.[68] If a defendant can enter a valid plea of guilty to an offense not charged, it is difficult to see why he cannot plead guilty to an offense that is clearly described but not affirmatively shown to be currently prosecutable.[69]

The likeliest explanation for results such as that in *Demillo* is the unthinking invocation of the talismanic term "jurisdiction." Characterizing the statute of limitations as "jurisdictional" has two immediate results: it establishes that the right to rely on the statute was not waived by the entry of a guilty

67. People v. West, 3 Cal. 3d 595, 612-13, 477 P.2d 409, 420, 91 Cal. Rptr. 385, 396 (1970).

68. *Id.* at 611-13, 477 P.2d at 419-20, 91 Cal. Rptr. at 395-96.

69. Of course, the *Demillo* court did not purport to proceed on the theory that petitioner's guilty plea was absolutely void because of the information's silence as to the time of commission of the offense. It will be recalled that the court responded to the Attorney General's offer of proof of limitations-tolling facts by stating that it was not in the business of resolving disputed issues of facts, rather than by forthrightly asserting the irrelevancy of the factual questions. The court thus assumed that the conviction could be saved, regardless of the state of the pleadings, by proof that the prosecution was not in fact barred by limitations.

In the absence of the theory that the defective pleading was fatal to the trial court's jurisdiction, the *Demillo* decision is not explicable on any apparent rational basis. The court may have been misled by the statement that "an indictment which when filed shows on its face that it is barred by the statute of limitations 'fails to state a public offense' . . . ." People v. Crosby, 58 Cal. 2d 713, 722, 375 P.2d 839, 845, 25 Cal. Rptr. 847, 853 (1962). As an abstract matter, this may be true. But an accusatory pleading will almost never show affirmatively that it is barred by limitations. It may show lapse of the prescriptive period, but it is extremely unlikely to allege facts negating the possibility that the statute was tolled during this period. It will thus do no more than suggest the possibility of prescription by showing that the date of the commission of the offense was beyond the limitations period. It is thus a practical impossibility for an accusatory pleading affirmatively to establish that the prosecution is barred by time. The failure to appreciate this fact may afford an explanation for the decision in People v. McGee, 1 Cal. 2d 611, 36 P.2d 378 (1934), in which defendant moved to vacate his judgment of conviction on limitations grounds. Noting that the accusation showed that the offense had been committed beyond the prescriptive period and that it failed to allege tolling facts, the California Supreme Court reversed an order denying the motion to vacate. It does not appear that the prosecution offered to prove that the statute was tolled, and the court thus did not have to determine the effect of such proof. Indeed, for all that appears, the prosecution in *McGee* was time-barred, and the case reached a proper result.

plea,[70] and permits the validity of a limitations defense to be inquired into on habeas corpus.[71] But "jurisdiction," particularly in California judicial parlance, is a term of great elasticity. In its general meaning, it connotes the power of a court to proceed in a given action; but in California, "the inability of a court to act except in a particular way is 'jurisdictional' as that term is used in connection with the prerogative writs."[72] The expanded term greatly facilitates the use of prerogative writs to review judicial actions, since such writs are ostensibly limited to the correction of acts in excess of jurisdiction. To characterize a legal question as a matter of "jurisdiction," therefore, is merely to say that it can be considered by way of extraordinary writ. The term is thus not an aid to analysis but a shorthand expression of a particular result. When used as if it were an analytical tool, it frequently turns into a substitute for analysis. *Demillo* apparently began with the concept that the statute of limitations is "jurisdictional" and concluded from the use of that amorphous term that a failure to plead compliance with the statute deprives the court of the power to prosecute and punish.[73]

The proper analytical framework for the formulation of rules governing the pleading of the statute of limitations in criminal cases requires that attention be directed to underlying policy considerations not necessarily reflected in such imprecise terms as "jurisdiction." As demonstrated earlier, legitimate if questionable policy considerations may justify a conclusion that the statute of limitations stands as a substantive bar to prosecution and punishment, which can be raised at any time. Some rational basis can be found for allowing an attack on an otherwise valid judgment on the basis that the prosecution was in fact barred by limitations. No rational basis can be found for allowing a conviction to be overturned on collateral attack on the sole ground that the accusatory pleading failed to allege that the prosecution was not barred.

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70. A guilty plea waives only nonjurisdictional defenses. *See* note 62 *supra.*

71. *See* Granucci, *supra* note 10, at 192, and cases cited therein.

72. *In re* Estrada, 63 Cal. 2d 740, 750, 408 P.2d 948, 955, 48 Cal. Rptr. 172, 179 (1965).

73. *In re* Demillo, 14 Cal. 3d at 602, 535 P.2d at 1184, 121 Cal. Rptr. at 728. As noted earlier, the court's assertion that the pleading defect itself voids the conviction is inconsistent with its assumption that the conviction could be saved on proof that the statute did not in fact run. *See* note 69 *supra.*

IV. CONCLUSION

The occasional and regrettable failure of the drafters of accusatory pleadings to allege facts showing that a prosecution is not barred by limitations leaves the courts with the duty to determine the consequences of this failure.[74] That duty has seldom been discharged in accordance with any defensible set of principles, and never with any apparent analytical depth.

It is not difficult to isolate the policy considerations that should enter into the development of rules for pleading the statute of limitations and to determine the consequences of violating these rules. These considerations effectively resolve limitations issues and further the discernible policies underlying limitations statutes. But these considerations lead to varying results, according to whether the statutes are construed to express a legislative intent to provide an accused with a defense benefitting only himself, or to provide an absolute bar to prosecution or punishment in the larger interests of society. Either construction is reasonable. Both constructions lead to a rule requiring that an accusatory pleading fully allege facts bearing on limitations. A construction of the statute as creating an absolute bar to prosecution or punishment supports a rule permitting a defendant to raise for the first time on appeal the failure of the pleading to do so. It would even permit the question of whether the prosecution was in fact barred by time to be litigated on collateral attack. The one result that cannot be countenanced under any construction of the statutes is the setting aside of a conviction on collateral attack on the sole ground of such a pleading defect, without regard to whether the statute had actually run. Such a result, a triumph of pettifoggery, can only bring the administration of justice into public disrepute.

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74. Even in jurisdictions that do not require the accusation to allege facts showing that the prosecution is not barred by limitations, there is nothing to prevent a prosecutor from inserting such allegations in the pleading. If in fact a prosecution is not barred by limitations, the allegations of facts showing timeliness will prevent the problems considered in this article from arising. If the prosecution is barred by time, it should not be brought in the first place.