Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival

I. Introduction

In the United States, child sexual abuse and neglect have reached major, if not epic, proportions.[1] An estimated 200,000 to 400,000 children are sexually abused each year.[2] A recent study suggests that perhaps one third of the female population experienced some form of sexual abuse as a child.[3] Increased societal recognition of child sexual abuse, attributable in part to increased reporting requirements, has reignited an age-old debate over the relative scope of such abuse and society's role in curbing it.[4]

The problem has received legislative and executive attention. For example, numerous state legislatures enacted legislation enlarging the criminal statute of limitations for child sex abuse offenses in an effort to facilitate criminal prosecution.[5] Additionally, the United States Attorney General's Office recently advocated the extension of such statutes of limitations.[6] These actions, although well-intentioned, frequently create agonizing dilemmas for the judiciary in applying the revised limitations period, especially where the legislature fails to expressly dictate its intentions as to the revised statute's application. Moreover, the legislation may run afoul of constitutional *ex post facto* prohibitions when applied in accordance with legislative dictates.

Preliminarily, this Note will illuminate the magnitude of the child sexual abuse problem, and the impact of the statute of limitations on

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1. ten Bensel, *Child Abuse and Neglect: The Scope of the Problem*, 35 Juv. and Fam. Ct. J. 1 (Winter 1984) [hereinafter *Child Abuse and Neglect*].

2. Middleton, *Plight of the Victim: A Plea for Action*, 66 A.B.A.J. 1190, 1192 (1980).

3. Landis, *Experiences of 500 Children with Adult Sexual Deviation*, 30 Psychology Q. Supp. 91 (1956).

4. *See* Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. Contemp. L. 31, 32 (1989) [hereinafter *Protecting Children*].

5. *See, e.g.*, Alaska Stat. 12.10.020(c) (Supp. 1988); Ariz. Rev. Stat. Ann. 13-107(B)(1) (Supp. 1988); Cal. Penal Code 801 (West 1985); Colo. Rev. Stat. 18-3-411 (1986); Tex. Crim. Proc. Code Ann. 12.01 (Supp. 1988).

6. *Attorney General's Task Force on Family Violence, Federal Executive and Legislative and State Legislative Action, Recommendations*, U.S. Atty. Gen., Final Report 103 (Sept. 1984) [hereinafter *Task Force on Family Violence*]. The task force recommended extending the statute of limitations to five years, such period commencing at the time the victim attains majority, or the age of sixteen, whichever first occurs.

the states' ability to prosecute child sexual abusers. The Note will then analyze the constitutional ramification of retroactive application of the revised statute. The Note will further address the various judicial approaches to the interpretation and application of a revised statute of limitations for child sexual abuse, especially where the legislature failed to expressly dictate the revised statute's application. Finally, the Note will suggest a uniform approach to interpretation and application of the revised statute, and propose that the states' compelling interest in prosecuting child sex abusers permits the revival of "time-barred" prosecutions.

II. Child Sexual Abuse - The Problem's Parameters

A. The Scope of The Problem

The painful reality of child sexual abuse has emerged from secrecy at least three times previously, only to retreat under threat to the dark chasms and inner recesses of society's consciousness.[7] Each time, however, society ignored, suppressed and condemned the enlightened few who dared suggest the existence of widespread child sexual abuse.[8] Most recently, beginning in 1978,[9] child sexual abuse recaptured the public spotlight, inducing an avalanche of media and scholarly works.[10] Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.[11] Increased societal cognizance of child sexual abuse is in large part attributable to the implementation of mandatory reporting requirements.[12] Various statutory reporting schemes require medical personnel, educators, relatives, social workers and even attorneys to report abuse.[13] However, even the increased reporting requirements fail to reveal the true scope of the problem. Incest, the most intimate form of child sexual abuse, is commonly unreported.[14] Often, the perpetrator, if not a family

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7. *Protecting Children*, *supra* note 4, at 32.
8. *Id.* at 31-36.
9. *Id.* at 32.
10. *Id.* Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.
11. *Id.* The *McMartin* case is reported as McMartin v. County of Los Angeles, 202 Cal. App. 3d 848, 249 Cal. Rptr. 53 (1988).
12. Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 Fam. L.Q. 151, 153-55 (Summer 1983).
13. Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 Hum. Rts. Ann. 441, 443-44 (1986) [hereinafter *Sexually Abused Children*].
14. *Id.* at 445.

member, is a relative or an adult known to the victim.[15] An estimated 90% of all cases involving female victims under the age of 12 are not reported to the police.[16] Although estimates of the extent of child sexual abuse vary widely, the problem is unquestionably of major magnitude.

Child sexual abuse inflicts staggering economic, psychological and social costs on society and its victims. These costs are "taken out of [the victims'] current and future health, happiness, and . . . productivity. . . . In effect, a large mortgage on their future life is taken out when children's legal interests are not satisfied. . . ."[17] The abused child often becomes the abuser.[18] Other long-term effects may include a propensity for promiscuity and prostitution as well as a predisposition to engage in sexually abusive relationships.[19] Various studies indicate other long-term effects including anxiety, pseudo-seductive behavior, substance abuse, sexual dysfunction, homosexuality and various forms of psychosis such as depression and suicidal obsession.[20]

In response to public outcries over the scope and treatment of the child sexual abuse problem, the criminal justice system initiated numerous

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15. LLOYD, CORROBORATION OF SEXUAL VICTIMIZATION OF CHILDREN, CHILD SEXUAL ABUSE AND THE LAW 122, n.88 (A.B.A. Nat'l Legal Resource Ctr. For Child Advoc. And Prot. (5th ed. 1984)).

16. Libai, *Protection of the Child Victim*, 15 WAYNE L. REV. 977, 1016, n.134 (1969) [hereinafter *Protection of the Child Victim*].

17. Miller & Miller, *Protecting the Rights of Abused and Neglected Children*, 19 TRIAL 68, 72 (June 1983) [hereinafter *Protecting the Rights*] (quoting Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U.L. REV. 561 (1980)). Child Abuse & Neglect; *supra* note 1, at 2. The author notes that the initial costs for child protective services is $10,000 per case, exclusive of legal costs. Psychological care may run as high as $24,000 per year. Thus, a conservative estimate of $50,000 a year per case is given. *Id.*

18. DeRose, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long Term Damages*, 25 SANTA CLARA L. REV. 191 (1985) [hereinafter *Adult Incest Survivors*.] The well-documented fact that abused children frequently become child abusers is noted as follows:

> In nearly all of the studies of male sexual offenders that have been done to date, well over half or in some cases nearly three-quarters of the men studied who are serving time in prison were found to have been sexually abused as young boys. . . . Therefore . . . from generation to generation, emotional, physical and sexual abuse are behaviors exhibited by men who most likely experienced such abuse in their own childhoods. Sadly, what these men learned from their parents, they learned too well.

Id. at 218, n.139 (quoting S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 67 (1978)).

19. Note, *Sexually Abused Children*, *supra* note 13, at 452.

20. *Id. See also* J. HERMAN, FATHER-DAUGHTER INCEST 105 (1981); B. JUSTICE & R. JUSTICE, THE BROKEN TABOO: SEX IN THE FAMILY 184-5 (1979); S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 121 (1978); *Adult Incest Survivors*, *supra* note 18, at 194; *Child Abuse and Neglect*, *supra* note 1, at 4-5.

reforms in an effort to address the needs of child abuse victims.[21] For example, commentators and critics propose that child abuse victims testify on videotaped recordings, thus reducing the trauma experienced by child abuse victims in testifying.[22] Additionally, numerous jurisdictions promulgated mandatory reporting requirements to increase the likelihood that child sexual abuse will be discovered.[23] Thus, increased societal cognizance has encouraged the judiciary and legislature to adopt meaningful measures to assist the child abuse victim.

B. Barriers to Prosecution of Abusers

As a preliminary barrier to prosecution, one must recognize the gross disparity between victim and offender in terms of power, knowledge and resources.[24] Adults and older children utilize this disparity to psychologically manipulate the victim.[25] In the case of incest, the victim is even more vulnerable, for the differences in power, knowledge and resources are multiplied by the victim's dependence upon the offender for life's basic necessities.[26]

Very limited force is required to molest a child. The child victim is seldom able to understand the significance or wrongfulness of the perpetrator's conduct.[27] Over 75% of reported incest cases involve father-daughter relations.[28] The father's position as an authority figure may be utilized to persuade the child to acquiesce. Although the request may seem unpleasant, distasteful, or even frightening, the child may be motivated by a strong desire not to displease the offender.[29] In other cases, the child may be assured that the activity is perfectly normal,

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21. *See* Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437 (1985). The article deals with proposed and adopted alterations to California's system. Many of the procedures have been adopted by other states, for example, the revision of reporting requirements.

22. *See* Note, *Sexually Abused Children*, *supra* note 13, at 478-80.

23. *See, e.g.*, CAL. PENAL CODE §§ 11165-11166 (West Supp. 1985). California's bill requires teachers, social workers, probation officers, psychologists, coroners, police, physicians, surgeons, dentists and numerous others to report suspected cases of child abuse. *Id.*

24. ten Bensel, *Child Abuse and Neglect: Definitions of Child Neglect and Abuse*, 35 JUV. & FAM. CT. J. 23, 29 (Winter 1984) [hereinafter *Definitions of Child Neglect*].

25. *Id.*

26. *Id.*

27. Note, *Balancing The Statute Of Limitations And The Discovery Rule: Some Victims Of Incestuous Abuse Are Denied Access To Washington Courts* - Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721, 727 (1987) [hereinafter *Balancing The Statute Of Limitations*].

28. Note, *Sexually Abused Children*, *supra* note 13, at 445 n.18.

29. Note, *The Crime of Incest Against the Minor Child and the State's Statutory Responses*, 17 J. FAM. L. 93, 96 (1978-79) [hereinafter *Incest Against the Minor Child*].

given the relationship between the adult and child.[30] Whether the cause of the offense is a disparity in power, knowledge or resources, the common result is an unwillingness or inability on the part of the child to report the offense.

Most children never tell anyone about the sexual encounter.[31] An estimated 75% to 90% of incest victims reach adulthood without revealing the incident(s).[32] The failure or inability of the child to report the offense may be motivated by one of several factors. First, incest victims may be ashamed or embarrassed, believing themselves to be the cause of the attack.[33] Other incest victims, frightened by the offender's threats, fear that the innocent parent will break-up the family.[34] Other children fear that revealing the relationship will encourage the father's anger, rejection or physical harm.[35] The child may fear her father will be imprisoned,[36] or at a minimum, that her mother will blame her.[37]

Another major cause of unreported offenses stems from the child's mental defense mechanisms. To cope with undisclosed victimization, children frequently mentally block-out the abuse.[38] As a result, the child may not remember or divulge the abuse for years.[39] Compounding the problem of non-reporting by child victims is the fact that incest occurs

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30. *Id.*
31. *Definitions Of Child Neglect*, *supra* note 24, at 31.
32. *Adult Incest Survivors*, *supra* note 18, at 194.
33. *Definitions Of Child Neglect*, *supra* note 24, at 30.
34. *Balancing the Statute of Limitations*, *supra* note 27, at 727.
35. *Id.*
36. *Id.*
37. *Id.* Dr. Judith Herman, a noted expert in father-daughter incest at Harvard Medical School summarizes such incest as follows:

> Incestuous abuse usually begins when the child is between the ages of six and twelve, though cases involving younger children, including infants, have been reported. The sexual contact typically begins with fondling and gradually proceeds to masturbation and oral-genital contact. Vaginal intercourse is not usually attempted until the child reaches puberty. Physical violence is not often employed, since the overwhelming authority of the parent is usually sufficient to gain the child's compliance. The sexual contact becomes a compulsive behavior for the father, whose need to preserve sexual access to his daughter becomes the organizing principle of family life. The sexual contact is usually repeated in secrecy for years, ending only when the child finds the resources to escape. The child victim keeps the secret, fearing that if she tells she will not be believed, she will be punished, or she will destroy the family.

Note, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 716 (1987) (quoting Herman, *Recognition And Treatment Of Incestuous Families*, 5 INT'L J. FAM. THERAPY 81, 82 (C. Barnard Ed. 1983)).

38. *Task Force On Family Violence*, *supra* note 6, at 103.
39. *Id.*

in secrecy and exhibits few outwardly detectable signs.[40] Thus, if the child does not report, the abuse may continue unnoticed.

Once abuse is reported, the chance of prosecuting the abuser is low. A mere 24% of all child sexual abuse cases result in criminal action.[41] Once reported, familial indecision[42] or prosecutorial discretion[43] may preclude criminal prosecution. Thus, the vast majority of child sexual abuse incidents go unreported or unprosecuted.

A final impediment to prosecution is the tolling of the statute of limitations. Most criminal statutes of limitations accrue from the date of the offense.[44] Thus, by the time the child becomes emotionally or psychologically capable of confronting the experience and seeks legal redress, the statutory period for prosecution may have expired.[45] Frequently, disclosure may not occur for one to three years subsequent to the offense.[46]

C. Changing Statutes of Limitations to Increase the Likelihood of Prosecution

The emotional and psychological barriers to reporting child sex abuse frequently foreclose the victim's opportunity for legal redress and preclude societal intervention.[47] Obviously, the opportunity for legal redress varies

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40. Note, *Incest Against The Minor Child*, *supra* note 29, at 96.

41. *Sexually Abused Children*, *supra* note 13, at 446. Even after detection, prosecution is impeded by (1) social skepticism about the reliability of the child's accusations; (2) classification of pedophilia as a mental disorder rather than a criminal offense; (3) procedural systems which traumatize the victim; and (4) reluctance of prosecutors to pursue prosecutions where the case rests primarily upon the content and stability of the child's testimony. *Id.*

42. *Id.* at 448-49.

43. *See supra* note 41.

44. *Task Force on Family Violence*, *supra* note 6, at 103. Of the jurisdictions addressing the issue of retroactive application of the enlarged limitations period within the context of child sexual abuse offenses, the following states have statutes of limitations accruing from the commission of the offense: California, CAL. PENAL CODE §§ 800, 801 (West 1985); Colorado, COLO. REV. STAT. § 18-3-411(2) (1986); Texas, TEX. CRIM. PROC. CODE ANN. § 12.01 (Vernon 1977, 1988 Supp.); Washington, WASH. REV. CODE ANN. § 9A.04.070 (1988). In the remaining two jurisdictions, the limitations period accrues from the time the minor reaches the age of 16: Alaska, ALASKA STAT. § 12.10.030(c) (1984) (The period runs from the earlier of the victim attaining the age of 16, or the report to a peace officer. The section does not extend the limitations period by more than five years.); Massachusetts, MASS. GEN. LAWS ANN. ch. 277, § 63 (West 1972, Supp. 1988) (The limitations period commences at the earlier of the victim attaining the age of 16, or the report to a law enforcement agency.

45. *Task Force on Family Violence, supra* note 6, at 103.

46. *Definitions of Child Neglect*, *supra* note 24, at 30.

47. *Task Force on Family Violence*, *supra* note 6, at 103.

in direct proportion to the length and accrual date of the limitations period. Limitations periods commencing at the date of the offense and expiring within five years are currently the norm.[48] However, lesser limitations periods still exist.[49] The statute of limitations in these jurisdictions remains a major impediment to legal redress.

In recognition of the delays common in the reporting of child sex abuse, the United States Attorney General recommended that the states enlarge the statutes of limitations so as to commence from the date of the victim's disclosure.[50]

Where legislatures respond to these concerns by extending the limitations period,[51] retroactive application may become an issue in implementing the revised statute. Several policy considerations support a presumption for retroactive application. First, retroactive application furthers the goal of reducing barriers to the prosecution of offenders and of permitting victims an opportunity for legal redress.[52] Abused children must recognize that society is concerned with their plight and that children's rights are being actively protected. Retroactive application of enlarged limitations periods channels the benefits of increased societal and legislative awareness to those children who have been abused, rather than merely protecting the abused children of tomorrow. Early societal intervention diminishes the psychological costs children pay by permitting prompt psychological care, and also by preventing additional abuse at the hands of the offender. Children, not adults, are the judges of our present civilization.[53]

A second policy consideration supporting retroactive application is the need to permit child abuse victims a day in court. The American legal system is designed to channel conflict resolution from the streets into the court system.[54] Fundamental to the operation of the legal system is the requirement that each litigant have his or her "day in court." Although in the criminal context it is the prosecution, not the victim,

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48. *See, e.g.*, IDAHO CODE § 19-40 (1987) (prosecution must be commenced within 5 years after offense committed); KAN. CRIM. CODE ANN. § 21-3106 (1971, Supp. 1988) (prosecution must be commenced within 5 years after offense committed).

49. *See, e.g.*, ARK. STAT. ANN. § 5-1-109 (1987) (prosecution must be commenced with 3 years after commission; first degree child sexual abuse is a class C felony per 5-14-108).

50. *Task Force on Family Violence*, *supra* note 6, at 103.

51. *See, e.g.*, Commonwealth v. Bargeron, 402 Mass. 589, 593, 524 N.E.2d 829, 831-32 (1988); State v. Hodgson, 108 Wash. 2d 662, 666, 740 P.2d 848, 850 (1987).

52. As well, society obtains an opportunity to deter, rehabilitate or incarcerate the offender.

53. *Protecting the Rights*, *supra* note 17, at 72.

54. *See, e.g.*, H. GRILLIOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 3 (2d ed. 1979); 1 C. TORCIA, WHARTON'S CRIMINAL LAW 1 (14th Ed. 1978).

who has his "day in court," the victim may experience relief and satisfaction from the defendant's prosecution, and thus indirectly, have his own day in court. The statute of limitations limits this right by forcing the party to bring his or her action in a timely manner or be forever barred. In the civil context, the use of exceptions to the limitations period's accrual such as the "discovery rule," limits the harshness imposed by stringent application of the limitations period.[55]

Retroactive application of revised statutes of limitations can serve a similar function in the context of child sexual abuse.

In the criminal context, the state and not the injured party prosecutes the action. In the civil context, the prospective plaintiff is generally cognizant of the injury when it occurs, and as a result, may bring an action in a timely manner. In the context of child sexual abuse the state is powerless to prosecute the child sex abuse offender until the state is informed of the offense. As discussed above, a variety of physical, emotional and psychological factors prevent the victim from reporting the offense.[56] As a result of this delay in reporting the offense, the limitations period and the state's right to prosecute may expire prior to the time a child reports the offense.

A final policy consideration compelling retroactive application of the enlarged limitations period is the need to punish the offender. One of the principal functions of criminal law is to deter the offender and all aspiring offenders.[57] The deterrence theory is predicated upon the belief that individuals are rational, hedonistic beings.[58] The unpleasantness of punishment, coupled with its certainty, deter the offender from repeating his lawless conduct.[59] A secondary benefit of the deterrence theory is the intimidation of potential offenders.[60] Thus, both the offender and the potential offender, faced with the certainty of severe punishment, will likely refrain from committing a contemplated crime.[61]

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55. *See, e.g.*, N.Y. Civ. Prac. L. & R. 214-c (McKinney Supp. 1987). This statute provides in pertinent part:

> "[W]here the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced . . . within one year of such discovery of the cause of the injury."

Id.

56. *See supra* notes 24-39 and accompanying text.

57. 1 C. Torcia, *supra* note 54, § 3. Criminal law may be premised upon any of three theories; deterrence, retribution or reformation. The deterrence theory is particularly appropriate for child sexual abuse offenses because of its focus upon the individual offender. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Studies reveal that child sex abusers are extremely likely to continue their nefarious conduct, absent societal intervention.[62] Documentation of unreported sexual assaults against children dramatize the magnitude of the problem.[63] A study of first offenders[64] demonstrated that many offenders commit numerous offenses prior to prosecution or conviction.[65] Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.[66] These figures are conservative estimates, given the fact that the majority of offenses go unreported, while numerous others go unrecognized by the criminal justice system.[67] Therefore, absent societal intervention, most offenders will continue their activities unimpeded.

The typical pedophile commits his first offense as an adolescent.[68] Pedophiles are likely to continue their illicit activities once commenced.[69] Thus, from a societal perspective, the opportunity for societal intervention at the earliest possible juncture is imperative so as to maximize deterrence. To be an effective deterrent, the punishment must be certain and severe.[70] Retroactive application of the revised statute of limitations maximizes society's opportunities for intervention, and therefore, increases the deterrent effect of criminal punishment. Furthermore, early intervention extirpates the offender from his criminal habitat, protects the child from continued victimization, and terminates the offender's reign of terror.

Critics contend that society has overreacted to the perceived demon, child sexual abuse.[71] Conceivably, this position has merit. However, at either extreme, either over or under reporting, truth seldom resides.[72] Legislatures mandate longer prison sentences for convicted child sexual offenders, while reducing judicial sentencing discretion.[73] Despite these

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62. *See* Groth, Longo, & McFadin, *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME AND DELINQ. 450, 451 [hereinafter *Undetected Recidivism*]; *but see* B. KARPAN, THE SEXUAL OFFENDER AND HIS OFFENSES 276-78 (New York 1954).

63. *Undetected Recidivism*, *supra* note 62, at 453.

64. Here, meaning those who experienced a first conviction, and not necessarily their first offense.

65. *Undetected Recidivism*, *supra* note 62, at 453-54. The study's authors interviewed offenders at correctional facilities in Connecticut and Florida. The number of undetected sexual assaults reported by the subjects ranged from 0 through 250. Undetected assaults averaged 4.7, representing the number of different victims molested, rather than the number of sexual contacts. *Id.* Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.

66. *Id.* at 456.

67. *Id.* at 457.

68. *Id.* at 450.

69. *Id.* at 451.

70. 1 C. TORCIA, supra note 54, § 3.

71. *Protecting Children*, *supra* note 4 at 39.

72. *Id.*

73. *Id.*

perceived overreactions, increased societal cognizance has resulted in the correction of at least one glaring impediment to criminal prosecution of the child sexual abuser, that is, the short statute of limitations period.

III. State Court Approaches To the Interpretation and Application of Legislatively Enlarged Statutes of Limitations for the Criminal Prosecution of Child Sexual Abuse Offenses

Within the criminal context,[74] the courts of six[75] jurisdictions have addressed the issue of the interpretation and application of legislatively enlarged statutes of limitations for child sexual abuse offenses. In interpreting and applying these statutes, the courts have applied a variety of procedures.[76] However, a two-step analysis predominates. First, the court must determine whether the revised statute survives *ex post facto* analysis; then, the court must determine how to interpret and apply the statute.

A. Ex Post Facto Analysis

The United States Constitution expressly prohibits the states from enacting *ex post facto* laws.[77] An *ex post facto* law, to be considered impermissible in the criminal context, "must be retrospective; that is, it must apply to events occurring before its enactment and must disadvantage the offender affected by it."[78] The classic exposition of *ex*

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74. This note is expressly limited to criminal prosecutions for child sex abuse. The statute of limitations is characterized differently within the civil context such that factors including minority or incapacity may apply so as to prevent the running of the statute of limitations until the child attains majority.

75. Those jurisdictions are: Alaska, California, Colorado, Massachusetts, Texas and Washington. A majority of the states have addressed the same issue within the general criminal statute of limitations context. As explained within this note, the state courts have reached diverse results using varied analysis. *See, e.g.*, State v. Paradise, 189 Conn. 356, 456 A.2d 305 (1983) (absent clear legislative intent requiring retroactive application, criminal statute of limitations applied prospectively; court did not determine whether the statute of limitations is procedural or substantive); Rubin v. State, 390 So. 2d 322, 324 (Fla. 1980) (statute of limitations is a substantive right, and so statute of limitations in effect at time of offense is controlling).

76. *Cf.* State v. Creekpaum, 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd*, 753 P.2d 1139 (Alaska 1988) (statute of limitations vests a substantive right; therefore, retroactive application of enlarged period prohibited); Archer v. State, 557 S.W.2d 244 (Tex. Crim. App. 1979) (statute may be applied to all offenses not time-barred); State v. Hodgson, 108 Wash. 2d 662, 740 P.2d 848 (1987) (statute of limitations is procedural; thus, judicial presumption of retroactivity requires retrospective application of revised statute).

77. U.S. Const. art. I, § 10, cl. 1.

78. Weaver v. Graham, 450 U.S. 24, 29 (1981).

post facto laws is found in the seminal case of *Calder v. Bull*,[79] which states:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[80]

The *ex post facto* prohibition was intended "to secure substantial personal rights against arbitrary and oppressive legislation, but not to limit legislative control of remedies and modes of procedure which do not affect matters of substance."[81] Thus, although the category of retroactive changes forbidden by the *ex post facto* clause includes more than just the elements and punishment for a crime, the prohibition, as defined in *Calder v. Bull*,[82] arguably does not extend to a retroactive application of the statute of limitations because extension of the statute of limitations performs none of the impermissibles forbidden by the *Calder* decision.

A fundamental issue in determining whether or not retroactive application of an enlarged statute of limitations is barred by the *ex post facto* prohibition is whether the statute of limitations vests substantive rights in the accused, or is merely a procedural barrier. If the statute vests substantive rights, then retroactive application of the statute of limitations should be prohibited by the *ex post facto* clause. If the statute is merely procedural, and vests no substantive rights, the enlarged statute of limitations survives *ex post facto* scrutiny.

In the context of child sexual abuse, few states have determined that statute of limitations vests substative rights in the accused.[83] However, the "substantive vested rights" analysis is important to understanding the "time-barred" approach, and the argument for more expansive retroactive application of enlarged statutes of limitations. One case which illustrates the substantive versus procedural rights analysis, and the vague-

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79. 3 U.S. (1 Dall.) 386 (1798).

80. *Id.* at 390.

81. Beazell v. Ohio, 269 U.S. 167, 170-71 (1925).

82. 3 U.S.(1 Dall.) 386 (1798).

83. *See, e.g.*, People v. Sweet, 207 Cal. App. 3d 78, 84, 254 Cal. Rptr. 567, 571 (1989). Additionally, both Florida and Alabama have held that the statute of limitations is substantive within the general eriminal context.

ness and uncertainty involved in the definition of an *ex post facto* law, is *State v. Creekpaum*.[84] In *Creekpaum* the Alaska Court of Appeals held that a criminal statute of limitations vests a substantive right in the defendant;[85] the Alaska Supreme Court, in overturning the decision, held that the statute of limitations is procedural, and as such, extension prior to the original period's expiration does not violate either the United States or the Alaska Constitution.[86]

The Alaska Court of Appeals determined that to be classified as substantive for purposes of *ex post facto* analysis, a change in the law must merely adversely affect the defendant, and operate so as to place the defendant "at a disadvantage in relation to the substance of the offense charged or the penalties prescribed for that offense."[87] The Alaska Court of Appeals found *Weaver v. Graham*[88] dispositive. In *Weaver*, the United States Supreme Court stated that although the "substantive vested rights" theory[89] is useful for due process analysis, the theory is irrelevant to the question of whether a change is substantive or procedural for *ex post facto* purposes.[90] Critical to *ex post facto* analysis is

> the lack of fair notice and governmental restraint when the legislature increases punishment beyond what is prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.[91]

The court of appeals found that retrospective application of the enlarged limitations period disadvantaged the offender affected by the change and was more onerous than the law in effect at the time of the offense. Thus, the Alaska Court of Appeals held that the *ex post facto* clauses of the federal and Alaska Constitutions prohibit retrospective change in a criminal statute of limitations.[92]

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84. 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd* 753 P.2d 1139 (Alaska 1988).

85. 732 P.2d at 569.

86. 753 P.2d at 1144.

87. *Id.* at 560. *See* Thompson v. Utah, 170 U.S. 343 (1898) ("[A] statute is *ex post facto* which . . . in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage.").

88. 450 U.S. 24 (1981).

89. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

90. *Weaver*, 450 U.S. at 29-30.

91. *Id.* at 30-31.

92. State v. Creekpaum, 732 P.2d 557, 568 (Alaska Ct. App. 1987).

After determining that the constitutional prohibition was not limited to retroactive changes in the elements of or punishment for a crime,[93] the court of appeals addressed the issue of whether the criminal statute of limitations vests a substantive right upon the accused.[94] Preliminarily, the court opined that the legislature may not revive an expired statute of limitations.[95] The court then reviewed historical precedents, noting that Alaskan courts had previously held that a civil statute of limitations was substantive, not procedural.[96] Additionally, criminal statutes of limitations had been held to be substantive, but only within other decisional contexts and not for purposes of *ex post facto* analysis.[97] The line dividing "substance and procedure shifts as the context changes . . . [and] implies different variables depending upon the particular problem for which it is used."[98] The *Creekpaum* court recognized that the distinction between a procedural and substantive change "cannot be reduced to a simple formula," but must be determined on a "case-by-case basis."[99] The *Creekpaum* court rejected the argument that the statute of limitations is a mere limitation upon the remedy,[100] instead finding that because the statute of limitations limits the circumstances under which guilt can be found and is intended to preserve the accuracy and basic integrity of the adjudicatory process in criminal procedure, the statute operates as a substantive right for purposes of *ex post facto* analysis.[101] Thus, without directly addressing the issue of legislative intent, the court forbade retroactive application of legislatively enlarged criminal statutes of limitations.[102]

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93. *Creekpaum*, 732 P.2d at 563-64.

94. *Id.* at 564.

95. *Id.* at 560-61. *See also* Falter v. United States, 23 F.2d 420 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

> Certainly it is one thing to revive a prosecution already dead, 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 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 stake forgives it.

Id. at 425-26.

96. *Creekpaum*, 732 P.2d at 566. *See* Nolan v. Sea Airmotive, Inc., 627 P.2d 1035 (Alaska 1981).

97. *See* State v. Frech Funeral Home, 185 N.J. Super 385, 448 A.2d 1037 (1982).

98. Hanna v. Plumer, 380 U.S. 460, 471 (1965). A court may seek to ascertain the differences between substance and procedure in the following contexts: conflict of laws, retrospective application of statutes and law-making. Busik v. Levine, 63 N.J. 351, 364-65, 307 A.2d 571, 578-79 (1973).

99. *Creekpaum*, 732 P.2d at 562.

100. *Id.* at 567.

101. *Id.* at 568.

102. *Id.*

The appellate court premised its decision to classify the statute of limitations as substantive largely upon the belief that, because the enactment of the statute serves notice to the accused of the period for which he must be prepared to defend his act, "basic fairness militates against requiring the accused to defend his acts once the period . . . has expired."[103] Although the decision is laudable for its effort to preserve the rights of the criminally accused, the court failed to consider or address the legislature's intent or the child victim's right to legal redress.

On appeal, the Alaska Supreme Court reversed, holding that criminal statutes of limitations are procedural[104] and as such, extension of the statute prior to the original period's expiration does not violate the United States or Alaska Constitutions.[105] Like both lower courts, the Alaska Supreme Court found *Weaver v. Graham*[106] dispositive.[107] In *Weaver*, the petitioner challenged, on *ex post facto* grounds, a change in Florida's statutory formula for the accrual of good time reductions in prisoners' sentences. The change made accrual of good time reductions more difficult, thus increasing the quantum of punishment suffered by each inmate. The Supreme Court held that the statute violated the *ex post facto* prohibition because it "makes more onerous the punishment for crimes committed before its enactment."[108]

Creekpaum argued that the *Weaver* decision introduced a new analytic approach to *ex post facto* analysis.[109] In place of the vested rights approach,[110] the court should focus upon only two criteria: (1) whether the law was retrospective, and (2) whether the change disadvantaged the offender affected by the change.[111] The Alaska Supreme Court rejected Creekpaum's argument, noting that the *Weaver* decision did not nullify existing *ex post facto* precedent.[112] Instead, the *Creekpaum* court found that the holding in *Weaver* fell within the traditional prohibition announced in *Calder v. Bull*[113] because "it focused on the change in the

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103. *Id.* The court further stated that the statute of limitations defines "the outer limit of delay, beyond which prosecution will not be tolerated, even where the government has exercised good faith in attempting to file . . . and when the accused is incapable of identifying prejudice . . . from the delay." *Id.*

104. State v. Creekpaum, 753 P.2d 1139, 1144 n.13.

105. *Id.* at 1144.

106. 450 U.S. 24 (1981).

107. *Creekpaum*, 753 P.2d at 1140.

108. 450 U.S. at 36.

109. 753 P.2d at 1141.

110. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

111. *Creekpaum*, 753 P.2d at 1141.

112. *Id.*

113. 3 U.S. (1 Dall.) 386, 390 (1798).

quantum of punishment Weaver suffered as a result of the new law."[114]

The *Creekpaum* court then applied a two-step test. First the court noted that the revised statute of limitations was explicitly retroactive.[115] Second, the court rejected Creekpaum's argument that the new law was more onerous simply because Creekpaum remained liable for prosecution when he would have been immune under the old statute.[116] The court determined that the extension of the statute of limitations was a mere procedural change[117] and, applying the *Calder v. Bull* test,[118] found that retroactive application did not violate the *ex post facto* clause because the change neither made conduct criminal which was innocent when undertaken, aggravated a crime, permitted more severe punishment than permissible when the crime was committed, nor altered the rules of evidence to permit conviction on different or lesser testimony than permissible when the crime was committed.[119]

B. Analysis of Court's Interpretation and Retroactive Application of Enlarged Statues of Limitation

If the enlarged statute of limitations survives a facial *ex post facto* analysis (i.e., the statute does not vest the defendant with a substantive right), the issue becomes whether the enlarged statute of limitations should be retroactively applied, and if so, whether the application is limited solely to offenses not time-barred as of the statute's effective date. The determinative question is whether prosecution is legally permissible as of the new statute's effective date.

Typically, courts' analysis rests upon what has become a fundamental precept of criminal law, that is, the legislature may not extend the statute of limitations so as to revive an offense already time-barred.[120] However, unless prospective application is expressly mandated, a statute which extends the limitations period applies to all offenses not time-barred as of the statute's effective date, "so that a prosecution may be commenced at any time within the newly established period, although the old period of limitations has then expired."[121] Thus, the principal consideration is

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114. *Creekpaum*, 753 P.2d at 1142.
115. *Id.*
116. *Id.*
117. *Id.* at 1144, n.13.
118. 3 U.S. (1 Dall.) 386, 390 (1798).
119. *Creekpaum*, 753 P.2d at 1143.
120. *See* Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.) *cert. denied* 277 U.S. 590 (1928) Sobiek v. Superior Ct., 28 Cal. App. 3d 846, 850, 106 Cal. Rptr. 516, 519 (1972).
121. Archer v. State, 577 S.W.2d 244. *See* Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943). Thus, the principal consideration is whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.

whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.[122] Traditionally, the new statute will be applied only where the accused does not own a vested right to avoid prosecution.[123] However, legislative intent, the doctrine of strict construction, and judicial presumptions may limit the statute's application. Generally, courts refuse to apply the statute to those defendants against whom the right to prosecute has expired prior to legislative extension, regardless of legislative intent.[124]

In discerning legislative intent as to the statute's retroactive application, courts use three different approaches. In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary.[125] In the second approach, the revised statute applies retrospectively in the absence of manifest legislative intent to the contrary.[126] Finally, where legislative intent is unclear, the courts apply the statute either prospectively or retrospectively, depending upon judicial presumptions and the judiciary's perception of legislative intent.[127]

In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary. The bare determination that there is no *ex post facto* barrier to retroactive application does not, without clear legislative intent, permit retroactive application.[128] Clear legislative intent is necessary because, as a general rule, changes

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122. *See, e.g.*, Archer v. State, 577 S.W.2d 244 (Tex. Crim. App. 1979); Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943).

123. *Sobiek*, 28 Cal. App. 3d at 850, 106 Cal. Rptr. at 519.

124. The majority opinion did not address Legislative intent in either Texas case. In People v. Smith, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985), the court addressed the issue of legislative intent, citing People v. Smith, 161 Cal. App. 3d 1053, 208 Cal. Rptr. 318 (1984) for the proposition that the revised statute may be retroactively applied without express legislative intent. This proposition is premised on the existence of established precedents permitting application of extended limitations periods to crimes committed before the enactments and a legislative awareness of the court's existing judicial precedents. Thus, the judiciary may infer that the legislature enacted the statute with the knowledge and purpose that the revised statute would apply to all cases not time-barred. A presumption of prospectivity "is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." *Smith*, 171 Cal. App. 3d at 1003, 217 Cal. Rptr. at 637.

125. *See, e.g.*, People v. Whitesell, 729 P.2d 985 (Colo. 1986); People v. Midgley, 714 P.2d 902 (Colo. 1986); People v. Holland, 708 P.2d 119 (Colo. 1985).

126. *See, e.g.*, State v. Hodgson, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part, remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

127. *See, e.g.*, Commonwealth v. Pellegrino, 402 Mass. 1003, 524 N.E.2d 835 (1988); Tigges v. Commonwealth, 402 Mass. 1003, 524 N.E.2d 834 (1988); Commonwealth v. Bargeron, 402 Mass. 589, 524 N.E.2d 829 (1988).

128. *Holland*, 708 P.2d at 120. *See also* United States v. Richardson, 512 F.2d 105 (3d Cir. 1975); State v. Paradise, 189 Conn. 346, 456 A.2d 305 (Conn. 1983).

in criminal statutes operate prospectively.[129] This presumption of prospectivity is premised upon several maxims fundamental to criminal law. A cardinal rule of statutory interpretation requires criminal statutes to be strictly construed in favor of the accused[130] and against the government.[131] Second, criminal limitations statutes are interpreted liberally in favor of repose.[132] However, despite the existence of these two maxims, it is commonly held that the words of a statute should be given their fair meaning,[133] and the statute interpreted in relation to the entire enactment purpose.[134]

A desire to protect the rights of the accused against disadvantageous procedural changes which could result in abuse or attainder may underlie the presumption for prospectivity.[135] Today, however, statutes of limitations are more likely to be liberally rather than strictly construed,[136] and as a result, the presumption for prospectivity should carry less weight. Where there is a presumption of prospective application, the court may apply the presumption in the absence of clear legislative intent to the contrary.

By rotely applying a presumption for prospective application, this approach fails to address the victim's right of legal redress. Although the presumption for prospectivity may have valid application where both

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129. *See* State v. Jones, 132 Conn. 682, 685, 47 A.2d 185, 187 (1946); Yates v. General Motors Acceptance Corp., 356 Mass. 529, 531, 254 N.E.2d 785, 786 (1969).

130. *Holland*, 708 P.2d at 120. *See also* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94-95 (1820)

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

See 1 C. Torcia, *supra* note 54, § 12.

131. United States v. Emmons, 410 U.S. 396, 411 (1973) ("this being a criminal statute, it must be strictly construd, and any abiguity must be resolved in favor of lenity.").

132. United States v. Scharton, 285 U.S. 518, 522 (1932); Waters v. United States, 328 F.2d 729, 742 (10th Cir. 1965).

133. Singer v. United States, 323 U.S. 338 (1945).

134. 1 C. Torcia, *supra* note 54, § 12.

135. *See* Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 464-65 (1982). The author suggests that retroactive changes in the statute of limitations are impermissible because the changes carry a risk of abuse and attainder and also because the changes are "unlikely to meet the special burden of justification applicable to all retroactive laws affecting personal liberties." *Id.*

136. E. Crawford, The Construction of Statutes § 349 (1940).

victim and accused are of majority, and are equally competent to protect their own rights, this presumption overcompensates for the accused's perceived disadvantages within the criminal justice system and awards the accused a decided advantage at the expense of the minor victim. This is because prospective application guards against disadvantageous procedural changes which operate to the detriment of the accused, but prevents the victim, an individual who is often unaware of his rights or powerless to protect them, from exercising his right to redress.[137]

The second approach mandates retroactive application of the revised statute in the absence of manifest legislative intent to the contrary.[138] In *State v. Hodgson*,[139] the Washington Court of Appeals, although recognizing that penal statutes are to be strictly construed in favor of the accused, stated that the strict construction doctrine should not be rotely applied, but instead, the judiciary should examine the rationale behind the doctrine to determine proper classification and application of the revised limitations statute.[140] The strict construction doctrine applies to penal statutes because "it is unjust to convict a person without clear notice to him that (1) his contemplated conduct is unlawful, and (2) certain penalties will attach to that conduct."[141] The effect of strict construction is to raise a judicial presumption of prospectivity.[142] However, where a statute relates to practice, procedures or remedies and does not affect a substantive or vested right, Washington courts reverse the presumption, and apply a general rule whereby procedural statutes are presumed to apply retroactively.[143] Therefore, to determine which presumption is applicable, a court must determine whether the statute of limitations operates as a substantive right or merely performs a procedural function.[144] The *Hodgson* court, however, rejected a strict substantive-procedural classification, finding that labeling the statute of limitations as one or the other tends to obscure rather than clarify the law.[145] The court therefore undertook to classify the statute of limitations based upon definition and function rather than mere label.[146]

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137. *See supra* notes 24-56 and accompanying text.

138. *See, e.g.*, State v. Hodgson, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part*, and *remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

139. *Id.*

140. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

141. *Id. See* Commonwealth v. Broughton, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

142. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

143. *Id. See* Johnston v. Beneficial Management Corp., 85 Wash. 2d 637, 641, 538 P.2d 510, 514 (1975).

144. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

145. *Id.*

146. *Id.*

Emphasizing the fact that statutes of limitations are subject to the will of the legislature,[147] the *Hodgson* court found that retroactive application did not impair vested or substantial rights, provided however, that the offense was not time-barred as of the statute's effective date.[148] This is so because "the statute is a mere regulation of the remedy, subject to legislative control, and does not become a vested right until the offense becomes time-barred."[149]

Because the statute of limitations approximates a procedural remedy rather than a substantive right, the *Hodgson* court determined that retroactive application did not violate the *ex post facto* clause. Applying the equivalent of the *Calder v. Bull* test,[150] the court permitted retroactive application because increasing the limitation period neither aggravated the crime, increased the punishment nor permitted the accused to be convicted under rules permitting "lesser" testimony.[151] In the absence of contrary legislative intent, the presumption of retroactivity applies to the revised limitations statute.[152] Thus, because the statute of limitations is not substantive, the *ex post facto* clause permits retroactive application of the enlarged limitations period in accordance with the judicial presumption of retroactive application.

The *Hodgson* court recognized the policy considerations underlying the legislature's extension of the limitations period.[153] Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.[154] Thus, although not premising a decision for retroactive application upon policy considerations, the court

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147. *Id.* The court characterized statutes of limitations as "matters of legislative grace . . . [and] a surrendering by the sovereign of its right to prosecute." *Id.*

148. *Id.* Therefore, until the right to a dismissal is absolutely vested, the legislature may change or repeal the limitations period. *Id. See also* Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964); Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

149. *Hodgson*, 108 Wash. 2d at 668, 740 P.2d at 851.

150. *See supra* text accompanying note 80; Calder v. Bull, 3 U.S. (1 Dall.) 386, 390 (1798).

151. *Hodgson*, 108 Wash. 2d at 669, 740 P.2d at 852.

152. *Id.*

153. *Id.* at 665, 740 P.2d at 850. The court, citing the legislature's final reports, noted that the limitations period was extended based upon experience showing that victims of child abuse, due to fear, lack of understanding or manipulation by the offender, often fail to report the abuse within the shorter limitations period. Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.

154. *Id.* at 666, 740 P.2d at 850.

nonetheless adopted a position which maximizes the protection of the child abuse victim.

In the final approach, the legislature's intent is not manifestly expressed, and as a result, the court resorts to judicial presumptions and the judiciary's perception of legislative intent to determine the revised statute's application.

The mere fact that the legislature extends the statute of limitations may support a presumption for retroactive application.[155] Where the legislature fails to clearly express an intention as to the application of the revised statute, a court may look to the various steps in the enactment process to resolve any ambiguity.[156] In *Commonwealth v. Bargeron*, the Massachusetts Supreme Court applied a two-step test to determine whether the revised limitations statute could be retroactively applied.[157] Noting that retroactive statutes are not *per se* unconstitutional,[158] the court applied the *Calder v. Bull* test,[159] determining that extension of the statute merely extends the time in which the government may prosecute, and as such, extension did not violate the *ex post facto* prohibition.[160] The court noted the absence of any express language evidencing the legislature's intent for retroactive application.[161] The court noted however, that the omission did not foreclose retrospective application.[162] Retroactive statutes are unconstitutional only when, on a balancing of opposing considerations, the statute is unreasonable.[163] A court may consider "the precise evil which is targeted in legislation under review."[164] The intent of the legislature, ascertained "from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the

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155. *See, e.g.*, Commonwealth v. Bargeron, 402 Mass. 589, 524 N.E.2d 829 (1988).

156. Commonwealth v. Collett, 387 Mass. 424, 433, 439 N.E.2d 1223, 1229 (1982).

157. *Bargeron*, 402 Mass. at 590, 524 N.E.2d at 830. Although the defendant was not charged with sexual abuse of a minor, the court's reasoning was applied to two other cases decided on the same date, both of which involved child sex abuse charges and application of the revised limitations period.

158. League v. Texas, 184 U.S. 156, 161 (1902).

159. *See supra* text accompanying note 80; Calder v. Bull, 3 U.S. (1 Dall.) 386, 390 (1798).

160. *Bargeron*, 402 Mass. at 591, 524 N.E.2d at 830.

161. *Id.* at 592-93, 524 N.E.2d at 831.

162. *Id.* at 592, 524 N.E.2d at 831. *See* Commonwealth v. Greenberg, 339 Mass. 557, 578-79, 160 N.E.2d 181, 195 (1959).

163. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976); American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., 374 Mass. 181, 189-90, 372 N.E.2d 520, 525 (1978).

164. *Bargeron*, 402 Mass. at 593, 524 N.E.2d at 832. *See* Commonwealth v. Collett, 387 Mass. 424, 432, 439 N.E.2d 1223, 1228-29 (1982).

purpose of its framers may be effectuated,"[165] determines the reasonableness of retroactive application and the legislature's intent. Thus, the court in *Bargeron* held there was no constitutional or statutory barrier to retroactive application of the revised statute.[166]

The court in *Bargeron* concluded that the mere extension of the limitations period for child sex abuse offenses furnished adequate indication of the legislature's intention to permit retroactive application of the revised statute.[167] The court reasoned that the Massachusetts legislature, recognizing the delays associated with a child's report of sexual abuse, may have sought to accommodate such delays by extending the limitations period.[168] The court, lauding the legislature for addressing the child sexual abuse issue, determined that "it is not reasonable to assume that the Legislature intended to delay the application of the new . . . statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment."[169] Thus, the court reasoned that retroactive application best reflected the legislature's intentions in passing the revised statute. Moreover, the court buttressed the decision in favor of retroactive application by noting that the statute of limitations is procedural, and as such, the judicial presumption of retroactivity which applies to non-substantive rights permits retroactive application.[170] Thus, although the legislature omitted language requiring retroactive application, the court found sufficient basis to permit retrospective application through the use of a judicial presumption for retroactivity, and the mere act of the legislature extending the limitations period.

IV. The Proposal: A Uniform Approach to the Interpretation and Application of a Revised Limitations Statute

Where the legislature acts to extend the criminal statute of limitations for child sex abuse offenses, strong policy considerations compel a presumption of retroactivity, absent manifest legislative intent to the contrary. This Note proposes that courts adopt an approach which realistically balances the needs of both offender and victim in light of the victim's inability to effectively protect his or her legal rights. Further, this Note suggests that retroactive application of an enlarged statute of limitations does not violate the *ex post facto* prohibition, even if applied

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165. Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606, 608 (1934).
166. *Bargeron*, 402 Mass. at 594, 524 N.E.2d at 832.
167. *Id.* at 591-94, 524 N.E.2d at 831-32.
168. *Id.* at 593, 524 N.E.2d at 831-32.
169. *Id.* at 594, 524 N.E.2d at 832.
170. *Id.*

to offenses "time-barred" at the extension date. The difficulty of child victims in obtaining legal redress, the need to afford the child victim a day in court, and the need to prevent offenders from escaping prosecution, collectively compel the application of a judicial presumption of retroactivity. Moreover, the mere fact that the legislature has addressed the issue by extending the statute of limitations may be construed as intending retroactive application.[171]

A. Uniform Approach: A Presumption of Retroactivity

Retroactive application of a legislatively enlarged criminal limitations period does not violate the constitutional prohibition against *ex post facto* laws. The majority of jurisdictions addressing the issue held that, for purposes of *ex post facto* analysis, the statute of limitations is procedural.[172] The statute of limitations, in criminal contexts, is an act of legislative grace[173] and a surrendering of the sovereign's right to prosecute.[174] At common law, criminal limitations periods were nonexistent.[175] The statute of limitations is clearly a reflection of public will and a matter of grace at least until such time as the limitations period expires.[176] In *Chase Securities Corp. v. Donaldson*,[177] the Supreme Court expounded upon the origin and application of statutes of limitations, stating that:

> [s]tatutes 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

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171. *See Bargeron*, 402 Mass. 589, 524 N.E.2d 829 (1988). "[I]t is not reasonable to assume that the Legislature intended to delay the application of the new ten-year statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment." *Id.* at 593, 524 N.E.2d at 832.

172. *See, e.g.*, United States ex rel. Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir.), *cert. denied*, 460 U.S. 1037 (1982); Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928); State v. Ferrie, 243 La. 416, 144 So. 2d 380 (1962); State v. Merolla, 686 P.2d 244 (Nev. 1984); Rose v. State, 716 S.W.2d 162, 163 (Tex.App. 1986). *But see, e.g.*, Stoner v. State, 418 So. 2d 171, 178 (Ala. Crim. App. 1982) (statute of limitations in criminal context vests substantive right); Rubin v. State, 390 So. 2d 322 (Fla. 1980) (statute of limitations vests substantive right in criminal context).

173. State v. Hodgson, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987).

174. *Id.*

175. 1 C. TORCIA, *supra* note 54, § 90.

176. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

177. 325 U.S. 304 (1945).

> being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the [a]voidable 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.[178]

However, mere categorization of the statute of limitations as substantive or procedural sidesteps the central question of the enlarged limitations period's effect.[179] Instead, courts should look to the nature and function of criminal statutes of limitations.[180] *Ex post facto* laws, as pronounced in *Calder v. Bull*,[181] are those laws which (1) make an act criminal which was innocent when done; (2) aggravate a crime or make it greater than when committed; (3) increase the punishment; or (4) alter the rules of evidence and require lesser or different evidence to convict than that required at the time of the offense.[182] The statute of limitations' extension performs none of these impermissibles. The statute's extension merely extends the time in which prosecution is permissible. As such, the legislature presumably could free an offense of any limitations period or could provide for successive extensions of finite periods.[183] However, statutes should not be given a construction which destroys or impairs a vested right.[184] Obviously, when the legislature extends the statutory period prior to the expiration of the original period, the accused has not obtained a vested right to be free from prosecution. If expressly directed, the legislature may even apply the extended lim-

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178. *Id.* at 314 (citation omitted).

179. *Hodgson*, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987). *See also* State v. Frech Funeral Home, 185 N.J. Super 385, 389-90, 448 A.2d 1037, 1039 (quoting Busik v. Levine, 63 N.J. 351, 364, 307 A.2d 571, 578 (1973) ("it is simplistic to assume that all law is divided neatly between 'substance' and 'procedure.' A rule of procedure may have an impact upon the substantive result and be no less a rule of procedure on that account. . . .").

180. *Hodgson*, 108 Wash. 2d at 667, 740 P.2d at 851.

181. 3 U.S. (1 Dall.) 386 (1798).

182. *Id.* at 390.

183. People v. Smith, 171 Cal. App. 3d 997, 1003, 217 Cal. Rptr. 634, 637 (1985).

184. E. CRAWFORD, *supra* note 136, § 278.

itations period to revive "time-barred" claims.[185] The extension therefore, does not divest the accused of a vested right. Thus, neither the *Calder ex post facto* test, nor the vested rights theory prohibit retroactive application of the enlarged period.

The strict construction doctrine is frequently utilized as a judicial procedure, limiting retroactive application unless clearly required by express language or necessary implication.[186] Strict construction of penal statutes is favored because the legislature owes the citizenry a duty to clearly state those acts for the commission of which a citizen may lose his life or liberty.[187] Although the citizenry may rely upon existing elemental definitions or proof requirements,[188] the accused cannot reasonably develop a reliance or expectation as to the time limit for prosecution. Even if developed, is there any societal interest to be served by protecting the reliance? When the accused has committed all of the elements of an offense, the statute of limitations functions only to restrain prosecution within legislatively prescribed temporal limits. Logic rejects the argument that altering the statute of limitations affects the expectations of the citizenry as to the lawfulness of their conduct. At most, only the perpetrator develops a reliance upon the statute of limitations, purposefully evading detection until the legislatively prescribed period expires. Numerous jurisdictions recognize this phenomena and by statute, prevent the tolling of the limitations period during the period when the accused is out of state or beyond the sovereign's jurisdiction.[189]

The statute of limitations serves as a buffer, preventing the expenditure of judicial resources where logically, evidentiary items such as testimony and documents, have disappeared, grown stale, or been destroyed, and can no longer perform the necessary evidentiary function.[190] Thus, at worst, extension or elimination of the limitations bar results in reduced judicial efficiency by forcing the court to determine the validity of a prosecution, rather than rotely applying the limitations period to bar the same. Granted, the accused must be protected from the retroactive application of a definitional alteration of the criminal

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185. *See infra* notes 195-246 and accompanying text.

186. Kopczynski v. County of Camden, 2 N.J. 419, 424, 66 A.2d 882, 884 (1949) "[w]ords in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied."); N. SINGER, SUTHERLAND STAT. CONSTRUCTION § 41.04 (4th Ed. 1986).

187. N. SINGER, *supra* note 186, § 59.03.

188. For a discussion of the citizen's reliance interest and the need to protect such interests, *see* Note, *Retroactive Application Of Statutes: Protection Of Reliance Interests*, 40 ME. L. REV. 183 (1988).

189. 1 C. TORCIA, *supra* note 54, § 94.

190. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979).

elements.[191] However, retroactive application of the enlarged statutory period does not prevent the citizenry from making everyday decisions with reasonable certainty, and does not alter the definition of unlawful conduct.

The strict construction doctrine provides that penal statutes should not apply retroactively without clear notice that one's contemplated conduct is unlawful and that certain penalties will attach.[192] The strict construction doctrine is not an impediment to retroactive application of a legislatively enlarged statute of limitations because retroactive application of the enlarged period neither affects the definition nor the penalty for the crime.[193] Moreover, retroactive application does not breach *ex post facto* prohibitions because extending the period prior to prosecution neither aggravates the crime, increases the punishment nor alters the rules of legal testimony necessary for conviction.[194] Thus, there are no constitutional or doctrinal barriers to retroactive application of a legislatively-enlarged limitations period.

B. Reviving Time-Barred Claims

Courts which permit retroactive application of an enlarged criminal limitations period deny application to offenses "time-barred" at the extension.[195] However, revival of a time-barred offense does not offend *ex post facto* prohibitions. The *ex post facto* prohibition has long been confined to the criminal context[196] but has never been defined with great clarity. Instead, vague notions of "justice and fair play"[197] are used to support judicial restraints on perceived *ex post facto* legislation. Courts suggest that a right, if either "substantial" or "vested," may not be altered after the fact.[198]

Nineteenth century treatise writers like Judge Cooley first coined the notion of "substantial rights."[199] Cooley opined that legislatures may

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191. Alteration of the definitional elements of the crime is a classic example of *ex post facto* legislation and would be prohibited.

192. Commonwealth v. Broughton, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

193. State v. Hodgson, 44 Wash. App. 592, 603, 722 P.2d 1336, 1342 (1986) *aff'd in part, rev'd in part*, and *remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

194. *See* United States ex rel. Massarella v. Elrod, 682 F.2d 688 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983).

195. *See, e.g.*, People v. Smith, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985); State v. Hodgson, 108 Wash. 2d 662, 740 P.2d 848 (1987).

196. *See* Note *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1492 n.4 (1975) [hereinafter *Ex Post Facto Limitations*].

197. *See* Falter v. United States, 23 F.2d 420, 425-26 (2d. Cir.), *cert. denied*, 277 U.S. 590 (1928).

198. *See, e.g.*, Kring v. Missouri, 107 U.S. 221, 232 (1882).

199. *See* T. COOLEY, CONSTITUTIONAL LIMITATIONS 272 (1868).

prescribe different forms of criminal procedure but may not dispense with any substantial protections which existing criminal law affords the accused.[200] This vague notion of a substantial right "vested" in the defendant, unlawfully taken away by legislative change, formed the foundation for the Supreme Court's decision in *Kring v. Missouri*.[201] *Ex post facto* analysis and the propriety of retroactive application require consideration of three factors: reliance, legislative function, and potential for legislative abuse.[202] *Ex post facto* legislation is objectionable because purportedly, citizens rely upon the law currently in effect to shape their conduct. Certainly, this premise is supportable with respect to the elements of a crime. However, few alleged criminals know the law, much less rely on it.[203] Certainly, ignorance of the law will not excuse conduct in violation of current statutes.[204] Reliance should be protected only if reasonable. If an individual commits a crime, the mere passage of time should not endow the individual with a vested right to escape punishment for the alleged wrong. An alleged defendant can not reasonably rely upon the statute of limitations to shelter his wrongful conduct, and society owes him no such guarantee.

Ex post facto laws are also undesirable because they fail to serve their primary purpose, deterrence.[205] This concept of *ex post facto* laws assumes that criminal legislation is promulgated primarily for deterrent effect. However, statutes of limitations are mere procedural limitations and purport to serve no deterrent purpose. The statute of limitations has no measurable impact on allegedly criminal behavior, neither encouraging nor deterring such conduct.

Finally, *ex post facto* laws are objectionable because they represent a potential for legislative abuse.[206] No legislative vindictiveness exists where the legislature extends the statute of limitations, unless directed principally to one individual. Unlike the enactment of legislation directed specifically toward a single individual or group, extension of child sexual abuse limitation periods neither suggests nor represents an abuse of legislative process.

In the civil context, courts have upheld the legislature's power to revive time-barred actions.[207] In *Chase Securities Corp. v. Donaldson*,[208]

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200. *Id.*

201. 107 U.S. 221, 232 (1882).

202. *Ex Post Facto Limitations*, *supra* note 196, at 1497-1501.

203. *Id.* at 1497.

204. *See, e.g.*, United States v. Casson, 434 F.2d 415, 422 (D.C. Cir. 1970).

205. *Ex Post Facto Limitations*, *supra* note 196, at 1498.

206. *Id.* at 1500-01.

207. *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Campbell v. Holt, 115 U.S. 620 (1885); Liebig v. Superior Court, 209 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).

208. 325 U.S. 304 (1945).

the Supreme Court ruled that revival of a personal cause of action, where the lapse of time did not vest the party with title to real or personal property, did not offend the fourteenth amendment.[209] Statutes of limitations are arbitrary, and their shelter has never been recognized as a fundamental right.[210] Furthermore, statutes of limitations are measures of legislative grace, subject to legislative control.[211] "[S]tatutes of limitation go to matters of remedy, not to destruction of fundamental rights."[212]

In *Campbell v. Holt*,[213] the progeny of *Chase Securities*, the Supreme Court found that the right to defeat a debt by the statute of limitations was not a vested right, and the legislature's determination that time shall be no bar did not violate any right.[214] Man has no "*property* in the bar of the statute as a defense to his promise to pay."[215] "It is no natural right, . . . but the creation of conventional law."[216] No right is destroyed when the law restores a remedy which has been lost.[217]

Similarly, logic suggests that revival of the statute of limitations in the criminal context violates no constitutional barriers. The majority of jurisdictions have found the statute of limitations to be procedural, not substantive.[218] However, courts have suggested that the defendant acquires a right not to be prosecuted when the statute expires.[219] Supposedly, the defendant's full liberty has been restored in a manner analogous to the acquisition of property through adverse possession.[220] The distinction between extension and revival in the criminal context can only be justified on the premise that only when a right to prosecute is revived does an act which could not have been punished without the statute become punishable.[221] Such reasoning begs the question and only tortures an initially weak definition of the *ex post facto* prohibition.[222]

If the statute of limitations were classified as substantive, a prohibition against revival would mold a consistent, though improper, train

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209. *Id.* at 311-12.
210. *Id.* at 314.
211. *Id.*
212. *Id.*
213. 115 U.S. 620 (1885).
214. *Id.* at 628.
215. *Id.* at 629.
216. *Id.* The court noted that the phrase "vested rights" is not found in the Constitution. *Id.* at 628. The Court's opinion suggests that the *ex post facto* prohibition was designed principally to protect constitutionally guaranteed rights. *Id.* at 629.
217. *Id.*
218. *See supra* note 172.
219. *See supra* notes 120 through 170 and accompanying text.
220. *See Ex Post Facto Limitations*, *supra* note 196, at 1512 n.78.
221. *Id.*
222. *Id.*

of logic. If the statute of limitations is initially substantive, then the *ex post facto* prohibition should prevent retroactive application, and revival is impossible from the onset. However, as noted, classification of the statute of limitations as substantive is arbitrary and decidedly improper.

The majority of jurisdictions classify the statute of limitations as procedural.[223] However, magically, courts hold that, upon expiration of the right to prosecute, the statute of limitations vests the defendant with a substantive right. How can a purely procedural device suddenly bestow upon the defendant a substantive right? An example will expose the inconsistent and illogical nature of the reasoning. Assume the existence of a two year statute of limitations. X commits a crime on December 30, 1984. Y commits a crime on January 1, 1985. On December 31, 1986, the legislature abolishes the statute of limitations and decrees retroactive application. The time-barred theory would hold that X could not be prosecuted while Y could.[224] Why should X have a substantive right to avoid prosecution while Y does not, when within a two day time span, both committed the same offense? Either the statute of limitations is procedural or substantive, but it is no chameleon! Weak justifications couched in terms of offending "our instinctive feelings of justice and fair play"[225] explain little and do not justify the transformation.

If the courts are attempting to protect the defendant's reliance on the statute of limitations which existed at the time the crime was committed, then the *ex post facto* prohibition should prohibit not only revival, but extension as well. In *Kring v. Missouri*,[226] the Supreme Court concluded that the *ex post facto* prohibition should apply to all changes enhancing the position of the state in criminal trials at the expense of the defendant.[227] However, in *Thompson v. Utah*,[228] the Supreme Court narrowed the application of the *Kring*, concluding that changes in criminal procedure could be, but are not necessarily, *ex post facto*.[229] The Court held that the defendant had a right to a twelve person jury trial at the time of his offense and that right could not be taken from him at a second trial.[230] The logical implication of the decision is that rights vest

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223. *See supra* note 172.

224. The substantive rights theory would hold that the revised statute could not apply retroactively.

225. *See* Falter v. United States, 23 F.2d 420, 426 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

226. 107 U.S. 221 (1882).

227. *Id.* at 232.

228. 170 U.S. 343 (1898).

229. *Id.* at 352.

230. *Id.*

in the defendant upon the commission of the offense. However, subsequent Supreme Court decisions suggest that the decision in *Thompson* did not limit the power of the legislature to make changes in "non-constitutional" procedural rights.[231] The determination whether a non-constitutional right could be a "substantial right" was left unresolved.[232]

If, as suggested by the *Thompson* decision, the *ex post facto* prohibition is designed to protect constitutional rights and not non-constitutional rights,[233] then clearly the defendant's right to avoid prosecution cannot rise to the level of a constitutionally guaranteed right. Assuming the *ex post facto* prohibition is designed to protect the defendant's reliance interest, the defendant is in effect alleging he acted on the premise that the prosecution would face certain obstacles which were subsequently removed. Thus, the interest the defendant wants elevated to the level of a constitutionally guaranteed right is a dubious interest in avoiding prosecution after committing a criminal offense.[234]

Revival of a cause of action is an extreme exercise of legislative power[235] and should be done only in rare circumstances. Some procedural rules should not be applied retroactively.[236] Ideally, a court should balance the state's public policy and interest in prosecution against the defendant's right to a technical defense. Rather than a prophylactic rule against retroactive application, revival should be permitted unless the rule was widely relied upon, the revised rule cannot serve its purpose if retroactively applied, or a vindictive legislative motive pervades.[237]

In *Liebig v. Superior Court of Napa County*,[238] the California Court of Appeals permitted the revival of plaintiff's time-barred tort action for sexual molestation against her grandfather.[239] Holding that "vested

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231. *See, e.g.*, Beazell v. Ohio, 269 U.S. 167 (1925) (upholding change permitting judicial discretion in granting separate trials); Mallett v. North Carolina, 181 U.S. 589 (1901) (upheld statute permitting state to appeal grant of new trial); Thompson v. Missouri, 171 U.S. 380 (1898) (defendant had no vested right in rule of evidence prior to passage of Missouri statute).

232. *Beazell*, 269 U.S. at 171. The court noted that "[j]ust what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Id.*

233. For example, the prohibition may protect constitutionally guaranteed rights such as the right to a jury trial in a criminal proceeding.

234. *Ex Post Facto Limitations*, *supra* note 149, at 1513.

235. People v. Robinson, 140 Ill. App. 3d 29, _____, 487 N.E.2d 1264, 1266 (1986); Hopkins v. Lincoln Trust Co., 233 N.Y. 213, 213, 135 N.E. 267, 267 (1922).

236. For example, those rules upon which the defendant may reasonably rely, and which directly shape his conduct. For example, the interspousal testimonial privilege.

237. *See Ex Post Facto Limitations*, *supra* note 149, at 1513-16.

238. 208 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).

239. *Id.* at _____, 257 Cal. Rptr. at 578.

rights'' are not immune from retroactive laws where an important state interest is at stake, the court found that maximizing, for as expansive a period of time as possible, the sexual abuse claims of minor plaintiffs was an overriding state interest.[240] Similarly, in the criminal context, the state's interest in prosecuting and punishing child sexual abusers overrides defendant's interest in freedom from prosecution and permits the revival of time-barred actions. In *Chase Securities Corp. v. Donaldson*,[241] the Supreme Court noted that a multitude of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seemed small.[242] Thus, where the state interest is great, the legislature may revive a time-barred action. However, revival should not be presumed and should only be permitted where the legislature expressly prescribes such application.

Courts frequently rely on the Fourteenth Amendment of the United States Constitution[243] to forbid revival of a time barred claim.[244] However, the Supreme Court in both *Campbell v. Holt*,[245] and *Chase Securities Corp. v. Donaldson*[246] determined that revival of an action not vesting a real or personal property right does not offend the fourteenth amendment. How can an alleged defendant obtain a vested right to be free from prosecution when he commits an act criminal at the time of performance? To justify this conclusion for the reason that the defendant's act could not have been punished but for the statute ignores logic, escapes reason and is but an exercise in semantic circumlocution. The state's interest in prosecuting child sex abusers overrides any ''vested substantial right'' the defendant may have acquired.

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240. *Id.*

241. 325 U.S. 304 (1945).

242. *Id.* at 315.

243. The amendment provides in pertinent part that, ''nor shall any State deprive any person of life, liberty, or property, without due process of law. . .'' U.S. CONST. amend. XIV, § 1.

244. *See, e.g.*, Board of Education v. Blodgett, 155 Ill. 441, 40 N.E. 1025 (1895); Sanchez v. Access. Associates, 179 Ill. App. 3d 961, 535 N.E.2d 27 (1989); Markley v. Kavanagh, 140 Ill. App. 3d 737, 489 N.E.2d 384 (1986).

245. 115 U.S. 620 (1885).

246. 325 U.S. 304 (1945).

V. Conclusion

Children have been described as the largest indigent class on earth.[247] Children are uniquely unable to protect their own rights.[248] Given this inability to protect their own rights, it is imperative that we, as a society, endeavor to protect those who are unable to protect themselves. It is the mark of a civilized society. Statutes of limitations safeguard the accused against stale claims by discouraging victims from sleeping on their rights. Although child sex abuse victims may have a moral obligation to report the offense in a timely manner, the public derives no benefit by shielding the offender from prosecution while simultaneously penalizing the victim for his or her inability to report the offense. The offender should not be permitted to control his destiny by allowing him to manipulate the victim, impeding reporting and preventing prosecution. Certainly, neither logic nor public policy require that society maintain a helpless, silent vigil, permitting the child sexual abuser to avoid prosecution by unlawfully detaining his victim, thus preventing the victim's report and the state's prosecution of the offense. Yet, stringent application of the statute of limitations inflicts a similar injustice upon the child sex abuse victim.

The child victim, subject to unique reporting impediments, deserves an opportunity for legal redress. Child sexual abusers must be deterred and punished. Retroactive application of legislatively enlarged statutes of limitations accomplishes each of these desirable objectives. The mere extension of the limitations period, when mated with legislative purpose, supports a presumption for retroactive application. Given the minor's decided disadvantage in knowledge, power and resources, fairness demands that the child victim be given every opportunity for legal redress. Thus, absent manifest legislative intent to the contrary, the needs of society and the child sexual abuse victim are best served by retroactive application of the enlarged limitations period, and where expressly decreed, the revised limitations period may be applied to revive a time-barred claim.

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247. Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 Okla. City U.L. Rev. 561, 565 (1989).

248. For example, many states provide that children under the age of ten are presumptively incompetent to testify. States also vary as to the threshold below which a child is deemed automatically incompetent to testify. *See e.g.*, Kellum v. State, 396 A.2d 166 (Del. 1978) (3 years old); State v. Thrasher, 223 Kan. 1016, 666 P.2d 772 (1983) (4 years old).