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CONFLICT OF THE CRIMINAL STATUTE OF LIMITATIONS WITH LESSER OFFENSES AT TRIAL

ALAN L. ADLESTEIN*

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I. INTRODUCTION

Criminal statutes of limitations have long been a familiar part of the American legal landscape.¹ They are legislative devices to protect a defendant from the risk of erroneous conviction due to stale evidence. They are also perceived as protecting society from crime by promoting accurate results at trial and efficient use of the prosecutor's resources. In addition, such statutes imply that a lengthy passage of time after the commitment of a crime makes punishment unfair to the perpetrator and unproductive for society.

The concept that a defendant may be found guilty of an uncharged lesser offense,² instead of the offenses formally charged

1. See *infra* part III.A (discussing the history, nature, and purpose of the criminal statute of limitations).

2. For purposes of clarity, the term "lesser offense" is used throughout this Article. This general term encompasses several seemingly more specific terms, such as "lesser-included offense," "necessarily included offense," and "lesser-related offense," which reflect federal and state law variations of the general concept. See *infra* notes 297-315 and accompanying text. The state law definition of such an offense may vary from broad to narrow, and the definitions may be either judicial or legislative. In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court established the federal definition—a narrow interpretation of the term "necessarily included offense," found in Rule 31(c) of the Federal Rules of Criminal Procedure. See *infra* notes 300-14 and accompanying text. In contrast, most courts use the more traditional term "lesser-included offense," yet determine the meaning of "included" according to the law of the particular jurisdiction. That meaning may depend on the statutory

in the indictment or information, is also a recognized and well-established feature of the American criminal justice system.³ As with the statute of limitations, both the defendant and society are perceived to benefit from the doctrine of lesser offenses⁴ because its use avoids the stark choice between conviction or acquittal on the charged offense, thereby permitting the alternative choice of conviction for a lesser offense that may reflect more accurately the actual evidence at trial. This efficient use of the criminal trial thus encourages more accurate results in a single adjudicative event.

This Article considers the legal responses that occur when the statute of limitations conflicts with the lesser offense doctrine at trial. A recent example is illustrative.⁵

Late on the night of June 22, 1981, Candice Short was found dead in her car in the parking lot of a suburban New Jersey shopping mall. Her father and her husband John had begun to look for Candice when she failed to pick up the Shorts' daughter from the babysitter. Candice had been beaten and stabbed, possibly with a screwdriver. Her neck was crushed, causing death by asphyxiation.⁶ Although there were superficial indications of sexual assault and robbery, the police discounted both motives, quickly focusing on her husband as a primary suspect.⁷ Investi-

elements of offenses, the essential facts alleged in the indictment, or the facts developed at trial. See *infra* note 299 and accompanying text. "Lesser offense" is an appropriate term for the general discussion in this Article because it does not suggest any particular jurisdiction's choice of definition.

3. See *infra* part III.B.1 (discussing the history, nature, and purpose of the doctrine of lesser offenses at trial).

4. Lesser offense law may be embodied in a particular jurisdiction's statutes (usually, the criminal or judicial codes), rules of criminal procedure, judicially created law, or any combination of these.

5. The facts set forth in the following paragraphs pertain to the 1989 murder trial of John Short in Passaic County, New Jersey. The facts are derived from the opinion of the Supreme Court of New Jersey and the petitions and briefs of the parties filed in that court in *State v. Short*, 618 A.2d 316 (N.J. 1993), and from the unpublished opinion of the Superior Court of New Jersey, Appellate Division. *State v. Short*, No. A-4556-88T4 (N.J. Super. Ct. App. Div. July 15, 1991), reprinted in Supplemental Brief and Appendix on Behalf of Defendant-Appellant at 21a-34a, *Short*, 618 A.2d 316 (No. 34, 132) [hereinafter Defendant's Brief].

6. *Short*, 618 A.2d at 317-18.

7. Supplemental Brief and Appendix on Behalf of Plaintiff-Respondent at 1-2, *Short*, 618 A.2d 316 (No. 34, 132) [hereinafter Plaintiff's Brief]; *Short*, No. A-4556-

gation disclosed that Candice and her husband did not have a harmonious marriage and that John had recently become involved with another woman.⁸ The police could not corroborate John's questionable alibi,⁹ and they expected to use some circumstantial evidence that they had discovered to induce a confession.¹⁰ That confession, however, was not obtained, and the police investigation became inactive in November 1981 (perhaps, in part, because of the death of the original investigating officer).¹¹

In June 1987, six years after the crime, an agent of the county prosecutor's office resumed investigation of Candice Short's homicide. During the investigation, the prosecutor's office reinterviewed a woman who, soon after the crime, had reported to the police that she had seen a man and woman, with physical descriptions matching those of the Shorts, arguing violently in a car parked at the shopping mall on the evening of the homicide.¹² In February 1988, John Short was indicted in Passaic County, New Jersey, for the purposeful or knowing murder of his wife.¹³

At his trial, Short requested that the jury be instructed on the lesser offenses of manslaughter.¹⁴ The trial judge agreed that, under the New Jersey law of lesser offenses, Short was entitled to such an instruction.¹⁵ However, unlike murder, which had no limitations period in New Jersey, the state statute of limitations for manslaughter offenses was five years.¹⁶ The judge was thus

88T4 (N.J. Super. Ct. App. Div. July 15, 1991) at 6-8, *reprinted in* Defendant's Brief, *supra* note 5, at 26a-28a.

8. *Short*, 618 A.2d at 317-18.

9. *Id.* at 318.

10. *See* Plaintiffs' Brief, *supra* note 7, at 2.

11. *See Short*, No. A-4556-8814 (N.J. Super. Ct. App. Div. July 15, 1991) at 8 n.2, *reprinted in* Defendant's Brief, *supra* note 5, at 28a; Plaintiffs' Brief, *supra* note 7, at 2.

12. Plaintiffs' Brief, *supra* note 7, at 2-3. When originally interviewed by the police, the witness had identified erroneously the color of Candice Short's car. *See id.*

13. *Id.* at 3.

14. *Short*, 618 A.2d at 318. Under New Jersey law, three manslaughter offenses—passion-provocation manslaughter, aggravated reckless manslaughter, and reckless manslaughter—were possible lesser offenses of murder. *Id.*

15. *Id.*

16. *State v. Short*, No. A-4556-88T4 (N.J. Super. Ct. App. Div. July 15, 1991) at

faced with an apparent conflict between the state law of lesser offenses and the statute of limitations. The evidence could have supported a jury's verdict of purposeful or knowing murder, as charged in the indictment,¹⁷ but a jury could also have found evidence that John Short killed his wife with a passion-provoked or reckless state of mind during a heated argument—manslaughter, rather than murder.¹⁸ A 1988 indictment of Short for the same manslaughter offenses clearly would have been time-barred under New Jersey law, but to refuse him the opportunity to receive a verdict on lesser offenses to which he would have been entitled absent the statute of limitations would have deprived him of a significant right at trial.

This conflict between New Jersey's criminal statute of limitations and New Jersey's lesser offense doctrine raised questions of state procedural law and, arguably, federal constitutional law. Did the state's statute of limitations prohibit an instruction on a time-barred lesser offense, thereby leaving the jury with an all-or-nothing choice of whether Short was guilty or not guilty of murder—a choice between imprisonment and freedom?¹⁹ Did

9, reprinted in Defendant's Brief, *supra* note 5, at 29a.

17. The Appellate Division rejected Short's challenge to the sufficiency of the evidence supporting his conviction for murder. *Short*, No. A-4556-88T4 (N.J. Super. Ct. App. Div. July 15, 1991) at 12-13, reprinted in Defendant's Brief, *supra* note 5, at 32a-33a. The New Jersey Supreme Court did not certify that issue for appeal. See Defendant's Brief, *supra* note 5, at 1 (stating that the only issue certified for appeal was the charge to the jury concerning the effect of the statute of limitations on the lesser-included offense of manslaughter).

18. Under the New Jersey law of lesser offenses, the fact that Short presented an alibi defense at trial (thus denying any participation in the homicide) did not preclude a lesser offense instruction based on reckless commission of the homicide or commission with reasonably provoked heat of passion. *Short*, 618 A.2d at 319 (noting that Short's primary defense was that he was not present when his wife was murdered and that he argued in the alternative that the evidence only supported a conviction for manslaughter).

19. The prosecution did not seek the death penalty in its case against John Short. See *id.* at 318. He was sentenced to 30 years in prison. *Id.*

Lesser offense doctrine is intrinsically bound up with the constitutional doctrine of double jeopardy. See *infra* note 314. Even without a statute of limitations problem, convicting Short of murder would have barred his trial and conviction for the lesser offense of manslaughter. Similarly, convicting him of the lesser offense of manslaughter would imply an acquittal on the greater offense of murder, thus barring retrial for that offense. See, e.g., Bradley E. Kotler et al., Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of*

the state statute of limitations prevent a judgment of conviction by the trial court on the time-barred lesser offense (and, is this question meaningfully different from the prior question)? Did it matter whether the defendant or the prosecutor requested the lesser offense instruction, or whether the court gave the instruction *sua sponte*?²⁰ Did the conflict between these two state criminal law concepts become a matter appropriate for consideration under the United States Constitution because a defendant is entitled to be found guilty beyond a reasonable doubt?

Short reflects both the complexity of the conflict between the statute of limitations and the doctrine of lesser offenses at trial²¹ and the many theoretically possible approaches to its resolution.²² One possible approach is jurisdictional. Under this approach, the trial judge would refuse to instruct the jury on an otherwise appropriate,²³ time-barred lesser offense because the criminal statute of limitations presents a legislatively created subject matter barrier to the trial court's limited authority. A second possibility is nonjurisdictional. This approach would call

Appeals 1992-1993, 82 GEO. L.J. 597, 979-80 & nn.1514-16 (1994) (noting that double jeopardy bars successive prosecutions for both greater and lesser-included offenses).

20. Both the prosecution and the defendant may request a lesser offense instruction under most circumstances. See *infra* note 313 and accompanying text. Some jurisdictions hold that the trial court should instruct *sua sponte* if the lesser offense instruction is appropriate. See *infra* note 355. In *Short*, the defendant requested the instruction. See *supra* note 14 and accompanying text.

21. The *Short* trial is a common example of the conflict that is the subject of this Article. The case was unusual, however, because no explanation for the six-year delay in completing the homicide investigation is given in the record. *Short*, 618 A.2d at 318. Indeed, the investigator from the county prosecutor's office who took up the case apparently discovered no new evidence. See Plaintiff's Brief, *supra* note 7, at 2-3. As will be seen from other examples in this Article, lengthy periods of time between a crime and its prosecution more commonly occur because the evidence necessary to complete the investigation and to formally charge the defendant is not available. See, e.g., *State v. Delisle*, 648 A.2d 632 (Vt. 1994); see also *infra* notes 182-85 and accompanying text (discussing *Delisle*).

22. For many state courts, the conflict between the statute of limitations and lesser offense law will be an issue of first impression, but decisional law concerning either of the two competing legal concepts may constrain how a trial judge resolves the conflict.

23. Whether such an instruction is appropriate depends on the particular jurisdiction's definition of a lesser offense and its rules for applying the lesser offense doctrine. Both definition and application are central issues of disagreement in lesser offense law. See *infra* notes 296-335 and accompanying text.

for a judicial finding that the statute of limitations is merely an affirmative defense that is waived implicitly when a defendant requests a lesser offense instruction or, conversely, that it is not waived if the record fails to reveal the defendant's explicit, knowing, and voluntary waiver. A variation of this waiver-based approach would be for the trial court itself to give the defendant the option to waive the statute of limitations defense in order to qualify for an otherwise appropriate, time-barred lesser offense instruction and verdict.

A trial judge also might instruct the jury on the elements of the applicable lesser offenses, but also then inform it that the statute of limitations does not permit a guilty verdict on those offenses.²⁴ Yet another possibility would be for the trial judge to give the appropriate, time-barred lesser offense instruction without mentioning the statute of limitations. The judge could then refuse to convict or enter judgment on a guilty verdict for a lesser offense because the statute of limitations had run. Each of these attempts to resolve the conflict has been considered in either federal or state courts.²⁵

To further complicate the analysis, the Supreme Court has indicated that the failure to give the jury an appropriate lesser offense instruction may raise due process issues.²⁶ In addition, the Court has held that if a defendant is legislatively denied such a lesser offense "third option" in a capital offense trial, such a denial will invalidate both the conviction and sentence under the Eighth and Fourteenth Amendments.²⁷

This Article will attempt to resolve the quandary created by the conflict at trial between criminal statutes of limitations and otherwise appropriate lesser offenses. The Article will suggest and justify a solution that both state and federal courts should adopt in noncapital cases, while considering the validity and

24. In *Short*, the trial judge chose this option for instructing the jury. As a result, the state supreme court reversed *Short*'s murder conviction. *Short*, 618 A.2d at 318, 322; see *infra* notes 154-58 and accompanying text.

25. See *infra* part II.F.

26. *Keeble v. United States*, 412 U.S. 205, 212-14 (1973); see *infra* notes 48-59 and accompanying text.

27. *Beck v. Alabama*, 447 U.S. 625, 642-43 (1980); see *infra* notes 84-89 and accompanying text.

scope of the Supreme Court's constitutional approach to the conflict in capital cases.

Part II of this Article explores the development of the conflict between criminal statutes of limitations and lesser offenses at trial through a discussion of federal and state cases, all of which have failed to satisfactorily resolve the conflict. Part III considers the conflict from the perspective of the history, nature, and purposes of both the criminal statute of limitations and the doctrine of lesser offenses. Both Parts II and III conclude that judicially applied labels of jurisdiction and federal due process are inappropriate pathways to solving the conflict. Part IV presents a solution that is in accord with the goals of fair and efficient criminal adjudication, including the proper role of the jury, the equal treatment at trial of criminal defendants who have committed the same offense, and the appropriate place of state criminal statutory and procedural law in our federal constitutional system. This solution proposes (1) that the criminal statute of limitations is not jurisdictional and can be waived by a defendant; (2) that although a court may enter a judgment and sentence upon a conviction of a time-barred offense if there is a proper waiver, the Constitution does not require a lesser offense verdict option absent such a waiver; and (3) that a defendant's failure to waive the statute should not preclude the judge from instructing the jury on the elements of an otherwise appropriate, time-barred lesser offense as a defensive theory, but should preclude the court from giving the jury the option to return a verdict on that offense.

II. THE CRIMINAL STATUTE OF LIMITATIONS AND LESSER OFFENSES—DEVELOPMENT OF THE CONFLICT

A. *Prelude: The Problem of the Jurisdictional Label*

Labels are indispensable tools for lawyers. They enable a bundle of concepts to be expressed efficiently and are an essential part of the shared language of the profession. Over the years, however, a widely used legal label may constrain the growth of the law in a particular area. The label "jurisdiction" has played a significant role in the development of both the law of criminal statutes of limitations and the doctrine of lesser offenses, but

neither area is "jurisdictional" in its nature or purpose. Judicial efforts to apply or avoid jurisdictional barriers have influenced profoundly attempts to resolve the conflict between the criminal statute of limitations and the doctrine of lesser offenses.

Courts have refused to allow juries to consider an otherwise appropriate lesser offense because the statute of limitations has been construed to remove the court's authority over time-barred offenses. The criminal statute of limitations has thus retained an unwarranted elevation over the lesser offense doctrine in several states due to some courts' tenacious adherence to the statute's jurisdictional label. Courts have also prohibited juries from considering an otherwise appropriate lesser offense because the jurisdiction for that offense was assigned by statute to another court. The need to resolve this particular jurisdictional dilemma led the Supreme Court to give the lesser offense doctrine a patina of constitutional status. Constitutional due process thus arose as yet another label that would significantly confuse judicial attempts to resolve the conflict between the doctrine of lesser offenses and the statute of limitations.

B. The Jurisdictional Label and the Criminal Statute of Limitations

For many years, courts and treatise writers accepted without challenge the idea that, unlike a civil statute of limitations, a criminal statute of limitations was jurisdictional—a legislative declaration limiting the power of a court that is dependent on the legislature for its substantive authority.²⁸ Neither the par-

28. See, e.g., *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964) (explaining that the criminal statute of limitations is jurisdictional and therefore noticeable for the first time on appeal); *Benes v. United States*, 276 F.2d 99, 108-09 (6th Cir. 1960) (stating the general rule that unlike a civil statute of limitations, a criminal statute of limitations is construed as a bar to prosecution, not as a statute of repose going to remedy only); *Spears v. State*, 160 So. 727, 728 (Ala. Ct. App. 1935) (concluding that the failure to indict for the lesser offense within the statutory limitations period rendered the court without jurisdiction to try that lesser offense); *People v. McGee*, 36 P.2d 378, 379 (Cal. 1934) (finding that the more desirable rule is that the criminal limitations statute is jurisdictional); *State v. Steensland*, 195 P. 1080, 1081 (Idaho 1921) (stating that the time within which an offense is committed is a jurisdictional fact in all cases subject to limitation); 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 92, at 628-29 (15th ed. 1993) ("Although a statute of

ties nor the court could create jurisdiction over the offense because the statute of limitations, in effect, had removed it.²⁹ In cases in which the trial court had no jurisdiction over a lesser offense because the statute of limitations had run on that offense—but not the greater offense charged in the indictment or information—the defendant could not be convicted of the lesser offense.³⁰

As pointed out by one early-twentieth-century treatise writer, this jurisdictional approach had the collateral effect of preventing a prosecutor from avoiding the statute of limitations if the state's evidence supported a verdict on the lesser time-barred offense, but not the greater offense charged.³¹ Also, under the

limitations in a civil case is merely one of repose, a statute of limitations in a criminal case is jurisdictional in nature, creates a bar to a criminal prosecution, and can be asserted at any time"; 21 AM. JUR. 2D *Criminal Law* § 225 (1981) (determining that a failure to comply with the limitation statute for the lesser offense is a defect going to the very jurisdiction of the court); C.C. Marvel, Annotation, *Conviction of Lesser Offense, Against Which Statute of Limitations Has Run, Where Statute Has Not Run Against Offense with Which Defendant Is Charged*, 47 A.L.R.2D 887, 890-91 (1956) ("It has been held that the necessity of compliance with the limitations statute, despite the indictment for the larger crime upon which no statute has run, goes to the very jurisdiction of the court.").

29. See Tim A. Thomas, Annotation, *Waivability of Bar of Limitations Against Criminal Prosecution*, 78 A.L.R.4TH 693, § 3 (1990) (citing cases in which the accused was prohibited from waiving the criminal statute of limitations).

30. See, e.g., *Fuecher v. State*, 24 S.W. 292 (Tex. Crim. App. 1893) (reversing judgment because motion for arrest of judgment should have been granted to defendant convicted of time-barred lesser offense of assault instead of the charged murder offense); 11 CYCLOPEDIA OF FEDERAL PROCEDURE § 39.164 (3d ed. 1989) (stating that "an accused in a timely prosecution for a felony cannot be convicted of a lesser-included offense which is barred by the applicable limitations"); 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 18.5(a) (1984) (stating that convictions for a lesser offense on which the statute of limitations has run have been consistently held as barred by the statute of limitations). But see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 18.5(a) (2d ed. 1992) (acknowledging, in a more recent volume, the possibility of waiver of the statute of limitations by a defendant); Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 472 & n.176 (1984) (stating the majority rule that a defendant cannot be convicted on a time-barred lesser offense); 21 AM. JUR. 2D *Criminal Law* § 225 (1981) ("In short, one cannot be convicted of a lesser offense on a prosecution for a greater crime . . . commenced after the statute has run on the lesser offense.").

31. The effect of the statute cannot be avoided by charging a crime not barred, and convicting of an offense which is included in the charge, but which was barred. Thus, where a person is indicted for murder, for

jurisdictional concept, whether the defendant or the prosecutor requested consideration of the time-barred lesser offense at trial could make no difference because neither party can confer jurisdiction on the court when the legislature has not chosen to do so. For example, in *Chaifetz v. United States*,³² even though the defendant requested a time-barred misdemeanor instruction, the court of appeals upheld the district court's refusal to so instruct on jurisdictional grounds, finding that which party requested a time-barred lesser offense instruction was "immaterial."³³ A trial court could not instruct the jury on a time-barred lesser offense,³⁴ a jury could not return a verdict on such an offense,³⁵ and a court could not lawfully enter a judgment or sentence on a lesser offense within the jurisdictional bar of the statute of limitations.³⁶

C. The Jurisdictional Label and the Lesser Offense

Just as statutes of limitations—labeled "jurisdictional"—create barriers to a jury's consideration of otherwise appropriate lesser offenses, so do other statutes that are more clearly jurisdictional in nature. This situation commonly occurs when an indictment charges an offense that is within the statutory jurisdiction of the trial court, but an otherwise appropriate lesser offense is statutorily consigned to the exclusive jurisdiction of another court. Such a barrier to the consideration of lesser offenses arises, for example, when jurisdiction is divided statutorily between a trial court of general jurisdiction and a family or juvenile court with

which no limitation is prescribed, and is found guilty of assault with intent to murder, which was barred when the indictment was found, a motion in arrest of judgment should be sustained.

WILLIAM L. CLARK, JR., *HANDBOOK OF CRIMINAL PROCEDURE* 153 (2d ed. 1918) (citation omitted).

32. 288 F.2d 133 (D.C. Cir. 1960), *rev'd in part*, 366 U.S. 209 (1961).

33. *Id.* at 136.

34. *Id.*

35. *Id.*; see, e.g., *Blackmon v. State*, 101 So. 319 (Fla. 1924) (approving a charge that informed the jury that a verdict on any lesser offenses of murder was not permissible because the statute of limitations had run on those offenses).

36. *Chaifetz*, 288 F.2d at 135 ("The rule is well established that, when an accused is on trial for a felony (not barred by limitations), he cannot be convicted of a lesser-included offense if the latter offense is barred.").

exclusive jurisdiction over particular offenses or offenders. A similar situation arises when a federal district court has limited jurisdiction over offenses committed on an Indian reservation, but the tribal authority has exclusive jurisdiction over an offense that may be a lesser offense of that charged in the district court.³⁷ Again, the salutary purposes of the lesser offense doctrine would be frustrated by an application of the concept of jurisdiction.

One apparent solution to this particular type of jurisdictional conflict is for the court to look to the creative concept of ancillary jurisdiction, a "label within a label,"³⁸ or to construe the trial court's jurisdictional statute broadly to encompass traditionally appropriate lesser offenses at trial.³⁹ Such an analysis should, of course, include a judicial evaluation of the purposes served by both the statutory division of jurisdiction and the doctrine of lesser offenses at trial. As will be discussed in the next section, however, the Supreme Court did not choose to so limit its analysis in *Keeble v. United States*,⁴⁰ but created, in dictum, a constitutional component of the lesser offense doctrine that has confused lesser offense law for over two decades.

37. See, e.g., *Kills Crow v. United States*, 451 F.2d 323 (8th Cir. 1971) (disapproving jury instruction for lesser-included offense of simple assault even though district court had statutory jurisdiction of the greater offense of aggravated assault under Major Crimes Act, 18 U.S.C. §§ 1153, 3242), cert. denied, 405 U.S. 999 (1972), overruled sub silentio by *Keeble v. United States*, 412 U.S. 205 (1973); *Douglass v. State*, 466 N.E.2d 721, 722 (Ind. 1984) (approving guilty plea to lesser offense than that charged in trial court where juvenile court would have jurisdiction of that offense if originally charged).

38. See, e.g., *Slater v. State*, 606 A.2d 1334 (Del. 1992) (recognizing superior court's "derivative jurisdiction" over lesser offense within exclusive jurisdiction of family court).

39. See, e.g., *Marine v. State*, 607 A.2d 1185, 1200-06 (Del. 1992) (en banc) (interpreting state statutory scheme to permit trial court to maintain jurisdiction over defendant tried as an adult for first-degree murder, even though jury found defendant guilty of lesser offense of second-degree murder—an offense that would have been, if originally charged, within the jurisdiction of the family court); *Kimball v. State*, 678 P.2d 675 (Nev. 1984) (finding that the trial court, which had original jurisdiction over the gross misdemeanor charge, also had jurisdiction to convict and sentence defendant for lesser misdemeanor offense, even though that offense, if originally charged, would have been within jurisdiction of justice's court); *State v. Saulnier*, 306 A.2d 67 (N.J. 1973) (same).

40. 412 U.S. 205 (1973); see *infra* notes 49-59 and accompanying text.

D. Challenges to the Jurisdictional Label—In re Winship,⁴¹ *Keeble v. United States*, and *United States v. Wild*⁴²

The seeds of the quandary that is the subject of this Article were planted in the 1970s. Earlier conflicts between the criminal statute of limitations and the lesser offense doctrine were resolved by adhering to the jurisdictional label of the limitations statute, precluding an otherwise appropriate lesser offense instruction, verdict, or conviction. After the 1970s, however, the easy reliance on the jurisdictional solution became unacceptable in the federal courts and began to crumble in the state courts as well. Meanwhile, the Supreme Court infused the concept of constitutional due process into the doctrine of lesser offenses at trial. This infusion argued against a jurisdictional interpretation of a federal statute that apparently precluded a lesser offense instruction.

Although *In re Winship*⁴³ is one of the most significant criminal due process cases of the past quarter century, this status is not due to the Supreme Court's statement there that every accused is protected against conviction except upon proof beyond a reasonable doubt.⁴⁴ That standard of proof was already well-established throughout the country.⁴⁵ Rather, *Winship* was important because it opened fact-finding in state criminal trials to federal judicial review under the aegis of the Due Process Clause.⁴⁶ *Winship* thus cleared the way for the Court's 1979 holding that federal district courts must consider habeas corpus petitions from state prisoners who allege that they were not convicted upon evidence that would convince a rational trier of fact of their guilt beyond a reasonable doubt.⁴⁷

41. 397 U.S. 358 (1970).

42. 551 F.2d 418 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977).

43. 397 U.S. 358.

44. *Id.* at 364.

45. *Id.* at 372 (Harlan, J., concurring). In fact, the context of *Winship's* holding was a nonjury adjudication of delinquency in New York Family Court. *Id.* at 360, 368. The application of a fundamental criminal procedural right in that context was an important part of *Winship's* holding.

46. *See id.* at 364.

47. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979). As the Court noted, "[a]fter *Winship* the critical inquiry . . . must be not simply to determine whether the jury was properly instructed [using the standard of proof beyond a reasonable doubt], but

In 1973, *Winship's* Due Process holding led the Supreme Court, in *Keeble v. United States*,⁴⁸ to decide whether a verdict of a jury that did not receive an appropriate lesser offense instruction was subject to attack for failing the reasonable doubt/due process standard.

Keeble was a Native American who got into a violent argument on an Indian reservation with his brother-in-law over the mistreatment of Keeble's sister.⁴⁹ The brother-in-law died of exposure after Keeble severely beat him.⁵⁰ Under the Major Crimes Act of 1885 (the Act),⁵¹ federal district courts have exclusive jurisdiction over a specific list of serious offenses committed by an Indian on a reservation.⁵² Other lesser crimes not listed in the Act remain within the exclusive jurisdiction of the tribe.⁵³ Keeble was charged and, after the trial judge denied his request for a lesser offense instruction for simple assault, convicted in district court for assault with intent to commit serious bodily injury.⁵⁴ The judge refused the instruction because the lesser offense was not specified in the Act and, therefore, was

to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318.

In more recent years, the Court has directed its attention to clarifying the precise definition of the reasonable doubt standard itself. *Winship*, in retrospect, made further federal involvement in state jury process inevitable. *See, e.g.,* *Victor v. Nebraska*, 114 S. Ct. 1239 (1994) (holding that state court instruction defining reasonable doubt did not violate Due Process Clause); *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) (holding that state court instruction defining reasonable doubt did violate the Due Process Clause). In *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), the Court unanimously held that a constitutionally deficient reasonable doubt instruction is never harmless error because the jury simply will not have reached a "verdict of guilty-beyond-a-reasonable-doubt" as required by the Sixth Amendment's jury trial guarantee. *Id.* at 2082. This constitutional restraint, as well as the Due Process Clause, served to control jury decisionmaking in criminal cases in both state and federal courts.

48. 412 U.S. 205 (1973).

49. *Id.* at 207.

50. *Id.*

51. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (current version at 18 U.S.C. §§ 1153, 3242 (1994)).

52. *Keeble*, 412 U.S. at 206.

53. *Id.* at 209-10.

54. This charge is immaterially different from one of the offenses listed in the Act. *Id.* at 206.

not within the statutory jurisdiction of the trial court.⁵⁵ Silently brushing aside the jurisdictional argument of the three dissenters,⁵⁶ the majority of the Court, in an opinion by Justice Brennan (the author of the majority opinion in *Winship*), agreed with the petitioner that the Act did not require that he be deprived of an instruction on a lesser-included offense.⁵⁷ But, in achieving this statutory construction, *Winship's* due process concept was pushed in an unexpected direction by Justice Brennan:

True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict. Indeed, while we have never explicitly held that the

55. *Id.*

56. As Justice Stewart stated in dissent:

"It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to decide a case." Were the petitioner's motion for an instruction on simple assault to be granted, and were a jury to convict on that offense [an issue the majority did not reach], I should have supposed until the Court's decision today that the conviction could have been set aside [on motion of the defendant] for want of jurisdiction.

Id. at 217 (Stewart, J., dissenting) (citations omitted).

57. *Id.* at 214.

Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions.⁵⁸

Thus, finding impetus, if not compulsion, in the Due Process Clause, the Court elevated the stature of the lesser offense doctrine and diminished jurisdictional concerns.⁵⁹

Jurisdictional concerns for the nature of the statute of limitations were similarly weakened in the federal courts by the D.C. Circuit in 1977 in *United States v. Wild*.⁶⁰ Because the federal statute of limitations⁶¹ was about to expire, Wild, an official of Gulf Oil Corporation under investigation for illegal corporate campaign contributions, offered to execute a written limitations waiver to forestall immediate indictment.⁶² The waiver, drafted by Wild's counsel, was accepted by attorneys for the Watergate Special Prosecution Force in the anticipation that Wild would further their investigation. That result did not occur, and Wild was later indicted for unlawful cash contributions to two members of the United States Senate, including the contribution that

58. *Id.* at 212-13.

59. Later court of appeals decisions held that once such a lesser offense instruction was given in a Major Crimes Act case, as required by *Keeble*, the district court would have power to convict and sentence a defendant found guilty of the lesser offense, even though that offense was not listed in the Act. *United States v. John*, 587 F.2d 683, 688 (5th Cir.) (alternative holding) (holding that the Supreme Court had recognized implicitly that federal courts have jurisdiction to convict and punish for a lesser offense of the crimes enumerated in the Act), *cert. denied*, 441 U.S. 925 (1979); *Felicia v. United States*, 495 F.2d 353 (8th Cir.) (same), *cert. denied*, 419 U.S. 849 (1974). Making no reference to these decisions, the Supreme Court noted in *Spaziano v. Florida*, 468 U.S. 447 (1984), that it had "assumed" such jurisdiction to convict in *Keeble*, *id.* at 454 n.5. In *United States v. Walkingeagle*, 974 F.2d 551 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1818 (1993), the court, relying on the implications of *Keeble*, held that the trial court had jurisdiction under the Act to convict and sentence for a lesser-included misdemeanor offense not specified in the Act, even if the trial court granted a pre-verdict judgment of acquittal on all of the government's felony charges under the Act, *id.* at 554.

60. 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977). The author of this Article was a member of the Watergate Special Prosecution Force team that tried and briefed *Wild*.

61. The particular statute of limitations involved was three years and was then found at 2 U.S.C. § 455(a) (Supp. V 1975).

62. *Wild*, 551 F.2d at 420.

was the subject of the waiver agreement and for which the statute of limitations had expired.⁶³ Wild's trial counsel successfully moved to dismiss the count of the indictment based on the time-expired payment, as the district court agreed that the statute of limitations was jurisdictional and could not be waived by the parties.⁶⁴ Distinguishing its earlier decisions that seemed to indicate the opposite,⁶⁵ the court of appeals refused to find that the statute of limitations presented a jurisdictional bar to the prosecution of the time-barred federal offense.⁶⁶ After considering the policy behind the statute of limitations,⁶⁷ the court stated:

It seems to us, too, that if a defendant may waive certain constitutional rights, he should certainly be capable in this instance of waiving a statutory right such as the statute of limitations If the strong policies behind these rights [the right to counsel, the protection against double jeopardy, and the trial venue right] are not violated by a rule permitting them to be waived by a defendant, we cannot find that the limitation statute's policy is violated here⁶⁸

63. *Id.* at 421.

64. *Id.*

65. *Id.* at 422; see *supra* notes 32-36 and accompanying text (discussing the D.C. Circuit precedent most relied on by the appellant, *Chaifetz v. United States*, 288 F.2d 133 (D.C. Cir. 1960), *rev'd in part*, 366 U.S. 209 (1961)).

66. The court of appeals relied on *United States v. Cook*, 84 U.S. 168 (1872), for its holding that the federal criminal statute of limitations was not jurisdictional. *Wild*, 551 F.2d at 421-22. In *Cook*, the Court held that a criminal defendant's demurrer to an indictment based on the statute of limitations was inappropriate and that, instead, the statute must be raised as a defense that the government may rebut by showing either that the offense did in fact occur within the statutory period or by showing the factual presence of a tolling exception. *Cook*, 84 U.S. at 177-80; see also *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917) (holding that the criminal statute of limitations is a defense that must be asserted at trial).

67. Quoting language from *Toussie v. United States*, 397 U.S. 112, 114-15 (1970), see *infra* note 263 and accompanying text, the court saw the policy behind the statute of limitations to be the protection of the defendant from a stale prosecution and the encouragement of law enforcement officials to act promptly, *Wild*, 551 F.2d at 424. The court also found it persuasive that Professors Moore and Wright, in their treatises on federal practice and procedure, agreed that under the preferred reading of Rule 12(b) of the Federal Rules of Criminal Procedure, the criminal statute of limitations was waived if not raised at or before trial. *Id.*; see *infra* note 262 and accompanying text.

68. *Wild*, 551 F.2d at 424-25.

Although the *Wild* holding was limited to a situation in which the defendant made a counseled written waiver of the statute of limitations before its expiration,⁶⁹ in retrospect it appears that the general notion of the statute as a bar to the jurisdiction of the trial court received a fatal blow, at least in the federal courts.⁷⁰ Several state high courts have also cited *Wild* in recent cases in which they held that their state statutes of limitations were not jurisdictional and that a defendant could waive the statute.⁷¹ Once the jurisdictional barrier is overcome, it is easy to reach the conclusion that a defendant is entitled to a requested lesser offense instruction on an appropriate but time-barred offense.

However, what if a state court, relying on state precedent and its view of legislative intent and public policy, rejects the approach of the majority of the federal circuits and continues to find that the state statute of limitations is an absolute jurisdic-

69. *Id.* at 425.

70. See, e.g., *Acevedo-Ramos v. United States*, 961 F.2d 305, 307-08 (1st Cir.) (holding that a guilty plea to a time-barred offense implicitly waives the statute of limitations and stating that "every circuit that has addressed it has held that the statute of limitations is a waivable affirmative defense rather than a jurisdictional bar"), *cert. denied*, 113 S. Ct. 299 (1992); *United States v. Arky*, 938 F.2d 579, 581-82 (5th Cir. 1991) (per curiam) (holding that the statute of limitations is an affirmative defense that is waived if not raised at trial and stating that "[s]ome courts have reasoned that the statute of limitations limits the court's subject-matter jurisdiction[] . . . [but t]his position . . . has been rejected by the majority of the circuits and commentators"), *cert. denied*, 112 S. Ct. 1268 (1992).

71. See, e.g., *State v. Littlejohn*, 508 A.2d 1376, 1382 (Conn. 1986) (holding that defendant should have been permitted to plead to substitute information charging time-barred offense because statute of limitations is affirmative defense subject to voluntary and intelligent waiver); *Brooks v. State*, 584 A.2d 82, 86 (Md. Ct. Spec. App. 1991) (holding that statute of limitations is not jurisdictional and is an affirmative defense that was waived by defendant's failure to raise it at trial); *Conerly v. State*, 607 So. 2d 1153, 1158 (Miss. 1992) (upholding guilty plea to time-barred offense because better rule is that statute of limitations is not jurisdictional and may be waived by counseled guilty plea); *State v. Lambrechts*, 585 A.2d 645, 646-47 (R.I. 1991) (finding that defendant's request for an instruction on a time-barred lesser offense was an election not to rely on affirmative defense of statute of limitations); *State v. Pearson*, 858 S.W.2d 879, 886-87 (Tenn. 1993) (finding that statute of limitations is not jurisdictional and may be the subject of a knowing waiver by defendant who pleads guilty to a time-barred offense, but that record did not support such a waiver).

tional bar?⁷² Does *Keeble's* due process language foretell constitutional doom for such a state law position when it forecloses an otherwise appropriate lesser offense instruction? In addition, if a defendant can waive the statute of limitations on a time-barred lesser offense because the jurisdictional label is abandoned, may a court then *force* the defendant to make such a waiver in order to obtain an instruction on the time-barred offense—thus permitting judgment and sentence on the lesser offense verdict? In the 1980s, the Supreme Court's decisions concerning lesser offense instructions in state capital cases heightened the quandary.

E. Lesser Offenses and the Supreme Court's Capital Cases—Beck v. Alabama,⁷³ Spaziano v. Florida,⁷⁴ and Schad v. Arizona⁷⁵

1. Beck v. Alabama—*Legislative Preclusion of Lesser Offenses*

If *Winship's* due process requirement of proof beyond a reasonable doubt⁷⁶ necessarily implied that an appropriate lesser offense option must be submitted to a jury, then that constitutional imperative surely would be a significant factor in resolv-

72. See, e.g., *Eckl v. State*, 851 S.W.2d 428, 429 (Ark. 1993) (concluding in dictum that statute of limitations is jurisdictional in the sense of not being subject to waiver in a criminal case); *People v. Chadd*, 621 P.2d 837, 847-48 (Cal.) (finding that the statute of limitations, being jurisdictional, compels reversal of conviction for time-barred offenses despite fact that defendant pleaded guilty to those offenses and did not attack conviction below), *cert. denied*, 452 U.S. 931 (1981); *People v. Ognibene*, 16 Cal. Rptr. 2d 96, 97, 98-99 (Cal. Ct. App. 1993) (finding defendant's request for a time-barred lesser offense instruction properly denied because court cannot enter judgment of conviction for such an offense); *Cane v. State*, 560 A.2d 1063, 1065-66 (Del. 1989) (*per curiam*) (stating in dictum that statute of limitations is jurisdictional in nature and confers substantive rights that a defendant may not waive, as distinguished from an affirmative defense); *State v. Sullivan*, 541 A.2d 450, 454 (R.I. 1988) (holding that defendant's request for an otherwise proper, time-barred lesser offense instruction was correctly denied by trial court because no conviction was possible on that offense); *State v. Seagraves*, 837 S.W.2d 615, 618, 621 (Tenn. Crim. App. 1992) (finding that trial court did not have subject matter jurisdiction to try appellant for time-barred lesser offense and that defendant may raise issue for first time on appeal).

73. 447 U.S. 625 (1980).

74. 468 U.S. 447 (1984).

75. 501 U.S. 624 (1991).

76. *In re Winship*, 397 U.S. 358 (1970); see *supra* notes 44-47 and accompanying text.

ing a conflict between the lesser offense doctrine and the statute of limitations. Seven years after Justice Brennan conjectured, in *Keeble*, on the due process implications of the lesser offense instruction,⁷⁷ his words were quoted in full and relied upon by the majority in *Beck v. Alabama*.⁷⁸

At the time of Beck's trial for the capital offense of intentionally killing a robbery victim, Alabama's death penalty statute prohibited the trial judge from giving a noncapital lesser offense instruction.⁷⁹ Instead, the statute required the trial court to give the jury only the choice between convicting on the charged capital crime or setting the defendant free.⁸⁰ Beck testified at trial that he had participated in a planned robbery, but that his accomplice in the robbery unexpectedly killed the victim.⁸¹ Felony murder, which does not require an intentional killing, was traditionally a noncapital lesser-included offense of the charged capital offense under Alabama law.⁸² The trial judge in *Beck*, relying on the death penalty statute, refused to give the other-

77. *Keeble v. United States*, 412 U.S. 205, 212-13 (1973); see *supra* note 58 and accompanying text.

78. 447 U.S. 625, 634-35 (1980).

79. ALA. CODE § 13-11-2(a) (1975). This provision is set out in *Beck*, 447 U.S. at 628-29 n.3.

80. *Beck*, 447 U.S. at 628-29. Under Alabama law, if the jury found the defendant guilty, it was required to impose the death penalty. *Id.* at 629. The trial judge could accept or reject the sentence after a hearing on aggravating and mitigating circumstances. *Id.*

81. *Roberts v. Louisiana*, 428 U.S. 325 (1976), decided four years before *Beck*, addressed a Louisiana death penalty statute. In a three-Justice opinion announcing the judgment of the Court, Justice Stevens concluded that the Louisiana death penalty statute was unconstitutional because it took a position opposite that of the Alabama statute later considered in *Beck*. *Id.* at 335-36. In Louisiana, the trial judge was required to give lesser offense instructions for second-degree (noncapital) murder and manslaughter in every case where the jury was trying a charge of first-degree (capital) murder, regardless of whether there was any evidence to warrant such an instruction. *Id.* at 334-35. That procedure had the effect of inviting the jury to choose acquittal over a death sentence (which was then mandatory upon conviction under Louisiana law) in an arbitrary and capricious disregard of both their oath and the judge's instructions on the law of the charged offense. *Id.* at 335. The Stevens plurality view carried the judgment of the Court over the five remaining justices because the concurring opinions of Justices Brennan and Marshall stated that the death penalty was unconstitutional. *Id.* at 336-37 (Brennan, J., concurring and Marshall, J., concurring). None of the opinions of the Court referred to *Keeble*.

81. *Beck*, 447 U.S. at 629-30.

82. *Id.* at 628-29.

wise appropriate lesser offense instruction.⁸³

Beck argued on appeal that he should have been permitted the lesser offense instruction of (noncapital) felony murder, rather than face the death-or-complete-acquittal choice that the Alabama statute gave the jury.⁸⁴ The Supreme Court agreed and, relying on the lesser offense discussion in *Keeble*, held that Alabama's unique statutory procedure violated due process.⁸⁵ Pointing out that the federal courts and every state court that had considered the issue recognized a right to a lesser offense instruction when the evidence warranted it,⁸⁶ the Court stated:

While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the “third option” of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments⁸⁷

Finding the Alabama statute unconstitutional, the Court struck down not only Beck's death sentence, but also his conviction on the merits.⁸⁸ The Court reasoned that the unavailability

83. *Id.* at 628-30.

84. Emphasizing the stark choice, the judge told the jury that if it acquitted Beck of the charged offense, “he ‘must be discharged’ and ‘can never be tried for anything that he ever did to [the victim] Roy Malone.’” *Id.* at 630 (citing Case Record at 743).

85. *Id.* at 635-38.

86. *Id.* at 636-37. The Court noted judicial decisions from 46 states that held that a defendant is entitled to a lesser-included offense instruction when the evidence warrants it, but also noted that states had differed on “the quantum of proof” necessary to give rise to a right to such an instruction. *Id.* at 636-37 n.12.

87. *Id.* at 637.

88. *Id.* at 642-43, 646.

of a "third option" verdict, to which the defendant otherwise would have been entitled, made the jury's conviction unreliable and its decision of guilt beyond a reasonable doubt uncertain.⁸⁹

Although the Court specifically refused to decide whether the Due Process Clause would require a court to give a lesser offense instruction in a noncapital case,⁹⁰ and although the Court placed its decision squarely in its line of capital cases requiring procedural rules that do not diminish the reliability of fact-finding because of the special nature of the death penalty,⁹¹ it is not surprising that commentators have interpreted *Beck's* reasoning to apply to noncapital verdicts as well.⁹² However, in the fourteen years since *Beck*, the Court has yet to make that extension of *Winship's* notion of due process. Such an extension would be unlikely and imprudent.

89. *Id.* at 642-43. Two years after *Beck*, in *Hopper v. Evans*, 456 U.S. 605 (1982), the Court reversed a Fifth Circuit habeas corpus decision that found a *Beck* violation when the defendant was denied a lesser offense instruction under the Alabama statute later invalidated in *Beck*. The Court held that the Alabama statute did not prejudice this defendant because his own evidence at trial—the defendant confessed his intentional murder to the jury—could not possibly have supported a lesser offense instruction under generally applicable Alabama law. *Id.* at 608, 611-12. The Court explained that although *Beck* stated that a lesser offense preclusion statute would introduce a level of uncertainty that could not be tolerated in capital cases, the holding of the case was that the court must permit the jury to consider a verdict of guilt of a lesser-included noncapital offense in every case only if "the evidence would have supported such a verdict." *Id.* at 610 (quoting *Beck*, 447 U.S. at 627).

90. *Beck*, 447 U.S. at 638 n.14.

91. *Id.* at 638, 642-43. Chief Justice Burger, writing for the majority in *Hopper*, characterized *Beck* as an Eighth Amendment decision that was concerned with channelling jury verdicts in death cases rather than as a due process decision. *Hopper*, 456 U.S. at 611 ("Our holding in *Beck*, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided."); see *supra* note 89.

92. Blair, *supra* note 30, at 464-65 (stating that the due process rationale of *Beck* should apply in noncapital cases because the integrity of the jury's fact-finding process is involved); Edward G. Mascolo, *Procedural Due Process and the Lesser Included Offense Doctrine*, 50 ALB. L. REV. 263, 291-92 (1986) (noting that lesser-included offense instructions perform exactly the same function in capital and noncapital cases by reducing the risk of erroneous jury verdicts and that there is no reason to limit the *Keeble/Beck* analysis to capital cases); Dianne S. McGaan, Note, *Beck v. Alabama: The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 WIS. L. REV. 560, 582-83 (stating that *Beck's* reasoning concerning a fair fact-finding process should be applied to noncapital cases).

In *Beck*, the Court chose to elevate the lesser offense doctrine to constitutional status by building upon *Keeble*'s intuitive premise that a jury cannot be relied upon to follow the court's instructions—requiring proof of every element of the charged greater offense beyond a reasonable doubt—when the evidence reveals the defendant's commission of a lesser crime upon which the jury does not have a verdict option.⁹³ The problem in *Beck*, however, was that the Alabama legislature removed the jury's otherwise appropriate lesser offense options in capital cases while requiring the jury's sentence of death to follow a guilty verdict.⁹⁴ This result was a unique and constitutionally faulty reaction by Alabama to the Court's disapproval of unguided jury discretion in imposing the death penalty expressed in *Furman v. Georgia*.⁹⁵ Why the Court did not choose to respond to that issue solely in terms of the narrow context of the Eighth Amendment's application in capital cases is unclear. In any event, it would seem inappropriate to extrapolate from the holding of *Beck* to another capital case in which the trial court, applying state lesser offense law of general applicability, found that a lesser offense option was improper under that law, even

93. In *Keeble*, Justice Brennan cited no authority for his conclusion that a "third option" lesser offense results in a more rational jury verdict. *Keeble v. United States*, 412 U.S. 205, 212-13 (1973). It would be difficult empirically to test that hypothesis, which, at its core, expresses a distrust in the jury's ability to follow the trial court's instructions to acquit if the originally charged offense is not proven to the jury's satisfaction beyond a reasonable doubt. Statistical data concerning the presence or absence of a noncharged lesser offense instruction and verdict option in a completed prosecution is not readily available. Relevant data could be developed by an original study of jury verdict forms. Perhaps a statistical correlation would appear between the number of defendants acquitted of the offense(s) in the indictment or information when there was a "third option" and the number of defendants convicted of such originally charged offenses when there was not a lesser offense option. Just what conclusions could be drawn from such a correlation would then remain to be seen.

94. *Beck*, 447 U.S. at 639-40. The Court rejected Alabama's argument in support of its capital case statutes, which prohibited any lesser offense instruction and made a jury sentence of death mandatory—subject to the judge's undisclosed final sentencing authority—in light of *Furman v. Georgia*, 408 U.S. 238 (1972). See *Beck*, 447 U.S. at 639-43. The Court stated, "[t]hus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." *Id.* at 640.

95. 408 U.S. at 314 (White, J., concurring).

though that ruling left the jury with no options other than to convict or to acquit on the charged capital offense. Therefore, at most, the Due Process Clause after *Keeble* and *Beck* informs, but does not solve, the quandary of the conflict between lesser offenses at trial and the statute of limitations, even in capital cases.

2. *Spaziano v. Florida*⁹⁶—*Does Due Process Require Waivability?*

The Court's puzzling opinion in *Spaziano v. Florida*, its first consideration of the conflict between lesser offense doctrine and the statute of limitations,⁹⁷ renews the connection between due process and lesser offenses that was born in *Keeble* and applied in *Beck*, but *Spaziano*'s result seems to turn away from that connection's implications.

Spaziano was convicted and sentenced to death for the first-degree (premeditated) murder of a Florida woman, whose body

96. 468 U.S. 447 (1984).

97. The Supreme Court originally refused to grant certiorari to *Spaziano* after the Florida Supreme Court upheld his conviction but remanded his death sentence. *Spaziano v. Florida*, 454 U.S. 1037 (1981) (denying certiorari). Justices Marshall and Brennan dissented from the Court's refusal to hear the case not only because they believed the death penalty was cruel and unusual punishment under the Eighth Amendment, but also because they believed that "[t]he principles underlying *Keeble* and *Beck* would seem to apply with just as much force where the statute of limitations on the lesser-included offenses has run." *Id.* at 1039 (Marshall, J., dissenting). Justice Blackmun also dissented from the certiorari denial in order to consider the lesser offense issue. *Id.* at 1041 (Blackmun, J., dissenting).

One year before, the same two Justices had joined Justice Blackmun (who would later write the opinion for the Court in *Spaziano*) in dissenting from the Court's denial of certiorari in a Florida death penalty case, *Holloway v. Florida*, 449 U.S. 905 (1980). *Holloway* was sentenced to death after his conviction by a Florida jury that was not instructed on lesser noncapital offenses because the state statute of limitations had run on those offenses. *Id.* at 906; see *infra* note 108 and accompanying text. In his dissent, Justice Blackmun said:

I am inclined to the view that petitioner retains his right to a lesser-offense instruction. The Court's decisions in both *Keeble* and *Beck* imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential factfinding function. Whether the trial court properly may enter a judgment of guilt should the jury convict for a [time-barred] lesser included offense seems to me a separate, *legal* matter with which the factfinder need have no concern.

Id. at 908 (Blackmun, J., dissenting) (citations omitted).

had been disposed of in a garbage dump.⁹⁸ The state's primary witness was a sixteen-year-old boy whom Spaziano had taken to the dump and shown the bodies of two women whom Spaziano claimed to have raped, tortured, and murdered.⁹⁹ The Supreme Court granted Spaziano's second petition for certiorari,¹⁰⁰ which raised two issues: (1) whether, under *Beck*, the conviction and sentence violated the Constitution because the jury was precluded by the trial court from considering time-barred, but otherwise appropriate, noncapital lesser offenses, and (2) whether the trial judge's override of the jury's recommendation of life imprisonment, as permitted by Florida law, was unconstitutional.¹⁰¹ Justice Blackmun wrote the Court's opinion affirming Spaziano's conviction and death sentence, deciding both issues against the appellant. The Court was unanimous on the statute of limitations/lesser offense issue, with Justice White, joined by then-Justice Rehnquist, expressing a significant qualification.¹⁰²

A point of particular interest is that the trial judge told Spaziano at the close of the evidence that he would instruct the jury on four noncapital lesser homicide offenses if Spaziano would waive the statute of limitations as to those offenses.¹⁰³

98. Brief for Petitioner at 4, *Spaziano* (No. 83-5596) [hereinafter Petitioner's Brief].

99. *Id.* at 2.

100. See *supra* note 97 (discussing the earlier denied petition).

101. Petitioner's Brief, *supra* note 98, at i. At the time of the murder, the Florida statute of limitations for all noncapital offenses was two years, with no limitations period for capital offenses. FLA. STAT. ANN. § 932.465 (West 1973). Later, the statute was changed to eliminate the limitations period for life felonies and to extend the period for other felonies. FLA. STAT. ANN. § 775.15 (West 1992 & Supp. 1995). Spaziano was indicted two years and one month after the murder. *Spaziano*, 468 U.S. at 450 & n.1.

102. See *Spaziano*, 468 U.S. at 467 (White, J., concurring). In *Spaziano*, Justice Stevens concurred in part and dissented in part. He accepted the majority's view of the statute of limitations issue without comment, but dissented on the constitutionality of the jury override. *Id.* (Stevens, J., concurring in part and dissenting in part). Justice Brennan joined in Justice Stevens's opinion. *Id.* Previously, Justice Brennan had written a concurring opinion in *Beck* and had joined both Justice Marshall's dissent to the original denial of certiorari in *Spaziano* and Justice Blackmun's dissent to the denial of certiorari in *Holloway*. Justice Marshall, who had dissented from the first denial of certiorari in *Spaziano*, and had joined Justice Blackmun's dissent to the denial of certiorari in *Holloway*, also joined Justice Stevens's opinion. *Id.*; see *supra* note 97.

103. *Spaziano*, 468 U.S. at 450. Florida law at the time of the 1976 trial required

Spaziano refused to do so.¹⁰⁴ Accordingly, the judge instructed the jury only on capital premeditated murder.¹⁰⁵ In the Supreme Court of Florida, Spaziano argued that *Beck* required the reversal of his conviction and sentence because the jury was not given the option of a noncapital lesser offense verdict.¹⁰⁶ The court rejected his argument, stating:

The *Beck v. Alabama* decision did not involve lesser included offenses for which the statute of limitations had run Whatever the implications of *Beck v. Alabama* may be, we do not find it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty.¹⁰⁷

The Florida court thus clearly grounded its holding on state law that required the statute of limitations to act as a bar to conviction on time-barred lesser offenses and that precluded a

that the jury be instructed on all noncapital lesser-included offenses even if there was no evidence to support a conviction for those offenses. Petitioner's Brief, *supra* note 98, at 8 n.2 (citing *Brown v. State*, 206 So. 2d 377 (Fla. 1968)). This rule was the type that the Court prohibited in *Roberts v. Louisiana*, 428 U.S. 325 (1976); see *supra* note 80. Petitioner also argued that the evidence at trial did, in fact, support an instruction on the lesser offenses (noncapital attempted first-degree murder, second- and third-degree murder, and manslaughter) because doubt remained about whether petitioner had premeditated the murder, even if the state proved that he did the killing. Petitioner's Brief, *supra* note 98, at 7-15. The state disputed this conclusion in its brief. Brief of Respondent on the Merits at 6-23, *Spaziano* (No. 83-5596) [hereinafter Respondent's Brief].

104. *Spaziano*, 468 U.S. at 450. The State's brief suggests that Spaziano refused the lesser offense options because he desired an all-or-nothing verdict. Respondent's Brief, *supra* note 103, at 13. In a colloquy with the trial court, Spaziano concluded, "I understand what I'm waiving [the option of the lesser noncapital offenses]. I was brought here on first-degree [capital] murder, and I figure if I'm guilty of this, I should be killed." *Spaziano*, 468 U.S. at 457 n.6.

105. *Spaziano*, 468 U.S. at 450; Petitioner's Brief, *supra* note 98, at 9 n.4 ("There are only two verdict alternatives in this case. The alternatives are, not guilty, or, in the alternative, guilty of murder in the first degree as set out in the indictment.").

106. *Spaziano*, 468 U.S. at 452-53. Spaziano made this argument in his first appeal to the Florida Supreme Court. The appeal resulted in a remand for a rehearing on the sentence because the defendant did not have access to confidential information in the presentence report relied on by the trial court. *Spaziano v. State*, 393 So. 2d 1119, 1122-23 (Fla.), cert. denied, 454 U.S. 1037 (1981). The court decided against Spaziano on the statute of limitations issue, *id.* at 1122, and both Justices Marshall and Brennan thought that the decision should be granted review, *Spaziano*, 454 U.S. 1037 (denying certiorari); see *supra* note 97.

107. *Spaziano*, 393 So. 2d at 1122.

jury instruction on those offenses. The court did not even consider the trial judge's waiver option. The significant question that arises, therefore, is whether the Supreme Court of the United States, in affirming Spaziano's conviction, accepted the jurisdictional argument of the Florida Supreme Court or affirmed only because the trial judge—apparently in contravention of Florida law¹⁰⁸—gave Spaziano the option to waive the statute of limitations and receive a lesser offense instruction.¹⁰⁹ The implications of the question are important. If *Spaziano* stands for the proposition that the Constitution¹¹⁰ requires a trial judge in a capital case to give the defendant the choice between the statute of limitations and an otherwise appropriate lesser offense instruction, even if state law bars judgment on the time-barred offense, then *Spaziano* would elevate the lesser offense dictum of *Keeble* (through *Beck*) to a constitutional level, overriding a state's law of limitations in capital cases and perhaps in noncapital cases as well.

Several commentators have read *Spaziano* to hold that it is not error for a state trial court to refuse a time-barred lesser noncapital offense instruction *if* the capital case defendant is given the option to waive the statute of limitations but rejects it.¹¹¹ However, given the language of Justice Blackmun's opin-

108. The Florida Supreme Court did not state that the statute of limitations was a waivable defense in Florida until 1984. *Tucker v. State*, 459 So. 2d 306, 309 (Fla. 1984). In *Tucker*, the court nonetheless refused to find such a waiver merely because the defendant had requested a lesser offense instruction. *Id.* The court stated that a waiver of the statute is valid only if the record reflects that the waiver was "knowingly, intelligently and voluntarily made" for the defendant's benefit after consultation with counsel and did not handicap the defense or contravene any public policy reasons for the statute. *Id.*

109. Although certiorari was denied from the first *Spaziano* decision, 454 U.S. 1037 (denying certiorari), the Supreme Court did grant review of the second decision, 464 U.S. 1038 (1984) (granting certiorari). The affirmance by the Supreme Court would thus seem to support the quoted position from the Florida Supreme Court's first *Spaziano* opinion.

110. The Court consistently refers to what *Beck* "requires," rather than discussing specific constitutional rights. *Spaziano*, 468 U.S. at 455-56.

111. See, e.g., 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 202(a) n.2 (Supp. 1995) ("The Supreme Court has held that a trial court need not present the issue of such a [time-barred] lesser included offense to the jury unless the defendant has waived the statute of limitations barring his prosecution for the lesser offense."); Jodi L. Short & Mark D. Spoto, Project, *Twenty-Third Annual Review of Criminal*

ion,¹¹² the concurring opinion of Justice White,¹¹³ and the procedural posture of the case as described above, a reading of the case that focuses on the waiver option as essential to the Court's decision appears to be incorrect.

Because Spaziano did not accept the trial court's offer of a waiver option, which, under the Florida Supreme Court's position, would have been irrelevant because waiver of the statute of limitations was not possible under state law, the question still remains as to what, if anything, the Constitution would require if a defendant offers to waive the statute in order to receive an instruction on a time-barred lesser offense, but the trial court refuses to give that instruction because state law does not permit conviction or judgment on the time-barred offense. In other words, should *Spaziano* be read as holding only that the Constitution does not require a state court to ignore its state law of limitations and instruct on lesser offenses for which there cannot be a conviction? Under such a reading, which reflects the position of the Florida Supreme Court, the precise issue is the effect of the statute of limitations upon a time-barred lesser offense under state law, not the trial court's or the defendant's offer of a waiver option at trial. In this light, consider these words of Justice Blackmun:

Petitioner would have us divorce the *Beck* rule from the reasoning on which it was based. The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. Where no lesser included offense exists, a lesser included offense instruction

Procedure: United States Supreme Court and Courts of Appeals 1992-1993, 82 GEO. L.J. 597, 1219 n.2370 (1994) ("The Supreme Court has held that a defendant is not entitled to have the jury instructed about a lesser included offense for which the statute of limitations has expired, unless she chooses to waive her statute of limitations defense."); Thomas, *supra* note 29, at 696 ("In *Spaziano v Florida*, [sic] it was held that in capital cases, a defendant is constitutionally entitled to waive the statute of limitations for lesser-included noncapital offenses so that the jury may be instructed on such offenses.") (citation omitted).

112. *Spaziano*, 468 U.S. at 449; see *infra* note 114 and accompanying text.

113. *Spaziano*, 468 U.S. at 467 (White, J., concurring); see *infra* note 118 and accompanying text.

detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result.

... Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process.

... *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice.¹¹⁴

This reasoning is all the Supreme Court in *Spaziano* needed to resolve the issue on appeal, and it was all that the Florida Supreme Court did hold. Such a position permits the state's view of the statute of limitations—in effect, whether the statute is jurisdictional in nature or, instead, a waivable defense—to determine the outcome, and limits *Beck* to the unique situation in which a statute precludes an otherwise appropriate lesser offense instruction only in a capital prosecution.¹¹⁵ Justice Blackmun, however, did not choose to stop at this dispositive point. He went on to ask, if “the jury is not to be tricked,” whether *Beck* then required a lesser offense instruction, with the defendant being forced to waive the statute of limitations, or, alternatively, if the defendant should be given a choice whether to have the benefit of either the statute or the instruction, but not both.¹¹⁶ Justice Blackmun then expressed the Court's preference for giving the defendant the choice.¹¹⁷

In their concurring opinions, Justices White and Rehnquist refused to join this portion of the majority opinion, labeling it dictum.¹¹⁸ Common sense supports their limited view of the

114. *Spaziano*, 468 U.S. at 455-56.

115. The holding of *Spaziano* is thus that under the Constitution, a state trial judge in a capital case need not instruct the jury on a lesser offense that is otherwise appropriate, but for which the conviction would be time-barred under state law. See *State v. Delisle*, 648 A.2d 632, 646 (Vt. 1994) (Johnson, J., concurring) (“The Court held [in *Spaziano*], in factual circumstances similar to this case, that the due process clause does not require that a lesser-included-offense instruction be given if the lesser-included crime is time-barred.”).

116. *Spaziano*, 468 U.S. at 456.

117. *Id.*

118. I join the Court's opinion and judgment except for the dictum on page 456 of the opinion indicating that *Beck v. Alabama*, 447 U.S. 625 (1980), requires a state court in the trial of a capital case to permit the defen-

case, for a broader reading must be premised on the questionable proposition that there existed either an established view of the state statute of limitations that permitted waiver of the defense and conviction for a time-barred offense or a federal constitutional imperative for the same view. It is also apparent that Spaziano was given a Hobson's choice rather than a fair and meaningful option. In order to potentially save his life through the "third option" instruction so valued by the Court, Spaziano had to give up his state law substantive right not to be convicted of offenses for which the prosecutor could not have charged him originally because the statute of limitations had run on those offenses.

3. *Schad v. Arizona*¹¹⁹—*The Single Noncapital Option*

The fact that *Beck* and *Spaziano* have limited application, even within the context of capital cases, became even clearer in *Schad v. Arizona*. In *Schad*, the defendant was found with a murder victim's car and personal possessions.¹²⁰ At his trial for first-degree capital murder, which encompassed both premeditated and felony murder under the Arizona statute,¹²¹ *Schad*, claiming he was only a thief, not a murderer, requested a lesser offense instruction for robbery.¹²² The trial judge refused, but did give an instruction on the lesser noncapital offense of second-degree murder.¹²³ The jury found *Schad* guilty of first-degree murder, and the court sentenced him to death.¹²⁴ In a five-to-four decision on the issue,¹²⁵ the Supreme Court upheld

dant to waive the statute of limitations and to give a lesser-included-offense instruction as to an offense that would otherwise be barred.

Id. at 467 (White, J., concurring).

119. 501 U.S. 624 (1991).

120. *Id.* at 628.

121. *Id.*

122. *Id.* at 629.

123. *Id.*

124. *Id.*

125. Justice Souter announced the judgment of the Court and delivered its opinion on the lesser offense issue. On that issue, he was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. *Id.* at 645-48. Justice White wrote a dissenting opinion, which included the lesser offense issue, which Justices Marshall, Blackmun, and Stevens joined. *Id.* at 652, 660-62 (White, J., dissenting).

the Arizona Supreme Court's decision that *Beck* did not require the robbery instruction.¹²⁶ Speaking for the majority, Justice Souter rejected the argument that the Constitution required that the jury in a capital case be instructed on every lesser noncapital offense supported by the evidence.¹²⁷ Looking to both *Beck* and *Spaziano*, he stated that the Court's goal was "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence."¹²⁸ The noncapital second-degree murder instruction operated to alleviate the due process concern about jury irrationality and to validate the jury's capital murder verdict.¹²⁹

After *Beck*, *Spaziano*, and *Schad*, the Constitution would thus appear to require a state court to provide a lesser offense option to the charged offense only if the charged offense is punishable by death and, even within the class of capital offenses, only if state law prevents the jury from considering lesser offense options in that special class of cases alone, or only if the jury is not presented with at least one other possible alternative noncapital verdict supported by the evidence. If, however, the statute of limitations generally operates to prevent such a verdict under state law, *Spaziano* does not appear to constitutionally mandate a state to provide a waiver option, even in capital cases. Finally, the Supreme Court's decisions in capital cases involving lesser offenses certainly do not require, or even convincingly presage, extending *Keeble*'s due process dictum to the trial of noncapital cases in either federal or state courts.¹³⁰ The solution to the

126. *Id.* at 647-48. The Court also upheld the Arizona court's decision that the trial court did not err by failing to require the jury to specify, or to unanimously agree upon, which theory of first-degree murder permitted by the statute—premeditated killing or felony murder—underlay its guilty verdict. This decision was announced in an opinion by Justice Souter that only three others joined. *Id.* at 627 (plurality opinion).

127. *Id.* at 646-48.

128. *Id.* at 646-47 (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984), and citing *Hopper v. Evans*, 456 U.S. 605, 609 (1982)); see *supra* note 89.

129. *Id.* at 647-48 (stating that the contention that the reliability of the verdict was diminished by the refusal to grant the robbery instruction is based upon the irrational assumption that the jury would choose capital murder over second-degree murder if it were unconvinced that the petitioner was guilty of either).

130. In *Gilmore v. Taylor*, 113 S. Ct. 2112 (1993), the petitioner was charged and

conflict between the statute of limitations and an otherwise appropriate lesser offense thus remains to be discovered outside of the United States Constitution.

F. The Conflict Illustrated in the Federal Circuits and the States

In the context of a federal statutory decision, *Keeble* stated the basic logic for elevating a lesser offense instruction to an essential ingredient of a rational jury verdict,¹³¹ but provided no empirical evidence or other support for that reasoning.¹³² In the special situation of the death penalty, the Supreme Court appeared to find that same logic to be a matter of constitutional imperative, at least to the extent of prohibiting a lesser offense preclusion statute.¹³³ When, however, at least one additional noncapital verdict option for the jury existed other than acquittal or conviction of the capital offense,¹³⁴ or when a state stat-

convicted of noncapital murder. In the Seventh Circuit Court of Appeals, he had argued successfully that the Illinois pattern jury instructions deprived him of due process by allowing the jury to find him guilty of murder without deciding whether the elements of the lesser offense of passion-provoked manslaughter were met. *Id.* at 2114. His habeas corpus case was limited to the question of whether the decision that favored his due process claim in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), was based on "new" constitutional doctrine under the rule of *Teague v. Lane*, 489 U.S. 288 (1989). *Gilmore*, 113 S. Ct. at 2116. In the course of reversing the court of appeals, the Supreme Court stated:

Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief.

. . . In this case, . . . petitioner argues that the challenged instructions prevented the jury from considering evidence of his affirmative defense. But in a noncapital case such as this there is no counterpart to the Eighth Amendment's doctrine of "constitutionally relevant evidence" in capital cases.

Id. at 2117-18 (citation omitted).

131. *Keeble v. United States*, 412 U.S. 205, 212-13 (1973) (stating that when the prosecution has not established every element of the charged offense beyond a reasonable doubt and there is evidence that the defendant committed some lesser offense, if a verdict option is not given for that offense, a defendant should not be exposed to the substantial risk that the jury will not perform according to theory and acquit); see *supra* notes 57-59 and accompanying text.

132. See *supra* note 93.

133. See *Beck v. Alabama*, 447 U.S. 625 (1980).

134. See *Schad v. Arizona*, 501 U.S. 624 (1991).

ute of limitations barred conviction of the applicable noncapital lesser offenses,¹³⁵ then the enhanced jury rationality provided by the lesser offense option either was not necessary¹³⁶ or did not exist.¹³⁷

The law's development away from constitutional restraint has left the conflict between lesser offenses and statutes of limitations unresolved for both federal and state appellate courts. Although *United States v. Wild*¹³⁸ and its progeny have all but destroyed the jurisdictional label of the statute of limitations in the federal circuits and weakened the hold of that concept in several state courts as well—often through a switch to the replacement label of a waivable “affirmative defense”¹³⁹—this change in the traditional view of the statute of limitations still leaves significant issues that arise from the concept of waiver.¹⁴⁰ Perhaps the most important of these issues is whether a

135. See *Spaziano v. Florida*, 468 U.S. 447 (1984); *supra* notes 114-18 and accompanying text (reciting the argument in support of this reading of *Spaziano*). Some commentators read the case more broadly, finding the Court's opinion to require a state trial court to give a capital defendant, otherwise entitled to a time-barred lesser offense instruction, the choice of waiving the statute of limitations regardless of whether state law treats the statute as waivable or nonwaivable. See *supra* note 111.

136. See *Schad*, 501 U.S. at 646-48.

137. See *Spaziano*, 468 U.S. at 455-56.

138. 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977).

139. See, e.g., *United States v. Schledwitz*, No. 92-6314, 1993 WL 533559, at *2 (6th Cir. Dec. 20, 1993) (stating that defendant could, and did, agree to waive the federal statute of limitations), *cert. denied*, 114 S. Ct. 2679 (1994); *Acevedo-Ramos v. United States*, 961 F.2d 305, 307-08 (1st Cir.) (explaining that the fact that every circuit court to address the issue has held the statute of limitations to be a waivable affirmative defense rather than a jurisdictional bar supports a finding that defendant's waiver of the statute of limitations can be inferred from his guilty plea), *cert. denied*, 113 S. Ct. 299 (1992); *United States v. Arky*, 938 F.2d 579, 581-82 (5th Cir. 1991) (*per curiam*) (concluding that at trial on a conspiracy charge, objections not made concerning failure to prove or to charge jury on overt acts barred by statute of limitations are waived because statute is an affirmative defense and not jurisdictional), *cert. denied*, 112 S. Ct. 1268 (1992); *State v. Littlejohn*, 508 A.2d 1376, 1381-82 (Conn. 1986) (finding that defendant could plead guilty to time-barred offense because the better view is that the statute of limitations is a waivable affirmative defense and not jurisdictional); *State v. Pearson*, 858 S.W.2d 879, 886-87 (Tenn. 1993) (finding that defendant may make knowing and voluntary waiver of statute and plead guilty to time-barred offense because statute of limitations is not jurisdictional).

140. In the appellate courts, the most pervasive of these issues is whether such a waiver should be inferred from a defendant's entry of a guilty plea to a time-barred

defendant should be compelled to choose between the statute of limitations and a lesser offense instruction, even if the necessity of that choice is not dictated by constitutional doctrine or by the legal labels of jurisdiction and affirmative defense.

Before proposing a solution to this and other issues involved in the conflict between the statute of limitations and the lesser offense doctrine, this exploration of the conflict will conclude with a discussion of some recent judicial attempts to resolve it. Since *Wild* was decided in 1977, only two federal circuits have reviewed federal convictions that directly involved a conflict between the statute of limitations and the lesser offense doctrine. Both of these cases illustrate the federal courts' progression from the certainty of the jurisdictional solution to the complexity of waiver.

1. *The Conflict in the Federal Circuits*

In *United States v. DeTar*,¹⁴¹ the Ninth Circuit Court of Appeals reversed the district court because the judge had refused to give an otherwise appropriate lesser offense misdemeanor instruction¹⁴² to a defendant who was indicted and convicted for felony tax evasion.¹⁴³ Because the federal statute of limitations

offense or from a defendant's request for a time-barred lesser offense instruction. Compare *Acevedo-Ramos*, 961 F.2d at 309 (concluding that statute of limitations is deemed waived when defendant pleads guilty, even without express waiver) and *Arky*, 938 F.2d at 581-82 (finding that defendant waived affirmative defense of statute of limitations by not raising objections at trial) and *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986) (stating that defendant's failure to assert that statute of limitations barred conviction on charged offense either before or during trial waived that defense), *cert. denied*, 480 U.S. 907 (1987) and *Conerly v. State*, 607 So. 2d 1153, 1158 (Miss. 1992) (concluding that defendant's guilty plea to an offense that is time-barred on its face operates to waive the affirmative defense of the statute of limitations) and *State v. Yount*, 853 S.W.2d 6, 9 (Tex. Crim. App. 1993) (en banc) (finding that defendant waived statute of limitations defense to lesser offense by requesting jury charge and was estopped from attacking conviction on that lesser offense) with *United States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992) (stating that although the defendant may agree to waive the statute of limitations, absent explicit agreement, defendant's waiver of the statute cannot be inferred) and *Pearson*, 858 S.W.2d at 886-87 (concluding that defendant's knowing and voluntary waiver of statute of limitations cannot be inferred from fact of guilty plea alone).

141. 832 F.2d 1110 (9th Cir. 1987).

142. *Id.* at 1114.

143. *Id.* at 1112, 1114. DeTar was charged with violating 26 U.S.C. § 7201 (1988).

had expired for the lesser offense,¹⁴⁴ the court of appeals faced the issue of whether the expired limitations period saved the conviction because the defendant did not explicitly waive the statute of limitations at trial and arguably was not entitled to the requested lesser offense instruction. Following the Fourth Circuit's opinion in *United States v. Williams*,¹⁴⁵ the *DeTar* panel held that by simply requesting the lesser offense instruction, the defendant had implicitly elected not to rely on the statute of limitations to bar conviction and judgment on the requested lesser offense and, therefore, the instruction should have been given.¹⁴⁶ The Ninth Circuit refused to follow a 1984 decision by the Florida Supreme Court that, in direct contrast, affirmed the trial court's refusal to give a time-barred lesser offense instruction because the defendant's mere request for the instruction, without an explicit waiver of the statutory bar, did not require the instruction to be given.¹⁴⁷

In *Williams*, the defendant had been indicted in federal court for first-degree (capital) murder, but was convicted for second-degree (noncapital) murder, a time-barred lesser offense for which he had requested an instruction, but for which he had not explicitly waived the statute of limitations.¹⁴⁸ Relying on *Wild*, the Fourth Circuit rejected the defendant's argument that the statute of limitations was jurisdictional, entitling him to a reversal of his conviction of the lesser offense, despite his request at trial.¹⁴⁹

Both *DeTar* and *Williams* are questionable decisions. In holding that the defendant waived the statute of limitations, *Wild* certainly supports the nonjurisdictional approach to the conflict between the statute of limitations and an otherwise appropriate

DeTar, 832 F.2d at 1112.

144. *Id.* at 1114. The six-year limitations period was the same for both offenses (violations of 26 U.S.C. § 7201 and § 7203), but the conduct of the latter offense—failure to pay tax when due—was outside of the period, while the conduct for evasion was still within the period. *Id.*

145. 684 F.2d 296 (4th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

146. *DeTar*, 832 F.2d at 1115.

147. *Id.* The court of appeals refused to follow *Tucker v. State*, 459 So. 2d 306, 309 (Fla. 1984). *DeTar*, 832 F.2d at 1115.

148. *Williams*, 684 F.2d at 297, 299.

149. *Id.* at 299-300.

lesser offense, but *Wild* does not support the conclusion that a defendant in any statute of limitations context—whether in pre-indictment negotiations, post-indictment plea bargaining, or during trial through the request for a lesser offense instruction—should ever be found to have waived the statute of limitations without an explicit, knowing, and voluntary waiver.¹⁵⁰ In addition, *Williams* may have a deeper flaw in its reliance on *Wild*'s finding of waiver of the statute of limitations. *Wild* concerned the waiver of the statutory bar to indictment itself and, sub silentio, to conviction and judgment on the charges contained in that indictment.¹⁵¹ The case did not concern the defendant's entitlement to a jury instruction about a lesser offense. In contrast to the issue in *Wild*, which was the validity of an initial criminal charge in conflict with the statute of limitations, the right to a jury instruction on a lesser offense at trial is not necessarily intertwined with the possibility of a guilty verdict on the time-barred offense or the entry of judgment on that verdict by the court.

2. *The Conflict in the States*

Should a defendant be able to obtain the opportunity for a rational verdict represented by a lesser offense instruction only by waiving, either explicitly or implicitly, the right not to be convicted or sentenced on the time-barred lesser offense? Moreover, even if waiver is found to be irrelevant because of a court's adherence to the jurisdictional view of the statute of limitations, does this mean that the defendant should be deprived of a time-barred lesser offense instruction, or that the instruction still may be given, but no conviction or judgment may be entered on the time-barred offense? Three state high courts that have recently considered directly the conflict between the limitations statute and lesser offenses at trial have taken an approach decidedly different from the waiver-based analysis of the Ninth

150. Cf. *United States v. Wild*, 551 F.2d 418, 425 (D.C. Cir.) (holding that the defendant validly waived the statute of limitations for his own benefit after consultation with counsel and with a full appreciation of the legal significance of the waiver), *cert. denied*, 431 U.S. 916 (1977).

151. *Id.* at 421.

Circuit, Fourth Circuit, and several states.

The facts of the New Jersey (noncapital) murder trial in *State v. Short*¹⁵² were set out in the Introduction to this Article.¹⁵³ In that case, apparently struggling with the conflict between an appropriate lesser offense instruction on manslaughter offenses and the expired five-year statute of limitations on those offenses,¹⁵⁴ the trial court instructed on the lesser offenses but, over defendant's objection, told the jury that if it found Short guilty of manslaughter, he would be acquitted by the court because the statute of limitations had run.¹⁵⁵ The New Jersey Supreme Court reversed Short's murder conviction¹⁵⁶ because "[j]urors who believe that a defendant has killed his wife are hardly likely to return a verdict of manslaughter knowing that defendant will go free if they do."¹⁵⁷ The court then held that "[t]he [trial]

152. 618 A.2d 316 (N.J. 1993).

153. See *supra* notes 6-16 and accompanying text.

154. In 1988, after the statute of limitations had run on manslaughter offenses arising from the homicide of Mrs. Short, the New Jersey legislature amended the state criminal code to remove all time limitations for manslaughter. See N.J. STAT. ANN. § 2C:1-6 (West Supp. 1994); *Short*, 618 A.2d at 321.

155. *Short*, 618 A.2d at 318, 320. The New Jersey Supreme Court's characterization of the instruction may not be entirely accurate. Neither the majority nor the dissenting opinions actually quote the instruction. The trial judge said, in pertinent part: "The defendant cannot be found guilty of lesser included offenses such as manslaughter, aggravated manslaughter or reckless manslaughter because the Statute of Limitations has run with respect to those offenses." Plaintiff's Brief, *supra* note 7, at 7 (quoting jury instruction from trial transcript). However, the trial judge continued:

The law says that a homicide which would otherwise be murder is manslaughter when the killing is committed in the heat of passion resulting from a reasonable provocation.

... Now accordingly because of the Statute of Limitations if you find beyond a reasonable doubt that the defendant purposely or knowingly caused the death of Candice Short or that he purposely or knowingly caused serious bodily injury to her which resulted in death, but you have a reasonable doubt as to whether he did so in the heat of passion upon a reasonable provocation, you must find the defendant not guilty.

Defendant's Brief, *supra* note 5, at 27-28 (quoting jury instructions) (citations omitted).

156. *Short*, 618 A.2d at 324. Three of the seven justices concurred in part and dissented in part. Their position was that a defendant must waive the statute of limitations defense in order to have the jury consider the option of a verdict on the time-barred lesser offense. *Id.* at 326 (O'Hern, J., concurring in part and dissenting in part).

157. *Id.* at 322. Although neither the opinions of the court nor the parties' briefs ever explicitly state the fact, the jury apparently was given a verdict option, as well

court should have instructed the jury on the lesser included offenses without telling it that the statute of limitations had run or that defendant would go free if the jury convicted him of those offenses and acquitted him of murder.¹⁵⁸

Did the appellate court mean that if the trial court had correctly instructed the jury (i.e., not mentioned the statute of limitations when it instructed on the lesser manslaughter offenses) and if the jury then had found Short guilty of manslaughter rather than murder, the trial court could have entered judgment and sentenced Short on the time-barred lesser offense? Surely not. The court never discussed whether Short waived the statute of limitations by requesting the lesser offense instruction and, in fact, strongly implied that such a waiver would not be permissible under New Jersey law.¹⁵⁹

Explicitly rejecting what it saw as contrary precedent in *Spaziano*, and accusing the United States Supreme Court of overlooking "the fundamental injustice entailed in forcing a defendant to choose between two critical substantive rights,"¹⁶⁰ the New Jersey court concluded that

[a] defendant's right to a fair trial cannot be conditioned on his or her giving up a vested right to a statute of limitations defense, and a defendant's vested right to a statute of limitations cannot be conditioned on his or her giving up the right to a fair trial.¹⁶¹

Dismissing the dissent's argument that its rule would lead to a trick on the jury¹⁶²—a result disparaged in *Spaziano*—the court stated that the jury's duty is to determine criminal culpa-

as an instruction, on manslaughter. See *id.* at 320 (stating that the trial court instructed the jury that any verdict of guilt it returned on the manslaughter charges would not result in a conviction); *id.* at 324 (concluding that the jury should not have been told of the sentencing implications for the verdicts available to it).

158. *Id.* at 322.

159. *Id.* at 320-21 (stating that the statute of limitations is tantamount to an absolute bar to prosecution and that the court was unable to conclude that the legislature intended to weaken that bar with respect to unindicted lesser-included offenses).

160. *Id.* at 323.

161. *Id.* (citing *Tucker v. Florida*, 459 So. 2d 306, 312 (Fla. 1984) (Boyd, C.J., concurring in part and dissenting in part); *State v. Muentner*, 406 N.W.2d 415 (Wis. 1987)).

162. *Id.* at 323-24.

bility, not ultimate punishment.¹⁶³ Although the trial court could not enter judgment on the time-barred lesser offense, Short had a right to the option of a jury verdict on that offense under New Jersey law.¹⁶⁴ Short could not be forced to make a choice, and the jury could not be told of the consequence of the time-barred verdict that resulted because the statute of limitations had run on the lesser offenses that were otherwise available under state law.¹⁶⁵ John Short could have his cake and eat it too:

We conclude that defendant was entitled to instructions on lesser included offenses, that the jury should not have been told of the sentencing implications for the verdicts available to it, and that defendant was entitled to the benefit of the running of the statute of limitations for the lesser included offenses.¹⁶⁶

The court in *Short* relied heavily on *State v. Muentner*.¹⁶⁷ In that case, the Supreme Court of Wisconsin held that Muentner's request for an instruction on a time-barred lesser offense, for which he was then convicted,¹⁶⁸ did not empower the trial court to enter judgment on that offense.¹⁶⁹ Muentner thus be-

163. *Id.* at 324. The general principle that the jury's proper role in a noncapital case is "to apply the law as [instructed] regardless of the consequence," and that "punishment . . . should not enter [its] consideration or discussion" was central to the Supreme Court's decision in *Shannon v. United States*, 114 S. Ct. 2419, 2423 (1994) (quoting the district court's instruction to the jury) (first alteration in original). In *Shannon*, the Court held that a federal district court is not required to instruct the jury regarding the consequences of a "not guilty by reason of insanity" verdict under federal statutory law. *Id.* at 2428.

164. *Short*, 618 A.2d at 324.

165. *Id.*

166. *Id.*

167. 406 N.W.2d 415 (Wis. 1987).

168. *Id.* at 418. The defendant, a bank president, was charged with two felony counts of falsifying entries with intent to deceive bank examiners and for the felony of receiving a kickback for making a loan. *Id.* at 417. Over the state's objection, he requested and received an appropriate lesser misdemeanor offense instruction for the false entry counts. *Id.* The jury acquitted the defendant of both felonies and convicted him on two counts of the lesser-included misdemeanor. *Id.* at 418. The statute of limitations in Wisconsin was six years for the felonies charged and three years for the lesser misdemeanor. *Id.* at 417.

169. *Id.* at 423. A single justice dissented, stating that the court had sanctioned a "loophole" that permitted a defendant to request a time-barred lesser offense instruc-

came a free man, having been acquitted on the charged felony counts and convicted instead on the lesser time-barred misdemeanors for which the trial court could not enter judgment.

At Muentner's trial, the state argued that because the defendant expressly refused to waive the statute of limitations,¹⁷⁰ the instruction should not have been given on the lesser offense.¹⁷¹ Relying on the Fourth Circuit's reasoning in *United States v. Williams*,¹⁷² the judge ruled that the request for the instruction constituted a waiver.¹⁷³ However, the Wisconsin Supreme Court found that not only did a request for a time-barred, otherwise appropriate lesser offense instruction not amount to an implicit or constructive waiver,¹⁷⁴ but that, under state law, whether or not the defendant made the request,¹⁷⁵ the statute of limitations precluded entry of a judgment on the time-barred offense.¹⁷⁶ That jurisdictional doctrine did not, however, prevent the jury from returning a verdict of guilty on the offense for which the statute had run.¹⁷⁷

tion while refusing to waive the statute of limitations. This loophole then permitted the defendant to escape punishment after a guilty verdict on the requested offense because the jury was not aware that the statute of limitations had run. *Id.* at 423-24.

170. When asked by the trial court if he would waive the statute of limitations as a condition of receiving the lesser offense instruction, Muentner stated that he would not do so. *Id.* at 419.

171. *Id.* at 417.

172. 684 F.2d 296 (4th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); see *supra* notes 148-49 and accompanying text.

173. *Muentner*, 406 N.W.2d at 418 n.6. Under Wisconsin law, the statute of limitations deprives the court of personal, not subject matter, jurisdiction. See *id.* at 419. On appeal, that peculiarity was part of the State's unsuccessful argument that the statute of limitations can be waived under Wisconsin law. *Id.* at 418.

174. *Id.* at 419.

175. *Id.* at 420 n.8.

176. *Id.* at 420 (holding that "when the statute of limitations runs on a crime, the court loses personal jurisdiction over the defendant . . . [and] loses the 'power to proceed to judgment'") (citing *State v. Pohlhammer*, 245 N.W.2d 478 (Wis. 1977)).

177. *Id.* The court stated that "although the jury may return a verdict convicting the defendant of the [time-barred] misdemeanor offenses, when submitted, the court is precluded from entering a judgment of conviction." *Id.*

One might argue that *Muentner* did not hold that the Wisconsin statute of limitations acts as a jurisdictional bar to conviction, even if a defendant were to explicitly elect to waive the statute. This view may arise from the fact that the court discussed at some length its prior decision in *State v. Pohlhammer*, 254 N.W.2d 478, and stated that *Pohlhammer* "suggests that the statute of limitations defense may be waived; however this must be an express waiver." *Muentner*, 406 N.W.2d at 419.

Because the trial court in this case did, in fact, give the time-barred instruction requested by the defendant even though the defendant refused to waive the statute of limitations, the appellate court opinion could have ended simply with a holding that the defendant did not waive the statute of limitations.¹⁷⁸ Instead, the court proceeded to state that the judgment of conviction must fail because the trial court lacked the power to enter it.¹⁷⁹ The high court, however, reached beyond this holding to state that the statute's barrier to conviction should not be seen to preclude the trial judge from giving the lesser offense instruction.¹⁸⁰ Having made this critical jump, the Supreme Court of Wisconsin apparently felt it necessary to turn aside the (nonbinding) concern that the United States Supreme Court expressed in *Spaziano*. Although *Muentner* was based on state law, its rejection of the Supreme Court's "trick on the jury" rationale in *Spaziano* is clear:

We also note that *Spaziano*'s conception that when a statute of limitations runs on a lesser included offense it thereby no longer "exists," does not comport with Wisconsin law and the relationship between the jury and judge in Wisconsin

In addition, however, the court also extensively cited language in *Pohlhammer* that strongly indicated that the Wisconsin limitations statute is a jurisdictional bar to the power of the court. *Id.* at 419-20 (finding that the court in *Pohlhammer* held that the defendant could challenge his guilty plea to a time-barred offense because he did not explicitly waive the statute of limitations). In any event, the significant point is that because the Wisconsin Supreme Court held in *Muentner* that the defendant was entitled to both a lesser offense instruction and a jury verdict option on the time-barred lesser offense, but that the trial court was powerless to enter judgment on that verdict, *id.* at 419-21, 423, a Wisconsin defendant need not waive the statute of limitations in order to get both an instruction and a time-barred verdict. Therefore, no defendant in Wisconsin will ever waive the statute because nothing is to be gained by such a waiver.

178. *Id.* at 419 ("We hold that a request for a lesser included offense instruction does not amount to any 'implicit' or constructive waiver of a statute of limitations defense.").

179. *Id.* at 420 (explaining that the effect of the running of the statute of limitations on a crime in Wisconsin is not to prohibit the trial court from instructing the jury on the elements of the crime, but to prohibit the court from entering a judgment of conviction on the time-barred offense).

180. *Id.* at 421 ("It may be argued that . . . [s]ince a statute of limitations defense arguably precludes conviction, a trial court should therefore not instruct on a time-barred offense. We disagree.").

criminal trials. In Wisconsin, the running of a statute of limitations on a particular offense does not mean the offense ceases to exist. A jury may still find, as a matter of fact, that a defendant is guilty of the offense. The consequence of the statute of limitations running on that offense is to preclude the entering of a judgment of conviction for that offense.

The jury here was not "tricked into believing that it ha[d] a choice of crimes, for which to find the defendant guilty," when, "in reality there [was] no choice." The jury did have a choice of crimes and *did* find the defendant guilty. Here, the jury was given a chance to deliberate and make findings as to what crime was committed. When the jury returned the guilty verdicts it had completed its job.¹⁸¹

The July 1994 opinion of the Vermont Supreme Court in *State v. Delisle*¹⁸² is the most recently reported judicial attempt to resolve the conflict between the statute of limitations and the doctrine of lesser offenses at trial. *Delisle* is factually similar to *Short* in many respects and is likewise a classic presentation of the controversy that is this Article's study.

After a woman was found murdered,¹⁸³ the police considered Delisle to be a suspect.¹⁸⁴ However, the police classified the homicide as unsolved until approximately fourteen years after the crime, when they developed enough evidence to charge him with first-degree murder.¹⁸⁵ Although the defendant offered an alibi and denied the killing, the State's evidence at trial supported the conclusion that the defendant committed the homicide by strangulation after an argument with the victim, with whom he was having a deteriorating love affair.¹⁸⁶ Under Vermont law, these facts provided sufficient support for a voluntary manslaughter (heat of passion) lesser offense instruction.¹⁸⁷ Delisle requested that the jury be instructed on the lesser offenses of

181. *Id.* at 423 (quoting *Spaziano v. Florida*, 468 U.S. 447, 456 (1984)).

182. 648 A.2d 632 (Vt. 1994).

183. Eight months after her disappearance, Laurie Gonyo's body was found wrapped in a tarp in a river. *Id.* at 634.

184. *Id.*

185. *Id.* The charges were brought shortly after the defendant's son, who was only 11 years old at the time of the murder, implicated his father. *Id.*

186. *Id.* at 634-35.

187. *Id.* at 637-38.

second-degree murder, on which the statute of limitations had not run, and voluntary manslaughter, on which the statute of limitations had run three years after the crime.¹⁸⁸ The trial court agreed to charge the jury on the lesser offense of second-degree murder, but refused to charge the jury on manslaughter unless the defendant waived the statute of limitations.¹⁸⁹ The defendant refused, and the jury was not given the option to convict him on the lesser offense.¹⁹⁰ On appeal, the defendant urged that he was entitled to the manslaughter verdict option without being forced to waive his rights under the statute of limitations.¹⁹¹ The defendant argued that the court could not have entered judgment on that verdict even if it had been returned by the jury.¹⁹²

Furthermore, putting a new twist on the classic case, *Delisle* had also asked the trial court, in the alternative, to at least instruct the jury members on the definition of manslaughter and to tell them that they must acquit him of the charged offense of first-degree murder if they found the facts to prove only manslaughter.¹⁹³ The defendant argued that the trial court's refusal of the alternate request alone was reversible error.¹⁹⁴ The Vermont Supreme Court agreed and reversed *Delisle's* second-degree murder conviction on that basis.¹⁹⁵

After discussing *Spaziano*, *Beck*, and *Short* at some length, the Vermont court set forth its own solution to the quandary of the conflict between the statute of limitations and lesser offenses at trial:

We conclude, therefore, that the rights of defendants and the integrity of the system would be best maintained by provid-

188. *Id.* at 637.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* This alternative would not give the jury the option to find the defendant guilty of manslaughter because the statute of limitations for a manslaughter conviction had expired.

194. *Id.*

195. *Id.* at 641 ("In this case, the trial court erred in refusing to give defendant's alternative proposed instruction, which would have informed the jury that defendant must be acquitted if found guilty of manslaughter.").

ing defendants with the choice of (1) foregoing an instruction on the time-barred, lesser-included offense, or (2) obtaining an instruction informing the jurors that, because the passage of time precludes prosecution for the lesser offense, they must acquit the defendant if they conclude that the evidence would support a conviction of the lesser crime only. We believe that the latter instruction can be given in a straightforward, understandable manner aided, if necessary, by the use of interrogatories.¹⁹⁶

The court thus explicitly approved an instruction like that given by the trial court in *Short*¹⁹⁷—an instruction that the New Jersey Supreme Court found to be reversible error because the court informed the jury of the running of the statute of limitations on the lesser offense.¹⁹⁸ The Vermont court held that giving the defendant an option of a time-barred lesser offense definitional instruction was not dependent upon the defendant's waiver of the statute of limitations¹⁹⁹ and did not distort the process by tricking the jury.²⁰⁰ The court explained that the jury would be told not only of the elements of the lesser offense—actually in the nature of a defense to the greater charged offense—but they would also be instructed that the statute of limitations precluded the possibility of its verdict on the lesser

196. *Id.* at 639-40 (citation omitted). Such a "defensive" use of a time-barred lesser offense instruction was also approved in *Padie v. State*, 557 P.2d 1138, 1141-42 (Alaska 1976) (*Padie I*), in which the court found that the jurisdictional nature of the statute of limitations precluded a conviction on the time-barred lesser offense, even though the defendant had requested that option. The court in *Padie I* did not state whether the expired statute of limitations should be mentioned to the jury during the course of such an instruction. In a later decision, *Padie v. State*, 594 P.2d 50 (Alaska 1979) (*Padie II*), the Alaska Supreme Court cited *United States v. Wild*, 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977), in rejecting the labels of both jurisdiction and affirmative defense, *Padie II*, 594 P.2d at 56-57. The court held that the defendant could make a knowing and voluntary waiver of the statute of limitations for the purpose of entering a bargained-for plea of *nolo contendere* to the same time-barred lesser offense considered in *Padie I*. *Id. Delisle* did not cite either of the *Padie* opinions.

197. *See supra* note 155 for the relevant portion of the jury instruction that the trial judge gave in *Short*.

198. *Delisle*, 648 A.2d at 640 ("We note that a similar instruction was explicitly rejected by a majority of the New Jersey Supreme Court in *State v. Short*.").

199. *Id.*

200. *Id.*

offense.²⁰¹

The Vermont Supreme Court did not, however, consider whether Delisle could have moved beyond a mere defensive instruction to a lesser offense verdict and judgment if he had waived the statute of limitations, as the trial court had demanded.²⁰² The Vermont solution, to the extent that it reaches under the facts of the case, thus still falls far short. It permits the defendant who wishes to have a time-barred but appropriate lesser offense instruction to receive one, and does so without forcing the defendant to waive the statute of limitations in order to receive the instruction. However, the defendant still faces the formidable obstacle of a jury that is instructed that the statute of limitations bars conviction on the lesser offense and, thus, that no verdict option exists for that offense. More importantly, the defendant apparently does not even have the option of explicitly waiving the state's statutory barrier to conviction and judgment on the time-barred lesser offense option.²⁰³

In sum, there is a confusing whirl of judicial solutions to the conflict between the statute of limitations and lesser offenses at trial.²⁰⁴ Lacking an applicable constitutional standard, courts

201. *Id.* at 640-41.

202. *Id.* at 637. The court did not have to reach this issue because Delisle refused to waive the statute of limitations in the course of his demand for a time-barred lesser offense verdict option. *Id.*

203. Justice Johnson, in his concurring opinion, refused to join the majority's "flawed compromise" resolution of the statute of limitations issue. *Id.* at 645. Looking to the text of the Vermont statute and to state precedent, he noted that "in Vermont, the statute of limitations is not simply an affirmative defense that defendant may waive if he chooses." *Id.* at 646 (Johnson, J., concurring). Further, Justice Johnson explained that "essential to the *Spaziano* analysis is the assumption that the statute of limitations on crimes is waivable as a matter of state law, whereas in Vermont, such is not the case." *Id.* at 647 (citation omitted).

Considering the public policy aspect of the statute, Justice Johnson strongly disapproved of the court's solution. He opted instead for a rule similar to that of *Short*, which permits the jury to be instructed on the time-barred lesser offense without any mention of the statute of limitations; such a rule also permits a jury verdict on that lesser offense, but does not permit the court's judgment thereon. *Id.* at 647-48.

204. This confusion appears most dramatically when the same court reaches apparently conflicting decisions, without reconciliation, within a short period of time. Compare *State v. Sullivan*, 541 A.2d 450, 454-55 (R.I. 1988) (holding that defendant's request for an otherwise proper time-barred lesser offense instruction was correctly denied by the trial court because no conviction was possible on that offense) with

have retreated into local precedent, legal labels, and partial answers. On the one hand, some courts view the statute of limitations as jurisdictional, thus precluding any time-barred lesser offense instruction²⁰⁵ or, alternatively, precluding only a judgment on a time-barred lesser offense verdict.²⁰⁶ On the other hand, other courts see the statute of limitations as an affirmative defense, a label that in turn raises the primary question of whether the defendant must waive the defense in order to obtain a lesser offense instruction,²⁰⁷ which also raises the secondary question of whether such a waiver may be inferred from the defendant's request.²⁰⁸ Finally, one state high court has adopted a rule that permits a time-barred lesser offense instruction only if the jury is informed that the statute of limitations does not permit its verdict on that instruction,²⁰⁹ while, in con-

State v. Lambrechts, 585 A.2d 645, 648 (R.I. 1991) (holding that defendant's request for an instruction on a lesser offense for which he was then convicted acted as an election not to raise an affirmative defense based on the statute of limitations).

205. See, e.g., *People v. Ognibene*, 16 Cal. Rptr. 2d 96, 98 (Cal. Ct. App. 1993) (relying on *People v. Diedrich*, 643 P.2d 971 (Cal. 1982), to explain that defendants are not entitled to instructions on time-barred lesser offenses even if the statute of limitations is waived because the statute of limitations is jurisdictional and a court cannot convict for such an offense); *Cane v. State*, 560 A.2d 1063, 1065-66 (Del. 1989) (holding that the defendant may not waive the statute of limitations' absolute jurisdictional bar to prosecution of a time-barred lesser offense); *Gurley v. State*, 348 N.E.2d 16, 20-21 (Ind. 1976) (ruling that defendant's request for an instruction on time-barred lesser offenses was properly denied because defendant could not have been convicted on those offenses).

206. Both *Short* and *Muentner* precluded only a judgment on a time-barred offense verdict. See *supra* notes 159, 169, 175-77 and accompanying text.

207. See, e.g., *State v. Keithley*, 463 N.W.2d 329, 331-32 (Neb. 1990) (holding that defendant was not entitled to a time-barred lesser offense instruction because he specifically refused to waive the statute of limitations).

208. Cf. *State v. Pearson*, 858 S.W.2d 879, 887 (Tenn. 1993) (explaining that in the context of a guilty plea, the better rule is to treat the statute of limitations as waivable, rather than jurisdictional, but to require that the waiver be knowingly and voluntarily made). Compare *State v. Leisure*, 796 S.W.2d 875, 879 (Mo. 1990) (en banc) (finding that defendant's request for a lesser offense instruction upon which he was convicted was a sub silentio waiver of the statute of limitations for that offense) with *Eaddy v. State*, 638 So. 2d 22, 24-25 (Fla. 1994) (holding that the defendant met the requirement of knowing and voluntary waiver of the statute of limitations through counsel's statements on the record at trial and that he was entitled to an instruction on time-barred lesser offenses).

209. *State v. Delisle*, 648 A.2d 632, 637 (Vt. 1994); see *supra* notes 196-201 and accompanying text.

trast, another high court has found reversible error if the same information is told to the jury.²¹⁰ In the face of this variety of approaches, policy has not been an effective guiding force. Perhaps this is because both the statute of limitations and the doctrine of lesser offenses at trial have divergent defendant-oriented and public-oriented purposes and, thus, produce confusion on this level of analysis as well.²¹¹

No current judicial resolution of the conflict between the statute of limitations and the lesser offense doctrine seems satisfactory. It does not seem fair to force a defendant who was indicted for a greater offense to relinquish the protection of the statute of limitations in order to have the benefit of an appropriate lesser offense option at trial while other defendants, engaging in the same offense conduct at the same time, but not charged with a greater offense, are exonerated by the state. Nor, from another point of view, does it seem efficient²¹² to permit a defendant to request a lesser offense verdict, which is known to be time-barred by every participant in the trial process but the jury, and then to walk away free of conviction or punishment when that requested verdict is, in fact, returned.

Current statutory solutions also seem unsatisfactory. Courts have not construed the general provisions in state statutes and criminal procedure rules that provide for the conviction of defendants for lesser offenses as intending conviction for time-barred lesser offenses.²¹³ Nonetheless, at least four states—Arkansas, Maine, North Dakota, and Utah—have enacted permissive legislation that specifically eliminates the otherwise applicable period of limitations for lesser offenses at trial. Maine did so as

210. *State v. Short*, 618 A.2d 316, 324 (N.J. 1993); see *supra* notes 157-58 and accompanying text.

211. See, e.g., *Delisle*, 648 A.2d at 640 (commenting on the dual purposes of the lesser offense doctrine); *State v. Muentner*, 406 N.W.2d 415, 419 n.7 (Wis. 1987) (commenting on the dual policies of the statute of limitations).

212. "Efficient" is used here to mean the most effective use of the costly procedure of a criminal trial and the optimal promotion of the criminal justice system's overall goals through the most appropriate adjudicative result.

213. See 21 AM. JUR. 2D *Criminal Law* § 225 (1981) (explaining that the rule that one cannot be convicted of a lesser time-barred offense is not changed by statutes providing that, on indictment for certain offenses, the accused may be found guilty of certain lesser offenses).

follows:

The defense established by this section [the general statute of limitations] shall not bar a conviction of a crime included in the crime charged, notwithstanding that the period of limitation has expired for the included crime, if as to the crime charged the period of limitation has not expired or there is no such period, and there is evidence which would sustain a conviction for the crime charged.²¹⁴

These straightforward legislative solutions may raise a serious constitutional issue if they are construed to permit conviction of a time-barred lesser offense when the defendant refuses to waive the statute of limitations. Well-established constitutional doctrine states that a legislative lengthening of a crime's limitations period is an *ex post facto* law as to a defendant for whom the original statute has already expired.²¹⁵ These permissive legislative provisions arguably fall within the reach of the *ex post facto* prohibition. These statutes each apparently invite the state to make the request for a time-barred lesser offense conviction option without the acquiescence of the defendant and thereby avoid the defense of an expired limitations period.²¹⁶ In con-

214. ME. REV. STAT. ANN. tit. 17-A, § 8(7) (West 1964); *see also* ARK. CODE ANN. § 5-1-109(d) (Michie 1993) (stating the same substantive content with slight textual variation). Utah's legislature has similarly provided:

Whenever a defendant is charged with an offense for which the period of limitations has not run and the defendant should be found guilty of a lesser offense for which the period of limitations has run, the finding of the lesser and included offense against which the statute of limitations has run shall not be a bar to punishment for the lesser offense.

UTAH CODE ANN. § 76-1-305 (1995); *see also* N.D. CENT. CODE § 29-04-02 (1991) (stating that a three-year statute of limitations for felonies other than murder does not prevent a person prosecuted for murder from being found guilty and punished for any included offense).

215. *See* 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.6 (1991 & Supp. 1993); *cf.* *United States v. Taliaferro*, 979 F.2d 1399, 1405-06 (10th Cir. 1992) (holding that the application of an extended statute of limitations period to offenses occurring prior to the legislative extension, when the prior and shorter statute of limitations has not run as of the date of the extension, does not violate the *Ex Post Facto* Clause); *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992) (same); *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.) (same), *cert. denied*, 277 U.S. 590 (1928).

216. *Cf.* Blair, *supra* note 30, at 475 n.186 (arguing that a coerced waiver of a statute of limitations defense in order to obtain a lesser offense instruction is analo-

trast to these permissive provisions, a restrictive approach is taken in a Louisiana statute.²¹⁷ This provision, which specifically applies the statute of limitations to lesser offenses at trial, is ambiguous as to the defendant's right to waive the protection of the statute.

As a matter of policy, the permissive statutory approach is undesirable because it permits the state to avoid the defendant's substantive right under the statute of limitations not to be punished for a time-barred offense without consent, thereby violating both the individual and the societal justifications for the law.²¹⁸ The restrictive approach of the Louisiana law is also undesirable if it precludes the defendant from making an informed waiver of the statute of limitations in order to have the option of conviction of an otherwise proper time-barred lesser offense.

A necessary step towards resolution of the conflict between the statute of limitations and the lesser offense doctrine that will better accommodate all the competing concerns is to carefully distinguish among the basic procedural concepts of the *trial court's jury instruction*, the *jury's verdict*, and the *court's judgment of conviction* (and sentence) based upon that verdict. In addition, the substantive doctrines in conflict must also be considered because their particular natures and policies must also play an important role in any meaningful solution.

III. HISTORY, NATURE, AND PURPOSES OF THE DOCTRINES IN CONFLICT

A. *The Criminal Statute of Limitations*

Whether the criminal statute of limitations is subject to waiver, or whether it is a legislative limit on the power of the court that is not subject to waiver by a party, is the central issue in resolving the conflict between the statute of limitations and the

gous to an ex post facto law). A constitutional challenge to provisions such as these has yet to be reported.

217. LA. CODE CRIM. PROC. ANN. art. 574 (West 1981) ("The time limitations applicable to the offense for which a person is prosecuted apply to a conviction or punishment for a lesser and included offense.").

218. See *infra* notes 263, 270-76 and accompanying text.

lesser offense doctrine.²¹⁹ Moreover, even if the criminal statute of limitations is determined to be subject to a defendant's waiver in a particular jurisdiction, a secondary state or federal law question remains as to whether a defendant should be forced to waive the statute's protection in order to obtain the benefit of a time-barred lesser offense instruction to the jury.

The defendant's ability to waive the criminal statute of limitations is one of the essential components of this Article's proposed solution to the conflict.²²⁰ Whether the statute is waivable should not depend on ambiguous text²²¹ or precedent unsupported by policy, but on the history, nature, and purposes of the limitations statute itself.

219. Although the Court in *Spaziano*, in its dictum, seemed to assume that a state defendant can waive the statute, *Spaziano v. Florida*, 468 U.S. 447, 456 (1984), that issue surely must be a matter of the law of the particular jurisdiction—just like procedures in criminal trials and substantive definitions of crimes—and not an issue uniformly resolved by federal constitutional law. See *supra* notes 114-15 and accompanying text.

220. See *infra* part IV.

221. For example, in his concurring opinion in *State v. Delisle*, 648 A.2d 632 (Vt. 1994), Justice Johnson found that the state statute of limitations could not be waived by the defendant because, in part, the statute provided that prosecutions commenced after the limitations period had run were "void." *Id.* at 646 (Johnson, J., concurring); see VT. STAT. ANN. tit. 13, § 4503 (1982).

Because general criminal statutes of limitations are so common in this country, see *infra* note 223, and because the historical continuity of such statutes is so deep, see *infra* notes 222, 233, it is difficult to see why slight and inconclusive variations in formalistic text should be read to imply that the legislature intended for the defendant to be able to waive the statute in one state and not another.

1. *The History and Nature of the Statute*

The fact that the federal government²²² and almost every

222. The general criminal statute of limitations governing prosecutions by the federal government is found in 18 U.S.C. §§ 3281, 3282 (1988). Section 3281 provides: "An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939." *Id.* § 3281. Section 3282 provides: "Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." *Id.* § 3282.

Both provisions are direct descendants of an enactment of the second session of the First Congress, approved on April 30, 1790. There, as part of "[a]n Act for the Punishment of certain Crimes against the United States," the Congress provided:

And be it further enacted, That no person or persons shall be prosecuted, tried or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prosecuted, tried or punished for any offence, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice.

Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119.

In 1876, the three-year limitations period for capital offenses, willful murder and forgery excepted, was extended to most federal crimes. Act of Apr. 13, 1876, ch. 56, 19 Stat. 32. In 1939, all capital offenses were removed from the limitations period. Act of Aug. 4, 1939, ch. 419, 53 Stat. 1198. In 1948, the limitations provisions for capital offenses (no limitations period) and noncapital offenses (three years) were first codified in their current sections. Act of June 25, 1948, ch. 645, 62 Stat. 683, 827-28 (codified at 18 U.S.C. §§ 3281-3282 (1988)). In 1954, Congress enacted the current general limitations period of five years for noncapital offenses unless otherwise excepted. Act of Sept. 1, 1954, ch. 1214, § 10(a), 68 Stat. 1142, 1145, *amended* by Act of Sept. 26, 1961, Pub. L. No. 87-299, 75 Stat. 640, 648.

The 1790 criminal statute of limitations, quoted above, governed fines and forfeitures for violations of penal statutes, as well as criminal offenses. *See infra* note 234. The statute of limitations that now governs civil fines, penalties, and forfeitures is found at 28 U.S.C. § 2462 (1988). The limitations period provided there is also five years. *Id.*

As explicitly provided for in the current general federal criminal limitations statute, 18 U.S.C. § 3282 (1988), Congress has enacted other provisions that pertain to specific offenses. *See, e.g.*, 18 U.S.C. § 3293 (Supp. V 1993) (extending the five-year statute of limitations to ten years for certain violations involving financial institutions including, *inter alia*, false entries, bank fraud, mail and wire fraud, and criminal violations of RICO). Although several such specific limitations provisions are placed within Chapter 213 (Limitations) of Title 18 of the United States Code, *see* 1 CORMAN, *supra* note 215, § 1.6 n.25, changes may appear elsewhere in the federal

state²²³ have statutes of limitations restricting the time period in which the government may charge a defendant is peculiar. No jurisdiction has held that criminal statutes of limitations are mandatory; they are solely a matter of legislative choice.²²⁴ Ac-

criminal code, *see, e.g.*, 18 U.S.C. § 3509(k) (Supp. V 1993) (statute of limitations that precludes prosecution for an offense involving the sexual or physical abuse of a child under age 18 extended until the child reaches age 25), or in other locations in the federal law where criminal penalties are provided, *see, e.g.*, 26 U.S.C. § 6531 (1988) (limitations period for criminal violations of the Internal Revenue Code is three years, six years for specific offenses listed as exceptions).

Other sections within Chapter 213 of Title 18 provide, *inter alia*, that no limitations period is applicable to fugitives, 18 U.S.C. § 3290 (1988), that the limitations period is suspended for specified white collar offenses when the United States is at war, *id.* § 3287, and that an additional short limitations period is available to permit a renewed indictment or information when the original felony charge has been judicially dismissed and the statute of limitations has expired, *id.* §§ 3288, 3289 (Supp. V 1993).

223. The textual approaches and limitations periods of state provisions vary. *See* 2 ROBINSON, *supra* note 111, § 202(a) n.1 (Supp. 1995) (listing state criminal statutes of limitations). South Carolina and Wyoming do not have any such statutes. *Id.* Kentucky, Maryland, and North Carolina only limit the time period for prosecuting misdemeanors. KY. REV. STAT. ANN. § 500.050 (Michie/Bobbs-Merrill 1990); MD. CODE ANN., CTS. & JUD. PROC. § 5-106 (1989 & Supp. 1994); N.C. GEN. STAT. § 15-1 (1983). Virginia and West Virginia do not limit the prosecution of any traditional felonies. VA. CODE ANN. § 19.2-8 (Michie 1990 & Supp. 1994); W. VA. CODE § 61-11-9 (1992). Mississippi excludes many, but not all, major felonies from limitations. MISS. CODE ANN. § 99-1-5 (1994).

Arizona's limitations periods begin with the state's actual or due diligence discovery of the offense. ARIZ. REV. STAT. ANN. § 13-107 (1989). Nevada also begins the running of the limitations period with "discovery" of the offense, but only if the crime is committed "in a secret manner." NEV. REV. STAT. ANN. § 171.095 (Michie 1992). Both are unlike the usual general statute of limitations that begins to run with the commission of all the elements of the offense. *See, e.g.*, CAL. PENAL CODE § 800 (West 1985) (prosecution shall be "commenced within six years after commission of the offense"); N.Y. CRIM. PROC. LAW § 30-10(2)(b) (Consol. 1986) (criminal prosecution for any other felony must be commenced within five years "after the commission thereof").

State statutes of limitations are frequently amended, usually to extend the limitations periods. *See, e.g.*, ALA. CODE § 15-3-5 (1982 & Supp. 1994) (adding offenses for which there are no limitations periods); KAN. STAT. ANN. § 21-3106 (1988 & Supp. 1994) (extending period for rape and aggravated sodomy). Like the federal government, *see supra* note 222, many states have amended their limitations provisions in recent years to lengthen the period for prosecution of abuse offenses against minors. For examples, *see* 2 ROBINSON, *supra* note 111, § 202(a).

224. Commentators have consistently described criminal statutes of limitations as "not a matter of right but of legislative grace." 1 TORCIA, *supra* note 28, § 92 & n.42 (citing cases). Courts and commentators have not suggested that such statutes are constitutionally required as a matter of due process because they are fundamen-

cordingly, the time periods in these statutes can be changed at the will of the legislature²²⁵ or can be eliminated entirely.²²⁶ Statutes of limitations in this country commonly vary in their manner of designating covered crimes²²⁷ and also vary, sometimes quite dramatically, in the limitations periods they provide.²²⁸ Nearly all statutes of limitations exclude limitations

tal to the American system of justice. The Supreme Court has, however, praised both criminal and civil statutes of limitations. *See, e.g., Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (stating that criminal statutes of limitations are to be liberally interpreted in favor of repose because they protect individuals and have a salutary effect on law enforcement); *Bridges v. United States*, 346 U.S. 209, 215-16 (1953) (discussing how the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, created an exception to a longstanding congressional "policy of repose" that is "fundamental to our society and our criminal law"); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("Statutes of limitation are vital to the welfare of society and are favored in the law."); *Adams v. Woods*, 6 U.S. 336, 341 (1805) (stating that restricting the fine and forfeiture penalty provision of the 1790 federal statute of limitations to criminal prosecutions would be "utterly repugnant to the genius of our laws") (Marshall, C.J.); *see also supra* note 222 (discussing the development of federal statutes of limitations).

225. Such statutes may be applied retroactively to lengthen the limitations period for a committed crime without violating the Ex Post Facto Clause as long as the time period of the original provision has not yet expired for the particular defendant for that offense. *See supra* note 215 and accompanying text.

226. For example, before John Short was prosecuted, New Jersey's legislature eliminated the limitations period for manslaughter. *State v. Short*, 618 A.2d 316, 321 (N.J. 1993). The court found the pre-amendment statute prevented Short's conviction and judgment on the time-barred lesser manslaughter offense. *Id.* ("As it happens, the Legislature has amended the New Jersey Code of Criminal Justice to remove all time bars for the offenses of aggravated manslaughter and manslaughter. Of course, no one has suggested that the amendment be applied retroactively to defendant's case.") (citation omitted).

227. For example, the federal statute has a single general limitations period for all noncapital offenses. *See supra* note 222. A single general limitations period is not typical in state statutes, which commonly differentiate between degrees of offenses, *see, e.g., OHIO REV. CODE ANN. § 29-2901.13* (Baldwin 1993) (providing different periods for felonies other than murder, for misdemeanors, and for minor misdemeanors), or provide limitations periods for specific offenses, *see, e.g., MINN. STAT. ANN. § 41-628.26* (West 1983 & Supp. 1995) (listing specific groups of offenses by section number and providing different limitations periods for each group, followed by a catch-all limitations period for offenses not listed).

228. *Compare* MICH. COMP. LAWS ANN. § 767.24 (West 1982 & Supp. 1994) (providing a ten-year limitation period for kidnapping, extortion, assault with intent to murder, and conspiracy to murder) with KAN. STAT. ANN. § 21-3106 (1988 & Supp. 1994) (providing a general limitations period of two years for all crimes except murder, certain sex offenses, and certain crimes by public employees). The most common long limitations period for felonies (other than capital offenses, noncapital murder,

periods for capital offenses and noncapital murder,²²⁹ and many do not limit the time for prosecution of other major offenses.²³⁰ The recent trend in both federal and state statutes of limitations is the legislative lengthening of the limitations periods for specific offenses, particularly child abuse offenses and financial crimes.²³¹ Criminal statutes of limitations are thus flexible instruments of legislative policy and often reflect the social concerns of the particular time and locality.

The current general federal criminal statute of limitations can be traced directly to an enactment of the First Congress.²³² Most states had statutes of limitations at the beginning of the Republic, many of those laws having early- or mid-eighteenth-century colonial ancestry.²³³ However, how criminal statutes of

abuse offenses against minors, and other selected felony offenses) is six years. *See, e.g.*, CAL. PENAL CODE § 800 (West 1985); N.H. REV. STAT. ANN. § 62-625:8 (1986 & Supp. 1994); OHIO REV. CODE ANN. § 29-2901.13 (Baldwin 1993). The most common limitations period for felony offenses in general, however, is three years. *See, e.g.*, COLO. REV. STAT. § 16-5-401 (1986 & Supp. 1994); ILL. COMP. STAT. ANN. ch. 720, para. 5/3-5 (Smith-Hurd 1993); IOWA CODE ANN. § 56-802.3 (West 1994); MO. ANN. STAT. § 556.036 (Vernon 1979 & Supp. 1994); NEB. REV. STAT. § 29-110 (1989); N.D. CENT. CODE § 5-29-04-02 (1991).

229. 1 TORCIA, *supra* note 28, § 92 ("It is commonly provided that a prosecution for murder or for an offense punishable by death or life imprisonment may be commenced at any time.") (citations omitted). New Mexico, an exception among the states, provides for a limitations period of 15 years for all capital and first-degree felonies. N.M. STAT. ANN. § 30-1-8 (Michie 1994).

230. 1 TORCIA, *supra* note 28, § 92; *see, e.g.*, ILL. COMP. STAT. ANN. ch. 720, para. 5/3-5 (Smith-Hurd 1993) (stating that a prosecution for murder, involuntary manslaughter, reckless homicide, treason, arson, or forgery may be commenced at any time); MISS. CODE ANN. § 99-1-5 (1994) (excluding murder, manslaughter, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, false pretenses, and abuse offenses against children from limitations period).

231. *See supra* notes 222-23.

232. *See supra* note 222.

233. For quotations and summaries of statutes of limitations, including criminal statutes, *see* J.K. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY (Boston, Little Brown 6th ed. 1876); WILLIAM BALLANTINE, A TREATISE ON THE STATUTE OF LIMITATIONS (Albany, Packard & Co. 1829); H.G. WOOD, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY (4th ed. 1916). Some examples of eighteenth-century criminal statutes are those of New Jersey (1796; capital offenses, except murder, three years, and all other noncapital offenses, two years), BALLANTINE, *supra*, at 469-72; New York (1788; all crimes except murder, three years), *id.* at 472-79; and Vermont (1797; all crimes except murder and arson, three years, but theft, robbery, burglary, and forgery, six years), *id.* at 515-17. The General Assembly of the Province of Pennsylvania enacted

limitations originated in this country and why they became so widespread is an interesting historical mystery.²³⁴ Criminal

a statute of limitations in 1684 providing that crimes against the governor for any hostility toward him or for incitement against him must be prosecuted within six months of the commission of the offense. Act of Assembly, May 10, 1684, CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA 166, 173-74 (1879).

234. In contrast to the British common law, present-day civil law systems on the European Continent have general criminal statutes of limitations similar to those of their antecedent Roman-law-based criminal justice codes. See, e.g., Developments in the Law, *Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) [hereinafter Developments]; Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 631 (1954). To trace the origins of American criminal statutes of limitations, it is important to acknowledge that the civil law, as well as the English common law, influenced how criminal procedure developed in the American colonies. Note, *supra*, at 631.

The Common Law as it came more and more to be the accepted law of the Colonies was already strongly influenced by the Natural Law movement [which is a source of Roman Law influences] . . . After the Revolution, the work of Story and Kent and the popularity of French and classical examples, made Roman Law terms and doctrines more familiar than they were in England.

MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY § 79 (1936).

The fact that another facet of our criminal justice system with strong colonial roots, the public prosecutor, was also foreign to English common law provides a historical analogy to the criminal statute of limitations. See PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 20-21 (1958) (observing that in England, until 1879, the Attorney General was the only person who could be described as a public prosecutor); RADIN, *supra*, § 135 (stating that criminal trials in seventeenth- and eighteenth-century England were to a large extent conducted by private prosecutors, as opposed to public ones, although such trials were "pleas of the crown"); MURRAY L. SCHWARTZ, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE* 5 (1962) (stating that the origin of the general purpose public prosecutor in America is a historical mystery); W. Scott Van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125 (discussing the possible Dutch origin of eighteenth-century American colonial public prosecutors with extensive responsibility for the investigation and trial of general criminal offenses, a civil law notion never of general significance in England).

Although all criminal offenses were against the "king's peace," 1 SIR FREDERICK POLLOCK & FREDERIC W. MATTLAND, *HISTORY OF ENGLISH LAW* 44 (Lawyers' Literary Club 1959) (2d ed. 1898), the notion of private prosecution is not at all strange when viewed in the context of the history of English criminal law. The injured party and selected members of the community who were made aware of the wrong (the inquest and, later, the grand jury) were responsible for bringing charges for common law wrongs. Prosecution of the offense was left to the injured party or other interested person and to the court. See 1 SIR JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 4, 419, 422, 427 (London, MacMillan 1883). "In all other countries the discovery and punishment of crime has been treated as pre-eminently the affair of the Government . . . In England it has been left principally to indi-

statutes of limitations were not a part of the English common law.²³⁵ Parliament did exercise the power of limitation for criminal offenses, but very sparingly, and only in a very small number of crimes.²³⁶ Many Americans, who take criminal stat-

viduals who considered themselves to have been wronged" *Id.* at 419. In addition, civil and criminal law were not completely distinct because forfeitures, fines, and other economic penalties were often involved in common law prosecutions. See 2 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 727-39 (photo. reprint 1978) (London, Valpy 1816) (regarding common law forfeiture); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 259-80 (photo. reprint 1978) (Cornhill, Nutt 1721) (regarding penalties recoverable by information). Parliament thus frequently provided in "penal" statutes that an injured party or a disinterested "common informer" could benefit by obtaining or sharing in specified penalties by bringing an "information" in the name of the Crown, much as in present day American *qui tam* suits. See ISAAC ESPINASSE, A TREATISE ON THE LAW OF ACTIONS ON PENAL STATUTES 5-16 (Exeter, N.H., Lamson 1822).

Laws with provisions for both state punishment and private benefit also were not uncommon in America. See, e.g., Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 112, 116 (making general larceny in places within federal jurisdiction and embezzlement of United States military property punishable by public whipping not exceeding 39 stripes and fine not exceeding the fourfold value of the property stolen, "the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor").

As early as Elizabethan times, actions to recover these types of penalties were severely limited in time of initiation by act of Parliament. An Act Concerning Informers, 1588-89, 31 Eliz. ch. 5 (Eng.). The first federal criminal statute of limitations contained a clause limiting the time for "any fine or forfeiture under any penal statute." Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119. Thus, the blending of civil and criminal actions for crimes and the coupling of private interests with that of the Crown in the enforcement of both penal statutes and common law offenses might, in part, explain the stunted development of both the public prosecutor and the criminal statute of limitations in England. The Continental systems, which historically have emphasized the role of the state rather than the injured party in the investigation and prosecution of crime, however, seem, in these limited respects, to be more analogous to the American system both today and in the late eighteenth century.

235. See, e.g., 1 CHITTY, *supra* note 234, at 160; ROBERT E. ROSS & MAXWELL TURNER, ARCHBOLD'S PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 55 (1938); 1 TORCIA, *supra* note 28, § 92; WOOD, *supra* note 233, § 28. According to one nineteenth-century English treatise writer:

With regard to limitations as to time, it is one of the peculiarities of English law that no general law of prescription in criminal cases exists amongst us. The maxim of our law has always been "Nullum tempus occurrit regi," and as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time. This principle has been carried to great lengths in many well-known cases.

2 STEPHEN, *supra* note 234, at 1-2.

236. In the early nineteenth century, Chitty listed only treason (three years), not

utes of limitations for granted, are surprised to learn that today, unlike civil law countries, England's law is still unreceptive to criminal limitations statutes.²³⁷

In addition to the mystery of the statutes' origin in the United States, the puzzling fact remains that many early American statutes of limitations had, and still do have, very short time periods during which the crime and its perpetrator must be discovered and prosecution instituted.²³⁸ America, of course, was much smaller in the eighteenth century, and communities were more tightly knit. The victim would most likely know the offender, particularly if a traditional common law offense was involved. This, however, was not always the case. In the eighteenth century, no professional police force was responsible for the investigation of crime.²³⁹ In addition, many people lived far from civilization and were isolated for months at a time. The fear of invasion and sudden death from an unknown intruder must have been a stark reality of life in the rural cabin or the frontier settlement. Many crimes must have gone unsolved or unprosecuted beyond the limitations periods. Nonetheless, the first federal criminal statute of limitations had a period of only two years for most felonies, and several states had similarly short limitations periods.²⁴⁰

attending church and sacrament (one year), all penal statutes (two years), and two other miscellaneous statutory offenses. 1 CHITTY, *supra* note 234, at 160-61.

237. See, e.g., PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 191 (12th ed. 1989) (stating that the most important statutory exceptions are for summary offenses, which have a six-month limitations period); Note, *supra* note 234, at 630 n.4 (listing treason, income tax offenses, perjury, sex crimes against children, and statutory summary offenses as the exceptions).

The absence of criminal limitations statutes does not preclude an English trial court from entertaining a defendant's motion that the prosecution should be dismissed because the Crown's unexcusable delay in bringing the charge caused prejudice in the particular case. See 11(1) LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND ¶ 786 (4th ed. 1990). Nonetheless, "[t]he jurisdiction to decline to allow criminal proceedings to continue should be used sparingly." *Id.* (citation omitted).

238. See *supra* notes 222, 228, 233.

239. Police, THE COLUMBIA ENCYCLOPEDIA 2181 (5th ed. 1993) (stating that the colonies maintained constables, surviving today as rural sheriffs, that regular police forces did not appear in the states until after 1844, and that on the frontier, vigilance committees functioned as police).

240. See *supra* notes 222, 233. Perhaps such short periods can be explained by the

No such mysteries surround the history and purpose of civil (noncriminal) statutes of limitations. To understand criminal limitations statutes, one must briefly consider and contrast their civil counterparts.²⁴¹ Early English limitations statutes, dating from the thirteenth century, applied only to real property. At first, such statutes were temporary in nature; their periods barred claims only for a given number of years from a fixed reference point, usually an event in a particular sovereign's life.²⁴² Not until the end of the fifteenth century were those limitations periods expressed as a given interval between the accrual of the claim and the commencement of the action.²⁴³ Not until the first quarter of the seventeenth century did the first significant English statute of limitations of general application state definite limitations periods, not only for real actions, but also for most personal actions in debt, contract, and torts.²⁴⁴ This statute, An Act for Limitation of Actions, and for Avoiding of Suits in Law of 1623 (Limitation Act),²⁴⁵ superseded-

American colonists' particular fear of state oppression, which was fanned by experiences with a hostile England. Short limitations periods, however, continued in both federal and state statutes of limitations well after the Revolution. The American legislative choice of time for criminal statutes of limitations was more likely originally influenced by the periods in the Continental statutes and by the short periods for personal injury and *qui tam* penal actions in England, even though English law did not provide a general model for criminal statutes of limitations. See *supra* note 234. Once those short periods became established in American law, they tended to become fixed.

241. There are several significant treatises on the law of statutes of limitations. See, e.g., ANGELL, *supra* note 233; BALLANTINE, *supra* note 233; CORMAN, *supra* note 215; WOOD, *supra* note 233. The nineteenth-century works in this group all trace the history of the English law of limitations in detail, and each contains a valuable appendix outlining English and American statutory material. Bridging the gap between Wood and Professor Corman's excellent contemporary study is the frequently cited 1950 *Statute of Limitations* study in the *Harvard Law Review*. See *supra* note 234. All of these works consider extensively the origin, development, purposes, and application of statutes of limitations, but none devotes more than a few pages to criminal statutes. For example, Professor Corman's two-volume work has one five-page section on criminal statutes of limitations. 1 CORMAN, *supra* note 215 § 1.6. Wood's two-volume study has two sections, totalling approximately six pages. 1 WOOD, *supra* note 233, §§ 13, 28. The *Harvard Law Review* piece has only scattered references to criminal limitations. Developments, *supra* note 234.

242. ANGELL, *supra* note 233, ¶¶ 12-14; 1 WOOD, *supra* note 233, § 2.

243. See, e.g., ANGELL, *supra* note 233, at 503-05 (giving text of statute); 1 WOOD, *supra* note 233, § 2 (citing Limitation of Prescription, 1540, 32 Hen. 8, ch. 2 (Eng.)).

244. See, e.g., ANGELL, *supra* note 233, ¶¶ 12-21.

245. 21 Jam. 1, ch. 16 (Eng.). For a full text of this statute see ANGELL, *supra*

ed all others²⁴⁶ and became the (often verbatim) model for statutes of limitations governing civil suits in many of the colonies.²⁴⁷ These American versions of the Limitation Act were often found intact long after the formation of the Republic.²⁴⁸ With the Limitation Act came many English precedents interpreting the statute, which were usually followed by American courts.²⁴⁹

At first, statutes limiting the time for bringing civil claims were resisted and interpreted narrowly by some American courts because such laws deprived those who failed to pursue their claims for excusable reasons of their due remedy. The concept of limitation of civil claims, however, soon gained wide and impassioned acceptance in this country.²⁵⁰ Commentators have explained this acceptance by notions of elemental fairness to the defendant,²⁵¹ natural law,²⁵² judicial efficiency,²⁵³ and the

note 233, at 505-08. For a textual summary, see 2 WOOD, *supra* note 233, at 1683-84. The time periods for these civil actions ranged from one year to six years for actions regarding personalty, and generally 20 years for actions regarding realty. *Id.* Parliament's purpose for this statute apparently was primarily to keep inconsequential claims from cluttering the King's courts. Developments, *supra* note 234, at 1178. In 1589, suits upon penal statutes were limited to short periods of time (one to three years), depending on whether the actions benefited the informer or the Queen. An Act Concerning Informers, 1588-89, 31 Eliz., ch.5 (Eng.); see *supra* note 234.

246. 1 WOOD, *supra* note 233, § 2.

247. Wood v. Carpenter, 101 U.S. 135, 139 (1879) (stating that most of the American colonies adopted the Limitations Act before the Revolution and that it "has since been the foundation of nearly all of the like legislation in this country"); see ANGELL, *supra* note 233, ¶ 21.

248. ANGELL, *supra* note 233, ¶ 21; 1 WOOD, *supra* note 233, § 2.

249. ANGELL, *supra* note 233, ¶¶ 14-21; 1 WOOD, *supra* note 233, § 2. Because of the well-established principle of English law that time did not run against the King, these statutes did not limit the power of the Crown or American governmental entities, unless explicitly stated. See, e.g., ANGELL, *supra* note 233, ¶¶ 34-41; ROSS & TURNER, *supra* note 235, at 55; 1 WOOD, *supra* note 233, §§ 52-52a. Statutes of limitations had no application to proceedings in equity, in which the judicially created doctrine of laches required the court to weigh the reasons for prejudicial delay. After the merger of law and equity courts, the statute of limitations governed all civil actions, but laches could still be a defense in an equity-type action before the statutory period had run. Developments, *supra* note 234, at 1183-84.

250. ANGELL, *supra* note 233, ¶ 23; 1 WOOD, *supra* note 233, § 4.

251. Largely because of the popularity and continuity of the civil statute of limitations since the Limitations Act of 1623, little legislative debate has arisen about the statutes' purposes. Developments, *supra* note 234, at 1185. Commentators have, of course, had their say about these matters. 1 CORMAN, *supra* note 215, § 1.1, at

necessity of stability in a growing commercial society.²⁵⁴ By the close of the nineteenth century, the law clearly held statutes of limitations in high esteem; the Supreme Court observed:

Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose

11 ("While the interests of the plaintiff, the defendant, and the general public all are served by the application of statutes of limitations, the defendant's interests are defined most often in judicial expression."); 1 WOOD, *supra* note 233, § 4 ("The underlying purpose of statutes of limitations is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution."); Developments, *supra* note 234, at 1185 ("The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant."); see Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130 (1955) (discussing the purposes of civil statutes of limitations).

252. JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 26 (Boston, Little Brown 1856).

It is, for example, a principle of natural justice, that a person who asserts against another a right which the latter denies, shall litigate it, if at all, before the defendant's witnesses are dead, and his documents wasted by time; yet the precise period within which this must be done, can only be fixed by a technical rule.

Id.

253. As expressed by Professor Corman:

The general interest of the public also is served by statutes of limitations. Judicial efficiency is the reward when these statutes produce speedy and fair adjudication of the rights of the parties. Certainty and finality in the administration of affairs is promoted, and courts are relieved of the burden of trying stale claims when plaintiffs have "slept" on their rights.

1 CORMAN, *supra* note 215, § 1.1, at 16 (citations omitted).

254. Developments, *supra* note 234, at 1185 ("In ordinary private civil litigation, the public policy of limitations lies in avoiding the disruptive effect that unsettled claims have on commercial intercourse."). In considering the social purposes implied in the common statement that statutes of limitations are statutes "of repose," Professor Callahan stated:

Finally, it is suggested that the "repose" which statutes of limitation are designed to assure is that of persons other than judges or of defendants to particular actions. . . . [I]t is clear that the interest referred to here is that of those persons who have dealings with others and, accordingly, are concerned in the stability of the positions of those with whom they deal. Without this stability there would be little repose for anyone.

The operation of the social purpose is especially evident in some instances, such as the transfer of property, but it is difficult to imagine one to which it does not apply. All business dealings of any kind are apt to depend on the financial stability of the parties

Callahan, *supra* note 251, at 136.

by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate activity and punish negligence.²⁵⁵

Criminal statutes of limitations in the United States fell within the general aura of approval granted to the limitations statutes that governed civil affairs for many of the same reasons. Unlike criminal statutes of limitations, civil statutes, even with their recognized lofty social purposes, were not held to be jurisdictional restrictions on a court's power.²⁵⁶ To the contrary, civil limitations statutes consistently have been held to be personal defenses that extinguish only the plaintiff's remedy, subject to waiver by the defendant if not appropriately pleaded.²⁵⁷

The criminal statute of limitations in the United States thus had a complex history that took from, but also departed from, the common law. The criminal limitations statute is only partially similar in form and purpose to its civil counterpart and is clearly different in its overall place and function in the law. The history of both statutes provides no substantial argument that the criminal statute of limitations is a jurisdictional bar to the power of the trial court.

The nature of the criminal statute of limitations also fails to support the jurisdictional conclusion. Regardless of the historical currents that led to the development of our criminal justice system,²⁵⁸ in present-day America, because crimes are seen as offenses against society itself, the state alone prosecutes criminal perpetrators.²⁵⁹ The goal of that prosecution is to condemn and punish publicly an offender who is proven guilty beyond a reasonable doubt so that both the offender and those who learn of the prosecution will be deterred from future crimes against soci-

255. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

256. See *supra* note 28 and accompanying text.

257. 1 CORMAN, *supra* note 215, §§ 3.1-2; 2 *id.* § 9.13 ("The statute will be waived unless it is pleaded; in addition, the statute of limitations defense is merely a procedural bar to recovery, waivable by the parties' express consent or conduct.").

258. See *supra* note 234.

259. For example, the law punishes unsuccessful attempts to harm because the mental culpability convincingly demonstrated thereby presents a danger to society that must be punished in accordance with the goals of the criminal law. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 27.04[A] (2d ed. 1995).

ety and internalize the lessons taught by an efficient criminal justice system. The offender is punished in a fashion that our society has legislatively determined is deserved, conferring a sense of moral closure to the victim, the offender, and society as a whole.²⁶⁰

Why should the state be prevented from achieving the law's significant purposes of social peace and moral balance by a limitations statute that considers only the passage of time, rather than any of the particular facts and circumstances involved in the crime and its investigation? Further, why should that time be measured in years rather than decades for many of our most serious offenses? Society's criminal justice goals surely go unfulfilled when manslaughters, rapes, robberies, arsons, thefts, and other crimes go unpunished because the evidence needed to prosecute is not yet discovered at the moment of the expiration of the statute of limitations, despite the diligence of the police and prosecutors.²⁶¹ Undoubtedly, an offender, at some time and place, has calmly calculated the statute of limitations' safe-haven in deciding whether to risk committing a carefully planned offense. Yet both federal and state legislatures throughout American history consistently have chosen to limit the reach of the criminal law in the inflexible manner of the statute of limitations. These statutes both create substantive rights for putative defendants and express social policy. If the history and the problematic nature of the statute of limitations do not support the argument that the statute should be seen as jurisdictional, perhaps the policy reasons underlying the statute may do so.²⁶²

260. For a brief discussion of the theories of punishment, see *id.* §§ 2.01-05.

261. The author is not aware of any published data that reports on matters closed by law enforcement agencies because the statute of limitations period expired. One set of statistics indicates that United States Attorneys declined to prosecute 232 cases in 1989 because the statute of limitations had run. U.S. DEPT OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1989 tbl. 1.3 (May 1992).

262. Criminal statutes of limitations also present factual issues that are not conducive to the adoption of a jurisdictional approach to the statute. Such factual issues may be presented in two contexts—tolling and the question of when the offense was completed.

Most criminal statutes of limitations provide that the running of the statute's time period will be suspended until specified tolling conditions, such as continuous absence from the jurisdiction, flight, present insanity, or another pending prosecution in the state, cease to exist. See 2 ROBINSON, *supra* note 111, § 202(d). The Model

2. *The Purposes of the Statute*

The Supreme Court's rationale for criminal statutes of limita-

Penal Code tolls the running of the statute "during any time when the accused is continuously absent from the State or has no reasonably ascertainable place of abode or work within the State," but for no longer than three years, or "during any time when a prosecution against the accused for the same conduct is pending in this State." MODEL PENAL CODE § 1.06(6) (1985). The general federal statute of limitations, *see supra* note 222, tolls if the person is "fleeing from justice." 18 U.S.C. § 3290 (1988).

Because the applicability of a fact-based tolling exception may not be apparent from the indictment, the Supreme Court held that a demurrer will not lie to a count of an indictment that appeared, on its face, to be barred by the federal statute of limitations. *United States v. Cook*, 84 U.S. 168, 178-79 (1872). Later, the Court indicated that the federal statute of limitations is an affirmative defense that must be raised at trial. *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917). *Contra State v. Morris*, 340 P.2d 447, 449-50 (Idaho 1959) (stating in dicta that the time period of the statute of limitations presents a "jurisdictional fact," and that the government must allege a statutory exception in the indictment).

Determining when the statute of limitations began to run is sometimes a disputed factual issue because the time of completion of the criminal offense may be a disputed matter for the jury to resolve. This issue would not arise, for example, in a prosecution for perjury, but could arise in a prosecution for a continuing offense such as conspiracy. 1 CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 193, at 708 (2d ed. 1982). Although one may find the criminal statute of limitations to be jurisdictional as a matter of statutory construction even though factual issues may arise under the statute, the presence of disputed matters for the jury seems to support a contrary conclusion. *See, e.g., State v. Johnson*, 422 N.W.2d 14 (Minn. Ct. App. 1988).

[T]he rule [that the statute of limitations is not jurisdictional] makes sense in a case of this type, where the defense may be met with a showing by the state that the statute of limitations is tolled for factual reasons. If the defense were jurisdictional, a defendant could raise it for the first time on appeal. . . . [The] factual issue would not have been addressed in the trial court, and this court would be forced to remand for a determination of the facts.

Id. at 16-17.

Commentators on the Federal Rules of Criminal Procedure agree that under Rule 12, the federal statute of limitations is not jurisdictional and is thus waived by the defendant if not raised during or before the trial. *See, e.g.,* 8 ROBERT M. CIPES, *MOORE'S FEDERAL PRACTICE* ¶ 12.03[2] (Feb. 1995) (stating that under Rule 12, the issue of the statute of limitations is waived by failure to raise it at the proper time); 1 WRIGHT, *supra*, § 193 (stating that although Rule 12 itself is silent as to when defenses such as the statute of limitations must be raised, the "sensible resolution" is that the statute is waived if not raised at trial). A defense based on the statute of limitations thus may not be raised initially by federal prisoners through collateral attack. 2 MARK S. RHODES, *ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* § 12:86 (2d ed. 1985).

tions involves both the protection of the individual defendant from a potentially unfair trial and a now perhaps undeserved punishment, and the protection of society from unprosecuted offenders, by using the sanction of preclusion to encourage law enforcement officials to promptly investigate and prosecute crime.²⁶³ Any argument that the criminal statute of limitations is jurisdictional, and thus should not be subject to waiver by a defendant seeking a time-barred lesser offense instruction or seeking to plead guilty to a time-barred offense, must be grounded in the public, rather than the individual, protective policy of the statute. That public policy must be so strong as to deprive a defendant of the plea bargain or verdict option that otherwise would be available to similarly situated defendants, were it not for the statute of limitations. In other words, before the personal shield of the criminal statute of limitations becomes a sword used against the defendant because society has a greater need for the limitation doctrine's protection, that need must be demonstrated.

However, there is no evidence to support that need and a supporting analogy in the criminal justice system does not readily present itself. The Sixth Amendment right to a speedy trial²⁶⁴

263. As the Court has explained:

Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose.'"

Toussie v. United States, 397 U.S. 112, 114-15 (1970) (citations omitted). These words are often quoted in whole or in part. See, e.g., *United States v. Marion*, 404 U.S. 307, 323 (1971); *United States v. Wild*, 551 F.2d 418, 424 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977). Based on congressional intent and the Court's expression of the purposes of the statute of limitations, *Toussie* held that failure to register with the Selective Service was not a continuing offense that prevented the commencement of the running of the federal statute of limitations, 18 U.S.C. § 3282 (1988). *Toussie*, 397 U.S. at 122-23.

264. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

certainly protects both society's interest in prompt criminal adjudication and the individual defendant's interest,²⁶⁵ yet a defendant may waive that right by not asserting it at the proper time.²⁶⁶ Other constitutional rights that protect the defendant,

The Sixth Amendment right to a speedy trial protects a defendant only after the putative defendant becomes an "accused," *Marion*, 404 U.S. at 313, either by formal indictment or information or by an arrest leading to formal charge, *id.* at 320; see also *Doggett v. United States*, 112 S. Ct. 2686, 2692 (1992) (same, citing *Marion*). *Marion* contains a lengthy footnote concerning the purposes of the criminal statute of limitations, which the Court looks to as "the primary guarantee against bringing overly stale charges." *Marion*, 404 U.S. at 322 & n.14 (citations omitted). This footnote relied on language quoted from both the Court's prior civil and criminal statute of limitations cases. The Court concluded that: "There is no need to press the Sixth Amendment into service to guard against the mere possibility the pre-accusation delays will prejudice the defense in a criminal case since statutes of limitations already perform that function." *Id.* at 323.

In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Court established four criteria for assessing speedy trial claims under the Sixth Amendment. In *Doggett v. United States*, 20 years later, the Court approved and characterized the *Barker* formula as follows: "[W]hether delay before trial was uncommonly long, whether the government or the defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett*, 112 S. Ct. at 2690.

Splitting five to four on the application of the last criterion to the facts of the case, the majority held that where the government was negligent in apprehending the defendant for a lengthy period following his indictment, the defendant—unaware of the indictment—was entitled to a presumption of prejudice at trial. *Id.* at 2694.

265. *Barker*, 407 U.S. at 519 ("[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the rights of the accused."). In *United States v. Levine*, 658 F.2d 113 (3d Cir. 1981), the court noted:

Yet statutes of limitations secure rights which run to society as well as to the accused, and resemble many of the interests guarded by the Speedy Trial Clause. . . . Both provisions shield defendants . . . [T]hey also afford society protection from unincarcerated offenders . . . as well as the reduced capacity of the government to prove its case.

Id. at 119. *Levine* held that an interlocutory appeal does not lie from a denial of defendant's pretrial motion to dismiss based on the federal statute of limitations. *Id.* at 126, 129.

266. Discussing how a defendant's failure to demand his right to a speedy trial fits within the Court's traditional doctrine of knowing and voluntary waiver of fundamental rights (such as the right to plead guilty, to have a jury trial, to exercise the privilege against self-incrimination, or to have assistance of counsel), the Court in *Barker* stated: "[W]e do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made." *Barker*, 407 U.S. at 529; see also *United States v. Spaulding*, 588 F.2d 669, 670 (9th Cir. 1978) (holding that a defendant may expressly waive his constitutional right to a speedy trial if the waiver is knowing and voluntary).

although not usually seen as having public purposes, also further societal interests. For example, both the Fifth Amendment protection against double jeopardy²⁶⁷ and the Sixth Amendment right to trial in the district where the offense was committed and right to have the assistance of counsel further society's goals.²⁶⁸ Society gains efficiency by prohibiting costly repeated prosecutions or additional punishments for the same offense, by maximizing the deterrent value of the prosecution through public trial and sentencing in the community where the social wrong was done, and by increasing the likelihood of an accurate result when a defendant is represented by counsel at trial and sentencing. Although all of these rights have both individual and public purposes, a defendant may waive them.²⁶⁹ The social purposes of the criminal statute of limitations must be evaluated to determine whether they are so unique and so powerful that they should be construed inflexibly to bar the jurisdiction of the court to enter judgment on a time-barred offense, thereby defeating the defendant's choice to waive the statute's substantive personal right.

As part of the extensive study and debate that led to the adoption of the Model Penal Code, the American Law Institute considered the policy reasons for its proposed limitations section.²⁷⁰ The Commentary to the limitations section discusses

267. The Fifth Amendment provides in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

268. See *supra* note 264.

269. *United States v. Wild*, 551 F.2d 418, 424-25 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977). Just because there is a capacity to waive a constitutional or statutory right does not necessarily mean that there is always a corresponding capacity to defeat the public purpose incorporated in that right. For example, a defendant's practical ability to waive the Sixth Amendment right to speedy trial by failing to raise that right does not result in the right to insist on a lengthy delay before trial. Also, the capacity to waive the Sixth Amendment right to a jury trial does not result in the right to insist on a bench trial. *Singer v. United States*, 380 U.S. 24, 26 (1965); cf. FED. R. CRIM. P. 23(a) ("Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government").

270. MODEL PENAL CODE § 1.06 (1985). Section 1.06 provides for a six-year prosecution commencement term for felonies of the first degree (other than murder), three years for any other felony, two years for misdemeanors, and six months for petty misdemeanors. *Id.* § 1.06(1)-(2). Special provisions extend the limitation statute for offenses involving fraud or breach of fiduciary obligation and for misconduct by pub-

five justifications for time limits in criminal prosecutions. First, and foremost, prosecutions should proceed with fresh evidence. Second, as time increases, the likelihood that the offender has reformed also increases, and the necessity for punishment diminishes (or the likelihood increases that the criminally inclined will be prosecuted for a more recent offense). Third, after a long period of time has passed, society's "retributive impulse" is likely to be replaced by sympathy for a defendant prosecuted for a long-forgotten offense. Fourth, reduction of the time of possible prosecution cuts off the ever-present potential for blackmail by one who is aware of the offense. Finally, criminal limitations statutes "promote repose by giving security and stability to human affairs."²⁷¹

As Professor Robinson points out, the rationale of the Commentary is subject to serious question.²⁷² The criminal trial process is specifically designed by its rules of evidence, by its strong commitment to the power of cross examination,²⁷³ and, most importantly, by its requirement of proof beyond a reasonable doubt, to exclude or discredit unreliable evidence.²⁷⁴ When a defendant chooses to waive the limitations statute to permit a jury and court to consider an alternative lesser offense or to plead guilty to a time-barred offense, any argument based upon protecting the defendant from an unfair result either fades or disappears. The argument based on the offender's reformation over time disregards both the general deterrence and retributive purposes of criminal punishment and, again, would not preclude a defendant from waiving that policy for his or her own benefit.

lic officers. *Id.* § 1.06(3). Rules for commencement of the statutory period and for tolling the running of the statute are also provided. *Id.* § 1.06(4)-(6).

271. MODEL PENAL CODE AND COMMENTARIES § 1.06 cmt. 1 (1985). The Commentary takes the position, based on case law, that the expiration of the statute of limitations applicable to a lesser-included offense "will act as a bar to a conviction for the lesser offense." *Id.* cmt. 2(d).

272. 2 ROBINSON, *supra* note 111, § 2.02(b).

273. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.").

274. Cf. *United States v. Curtiss Aeroplane Co.*, 147 F.2d 639, 642 (2d Cir. 1945) (Learned Hand, J.) (debunking the stale evidence argument in the context of a civil case).

Although in some cases a community's impulse for the moral balance of retribution may weaken with the running of the limitations period, in many others, particularly those involving homicide or lasting physical or psychological damage, no such weakening occurs. Finally, there is the social stability argument. In the criminal context, this rationale must be different than that for civil statutes of limitations.²⁷⁵ In the civil context, the concern is for stabilizing commercial enterprise and preventing disruption to the market system that flows from the uncapped risk of plaintiffs seeking recourse in an untimely fashion.

In support of criminal limitations statutes, there seems to be some merit to the position that if a long time goes by, the expenditure of society's resources in criminal prosecution—in terms of the costs of the investigation, trial, and (if the burden of proof at trial is met) punishment—and the costs to the community that follow from removing a now productive member from its midst are not warranted.²⁷⁶ The rebuttal to this argument, however, is significant. The problem with statutes of limitations in general, and criminal statutes of limitations in particular, is that they paint with the broad brush of an inflexible general rule. No room remains for prosecutorial evaluation of the particular offense or offender or, as in the English system today, for a judicial consideration of a laches-like defense based on the facts of a particular case.²⁷⁷ Restricted by the Supreme Court's very narrow definition of due process in the context of pre-charge delay,²⁷⁸ the American defendant asserting an untimeliness defense must rely on the statute of limitations, if applicable, or, to obtain constitutional relief, prove that intentional and improper-

275. See *supra* notes 250-55 and accompanying text.

276. See 2 ROBINSON, *supra* note 111, § 2.02(b).

277. See *supra* note 237.

278. See *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977); *United States v. Marion*, 404 U.S. 307, 324 (1971) ("[T]he Due Process Clause . . . would require dismissal of an indictment if it were shown that delay . . . caused substantial prejudice to [the defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."). One recent survey of due process cases involving pre-accusation delay does not report a single federal appellate case in which the defendant was successful. Kathryn M. Keating, Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993*, 82 GEO. L.J. 597, 908-11 (1994).

ly motivated delay in either the investigation or initiation of the prosecution has caused actual prejudice. Perhaps neither the statutory nor the due process alternative serves the necessary social purposes as effectively as would a flexible, nonconstitutional approach that permits the court to weigh the actual prejudice caused by unjustifiable delay against the reasons for such delay.²⁷⁹ More importantly, criminal statutes of limitations using an all-or-nothing approach interfere with the prosecutor's discretion in a way that contradicts the efficient operation of the current system. The prosecutor is an executive officer who must exercise judgment as to whether it is appropriate to proceed with a particular prosecution or even to continue with a particular investigation.²⁸⁰ The factors considered in the exercise of this discretionary decision are myriad and include the seriousness of the offense, the personal circumstances of the defendant, the strength of the available evidence, and the significance of the prosecution in all its aspects measured against the limited resources of every prosecutor's office. The time that has passed since the commission of a particular offense may also be a factor, as well as the offender's demonstrated rehabilitation and the victim's call for retribution.²⁸¹

Not only is the time factor significantly removed from the prosecutor's discretion by the criminal statute of limitations, but

279. The danger of such a course would be excessive judicial interference prior to the charge in the executive functions of law enforcement agencies and prosecutors. The inefficiency that such interference creates has made the courts reluctant to undertake judicial review of precharge decisionmaking. *See, e.g., Lovasco*, 431 U.S. at 790 (stating that a prosecutor's discretionary decision as to timing of the indictment is not subject to judicial disagreement unless the delay violates "fundamental conceptions of justice").

280. The Supreme Court has recognized the importance of this discretion and has refused to interfere with its exercise by federal prosecutors except when an unconstitutional discriminatory effect motivated by a discriminatory purpose is proven. *See Wayte v. United States*, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.").

281. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.9(a) (3d ed. 1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE] (stating that prosecutor should not permit prosecution in absence of sufficient admissible evidence to support a conviction); *id.* Standard 3-3.9(b) (stating that prosecutor may, in some circumstances consistent with public interest, decline to prosecute even if there is sufficient evidence to convict).

the plea bargaining process is decidedly changed as well. The necessity of plea bargaining in today's criminal justice system is difficult to deny.²⁸² If, however, the statute bars lesser offenses from the charge-bargain dynamic, the prosecutor and the defendant may be forced to a trial that they both wish to avoid. By default, the defendant may face a greater charge than the prosecutor might otherwise believe to be appropriate in the particular circumstances. The social costs of this result, in terms of inefficiency, are apparent. Measurable costs, dictated by the statute of limitations, attach to both a prosecutor's forced decision to overcharge and to the resultant inappropriate punishment of the defendant. In law and economic terms, this result artificially distorts the efficient market decisions of plea bargaining.²⁸³

The judicial decision to deny the defendant at trial the option of waiving the protection of the statute of limitations, which would permit the jury to consider a verdict on a lesser offense and the court to enter judgment on such a verdict, involves a variation of these same costs. The jurisdictional bar may well prevent the best possible result as determined by the jury in a particular case—a possibility that, as the next section discusses, is otherwise acknowledged without exception in this country through the lesser offense doctrine.

The history, nature, and social purposes of the legislative time barrier to prosecution thus do not support the conclusion that a defendant should be precluded from waiving the statute of limitations at trial for his or her own benefit. The trend in the federal and state courts toward permitting the possibility of such a waiver by disregarding the traditional jurisdictional label is correct and justifiable.²⁸⁴ The public purposes of the criminal statute of limitations do not preclude a defendant's waiver, and they

282. See *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970) (pointing out the benefits to both defendants and the state from the guilty pleas that precede over three-fourths of the criminal convictions in this country).

283. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.7 (4th ed. 1992) (discussing how changes in criminal procedure affect economics of plea negotiations); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289-91, 304-21 (1983) (discussing prosecutorial discretion and plea bargaining as elements of a well-functioning market system that will yield efficient results if not defeated by regulation).

284. See 1 CORMAN, *supra* note 215, § 1.6.

do not justify rejecting a jury's guilty verdict on a time-barred offense that has been submitted to them. The social benefits of a jurisdictional approach to the criminal statute of limitations are, at best, uncertain in today's criminal justice system.

Legislatures will likely continue to lengthen the periods of criminal statutes of limitations for particular offenses as the then current "crime problem" warrants. Perhaps they will lengthen limitations periods in general or eliminate those periods entirely for certain serious offenses. It is unlikely, however, given their long history in this country and the consistently laudatory description of those provisions in the courts, that criminal statutes of limitations will be widely repealed. Without a specific legislative direction, however, a jurisdictional reading of such statutes that precludes the defendant's choice to waive the statute or the courts' power to act on that choice is unwarranted.

B. The Doctrine of the Lesser Offense at Trial

1. The History, Nature and Purposes of the Doctrine

The history, nature, and purposes of the doctrine of lesser offenses at trial must play a significant part in resolving the conflict between that doctrine and the statute of limitations. Unlike the criminal statute of limitations, the origin of the lesser offense doctrine in the United States is not obscure—it was prominently and deeply imbedded in the common law.²⁸⁵ The

285. See *Beck v. Alabama*, 447 U.S. 625, 633 & n.9 (1980) ("At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged."); *Hagans v. State*, 559 A.2d 792, 799-800 (Md. 1989) (discussing English cases); 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 301-02 (Savoy, Nutt & Cosling 1736) (listing lesser offenses for which a defendant could be convicted at common law).

The lesser offense doctrine first developed in the common law as an aid to the prosecutor who failed to prove an element of the charged offense at trial. *Beck*, 447 U.S. at 633. Facilitating that practice were the then common, but now frowned upon, special verdicts in criminal cases, which permitted the jury to specify the facts of the matter, leaving it to the court to enter judgment on the charged or lesser offense. 2 CHITTY, *supra* note 234, at 636-37, 644-46; 2 HALE, *supra*, at 302-05; 2 HAWKINS, *supra* note 234, at 439-40.

Although defendants may have gained some benefit from the application of the lesser offense doctrine at common law, a large number of felonies, excluding man-

concept of the lesser offense at trial was predicated upon the fact that most significant common law criminal offenses were made up of elements that overlapped other offenses—for example, murder and manslaughter, robbery and larceny, rape and assault.²⁸⁶ The evidence at trial might fail to convince a jury of one or more of the elements necessary for conviction of the charged offense, yet successfully prove a completely included “lesser” offense not alleged in the indictment.²⁸⁷

slaughter, were punishable by death. RADIN, *supra* note 234, § 140; 2 STEPHEN, *supra* note 234, at 212, 219; 3 *id.* at 78-79. Defendants on trial for felonies could not be convicted of misdemeanors because to do so would unfairly deprive them of the unique privileges of a misdemeanor trial, such as the assistance of counsel. 2 CHITTY, *supra* note 234, at 639. In a 1918 text, an American commentator spoke of “a few states” that still followed the old felony-misdemeanor lesser offense rule, although the original reasons for it were obviously no longer applicable. CLARK, *supra* note 31, § 122.

It is unclear when the courts first acknowledged a defendant’s right to request consideration of a lesser offense. In his 1856 text, Bishop stated that the election was the prosecutor’s alone, BISHOP, *supra* note 252, § 536, but the Supreme Court’s first lesser offense case, *Sparf v. United States*, 156 U.S. 51 (1895), concerned the defendants’ request for a lesser-included offense manslaughter instruction in a federal trial court, *id.* at 59 (noting the instruction was rejected only because there was no evidentiary support for it).

Finally, at common law, conviction for a lesser offense at the trial on a greater offense would avoid the necessity of another trial for the lesser offense, if the jury acquitted the defendant of the greater charged offense. See Mascolo, *supra* note 92, at 265 (stating that lesser offense doctrine “originated as a means of implementing the policy at common law against multiple trials for the same allegation[s]”). This policy is embodied in the common law pleas of *autrefois acquit* and *autrefois convict*. ROSS & TURNER, *supra* note 235, at 145-55 (stating that defendant was entitled to dismissal of indictment charging violation of the same criminal offense for which he was acquitted or convicted under common law, or indictment based on the same conduct if a specific statute so provided). The Double Jeopardy Clause of the Fifth Amendment is based on this same concept. See *supra* note 267 and accompanying text.

286. See, e.g., BISHOP, *supra* note 252, §§ 529-539.

287. The common law approach to the lesser offense doctrine was narrowly focused on the elements of the offenses involved. 2 CHITTY, *supra* note 234, at 38; 2 HAWKINS, *supra* note 234, at 440. This approach, known in today’s courts as the “elements” approach, defines a lesser offense as an offense that is always committed by committing the greater charged offense, but which has fewer elements than the greater offense. 5 RHODES, *supra* note 262, § 31:13; 4 CHARLES E. TORCIA, WHARTON’S CRIMINAL PROCEDURE § 473 (13th ed. 1992); 3 WRIGHT, *supra* note 262, § 515.

Manslaughter, which permits a noncapital punishment for criminal homicide, is probably the original lesser offense. 3 STEPHEN, *supra* note 234, at 78-79. Man-

The federal government and every state jurisdiction considering lesser offenses at trial has provided, in some manner, for the possibility of a jury instruction and verdict²⁸⁸ for a lesser offense than the offense charged in the indictment or information.²⁸⁹ There can also be no question about the significant utility of the lesser offense doctrine. Given the pervasive overlap-

slaughter is one of the most common lesser offenses at trial, but perhaps the most theoretically complex because it arguably has more elements than murder, not fewer. If murder is defined to include, *inter alia*, the intentional killing of a human being without justification or excuse, and manslaughter is defined to include, *inter alia*, such an intentional killing in the heat of passion, then heat of passion manslaughter has one additional element. *Id.* at 84-85.

The common law did not have this conceptual difficulty because although murder was "attended by one or more of the states of mind included under the description of malice aforethought," in manslaughter "malice aforethought is absent." *Id.* at 21; see also 4 WILLIAM BLACKSTONE, COMMENTARIES *191-92. In other words, manslaughter was defined as murder without the element of malice; therefore, common law manslaughter was a lesser-included offense of murder. Heat of passion, of course, does not vitiate intent. Rather, it mitigates the punishment for certain provoked but inexcusable and unjustifiable intentional killings. Today, manslaughter is considered a lesser offense of intentional murder, even under the narrow "elements" approach. As the cases considered in this Article have demonstrated, a criminal homicide defendant faces serious consequences when a jury is precluded from considering a lesser offense option because the statute of limitations has run.

The "elements" approach does not permit the jury to disregard the evidence and simply substitute a lesser offense for the greater one proven at trial, even if the elements of the lesser offense were necessarily included in the charged offense. The evidence at trial must support both an acquittal of the greater offense and a conviction of the lesser offense. *Schmuck v. United States*, 489 U.S. 705, 716 n.8 (1989) ("[T]he evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater.") (citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)); *Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("[D]ue process [in a capital case] requires that a lesser included offense instruction be given only when the evidence warrants such an instruction."); 4 TORCIA, *supra* note 287, § 473.

288. A lesser offense conviction is also possible in a bench trial. See 3 WRIGHT, *supra* note 262, § 515 (Supp. 1995).

289. The Supreme Court has stated:

In the federal courts, it has been "beyond dispute that the defendant is entitled to an instruction on a lesser included offense" Similarly, the state courts that have addressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it.

Beck v. Alabama, 447 U.S. 625, 635-37 (1980) (citation and footnote citing cases from 42 states omitted); see also *Hagans v. State*, 559 A.2d 792, 800-01 & nn.5-6 (Md. 1989) (citing examples of judicial adoption of the lesser offense doctrine, examples of statutory lesser offense provisions from 29 states, and examples of rules of procedure from five states providing for lesser offenses at trial).

ping of today's statutory criminal offenses, a system of criminal adjudication that permitted only conviction or acquittal of charged offenses regardless of the evidence developed at trial would be overly formalistic and inflexible from both the prosecution's and the defense's perspective. Moreover, according to the reasoning approved by the Supreme Court in *Keeble*, *Beck*, and *Spaziano*, such a system would increase the psychological risk of irrational results at trial because the jury would be presented only with the all-or-nothing choice between conviction or acquittal of the charged offense.²⁹⁰

However salutary the general concept appears to be, the lesser offense doctrine has always been fraught with difficulty in application,²⁹¹ resulting in many significant areas of disagreement among the states and among federal appeals courts. In addition, as discussed in Parts II.D and II.E, the Supreme Court's suggestion that the doctrine of lesser offenses may be a required component of the proof-beyond-a-reasonable-doubt/due-process standard has further complicated an understanding of the law.²⁹²

Some commentators, therefore, have concluded that the dictates of the Constitution should play a part in resolving the conflict between the statute of limitations and an otherwise appropriate lesser offense at trial.²⁹³ Such a constitutionally based solution could not be meaningfully accomplished without imposing a uniform federal standard of lesser offenses on the states in place of the diverse approaches currently in effect. That choice, reaching far beyond *Winship*,²⁹⁴ would significantly al-

290. See *supra* notes 58, 78, 87, 89-90, 102, 114 and accompanying text.

291. See *Brown v. State*, 206 So. 2d 377, 380 (Fla. 1968) (stating that the situation of the lesser-included offense has "challenged the effective administration of criminal justice for centuries"); Blair, *supra* note 30, at 445-46 (stating that whether the prosecutor or defendant invokes the lesser offense doctrine, its application has caused considerable confusion among courts and commentators); Mascolo, *supra* note 92, at 271 (stating that the lesser-included offense doctrine "is a source of confusion and controversy in American jurisprudence").

292. The holdings of these cases cannot be read to require a lesser offense instruction in any trial in which the statute of limitations bars conviction on the lesser offense, even a capital case. See *supra* notes 112-18 and accompanying text.

293. See *supra* note 92.

294. See *supra* notes 43-47 and accompanying text.

ter the balance between local diversity of nonfundamental procedural rights and mandatory constitutional standards that underlies our criminal justice system. This Article, however, concludes that the lesser offense doctrine should not be of constitutional stature.²⁹⁵ Rather, courts or legislatures should, as a matter of the law of the jurisdiction, permit defendants to waive the protection that the statute of limitations affords in order to permit the entry of a judgment upon a jury's guilty verdict for an otherwise proper, time-barred lesser offense.

2. *Definition and Application of the Doctrine Within a Federal System*

Although the lesser offense concept appears straightforward, its application raises extraordinarily complex issues. The scope of this Article does not include a discussion of all these complexities.²⁹⁶ Rather, this Article addresses the extent of the diversity and the many layers of the lesser offense concept, not the merits of one choice over another. It is one thing to approve the lesser offense doctrine in general, and quite another to define its necessary particulars. American courts, faced with the common-law concept of the lesser offense and with inconclusive expressions of that doctrine in statutes and rules of procedure, have had to decide what is and what is not a lesser offense; whether

295. See *infra* notes 336-39 and accompanying text.

296. See, e.g., Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191 (1984) (reviewing differing federal definitional standards and evidentiary requirements for the lesser offense doctrine and criticizing courts for not considering theoretical reasons for their preferences); Bernard E. Gegan, *Lesser Included Crimes Under Felony Murder Indictments in New York: The Past Speaks to the Present*, 66 ST. JOHN'S L. REV. 329, 368-72 (1992) (criticizing the present statutory definition of "lesser included offense" as an undesirable "radical break with prior law"); Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. PUGET SOUND L. REV. 185 (1992) (stating that early Washington cases recognized the subtlety and complexity of the lesser offense doctrine, but that recent cases have not); Stuart S. Yusem, Comment, *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, 84 DICK. L. REV. 125, 126-27 (1979) (stating that "complex and contradictory proclamations [concerning the lesser offense doctrine] by the Pennsylvania Supreme Court and inconsistent application by the Superior Court" has added confusion to the doctrine); see also Blair, *supra* note 30, at 445-51 (containing helpful descriptions of the complexities of the lesser offense doctrine and its application); Mascolo, *supra* note 92, at 271-85 (same).

that definition has an evidentiary component or is simply a matter of abstract statutory comparison; what quantum of evidence is necessary to satisfy an evidentiary component; whether the doctrine of lesser offenses is related to, or is a facet of, the complex constitutional concept of double jeopardy; and whether both the prosecution and the defense must have mutual access to invocation of the doctrine, however it is defined.²⁹⁷

Several definitional standards for lesser offenses at trial have developed in the United States, and many of the application issues left for judicial decision are resolved differently based on the chosen standard.²⁹⁸ These standards are variously denominated and may partially overlap. They range from narrow to broad and focus on whether the statutory elements of the lesser offense are a necessary subset of the elements of the greater

297. See, e.g., *State v. Keffer*, 860 P.2d 1118 (Wyo. 1993). In *Keffer*, the Wyoming Supreme Court recently found itself immersed in all of these issues. In that case, the trial court refused the state's request to instruct the jury on the lesser offense of manslaughter because the defendant objected in writing to that instruction and because the evidence did not support the instruction. *Id.* at 1121. The jury found the defendant not guilty of second-degree (nonpremeditated) murder and the state filed exceptions in the state supreme court. *Id.* at 1122-23. The Wyoming Supreme Court reversed the trial court and held that the lesser offense instruction should have been given as requested by the prosecution. *Id.* at 1139-40. In so doing, the court switched the standard of lesser offense (its rule of procedure, like the federal rule, speaking in terms of an offense "necessarily included in the offense charged") from the much broader "inherent relationship" test to the narrow "statutory elements" test. *Id.* at 1133-34. Along the way, the court found it necessary to consider at length (1) the bases for those two definitional standards (relying on Blair, *supra* note 30), as well as for the different approach of the Model Penal Code, *Keffer*, 860 P.2d at 1128-29; see *infra* note 299; (2) the relationship of double jeopardy doctrine to the various standards, *Keffer*, 860 P.2d at 1129-31; see *infra* note 314; (3) the due process "implications" of *Keeble* and *Beck*, *Keffer*, 860 P.2d at 1131-32; see *supra* notes 58, 87 and accompanying text; (4) the constitutional requirement of notice and the compatibility of that doctrine with the principle of mutuality of access by the prosecution and the defense to the lesser offense instruction, *Keffer*, 860 P.2d at 1132-33; see *infra* note 313; (5) the corollary issue of the ability of the defendant to "veto" an instruction requested by the government, *Keffer*, 860 P.2d at 1134; (6) whether only "some evidence," which "ought to be perceived as minimal," (the "jury theory") is enough to justify a lesser offense instruction, or whether a factual dispute is necessary regarding one of the differentiating elements between the greater and lesser offense that requires the court to evaluate the evidence ("the court theory"), *id.* at 1134-36; see *infra* notes 321-22; and (7) whether the appropriate standard of appellate review of the trial court's decision regarding lesser offenses is de novo, *Keffer*, 860 P.2d at 1137.

298. See, e.g., *Keffer*, 860 P.2d at 1118.

offense (the "elements" approach), whether the evidence produced at trial supports an inference that the defendant committed an offense related to the charged offense (the "inherent relationship" approach), or whether the factual allegations of the indictment or information implicate a lesser offense (the "pleadings" approach).²⁹⁹

The federal statutory embodiment of the lesser offense doctrine was originally enacted in 1872³⁰⁰ and was recast with little change in 1944 as Federal Rule of Criminal Procedure 31(c).³⁰¹ It was not until 1989, however, that the Supreme Court settled on a lesser offense standard through its interpre-

299. For discussions of these definitional standards, see Blair, *supra* note 30, at 447-50; Ettinger, *supra* note 296, at 198-209; Mascolo, *supra* note 92, at 273-80; Russell G. Donaldson, Annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 A.L.R.4TH 1081 (1986); David E. Rigney, Annotation, *Propriety of Lesser-Included-Offense Charge to Jury in Federal Criminal Case—General Principles*, 100 A.L.R. FED. 481 (1990).

The American Law Institute's Model Penal Code takes yet another approach to defining a lesser offense. It incorporates the "statutory elements" standard and also breaks new ground beyond the "inherent relationship" standard. The Code provides as follows:

(4) *Conviction of Included Offense Permitted.* A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
(b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or
(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

MODEL PENAL CODE § 1.07(4) (1985).

The Code's liberal approach to the lesser offense definition has not been widely adopted. *Keffer*, 860 P.2d at 1129.

300. An Act to Further the Administration of Justice, ch. 255, § 9, 17 Stat. 196, 198 (1872) ("[I]n all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment . . .").

301. Rule 31(c) was intended to restate the law of lesser offenses existing at the time of its adoption; the rule has not been amended since its enactment. *Schmuck v. United States*, 489 U.S. 705, 718-19 (1989). Rule 31(c) states: "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." FED. R. CRIM. P. 31(c).

tation of Rule 31(c), thereby resolving many of the issues that had divided the federal courts.³⁰² In *Schmuck v. United States*,³⁰³ the Court affirmed the Seventh Circuit's en banc decision adopting the traditional, narrow "elements" standard³⁰⁴ and rejected the significantly broader "inherent relationship" test formulated by the District of Columbia Circuit in 1971³⁰⁵ and adopted by the Ninth Circuit in 1986.³⁰⁶

Schmuck was a used car distributor who rolled back the odometer readings of used cars before selling them at elevated prices to retail dealers.³⁰⁷ He was convicted for mail fraud, a felony, after the district court refused to give a lesser offense instruction for odometer tampering, then a federal misdemeanor.³⁰⁸ In making its decision, the Court first looked to the text of Rule 31(c), which suggested that the statutory elements of the offenses should govern.³⁰⁹ Second, because the Rule had not

302. The Supreme Court decided nine significant cases involving the lesser offense doctrine before 1989. Four of those cases were in the context of state capital cases. *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hopper v. Evans*, 456 U.S. 605 (1982); *Beck v. Alabama*, 447 U.S. 625 (1980); *Roberts v. Louisiana*, 428 U.S. 325 (1976); see *supra* part II.E. The remaining cases, dating back from *Keeble v. United States*, 412 U.S. 205 (1973); see *supra* notes 48-59 and accompanying text, to *Sparf v. United States*, 156 U.S. 51 (1895); see *infra* notes 316-20 and accompanying text, all involved federal trials and the interpretation of Rule 31(c) and its predecessor statute. See *Sansone v. United States*, 380 U.S. 343 (1965); *Berra v. United States*, 351 U.S. 131 (1956); *Stevenson v. United States*, 162 U.S. 313 (1896).

303. 489 U.S. at 705. *Schmuck* was a five-to-four decision in which the dissenters addressed only the "mailing" requirement of the mail fraud statute, 18 U.S.C. § 1341 (1988). *Id.* at 722-25 (Scalia, J., dissenting).

304. *United States v. Schmuck*, 840 F.2d 384, 389 (7th Cir. 1988) (en banc), *aff'd*, 489 U.S. 705 (1989). A panel of the Seventh Circuit had ruled that odometer tampering was a lesser-included offense under Rule 31(c) because the evidence at trial supported the inference that Schmuck committed the less serious crime, and both the indicted offense and the lesser offense related to the protection of the same interests (the "inherent relationship" test). *United States v. Schmuck*, 776 F.2d 1368 (7th Cir. 1985), *rev'd*, 840 F.2d 384 (7th Cir. 1988) (en banc), *aff'd*, 489 U.S. 705 (1989).

305. *United States v. Whitaker*, 447 F.2d 314, 319 (D.C. Cir. 1971).

306. *United States v. Martin*, 783 F.2d 1449, 1451 (9th Cir. 1986); *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980).

307. *Schmuck*, 489 U.S. at 707, 711.

308. *Id.* at 707-08.

309. *Id.* at 716-17. The Court emphasized that Rule 31(c) provided that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." *Id.* at 708.

been amended since its passage, the Court examined the prevailing federal and state practice at the time of the adoption of the Rule in 1944.³¹⁰ Finally, the Court noted the greater certainty and predictability of the elements test.³¹¹

The Court did not discuss the extensive justification given by the two federal circuits and several state high courts for a broader approach based on the evidence at trial rather than on abstract statutory analysis.³¹² Rather, the Court expressed concern that under the "inherent relationship" standard the prosecution would be unable to seek a lesser offense conviction. The doctrine's requirement of mutuality³¹³ would thus be destroyed because the defendant may not have constitutionally sufficient notice of the lesser offense if the elements of that offense were not a subset of the indicted offense.³¹⁴

310. *Id.* at 718-20.

311. *Id.* at 720-21.

312. In addition to the Ninth Circuit and District of Columbia Circuit opinions already cited, *see supra* notes 305-06 and accompanying text, the Court ignored the rationale for the "inherent relationship" standard set forth in 1984 by the Supreme Court of California in *People v. Geiger*, 674 P.2d 1303 (Cal. 1984) (en banc) (holding that failure to give defendant's requested instruction on related, but not included, offense of vandalism for second-degree burglary was prejudicial error because fundamental fairness mandates the broader "inherent relationship" rule). The California Supreme Court looked to the District of Columbia Circuit and the Ninth Circuit, as well as to opinions from the Supreme Courts of Montana, *State v. Gopher*, 633 P.2d 1195 (Mont. 1981); Idaho, *State v. Boyenger*, 509 P.2d 1317 (Idaho 1973); and Michigan, a series of decisions beginning with *People v. Chamblis*, 236 N.W.2d 473 (Mich. 1975), as well as to the Hawaiian legislature, which had adopted a lesser offense statute with a provision based on § 7.01(c) of the Model Penal Code, HAW. REV. STAT. § 701-109(4)(c) (1985); *see supra* note 299; *Geiger*, 674 P.2d at 1309-10; Donaldson, *supra* note 299.

313. The concept of "mutuality" requires that both the prosecutor and the defense have equal access to a lesser offense at trial, and that neither party can block that access if otherwise proper under the law. Under this doctrine, the defendant is not entitled to a lesser offense instruction if the government is not entitled to such an instruction. *Schmuck*, 489 U.S. at 718; *Keeble v. United States*, 412 U.S. 205, 214 n.14 (1973). The requirement of mutuality recognizes that the lesser offense doctrine "developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Schmuck*, 489 U.S. at 717 n.9 (quoting *Beck v. Alabama*, 447 U.S. 625, 633 (1980)). States that have adopted the "inherent relationship" standard of lesser offenses at trial have necessarily dispensed with the requirement of mutuality. *See, e.g., Geiger*, 674 P.2d at 1312 ("That the prosecutor is not entitled to obtain a conviction on a charge of which the defendant lacks notice provides no basis, in logic or justice, for depriving a defendant of instructions on a charge at his request.").

314. *Schmuck*, 489 U.S. at 718. It is interesting to note that Justice Blackmun,

The tension between a narrow and broad approach to the definition of a proper lesser offense can be expected to continue in the state courts even after the Supreme Court's expression of the federal rule in *Schmuck*.³¹⁵ The different definitional standards and the subsidiary issues that arise in applying them inevitably reflect the adopting jurisdiction's view of the proper role of the jury in a criminal trial. A narrow view of the jury's decisionmaking power would favor the narrow definition of lesser offenses expressed in the "elements" test. A broader view of the jury's discretion in a criminal case would be more compatible with the standard that permits the jury, if the defendant so chooses, to convict for any lesser offense demonstrated by the evidence at trial.

In addition to the definitional choice, two other significant components of lesser offense law are the subjects of diverse opinion—the evidentiary component and the transitional instruction.

who wrote the majority opinion in *Schmuck*, did not discuss the fact that the narrow "elements" approach to lesser offenses was the most compatible with the then-applicable standard for identifying the "same offense" under the Double Jeopardy Clause, as expressed in the *Blockburger* rule. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."); see also *State v. Keffer*, 860 P.2d 1118, 1130 (Wyo. 1993) ("It is clear that the *Blockburger* analysis parallels the statutory elements test for lesser included offenses."). In 1990, a bare majority of the Court supplemented the *Blockburger* test, which is essentially an elements test that bars re-prosecution for a lesser-included offense, *Brown v. Ohio*, 432 U.S. 161, 168 (1977), with a broader test based on "conduct that constitutes an offense for which the defendant has already been prosecuted," *Grady v. Corbin*, 495 U.S. 508, 521 (1990), overruled by *United States v. Dixon*, 113 S. Ct. 2849 (1993). *Grady* was overruled only three years later, and the *Blockburger* elements test was reinstated, over Justice Blackmun's dissent, as the double jeopardy standard by a different majority. *Dixon*, 113 S. Ct. at 2863-64; *id.* at 2879-81 (Blackmun, J., concurring in part and dissenting in part).

315. See *People v. Whitfield*, 24 Cal. Rptr. 2d 210 (Cal. Ct. App. 1993) (finding that filing of information charging forcible rape tolled limitations period for offense of prostitution, which, because it was based on the same conduct as the charged offense, was a lesser offense upon which defendant was entitled to have jury instructed at trial). Compare *Keffer*, 860 P.2d at 1123-24, 1133-34 (abandoning the "inherent relationship" definition of lesser offense at trial for "statutory elements" definition stated in *Schmuck*) with *State v. Yates*, 571 A.2d 575, 576-77 (R.I. 1990) (rejecting "statutory elements" definition of lesser offense for "inherent relationship" standard already in place, despite Supreme Court's holding in *Schmuck*).

Again, the choices necessarily reflect a view of jury function in a criminal case. The definition of the lesser offense standard is a necessary, but not sufficient, step in the trial court's decision whether to give a lesser offense instruction and verdict option to the jury. Regardless of the definition of the standard, the court must also decide what quantum of evidence must be presented at trial in order to justify a lesser offense instruction. The Supreme Court stated in *Sparf v. United States*,³¹⁶ the Court's first lesser offense case, that a defendant was not entitled to a lesser offense instruction³¹⁷ if there was no basis in the evidence at trial for the jury to conclude that the defendant was innocent of the charged greater offense and guilty instead of the lesser offense.³¹⁸ Otherwise, contrary to the intent of Congress and to sound policy, juries would be invested "in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial."³¹⁹ Consistent with

316. 156 U.S. 51 (1895).

317. *Id.* at 52, 59 (involving a manslaughter instruction in a federal trial for capital murder on the high seas).

318. *Id.* at 63-64.

319. *Id.* at 63. The *Sparf* opinion is notable for its extensive discussion of the doctrine of jury nullification. Justice Harlan, writing for the majority, approved the trial judge's instructions (in response to direct questions from the jury) that even though manslaughter was a lesser offense of murder under common law, a manslaughter verdict was not appropriate in the case at bar under federal law because the facts in evidence could not support a finding of homicide without malice. *Id.* at 59-61, 106. The issue of nullification arose because the trial judge acknowledged to the jury that "even in this case [where a lesser offense verdict was not supported by the evidence] you have the physical power to [return a noncapital verdict of manslaughter]; but as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court." *Id.* at 62 n.1 (emphasis deleted). This position was strongly approved by the Court, which stated:

We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. . . . Under any other system . . . our government will cease to be a government of laws, and become a government of men.

Id. at 102-03.

One need not go back to the end of the last century to find another demonstration that the evidentiary component of the lesser offense doctrine is at the core of the state's view of proper jury function in a criminal case. In *People v. Fernandez*, 31 Cal. Rptr. 2d 677 (Cal. Ct. App. 1994), the jury asked the trial judge whether they could find the defendant guilty of the lesser misdemeanor of assault, rather than the felony of battery with serious bodily injury, because even though California

the notion that the lesser offense doctrine is not intended as a mercy-dispensing device for the jury,³²⁰ the Court has referred several times to the necessity for an evidentiary component to the standard used in the federal courts.³²¹ Many state courts

law required them to find the injuries to be serious based on the evidence at trial, "our feelings don't follow this." *Id.* at 678-79. The appellate court upheld the trial judge's simple answer to the jury—"no"—because the defendant was not entitled to an instruction telling the jury that it had the power to nullify the law, even if it may, in fact, have had such power. *Id.* at 679-80; see also *United States v. Dougherty*, 473 F.2d 1113, 1133-34 (D.C. Cir. 1972) (stating that to give every jury the option of disregarding the law risks caprice, if not chaos).

320. See, e.g., *Sparf*, 156 U.S. at 64 (finding that lesser offense doctrine should not be used as a vehicle for the jury to "commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law"); *Kelly v. United States*, 370 F.2d 227, 229 (D.C. Cir. 1966) (stating that lesser-included offense instruction may not be used as a device to encourage the "mercy-dispensing power" of the jury), *cert. denied*, 388 U.S. 913 (1967); *Donaldson*, *supra* note 299, at 1091 (stating that even under broad "related offense" standard for lesser offenses at trial, the jury should not be encouraged to convict of a lesser offense out of "mere sympathy or reluctance to impose a severe penalty, but should only be given a choice where there is actually a fact issue as to guilt").

321. See, e.g., *Schmuck v. United States*, 489 U.S. 705, 716 n.8 (1989) ("Our decision in no way alters the independent prerequisite for a lesser included offense instruction that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater.") (citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)); *Hopper v. Evans*, 456 U.S. 605, 611-12 (1982) (finding that lesser offense instruction is required "only when the evidence warrants such an instruction") (emphasis omitted); *Sansone v. United States*, 380 U.S. 343, 350 (1965) ("A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.").

The Supreme Court established the federal rule concerning the quantity of evidence necessary to justify a lesser offense instruction and verdict in 1896: "The evidence . . . need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine." *Stevenson v. United States*, 162 U.S. 313, 314 (1896); see also 5 RHODES, *supra* note 262, § 31:12 (stating that "there must be some evidence which would justify conviction of the lesser offense"). This rule is also commonly followed in the states. See, e.g., *Fulghum v. State*, 277 So. 2d 886, 890 (Ala. 1973) (stating that a lesser-included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position"); *Ewish v. State*, 871 P.2d 306, 310 (Nev. 1994) (finding that for a trial judge to give a lesser offense instruction, there must be evidence that reasonably supports guilt of the lesser crime); *Mascolo*, *supra* note 92, at 280 (stating that any quantum of evidence that permits the jury rationally to acquit the defendant of the charged offense and convict on the lesser offense is sufficient to justify the instruction and citing state cases). *But see*, e.g., *People v. Scarborough*, 402 N.E.2d 1127, 1132 (N.Y. 1980) (finding that test is not whether "any view" of the evidence would support jury's verdict

have also required an evidentiary component.³²²

Some state courts have taken the view that, in general, a defendant's not guilty plea to the greater charged offense puts in issue any lesser offense qualifying under the statutory "elements" standard and that "[t]rial courts should not be in the business of reviewing the record and weighing the evidence to determine when a lesser-included offense instruction should be given."³²³ In part, this broad view of the jury's role in a criminal trial can be justified by the argument that if the jury chooses to reject one element of the government's proof (for example, the inference of premeditation necessary for first-degree murder), it should be able to find the defendant guilty of the statutory lesser offense established by the absence of the failed element, even if there has been no evidence specifically presented at trial to support that alternative result.

What if, as in *State v. Short*,³²⁴ the accused supports a de-

on lesser offense, but whether "a reasonable view" of the evidence would support such a verdict).

322. See, e.g., *Hagans v. State*, 559 A.2d 792, 803 n.10 (Md. 1989) (referring to rule that when there is no evidence to support a conviction on the lesser offense, there should be no instruction on that offense); *O'Bryan v. State*, 876 P.2d 688, 689 (Okla. Crim. App. 1994) ("We have consistently held it is the duty of the trial court to determine as a matter of law whether the evidence is sufficient to justify the submission of instructions on a lesser included offense."); *State v. Delisle*, 648 A.2d 632, 637 (Vt. 1994) (deciding that a requested lesser offense instruction will be given only if the facts in evidence reasonably support such an instruction); *State v. Keffer*, 860 P.2d 1118, 1136 (Wyo. 1993) ("[W]e adhere to the view that the giving of a lesser included offense instruction is appropriate if there are in dispute factual issues that would permit a jury rationally to find the defendant guilty of the lesser offense and acquit the defendant of the greater.").

323. *State v. Jeffries*, 430 N.W.2d 728, 738 (Iowa 1988). In *Jeffries*, the Iowa Supreme Court carefully reviewed the doctrine of lesser offenses at trial and, while maintaining the strict "elements" standard for lesser offenses, abandoned any evidentiary qualification by the trial court (the "court function test") and instead found screening to be an infringement on the proper role of the jury. *Id.* at 736-38. The court held that the submission of a lesser offense to the jury should be "automatic," once the requirements of the "elements" standard were met as a matter of law (the "jury function test"). *Id.* at 737. The Iowa court followed *People v. Beach*, 418 N.W.2d 861, 868 (Mich. 1988) (stating that jury instruction should be given automatically for lesser-included offenses that meet the strict "elements" test). See James Benzoni, Note, *Courts Must Instruct on Lesser-Included Offenses That Fit Within the Elements of the Greater Charged Offense, Regardless of the Evidence*—*State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988), 39 DRAKE L. REV. 549 (1989-1990).

324. 618 A.2d 316 (N.J. 1993).

fensive theory of complete innocence with alibi testimony?³²⁵ Should that defensive posture defeat the defendant's request for a lesser offense instruction for manslaughter based on the state's proof at trial that the defendant was seen in a violent argument with the victim shortly before the homicide?³²⁶ However such questions are answered by the courts, the answers will surely reflect the jurisdiction's view of how much the law should restrict the jury's role in a criminal trial.

Definitional and evidentiary issues aside, there is also a significant divergence of judicial opinion as to the proper method for submitting a lesser offense instruction to the jury once the trial court has decided that such an instruction is appropriate (the "transitional instruction"). The issue is whether the jury should be told that they must first reach a unanimous verdict of acquittal on the charged greater offense before they proceed to consider the lesser offense (the "acquittal first" option), or whether they may proceed to a verdict upon the lesser offense if they are unable to agree on a verdict on the greater offense (the "unable to agree" option). The "unable to agree" option would seem to have the effect of encouraging jury compromise in favor of a verdict on the lesser offense, thus reducing the number of hung juries. This compromise, however, is not necessarily more beneficial to the defendant in every case. Similarly, the "acquittal first" option may have a tactical advantage for either side, depending upon the development of the evidence at trial.

At the time of Judge Friendly's opinion in *United States v. Tsnas*,³²⁷ neither the Supreme Court nor any circuit court had considered the proper transitional instruction in the federal

325. *Id.* at 319 (stating that defendant is entitled to a lesser offense instruction for manslaughter even though he presented an alibi defense); see *supra* note 9 and accompanying text; see also *Stevenson v. United States*, 162 U.S. 313, 322 (1896) (rejecting the government's argument that because defendant's evidentiary theory at trial was self-defense, defendant was not also entitled to a contradictory lesser offense manslaughter instruction); *State v. Wilson*, 440 N.W.2d 534, 542-43 (Wis. 1989) (finding that because the jury could disbelieve the defendant, he was entitled to a lesser offense instruction that directly contradicted his defensive theory if the lesser offense were supported by a reasonable view of the evidence).

326. See, e.g., *Short*, 618 A.2d at 318.

327. 572 F.2d 340 (2d Cir. 1977), *cert. denied*, 435 U.S. 995 (1978).

courts.³²⁸ The Supreme Court still has not done so. Judge Friendly resolved the matter by stating that because neither law nor policy led him to the conclusion that either option was right or wrong, "[t]he court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects."³²⁹ This Solomon-like approach has satisfied some other jurisdictions,³³⁰ but the surface neutrality toward proper jury function implicit in Judge Friendly's "defendant's option" approach was recently rejected strongly by the Supreme Court of North Dakota in *State v. Daulton*.³³¹ The court found the "acquittal first" rule as it was adopted by twelve states³³² to be both better reasoned and supported by the traditional view that juries should not be led to abandon the law for the sake of compromise—a result it found unacceptably encouraged by both the Second Circuit's "optional" approach and the "unable to agree" approach.³³³ Consequently, significant policy issues concerning the jury's role in a criminal trial arise even in respect to the seemingly minor and technical issue of the method of submission of a lesser offense instruction to the jury.

Thus, even though, as the Court stated in *Beck*,³³⁴ the basic concept of the lesser offense option at trial is well-established in the historical and modern practice of this country, the definition and application of that concept in its significant particulars is far from uniform. That lack of uniformity, at least in part, re-

328. *Id.* at 342.

329. *Id.* at 346.

330. See *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *Jones v. United States*, 620 A.2d 249, 252 (D.C. 1993); *State v. Powell*, 608 A.2d 45, 47 (Vt. 1992).

331. 518 N.W.2d 719 (N.D. 1994).

332. The court cited opinions from Alabama, Arizona, Colorado, Connecticut, Georgia, Montana, Nebraska, New York, North Carolina, Pennsylvania, Tennessee, and Wisconsin as approving the "acquittal first" instruction. *Id.* at 721. The court also identified two states—Alaska and California—that have adopted a modification of the "acquittal first" rule and four states—Hawaii, Michigan, Ohio, and Oregon—that have adopted the "unable to agree" instruction. *Id.*

333. *Id.* at 722 ("The primary difficulty with the unable to agree instruction is it dilutes the requirement of unanimity and encourages the jury to bypass the charged offense on its way to a compromise verdict.").

334. *Beck v. Alabama*, 447 U.S. 625, 633, 635-36 (1980).

flects divergent views on the role of the jury. Beyond the definition and application of the lesser offense doctrine at trial is the foundation of lesser offense law itself—as found in the substantive criminal law of each jurisdiction. The vast diversity of that law often results in divergent applications of the lesser offense doctrine, even in states with similar standards for lesser offenses at trial.³³⁵

Despite the Supreme Court's repeated references to the due process language found in *Keeble*,³³⁶ the majority of federal appeals courts have correctly treated the application of the lesser offense doctrine as a matter of state law.³³⁷ To elevate the lesser offense doctrine to constitutional status as a corollary of *Winship*'s due process requirement of proof beyond a reasonable doubt is both unwise and unworkable. The lesser offense doc-

335. See, e.g., *State v. Long*, 675 P.2d 832, 839-41 (Kan. 1984). In Kansas, robbery requires only the taking of property from the person or presence of another by threat or use of force, but theft requires a specific intent to permanently deprive the owner of property. In *Long*, the Kansas Court of Appeals had held that theft was not a lesser-included offense of robbery under state law. *Id.* at 838. The Kansas Supreme Court, however, held that, under Kansas law, theft was "a 'lesser degree of the same crime' which embraces robbery" and, therefore, a defendant indicted for robbery was entitled to a lesser offense instruction for theft, if evidence at trial supported that instruction. *Id.* at 841 (citation to lesser offense statute omitted).

336. 412 U.S. 205, 212-13 (1973); see *Spaziano v. Florida*, 468 U.S. 447, 454 (1984); *Beck*, 447 U.S. at 634-35.

337. Most federal courts of appeals have refused the habeas petitions of state noncapital prisoners that were based on the assertion that a lesser offense instruction was refused at trial in violation of state law. See *Lujan v. Tansy*, 2 F.3d 1031, 1036 (10th Cir. 1993) ("[T]his circuit has agreed with a majority of those circuits addressing the issue and held that a petitioner in a noncapital case is not entitled to habeas relief for the failure to give a lesser-included offense instruction 'even if in our view there was sufficient evidence to warrant the giving of an instruction . . .'" (quoting *Chavez v. Kerby*, 848 F.2d 1101, 1103 (10th Cir. 1988), cert. denied, 114 S. Ct. 1074 (1994)); *Tata v. Carver*, 917 F.2d 670, 671-72 (1st Cir. 1990) (stating that the Fifth, Ninth, Tenth and Eleventh Circuits have concluded that a state trial court's failure to give a lesser offense instruction raises no federal issue, whereas the Sixth, Seventh, and Eighth Circuits have considered whether the failure to give a lesser offense instruction was "so fundamental a defect as to cause 'a complete miscarriage of justice,'" and the Third Circuit alone has extended the reasoning of *Beck* to noncapital cases) (quoting *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir.) (en banc), cert. denied, 496 U.S. 929 (1990)); see also *Bagby*, 894 F.2d at 797 (stating that *Beck* is grounded upon Eighth Amendment concerns rather than due process, and that the majority of circuits share the view that a state court's failure to instruct on lesser offenses at trial is "not an error of such character and magnitude to be cognizable in federal habeas corpus review") (citations omitted).

trine is not merely a matter of definition that can be readily incorporated as part of the requirement of guilt beyond a reasonable doubt, even if the narrow "elements" standard of *Schmuck* were imposed on the states as a minimal constitutional "floor." Rather, the lesser offense doctrine is a multifaceted body of law, with each part having significance for the state's own vision of the jury's role at trial. Any imposed standard, even a minimal one, would have profound effects upon the many subsidiary issues involved in the application of the doctrine and upon the jury's process and scope of decisionmaking. The imposition of a federal lesser offense standard is an unlikely leap for a Court that has yet to define what the fundamental doctrine of proof beyond a reasonable doubt minimally requires from the state courts.³³⁸ Therefore, the states have not defined or applied the lesser offense doctrine in a uniform manner, and the federal courts, considering the doctrine of lesser offense within the context of Rule 31(c), have not suggested that their decisions constitutionally prohibit alternative approaches in the states to the doctrine's definition or application.

Certainly, fairness to the defendant is an important policy justification for the lesser offense concept in general. That policy, however, does not carry with it a constitutional mandate.³³⁹ Just as the substantive criminal law and its judicial administra-

338. As fundamental as the reasonable doubt standard is, the Court has yet to define it fully. Rather, the Court has discussed what the standard does or does not permit. In fact, the Court has not held, under either the Due Process Clause or the Sixth Amendment, that the reasonable doubt standard must be defined to the jury at all. See *Victor v. Nebraska*, 114 S. Ct. 1239, 1243 (1994) (stating that the Constitution does not require trial courts to define reasonable doubt and, when defined, does not require that any particular form of words be used to advise the jury of the government's burden; rather, taken as a whole, the instructions must properly convey the concept); *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081-82 (1993) (stating that Sixth Amendment requires that the jury apply the reasonable doubt standard and that improper definition of that standard cannot be harmless error); see also *United States v. Reives*, 15 F.3d 42, 43-46 (4th Cir.) (holding that it was not error for trial court to refuse to give a definition of reasonable doubt, even when a definition was requested by the jury, and discussing the split among both circuit courts and state courts about if, when, and how the concept of reasonable doubt should be defined), cert. denied, 114 S. Ct. 2679 (1994).

339. Cf. *Medina v. California*, 112 S. Ct. 2572, 2580 (1992) ("The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused.").

tion are so often intertwined, and just as both substantive and procedural criminal law in America are best left to state legislatures and state courts unless there is a strong compulsion to do otherwise under the Constitution,³⁴⁰ the doctrine of lesser offenses should not be controlled by a federally imposed standard. Yet, without a constitutional standard of lesser offenses, it is problematic to maintain that the Due Process Clause requires a lesser offense instruction and verdict option in any particular case when a state court has held otherwise as a matter of state law.

Nonetheless, the lesser offense doctrine, however it is defined and applied, does serve an important role in a criminal trial. The concept contributes significantly to adjudicative efficiency, including achieving the most appropriate result at trial. Constitutional requirements aside, sound policy demands that the lesser offense doctrine be available to the prosecution and defense as a primary component of plea bargaining and to both parties at trial as a flexible response to the unpredictable realities of proof in the courtroom. In contrast, the criminal statute of limitations is an inflexible concept to control the time allowed for the initiation of prosecution that should not be used, either before or at trial, as a sword against the defendant by prohibiting waiver of the statute's protection.

Even if the American system of criminal adjudication were not historically endowed with the concept of lesser offenses at trial, the necessity for efficiency in criminal trials would likely compel the creation of the concept. One wonders if the same institutional inevitability is true for criminal statutes of limitations. In any event, the doctrine of lesser offenses, in each of its trial aspects—instruction, verdict option, and judgment—is of too much

340. The Supreme Court has stated:

"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."

Schad v. Arizona, 501 U.S. 624, 638 (1991) (plurality opinion) (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)).

utility to society and of too great a benefit to both sides of a criminal case to be sacrificed for the sake of a statute of limitations unjustifiably construed as jurisdictional. That decision is a matter of policy choice, however, and inappropriate for national constitutional control.

IV. A PROPOSED SOLUTION TO THE CONFLICT

A. *In Summary*

Characterizing the criminal statute of limitations as an absolute barrier to judicial authority is unjustified by the statute's history and purpose; the constitutional description of the role of lesser offenses at trial ignores the significant implications of that doctrine's variety of definitions and applications. The legal labels of "jurisdiction" and "due process" have thus failed to shed light on the conflict between the criminal statute of limitations and lesser offenses at trial. Judicial attempts to resolve the conflict have been confused, inconsistent, and inadequate because the history, nature, and purposes of the two doctrines in conflict have not been adequately considered.

The broader social purposes of the criminal statute of limitations are debatable and uncertain. The statute, however, surely grants a substantive right to a defendant prosecuted beyond the time limit. That personal right should be subject to an informed waiver by the defendant, as are most other rights, unless a public purpose to the contrary is clearly demonstrated. In contrast, there is no such tension between the public and personal purposes of the doctrine of lesser offenses. The doctrine of lesser offenses allows the criminal justice system to operate efficiently, benefiting both the state and the accused before and during trial. From both the prosecution's and defense's point of view, the most appropriate result is more likely to be achieved when a statute of limitations does not remove the possibility of a lesser offense from either a plea bargain or verdict. Each state, however, has made its own choices about how to define and apply the many facets of the lesser offense doctrine, and those choices reflect the particular jurisdiction's view of the proper role of the criminal jury. The lesser offense doctrine is not suitable for constitutional uniformity, even on the minimum level represented

by the federal "elements" test. The Supreme Court's capital cases dealing with lesser offenses at trial do not lead to a contrary conclusion.³⁴¹ Nevertheless, courts and legislatures should seek to ensure that the salutary purposes of the lesser offenses doctrine are not frustrated by a criminal statute of limitations that a defendant has chosen to waive.

B. The Role of the Jury

From the early days of the criminal jury trial law in England, when jury members occasionally were subjected to penalties for disobedience,³⁴² to the present, when the American jury is acknowledged to have the power to nullify the law by its general verdict (but is not instructed of its right to do so),³⁴³ lawyers and judges have been ambivalent about the level of trust to give these randomly summoned decisionmakers in criminal trials. Devices to keep the jury within the role of fact finder in a criminal case—such as the once common special verdict and today's often numbingly complex instructions to the jury on the law that binds it—are in part an expression of this ambivalence. The Supreme Court has often referred to the trust the judicial system places in the jury to reach the appropriate result,³⁴⁴ but also

341. Although cases with capital charges often result in lesser offense issues at trial, the remaining discussion in part IV of this Article does not distinguish between capital and noncapital cases. It does not distinguish between these cases because the Court's holdings in its capital lesser offense cases are narrow and do not signify that either federal or state statutes of limitations are superseded by a general constitutional requirement of lesser offenses at trial, even in capital cases. See *supra* part II.E. A fair reading of these cases is that a state may not constitutionally distort its lesser offense law, which is generally applicable to all offenses, in order to deprive a capital defendant of at least one noncapital verdict option at trial. A state need not, however, disregard its own generally applicable lesser offense law (which would include the definitional standard, the evidentiary standard for application, and the proper transitional instruction, see *supra* notes 297-333 and accompanying text) or its criminal statute of limitations (including whether the statute may be waived), even in capital cases.

342. The last, and perhaps the most famous example of judicial punishment of a jury for disobedience, arose in the trial of William Penn and William Mead in 1670, in which the jury was fined and imprisoned for contempt after their refusal to return a guilty verdict. That punishment was eventually found to be unlawful and was overturned in *Bushell's Case*. See 1 STEPHEN, *supra* note 234, at 373-75 & n.3.

343. See *supra* notes 319-20.

344. The Court has stated:

has spoken often of the many rules of criminal procedure and evidence deemed necessary to prevent the jury from being misled in its decisionmaking.³⁴⁵

This significant theme of trust and distrust is central to the issue of the conflict between the statute of limitations and the doctrine of the lesser offense at trial. The Court's statement of the important role of the "third option" lesser offense in jury deliberations is an expression of that distrust.³⁴⁶ This view is based on a psychological assumption that when the evidence reveals that the accused has committed some offense, particularly a serious or violent offense such as manslaughter or aggravated assault, the jury cannot be trusted to follow the trial court's instructions to acquit the defendant, even if the government has not proven all the elements of the charged greater offense to the jury's satisfaction.

Beyond this assumption is the notion expressed by the New Jersey Supreme Court in *State v. Short*³⁴⁷ that if the jury is instructed on the elements of a time-barred, but otherwise appropriate, lesser offense, but is told that the statute of limitations

We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings. . . . [A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and a little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them

Duncan v. Louisiana, 391 U.S. 145, 156-57 (1968) (citing Harry Kalven, Jr. & Hans Zeisel, *THE AMERICAN JURY* (1966)); see also Alan L. Adlestein, *A Corporation's Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375, 394-95 (1994) (discussing the debate over the efficacy of the criminal jury).

345. See, e.g., *Simmons v. South Carolina*, 114 S. Ct. 2187, 2197 (1994) ("While juries ordinarily are presumed to follow the court's instructions, we have recognized that in some circumstances 'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)) (internal citations omitted).

346. See *Schad v. Arizona*, 501 U.S. 624, 647 (1991); *Spaziano v. Florida*, 486 U.S. 447, 455 (1984); *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Keeble v. United States*, 412 U.S. 205, 212-13 (1973); *supra* parts II.B, II.C.

347. 618 A.2d 316 (N.J. 1993).

will prevent judgment or punishment by the court on that offense, the jury will refuse to consider that verdict option.³⁴⁸ *Spaziano v. Florida* nonetheless concluded that if the court does not tell the jury that a lesser offense verdict option will be barred from the court's judgment by the statute of limitations, the jury will feel "tricked," and its role as the responsible voice of the community in a criminal case will be discredited.³⁴⁹ The contrary argument is that the jury is not "tricked" in such circumstances because the jury's role is to decide the facts of the case, whereas it is the court's sole duty to consider whether a defendant should be punished or whether there are other legal obstacles to an entry of judgment of conviction.³⁵⁰

In light of these jury issues, as well as the nature and purposes of the criminal statute of limitations and the doctrine of lesser offenses,³⁵¹ this Article proposes the following solution to the

348. *Id.* at 322; see *supra* notes 156-58 and accompanying text.

349. *Spaziano*, 468 U.S. at 455-56; see also *State v. Delisle*, 648 A.2d 632, 638-39 (Vt. 1994) ("[I]t is one thing to withhold from the jury unnecessary information, and quite another to mislead jurors by instructing them that they may find a defendant guilty of an offense for which there can be no judgment of conviction.").

350. *Short*, 618 A.2d at 324. See generally *Shannon v. United States*, 114 S. Ct. 2419, 2428 (1994) (holding that a federal district court is not required to instruct the jury regarding the consequences to the defendant of a "not guilty but insane" verdict option under the Insanity Defense Reform Act of 1984). Justice Thomas, writing for the majority in *Shannon*, stated:

The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. . . . Information regarding the consequences of a verdict is therefore irrelevant to the jury's task.

Id. at 2424; see also Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123 (1985) (stating that informing the jury of the legal consequences of its verdict impairs the efficiency and integrity of the trial process).

A return to the once accepted concept of the special verdict in a criminal trial—which would permit the jury to answer specific factual questions without concern for the legal consequences of its answers—in some cases might offer a solution to the conflict between the statute of limitations and an otherwise appropriate lesser offense instruction at trial. Such factual verdicts, however, while still permissible in some criminal trials with the consent of the defendant, are fraught with the potential for reversible error because of the danger to the accused that the jury's still-required general verdict will be somehow prejudiced or undermined. See, e.g., LAFAVE & ISRAEL, *supra* note 30, § 23.7(d).

351. See *supra* part III.

conflict between the statute and the doctrine.

C. A Three-Part Solution: Waiver, Judicial Authority, and Defensive Theory

(1) THE DEFENDANT CAN WAIVE THE CRIMINAL STATUTE OF LIMITATIONS. Defendants should be permitted to waive the criminal statute of limitations because protection of the accused is the most significant policy reason for these statutes.³⁵² Waiver should be possible in the plea bargaining process and during trial. In particular, access to the socially beneficial doctrine of lesser offenses should not be denied to a defendant because the statute of limitations has been seen as a jurisdictional limitation on the power of the court in the past.³⁵³

The statute of limitations, regardless of whether it is a wise policy choice, creates significant substantive legal rights for the accused in a criminal setting. A waiver of that statute, therefore, should not be inferred from the defendant's actions, but should be founded only upon an explicit waiver with the advice of counsel.³⁵⁴ To prevent unnecessary appellate challenges, and to assist in the resolution of those that might occur, a pre-indictment waiver should be required to be in writing. In addition, either a guilty plea or a request for a lesser offense instruction involving a time-barred offense should require an informed waiver of the statute of limitations by the defendant on the record.³⁵⁵ No mu-

352. See *supra* notes 263, 270-74 and accompanying text.

353. See *supra* part III.A.

354. See, e.g., *United States v. Wilson*, 26 F.3d 142, 155-56 (D.C. Cir. 1994) (stating that *United States v. Wild* requires an inquiry into whether a written waiver of statute of limitations was made knowingly, voluntarily, and intelligently); *United States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992) (finding that absent explicit agreement, defendant's waiver of the statute of limitations cannot be inferred); *United States v. Caldwell*, 859 F.2d 805, 807 (9th Cir. 1988) (upholding counseled open-ended written agreement to waive statute of limitations because it was entered into knowingly and voluntarily), *cert. denied*, 489 U.S. 1039 (1989); *United States v. Wild*, 551 F.2d 418, 425 (D.C. Cir.) (finding that defendant, with advice of counsel, may make written waiver of unexpired statute of limitations before indictment), *cert. denied*, 431 U.S. 916 (1977); Comment, *Waiver of the Statute of Limitations in Criminal Prosecutions: United States v. Wild*, 90 HARV. L. REV. 1550, 1555-56 (1977) (stating that courts should require defendant's waiver of statute of limitations to be counseled, voluntary, informed, and explicit); see *supra* notes 140, 208 and accompanying text.

355. The question arises whether a trial court should have the duty to inform the

tuality remains, however, in the lesser offense doctrine for time-barred offenses under this proposal.³⁵⁶ This result is appropriate because even though the reasons for the delay might have been excusable or even commendable, the expiration of the statute of limitations is in the sole control of the government.

(2) IF THE STATUTE OF LIMITATIONS IS PROPERLY WAIVED, THE TRIAL COURT IS PERMITTED TO ENTER JUDGMENT AND SENTENCE FOR A CONVICTION OF A TIME-BARRED OFFENSE. The defendant's waiver of the statute of limitations, as permitted in paragraph (1) above, should enable the trial court to enter a judgment of conviction upon an otherwise appropriate guilty plea to a time-barred offense or upon the jury's guilty verdict on a time-barred, but otherwise appropriate, lesser offense. The public policy reasons for the statute of limitations, as well as the history and nature of that statute, do not justify interpreting the statute of limitations as a legislative prohibition of the court's otherwise appropriate jurisdiction in a criminal case.³⁵⁷

(3) A DEFENDANT'S FAILURE TO WAIVE THE STATUTE OF LIMITATIONS SHOULD NOT PRECLUDE A MODIFIED JURY INSTRUCTION BASED ON AN OTHERWISE APPROPRIATE TIME-BARRED LESSER OFFENSE. Having made the choice not to waive the statute of limitations for an otherwise

defendant of the possibility of waiver of the statute of limitations in order to obtain the option of a time-barred lesser offense at trial, particularly in light of the generally accepted notion that a trial judge can instruct the jury *sua sponte* on a lesser offense it deems appropriate to the case. *See, e.g., State v. Kupau*, 879 P.2d 492, 500 (Haw. 1994) (recognizing the established law that the court may give a lesser offense instruction over the objection of both parties, and finding that such an instruction is not mandatory, but within trial court's discretion). Of course, the court has the power to inform the defendant of the possibility of such a waiver. It should not, however, have the responsibility to do so because the choice is usually one of trial strategy, best left to defense counsel in consultation with the defendant. *See ABA STANDARDS FOR CRIMINAL JUSTICE, supra* note 281, Standard 4-5.2 commentary (noting the importance of defense counsel's consulting fully with the defendant about any lesser offenses the court may be willing to submit to the jury). In contrast, active judicial participation in raising the possibility of waiver, as the trial judge did in *Spaziano*, *see supra* notes 103-09 and accompanying text, could be seen as coercive for much the same reason as is the judge's participation in plea bargaining, *cf. FED. R. CRIM. P. 11(e)(1)*.

356. *See supra* note 313 and accompanying text.

357. *See supra* part III.A.

appropriate time-barred lesser offense at trial, a defendant is still entitled to have the jury instructed on the elements of that lesser offense—but as a defensive theory only. The court, however, should not give the jury a verdict option for that lesser offense or explain that the statute of limitations bars such a verdict or judgment upon it.

This concept is simple in design, but somewhat complex in execution. The facts and circumstances of the particular case are necessarily involved in such an instruction, and thus it is for the court, with suggestions of counsel, to appropriately craft the instruction in light of the evidence and the defendant's theory of the case.³⁵⁸ The court in *State v. Delisle*³⁵⁹ approved such a defensive lesser offense instruction as a solution to the conflict between the statute of limitations and lesser offenses at trial.³⁶⁰ The Vermont Supreme Court, however, required that the jury be informed that the statute of limitations had run on the lesser offense that underlay the instruction.³⁶¹ Although this author does not subscribe to a solution that has deception of the jury as one of its components, when the jury does not have a verdict option to convict on the lesser-included offense, there is no reason why the jury should be informed about the statute of limitations, and there is no need to take the risk that such information would confuse or prejudice the jury.

The facts of *State v. Short*³⁶² can serve as the basis for a hypothetical example in which such a defensive instruction would be appropriate, if the defendant requested a lesser offense instruction, but refused to waive his substantive rights under the statute of limitations. In this hypothetical, under state law, the defendant would have been entitled to a lesser offense manslaughter verdict option were it not for the statute of limitations.

358. For an example of such a defensive instruction, given in a case in which the court found the statute of limitations to preclude the defendant's request for a lesser offense instruction and verdict option because the statute was jurisdictional, see *Padie v. State*, 557 P.2d 1138, 1141-42 (Alaska 1976) (*Padie I*); *supra* note 196 and accompanying text.

359. 648 A.2d 632 (Vt. 1994).

360. *Id.* at 640-41.

361. *Id.*; see *supra* notes 196-97 and accompanying text. The court in *Delisle* did not decide that the defendant had an option to waive the statute in Vermont.

362. 618 A.2d 316 (N.J. 1993); see *supra* notes 5-18 and accompanying text.

The court, therefore, should grant defense counsel's request for an instruction that informs the jury that, if they decide that the defendant caused the death of his wife, but did so in the heat of passion following a violent argument with her, then the government has failed to meet its burden of proof for the murder charged in the indictment beyond a reasonable doubt and the defendant must be found not guilty.

A similar hypothetical can be based on the facts of *Spaziano v. Florida*.³⁶³ If the defendant refused to waive the statute of limitations on noncapital murder, but argued that the inference of premeditated murder arising from the state's evidence should be rejected, the jury should be instructed that even if it finds that the defendant killed the victim, they cannot find the defendant guilty of capital murder as charged in the indictment if they do not believe the state proved the defendant's premeditation beyond a reasonable doubt.

In a case that involves an indicted felony with an otherwise appropriate, but time-barred, lesser misdemeanor option (for example, *State v. Muentner*³⁶⁴), the appropriate instruction would inform the jury that if they believe that the defendant's conduct (in *Muentner*, the making of false entries in bank records) was not done with the defined intent of the charged offense (to deceive bank examiners), then they must find the defendant not guilty of the offense specified in the indictment. This outcome must result even if the jury finds that the defendant engaged in the conduct specified in the indictment because the government did not prove the necessary intent beyond a reasonable doubt.

Such an approach to a defensive instruction would seem to be feasible for every type of lesser offense regardless of whether a narrow or broad definitional standard has been adopted for that doctrine in the jurisdiction or what quantum of evidence is required to activate the doctrine. The purpose of this instruction is to inform the jury fully and accurately as to the law and to guide it appropriately in its consideration of the facts. The instruction does so without deception and with the faith that the

363. 468 U.S. 447 (1984); see *supra* notes 99, 103-04 and accompanying text.

364. 406 N.W.2d 415 (Wis. 1987); see *supra* note 168 and accompanying text.

jury can be trusted to follow the law if it is carefully explained by the court. Although a jury should not be concerned with punishment, a jury does have a right to expect that if it reaches a verdict option submitted to it, that verdict will be the judgment of the court. Of course, this result does not always occur—for example, the court's entry of a judgment of acquittal notwithstanding the verdict—but those occasions are qualitatively different than permitting a jury to deliberate to a verdict that the law specifically prohibits if the defendant does not waive the statute of limitations.

An instruction on the time-barred offense characterized as a defense, rather than as a separate verdict option, is still subject to attack based on the *Keeble* rationale.³⁶⁵ Lacking a "third option" to an acquittal or guilty verdict on the greater offense, the jury—learning of the lesser criminal conduct or intent underlying the defense (less an element needed to prove the charged greater offense)—will convict of the charged offense by default.³⁶⁶ Under paragraph (1) of this proposal, however, the defendant is entitled to choose to strengthen the jury's consideration of the lesser offense by a verdict option in addition to a defensive instruction. That strategic choice is for the defendant to make, not for the court to force as a Hobson's choice.

D. In Support

None of the appellate opinions discussed in this Article, and none of which this author is aware, has adopted this proposed approach to resolve the conflict between the statute of limitations and the lesser offense doctrine at trial. In each case, the appellate courts have chosen to emphasize one aspect of a process that should be carefully separated into three parts—the instruction to the jury, the verdict options for the jury, and the court's power to enter judgment and sentence upon the verdict. Each facet of this process has different significance for the defendant, the prosecutor, the jury, and the court.

The criminal statute of limitations has debatable social utility

365. *Keeble v. United States*, 412 U.S. 205, 212-13 (1973).

366. *Id.*; see *supra* note 58 and accompanying text.

and is subject to the political whim of the legislature. A direct legislative solution to the conflict between the statute and the lesser offense doctrine could arise by the adoption of a provision that permits a defendant to waive the statute of limitations, as suggested in paragraph (1) of this proposal, and permits the court to enter a judgment and sentence on a guilty plea or a guilty verdict on the time-barred lesser offense, as suggested in paragraph (2). An indirect legislative solution to the conflict is possible, at least in part, if the legislature either significantly lengthens or eliminates the limitations period for all forms of homicide (the most fertile ground for lesser offenses) or for all serious felonies.³⁶⁷

As long as the statute of limitations is applicable, however, it creates undeniably significant personal rights for a defendant accused of a time-barred offense. That shield should not be turned into a sword by prohibiting defendants to waive the statute of limitations for their own benefit. At the same time, the doctrine of lesser offenses is of demonstrable value to both the parties and is necessary for an efficient criminal justice system. If a defendant chooses to waive the statute of limitations to gain the option of a jury verdict for a time-barred lesser offense, the benefits of the lesser offense doctrine should be fully available. If a defendant does not choose to waive the statute of limitations, then that accused should not have the benefit of a verdict upon which judgment may not be entered under the law of the jurisdiction. The defendant, however, should have the option of a defensive instruction based upon the elements of the time-barred offense. The purpose of the lesser offense doctrine, achieving the most desirable result with adjudicative efficiency, will thus be accomplished in significant part without forcing the defendant to waive the right granted by the statute of limitations in order to achieve an appropriate jury instruction on the substantive criminal law.

367. For examples of state statutes of limitations that so provide, see *supra* notes 223, 230 and accompanying text.

V. CONCLUSION

When faced with a conflict between the criminal statute of limitations and the doctrine of lesser offenses at trial, courts and commentators have failed to consider the history, nature, and policies of these two legal concepts, and have looked inappropriately to the legal labels of jurisdiction and federal due process.

A defendant should be permitted to knowingly waive the personal benefits of the statute of limitations in order to obtain the option of the jury's verdict on a time-barred, but otherwise appropriate, lesser offense. The questionable social utility of the criminal statute of limitations should not provide policy support for precluding such a waiver. That waiver having been made, the court should not degrade the jury's role in the criminal justice system by disregarding that verdict and refusing to enter judgment because the statute of limitations has run on the offense of conviction.

However, if an informed waiver of the statute of limitations is not explicitly made, and the defendant is therefore not entitled to a jury verdict on the lesser offense and to the court's judgment on that verdict, the defendant still should not be precluded from an appropriate instruction based upon the elements of a lesser offense that happens to be time-barred. We should expect our trial judges, as advised by trial counsel, to craft instructions that present the theory of the defense to the jury—including the place of the elements of the lesser offense within that defensive theory—without mention of the statute of limitations. And, when such a defensive instruction is given, the jurors should be trusted to follow it, without assuming that they will refuse to acquit because the evidence indicates that some crime has been committed, even though the charged offense has not been proven to their satisfaction.