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Expanding Statutes of Limitations for Sex Crimes: Bad Public Policy*

di Michael Vitiello

Abstract: The Victims' Rights Movement has been one of the most consequential political forces in the United States over the past fifty-plus years. It has scored major legislative victories across the country. Every state and the federal government have adopted major laws advanced by the movement. After years of expanding prison populations, many policymakers and scholars have begun to question the wisdom of many of the movement's legislative victories.

Despite current pushback against the movement, the movement and members of the public are pushing for the elimination or dramatic extensions of statutes of limitations for sex offenses and child-sex offenses. Such laws seem non-controversial to members of the public when they read about scandalous conduct of prominent, powerful men. What is not to like about extending the statute of limitations to allow indictment and conviction of pedophiles and rapists?

This paper explores that question. After providing a brief overview of statutes of limitations in the United States, it explores pressure to abandon or extend such statutes in sex offense and child-sex offense cases. Thereafter, the paper examines the arguments advanced by proponents of such laws and rebuts those claims. For example, this paper offers a rebuttal to the promise that victims of abuse will find "closure" by finally seeing their abusers convicted and to claims that victims often cannot recall details of their assault for years after their abuse, thereby justifying the extension of limitation periods. At its core, this paper advances the argument that extending statutes of limitations unacceptably increases the risk of convicting innocent defendants, a fact ignored by victims' rights advocates.

Keywords: Criminal justice; Statues of limitations; Sex offenses; Child-sex offenses; Victims' rights

Introduction

Statutes of limitations vary across the 50 states within the United States¹ and within the federal system.² One can make some generalizations: for example, murder has no statute of limitations;³ but for all but a few crimes, statutes typically require prosecution within a matter of several years.⁴

In recent decades, states and Congress have extended statutes of limitations for two categories of crimes: sex offenses with children and sex offenses generally.⁵ Headlines about systematic child abuse, for example, by priests and other authority figures, have created pressure to abandon or lengthen statutes of limitations across the country.⁶ Similarly, headlines about prominent men abusing power to extort sex from women in subordinate positions have also fueled parallel extensions of statutes of limitations for sex offenses.⁷ These changes have occurred in liberal and conservative states across the country.⁸

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¹ *Time Limits for Charges: State Criminal Statutes of Limitations*, FindLaw (Apr. 16, 2020), <https://criminal.findlaw.com/criminal-law-basics/time-limits-for-charges-state-criminal-statutes-of-limitations.html>

² See generally C. Doyle, *Statutes of Limitation in Federal Criminal Cases: An Overview*, Cong. Research Serv. (Nov. 14, 2017), <https://fas.org/sgp/crs/misc/RL31253.pdf> (offering general information about statutes of limitations in federal criminal cases, ranging from sex crimes to arson to immigration offenses).

³ See *Time Limits for Charges*, *supra* note 1.

⁴ See *id.*

⁵ See Doyle, *supra* note 2, at 4 (reporting that Congress extended the statute of limitations generally and eliminated the statute of limitations for child sexual abuse cases arising under specific statutory provisions); see also Haley Sweetland Edwards, *Statute-of-Limitation Laws Can Leave Few Choices for Child Sex-Abuse Victims. That's Why These People Are Trying to Change Them*, *Time* (Sept. 13, 2018, 11:01 AM), <https://time.com/5394927/statute-of-limitations-changes/> (asserting that 15 states took up bills that would change statutes of limitations for child sex abuse cases and two states, Hawaii and Michigan, passed such bills).

⁶ Edwards, *supra* note 5.

⁷ See, e.g., J. Filipovic, *Corey Feldman's Claims Show Why Sex Crimes Should Have No Statute of Limitations*, *Time* (May 26, 2016), <https://time.com/4349546/statute-limitations-rape-feldman/>.

⁸ See generally *State by State Guide on Statutes of Limitations*, RAINN, <https://www.rainn.org/state-state-guide-statutes-limitations> (reporting general information for each state's statutes of limitations for sex crimes); see also Gov. Cuomo Signs Bill Extending Statute of Limitations for Rape, *NBC N.Y.* (Sept. 18, 2019, 4:55 PM), <https://www.nbcnewyork.com/news/local/cuomo-signs-bill-extending-statute-of-limitations-for-rape/1991478/> (explaining Democratic New York Governor Cuomo's choice to enact legislation extending the statute of limitations for rape) and E. Epperly, *New Law Erases or Extends Statute of Limitations for Various Sex Crimes*, *The Daily Chronicle*

One might ask, what is not to like about such efforts? Surely, there are few more sympathetic victims than children and individuals in subordinate positions compelled to accept unwanted sexual contact. This paper focuses on that question.

Elsewhere, I have written about the victims' rights movement.⁹ While acknowledging some of the important policy changes inspired by the movement, I have also critiqued some of its excesses.¹⁰ The movement has been instrumental in extending statutes of limitations or their elimination in sex and child sex offense statutes.¹¹ They can advance their cause because to members of the public and, therefore, to policymakers, such extensions come with little cost.¹² After all, who can defend sexual abusers?

The thesis of this paper is that the extension or elimination of statutes of limitations increases the risk of convicting innocent defendants.¹³ Lost in the march towards extending the statute of limitations is a meaningful discussion of the policies that support statutes of limitations.¹⁴ Repose, the idea that one can now go on with his life after the statute has run, is not the only policy supporting statutes of limitations.¹⁵ As developed below, statutes of limitations advance accurate factfinding: extending them may result in the loss of exculpatory evidence.¹⁶ Further, memories are shaped by many factors, often post-event.¹⁷ Those factors may create false memories, leading to false

(Apr. 19, 2019), http://www.chronline.com/crime/new-law-erases-or-extends-statute-of-limitations-for-various-sex-crimes/article_686c1988-62e1-11e9-9d7e-1bf7b66604b1.html (describing Washington's new law eliminating the statute of limitations for most sex crimes against minors and extending statutes of limitations for rape).

⁹ M. Vitiello, *The Victim Impact Statements: Skewing Criminal Justice Away from First Principles*, in 76 *N.Y.U. Ann. Surv. Am. L.* (forthcoming 2021).

¹⁰ *Id.*

¹¹ See, e.g., L. Bazelon & B. Green, *Victims' Rights from a Restorative Perspective*, in 17 *Ohio St. J. Crim. L.* 293, 307 (2020) (describing how the victims' rights movement and the #MeToo Movement have led to reform, including New York's Child Victims Act, which extends the statute of limitations in sexual assault cases).

¹² See, e.g., A. Yoon-Hendricks, *New California Law Gives Victims of Childhood Sexual Assault More Time to File Lawsuits*, *The Sacramento Bee* (Oct. 14, 2019, 3:08 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article236209553.html> (describing successful efforts of Californians, including childhood sexual assault survivors and policymakers, to pass a bill extending the statute of limitations for childhood sexual abuse claims in California).

¹³ See *infra* Part III(B).

¹⁴ See *id.*

¹⁵ J. DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, in 41 *Hous. L. Rev.* 1205, 1209-10 (2004) (listing several policies supporting statutes of limitations, including the desire for prosecutions to be based on reasonably fresh evidence and diligent prosecution) (internal quotations omitted).

¹⁶ See *infra* Part III(B).

¹⁷ See, e.g., E. Loftus, *Memory*, 2006, 37, 47

accusations and convictions.¹⁸ Extending the statutes of limitations add to the chance that innocent offenders end up convicted of serious crimes.¹⁹ Also lost in the victims' rights movement's efforts to extend statutes of limitations is the fact that many jurisdictions have in place rules that already extend the limitation's period²⁰ and that they have extended statutes of limitations in such cases for civil actions, protecting many of the claimed interests of abuse victims.²¹

Part I provides a brief overview of statutes of limitations around the United States.²² Part II turns to recent developments that have led to abandoning or lengthening statutes of limitations for sex offenses and child sex offenses. That section explores arguments advanced by proponents for such extensions.²³ Part III argues that efforts to abandon statutes of limitations for sex offenses are misguided. Most importantly, while victims of sexual abuse are among the most sympathetic crime victims, the victims' rights movement has caused policymakers to lose sight of fundamental principles of criminal law.²⁴ Critically, the extension of statutes of limitations increases the likelihood of convicting innocent defendants.²⁵

Part I: An Overview of Statutes of Limitations around the United States

The United States consists of 50 states, each with its own criminal law, and the federal system, with separate criminal laws.²⁶ As a result, generalizing about statutes of limitations has its limits. Some generalizations are possible.

As implied by the term itself, limitations on the government's ability to bring criminal charges are creatures of statutes.²⁷ They did not exist at common

¹⁸ See, e.g., E. Loftus, *The Myth of Repressed Memory*, New York, 1994, 8-19.

¹⁹ See *infra* Part III(B).

²⁰ For example, Connecticut, Indiana, and New Jersey, among other states, have provisions that expand or eliminate the statute of limitations for sex crimes if DNA evidence is available. See *State by State Guide on Statutes of Limitations*, RAINN, <https://www.rainn.org/state-state-guide-statutes-limitations>.

²¹ Associated Press, *A Look at 15 States Making it Easier to Sue Over Sex Abuse*, *abcNews* (Dec. 1, 2019, 10:04 PM), <https://abcnews.go.com/US/wireStory/15-states-making-easier-sue-sex-abuse-67428898>.

²² *Infra* Part I.

²³ *Infra* Part II.

²⁴ *Infra* Part III.

²⁵ See *id.*

²⁶ See L.B. Eisen, *Criminal Justice Reform at the State Level*, *Brennan Center for Justice* (Jan. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level> (offering an overview of the various levels of criminal justice in the United States).

²⁷ Doyle, *supra* note 2, at 1.

law,²⁸ the system that the United States inherited from England.²⁹ Despite the adoption of English common law, the First Congress in the United States enacted legislation creating specific statutes of limitations.³⁰

In the federal system, by legislation, capital offenses may be brought without time limitations.³¹ Congress created a catchall provision creating a five-year statute of limitations for federal crimes.³² In some instances, Congress has created specific statutes of limitations, dealing with a particular crime. For example, theft of artwork has a 20-year statute of limitations³³ and arson has a 10-year statute of limitations.³⁴ The pattern varies, depending on unique policy considerations for other crimes or circumstances that may make detection difficult.³⁵

Federal law now contains two major provisions extending the statute of limitations in child sex abuse cases. One provision eliminates the statute of limitations entirely for certain child sexual abuse cases.³⁶ Another provision allows charges to be brought within the longer of 10 years or the life of the victim.³⁷

States vary considerably with regards to statutes of limitations. Most states include no statute of limitations for murder.³⁸ States vary on the length of the statutes of limitations for other felonies. Alaska, for example, has two tiers of crimes: for some, the statute of limitations is five years, for others, ten years.³⁹ Arizona's general statute of limitations is seven years.⁴⁰ California sets the

²⁸ *Doggett v. United States*, 505 U.S. 647, 667 (1992) (Thomas, J., dissenting).

²⁹ J. Harper, *Remember the Common Law*, *Cato Institute* (2016), <https://www.cato.org/policy-report/march/april-2016/remember-common-law>. Today, no jurisdiction in the United States recognizes the power of judges to create criminal law.

³⁰ Doyle, *supra* note 2, at 1.

³¹ *Id.*

³² 18 U.S.C. § 3282.

³³ Doyle, *supra* note 2, at 3.

³⁴ *Id.*

³⁵ *See id.* at 3 (“Investigative difficulties or the seriousness of the crime seem to have provided the rationale for enlargement of the time limit for prosecuting these offenses beyond the five-year standard”).

³⁶ 18 U.S.C. § 3299.

³⁷ Doyle, *supra* note 2, at 4.

³⁸ *See generally Time Limits for Charges, supra* note 1; *see, e.g., Iowa Criminal Statute of Limitations Laws, FindLaw* (Oct. 12, 2020), <https://statelaws.findlaw.com/iowa-law/iowa-criminal-statute-of-limitations-laws.html>; *Florida Criminal Statute of Limitations Laws, FindLaw* (Sept. 29, 2020); <https://statelaws.findlaw.com/florida-law/florida-criminal-statute-of-limitations-laws.html>; *Maryland Criminal Statute of Limitations Laws, FindLaw* (Oct. 12, 2020), <https://statelaws.findlaw.com/maryland-law/maryland-criminal-statute-of-limitations-laws.html>.

³⁹ *Time Limits for Charges, supra* note 1.

⁴⁰ *Id.*

limitations at six or three years, depending on the crime.⁴¹ Connecticut has a patchwork: for the most serious felonies, there is no statute of limitations.⁴² For most other felonies, the statute of limitations is five years.⁴³ For sexual assault, abuse or exploitation, the statute of limitations is thirty-years.⁴⁴ In cases of abuse of minors, the statute of limitations runs for five years after the victim gives notification to the police.⁴⁵ One can find a comprehensive list of state statutes of limitations at the website cited below.⁴⁶

Most jurisdictions recognize various equitable exceptions to the more rigid time limits implied by statutes of limitations.⁴⁷ Statutes of limitations may be tolled if a defendant has fled or otherwise frustrated reasonable efforts of police to locate him.⁴⁸ Typical is a federal statute that provides that “No statute of limitations shall extend to any person fleeing from justice.”⁴⁹ State statutes vary. For example, some require a showing that the offender was fleeing or hiding.⁵⁰ Other statutes toll the limitation period for any amount of time that the offender is absent from that state.⁵¹ Yet another variation tolls the statutes of limitations when the suspect is out of state, but the relevant provision may set out deadlines for prosecution.⁵²

Importantly, these kinds of laws reflect a balance of competing policies. As summarized in the Working Papers of the National Commission on Reform of Federal Criminal Laws:

The primary reasons for restrictions of time revolve around universally accepted notions that prompt investigation and prosecution insures that conviction or acquittal is a reliable result, and not the product of faded memory or unavailable evidence; that ancient wrongs ought not to be resurrected except in some cases of concealment of the offense or identity of the offender; and that community security and economy in allocation of enforcement resources require that most effort be concentrated on recent wrongs.⁵³

As indicated above, on the other side of the ledger are equitable considerations.⁵⁴ The law should not encourage an offender to frustrate the

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ DiFonzo, *supra* note 15, at 1212.

⁴⁸ *Id.*

⁴⁹ 18 U.S.C. § 3290.

⁵⁰ DiFonzo, *supra* note 15, at 1213.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1209.

⁵⁴ *See supra* Part I.

legitimate efforts to pursue the offender's arrest and prosecution.⁵⁵ As developed below, states and the federal government have rethought that balance in child sexual abuse and sexual assault cases.⁵⁶

Part II: The Call to Abandon Statutes of Limitations for Sex and Child Sex Offenses

One does not need to look far to find headlines about the demand to extend statutes of limitations in various sex offense cases. Even before the #MeToo movement,⁵⁷ revelations about years of cover-ups about child sexual abuse by Catholic priests and other men in positions of power have incensed members of the public.⁵⁸

Claims of sexual abuse by Catholic priests surfaced in the mid-1980s in the United States.⁵⁹ Books and articles about the abuse began to appear in the 1990s, culminating with an importance series published by the Boston Globe newspaper.⁶⁰ The cases continue to surface with several themes: Church officials routinely reappointed priests to other dioceses;⁶¹ they seldom reported abuse to

⁵⁵ *See id.*

⁵⁶ *Infra* Part II.

⁵⁷ *See generally* *History & Inception, Me Too*, <https://metoomvmt.org/get-to-know-us/history-inception/>.

⁵⁸ *See* H. Callaghan, *End the Statute of Limitations*, *Markkula Center for Applied Ethics* (Aug. 27, 2018), <https://www.scu.edu/ethics/all-about-ethics/extend-the-statute-of-limitations/> (arguing that ending or extending statutes of limitations for sex crimes may help abuse victims in the future).

⁵⁹ M. Moran, *Cardinal Sins: How the Catholic Church Sexual Abuse Crisis Changed Private Law*, in 95 *The Geo. J. Gender & the Law* 101-03 (2019).

⁶⁰ M. Rezendes, *Church Allowed Abuse by Priest for Years*, *Boston Globe* (Jan. 6, 2002), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlrAT25qKGvBuDNM/story.html>. *See also* *Report I of the 40th Statewide Investigating Grand Jury* (July 27, 2018), <https://www.attorneygeneral.gov/wp-content/uploads/2018/08/A-Report-of-the-Fortieth-Statewide-Investigating-Grand-Jury-Cleland-Redactions-8-12-08-Redacted.pdf>.

⁶¹ *See* C. Lauer & M. Homer, *Almost 1,700 Priests and Clergy Accused of Sex Abuse Are Unsupervised*, *NBC News* (Oct. 4, 2019, 9:03 AM), <https://www.nbcnews.com/news/religion/nearly-1-700-priests-clergy-accused-sex-abuse-are-unsupervised-n1062396> (finding that at least 160 priests accused of sexual abuse continued working or volunteering in churches, including some Catholic dioceses overseas).

public officials;⁶² the Church officials seemed more concerned about the Church's reputation than the harm to young victims of abuse.⁶³

Lawsuits mounted against the Church. Those suits ended up settling, costing the Church millions of dollars.⁶⁴ Often, Church officials were not forthcoming during discovery; instead, they attempted to shield the Church and its priests from public scrutiny.⁶⁵ Another tactic was to attempt to acknowledge the abuse scandal but engage in damage control. For example, even as recently as 2008, years after the cases began to mount up, Church officials contended that only about 1% of its priests worldwide were involved in abuse.⁶⁶

In 2018, a Pennsylvania grand jury reported its findings about abuse within the church in that state.⁶⁷ In its 884-page report, the grand jury found over 1000 claims of abuse by about 300 priests in six of the eight dioceses in Pennsylvania.⁶⁸ The report speculated that there were likely thousands more cases that went unreported.⁶⁹

Despite obvious criminal violations, the state pursued only two criminal cases. That was so because the statute of limitations had run on most of the crimes.⁷⁰ Among several recommendations, the Pennsylvania grand jury urged that the statute of limitations for criminal violations be eliminated.⁷¹

⁶² See, e.g., L. Goodstein & M. Dave, *Catholic Church in Illinois Withheld Names of at Least 500 Priests Accused of Abuse, Attorney General Says*, *N.Y. Times* (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/illinois-attorney-general-catholic-church-priest-abuse.html> (reporting that the dioceses publicly named only 185 of the 690 priests accused of abuse).

⁶³ See *id.*

⁶⁴ See, e.g., K. Coffman, *Catholic Church Pays \$7 Million to Victims in Colorado of Sexual Abuse by Priests*, *Reuters* (Dec. 1, 2020, 5:12 PM), <https://www.reuters.com/article/us-colorado-priests-sexabuse/catholic-church-pays-7-million-to-victims-in-colorado-of-sexual-abuse-by-priests-idUSKBN28C04C>.

⁶⁵ See, e.g., J. Morson, *A Vanishing Priest, a Wall of Secrecy and a 25-Year-Old Abuse Case*, *N.Y. Times* (Jan. 30, 2021), <https://www.nytimes.com/2021/01/30/nyregion/religious-orders-abuse.html> (offering just one example of the Church and its officers not complying with discovery in a civil action).

⁶⁶ R. Owen, *Pope Calls for Continuous Prayer to Rid Priesthood of Paedophilia*, *The Times* (Jan. 7, 2008), <https://web.archive.org/web/20110629142115/http://www.timesonline.co.uk/tol/comment/faith/article3142511.ece>.

⁶⁷ See *Report I*, *supra* note 60.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.*

⁷⁰ See L. Goodstein & S. Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania*, *Report Says*, *N.Y. Times* (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html>.

⁷¹ *Report I*, *supra* note 60, at 307. Interestingly, the grand jury recommended that the statute of limitations for civil liability be extended, not eliminated. As developed in this paper, sound policy seemingly would flip those recommendations.

Stories continue to emerge that enrage the public. For example, in 2019, the Associated Press published a report revealing that about 1,700 priests, monks, and other Church members accused of sexual misconduct were “living under the radar,” unsupervised by Church or police authorities.⁷² Many of those individuals were working with young people in positions of trust or authority.⁷³

The COVID-19 pandemic has pushed many stories off the front page in 2020. But another headline story during 2020 was the Boy Scout sex abuse scandal.⁷⁴ That scandal dates back many years but picked up momentum in more recent years. Civil suits resulted in significant jury verdicts, eventually leading the organization to file in federal court to seek Chapter 11 Bankruptcy protection in February 2020.⁷⁵ By November 2020, over 60,000 men had come forward to make claims against the organization, with many more victims who chose not to join the proceedings.⁷⁶

As with the Catholic Church, the Boy Scout officials tried to deny claims abuse for many years.⁷⁷ Also similar to the situation with regards to criminal prosecution of priests, few criminal charges have been brought against sex abusers within the Boy Scouts.⁷⁸

Similar to the story involving the Boy Scouts, COVID-19 pushed other sex scandals off the front page. The powerful movie mogul Harvey Weinstein first came under public scrutiny for sex offenses in 2017.⁷⁹ He was convicted of two counts of sexual misconduct in January 2020 and sentenced to 23 years in prison in February 2020.⁸⁰

⁷² Lauer & Hoyer, *supra* note 61.

⁷³ *Id.*

⁷⁴ See W. Goodwyn, *Boy Scouts of America Sexual Abuse Victims Seek Justice in Bankruptcy Court*, NPR (Nov. 13, 3030), <https://www.npr.org/2020/11/13/933924470/boy-scouts-of-america-sexual-abuse-victims-seek-justice-in-bankruptcy-court>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See E. Dockterman, *These Men Say the Boy Scouts' Sex Abuse Problem is Worse Than Anyone Knew*, *Time* (June 1, 2019, 7:00 AM), <https://time.com/longform/boy-scouts-sex-abuse/> (explaining how the Boy Scout organization is in denial about claims of abuse despite the fact that tens of thousands of members have come forward alleging abuse).

⁷⁸ *Id.* (reporting that the Boy Scouts hired lobbyists to protest the extension of statutes of limitations in an effort to avoid said criminal charges).

⁷⁹ See C. Dwyer, *Harvey Weinstein Sentenced to 23 Years in Prison for Rape and Sexual Abuse*, NPR (Mar. 11, 2020, 11:06 AM), <https://www.npr.org/2020/03/11/814051801/harvey-weinstein-sentenced-to-23-years-in-prison>.

⁸⁰ *Id.*

Many claims of other act of sexual misconduct have surfaced against Weinstein.⁸¹ While Weinstein faces an indictment in Los Angeles, California, many of the other charges are time-barred.⁸²

Allegations against once beloved actor Bill Cosby also focused national attention on difficulties faced by women who have been assaulted by prominent men.⁸³ Despite more than 50 women coming forward with charges against Cosby, prosecutors were barely able to proceed against Cosby because the statute of limitations almost ran on the charges eventually brought against him.⁸⁴

Before his suicide in jail, Jeffrey Epstein was yet another prominent man facing many charges of sexual abuse.⁸⁵ As with Weinstein, Boy Scout leaders, and priests, Epstein would have been able to avoid prosecution on state law charges but would have been subject to federal charges because of their longer statutes of limitations.⁸⁶

Cases like these make powerful headlines. Beyond the headlines, a number of interest groups, notably victims' rights organizations, have been able to advance their policy positions in part because of the headlines.⁸⁷ That agenda includes lengthening or abandoning statutes of limitations in sex and child sex offense cases.⁸⁸

Backed by victims' rights organizations, policymakers have advanced several arguments to justify lengthening or abandoning statutes of limitations in sex and child sex offense cases. Here are some of those arguments in the words of victims' rights advocates. For example, according to a spokesperson for the Rape, Abuse, and Incest National Network (RAINN), "The act of rape doesn't change over time – just because a certain amount of time has passed

⁸¹ *See id.*

⁸² *See, e.g., Full Coverage: Harvey Weinstein is Found Guilty of Rape, N.Y. Times* (Feb. 24, 2020, 7:43 PM), <https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html> (listing several allegations against Weinstein for which charges could not be filed because too much time had passed).

⁸³ *See* M. Giles & N. Jones, *A Timeline of the Abuse Charges Against Bill Cosby*, *Vulture* (Dec. 30, 2015), <https://www.vulture.com/2014/09/timeline-of-the-abuse-charges-against-cosby.html>.

⁸⁴ *See id.* (reporting only one accusation that falls within the statute of limitations).

⁸⁵ *See* M. Gajanan, *Here's What to Know About the Sex Trafficking Case Against Jeffrey Epstein*, *Time* (July 17, 2019, 12:00 PM), <https://time.com/5621911/jeffrey-epstein-sex-trafficking-what-to-know/>.

⁸⁶ *See* M. Dorf, *The Epstein Indictment and Statutes of Limitations*, *Dorf on Law* (July 9, 2019), <http://www.dorfonlaw.org/2019/07/the-epstein-indictment-and-statutes-of.html>.

⁸⁷ *See* Bazelon & Green, *supra* note 11, at 305-307.

⁸⁸ *Id.* at 307.

doesn't mean that someone is less culpable.”⁸⁹ Some offenders are serial offenders, creating a continuing public safety issue. As the RAINN spokesperson stated, “We don't want to reward a rapist for being good at not getting caught.”⁹⁰

Victims' advocates argue that abuse victims suffer from repressed memories.⁹¹ A website for a group of child molestation attorneys states that, “Our legal team of child molestation attorneys . . . cannot even begin to count how many victims with whom we have spoken with convey that, in their 40's and 50's, little pieces of memories come at them bit by bit. . . Eventually, like a jigsaw puzzle, they put together these pieces until they come to the realization that, ‘Oh my God, I was sexually abused by my coach.’”⁹² Apparently, the average age for childhood and adolescent abuse victims to reveal their abuse is 52 years old.⁹³ Some psychologists explain that delay by reference to difficulties that young victims have in trusting adults and to the need to be sufficiently independent to disclose the facts of their abuse.⁹⁴

Advocates for victims of sexual and child sexual assault believe that “statutes of limitations are a bitter impediment to justice.”⁹⁵ Contrary to conventional teaching, some advocates contend that “our brains are actually wired to hold on to the details of stressful and traumatic experiences.”⁹⁶

Victims' rights organizations also point to other legislative changes as part of their positive contribution to the law.⁹⁷ Most states now allow victim impact statements and evidence as part of the sentencing process in criminal cases.⁹⁸ Such evidence can be powerful, as evident in some widely reported

⁸⁹ J. Singer, *Statutes of Limitations Put an Expiration Date on Prosecuting Sexual Assault. In the #MeToo Era, Survivors Want Them Eliminated*, *Glamour* (Jan. 7, 2020), <https://www.glamour.com/story/statutes-of-limitations-sexual-assault>.

⁹⁰ *Id.*

⁹¹ See *id.*; see also J. Hopper, *How Reliable Are the Memories of Sexual Assault Victims?*, *Scientific American* (Sept. 27, 2018), <https://blogs.scientificamerican.com/observations/how-reliable-are-the-memories-of-sexual-assault-victims/>.

⁹² *Changing the Statute of Limitations to Benefit Sex Abuse Victims*, *Corsiglia McMahon & Allard*, <https://childmolestationattorneys.com/changing-statute-limitations-benefit-sex-abuse-victims/>.

⁹³ H. Giorgis, *The Biggest Deterrent to Reporting Child Sexual Abuse*, *The Atlantic* (June 26, 2019), <https://www.theatlantic.com/entertainment/archive/2019/06/fixing-statute-limitation-laws-child-sexual-abuse/592627/>.

⁹⁴ See *id.*

⁹⁵ Singer, *supra* note 89.

⁹⁶ *Id.* See also Hopper, *supra* note 91 (“[M]emories of highly stressful and traumatic experiences, at least their most central details, *don't* fade over time”).

⁹⁷ Singer, *supra* note 89. See also Giorgis, *supra* note 93.

⁹⁸ P. Cassell & M. Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, in 110 *J. Crim. L. & Criminology* 99, 101 (2020).

cases.⁹⁹ Importantly, many victims' rights supporters argue that participating in criminal proceedings where victims can confront their abusers produces "closure" for the victims.¹⁰⁰

Some legislatures single out for special treatment cases where DNA evidence exists.¹⁰¹ While a state might keep in place statutes of limitations for other offenses, it might create an exception if DNA evidence is available.¹⁰²

These efforts often go hand in hand with legislation to extend the statute of limitations in civil cases.¹⁰³ As indicated above, in some instances, as with the Boy Scouts, extending the statute of limitations has led to a flood of case filings, pushing the organization into bankruptcy.¹⁰⁴ Some victims' rights advocates argue that reality supports extending or abandoning the statute of limitations in criminal cases.¹⁰⁵

Cases like those highlighted above produce broad public support. What is objectionable about efforts to support victims of such egregious crimes? I turn to that question below.¹⁰⁶ First, however, one needs to understand the role that the victims' rights movement has played in the development of criminal justice policy in the United States.¹⁰⁷

Part III: Abandoning Statutes of Limitations and Eroding the Commitment to Protect Criminal Defendants

⁹⁹ See J. Lepore, *The Rise of the Victims' Rights Movement*, *The New Yorker* (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement?source=search_google_dsa_paid&gclid=EAIaIQobChMIqpuf7rLg7wIVTzizAB2UyA0sEAAAYASAAEgKKu_D_BwE.

¹⁰⁰ See, e.g., P. Cassell, *In Defense of Victim Impact Statements*, in 6 *Ohio St. J. Crim. L.* 611, 621-623 (suggesting that victim impact statements can be therapeutic for victims). *But see generally* S. Bandes, *Victims, "Closure," and the Sociology of Emotion*, in 72 *Law & Contemp. Probs.* 1 (2009) (critiquing the closure rationale for victim impact statements).

¹⁰¹ DiFonzo, *supra* note 15, at 1218-24.

¹⁰² *Id.*

¹⁰³ See *A Look at 15 States Making it Easier to Sue Over Sex Abuse*, *supra* note 21 (listing states in which efforts to expand civil statutes of limitations have been successful).

¹⁰⁴ L. Wamsley & W. Goodwyn, *Boy Scouts of America Files for Bankruptcy as it Faces Hundreds of Sex-Abuse Claims*, *NPR* (Feb. 18, 2020, 1:08 AM), <https://www.npr.org/2020/02/18/806721827/boy-scouts-of-america-files-for-bankruptcy-as-it-faces-hundreds-of-sex-abuse-cla>.

¹⁰⁵ *Supra* Part II.

¹⁰⁶ *Infra* Part III.

¹⁰⁷ *See id.*

Victims' rights organizations have had a profound effect on the criminal justice system in the United States.¹⁰⁸ That impact earns mixed reviews.¹⁰⁹

The victims' rights movement gained traction in the United States, in part, as a reaction against expansion of criminal procedural rights established by the United States Supreme Court during the tenure of Chief Justice Earl Warren.¹¹⁰ Notably, between 1961 and 1969, the Warren Court found that various provisions in the Bill of Rights applied as limitations on state, not merely federal, power.¹¹¹ For example, the Court held that the remedy for violations of the Fourth Amendment (protecting against unreasonable searches and seizures) was the exclusion of that evidence.¹¹² It found that states had to appoint counsel for indigent defendants charged with felonies.¹¹³ Perhaps most famously, or infamously, depending on one's view of the issue, the Court held in *Miranda v. Arizona* that police needed to give a suspect a set of detailed warnings if police engaged in custodial interrogation.¹¹⁴ The Court's critics saw such rights as contributing to rising crime rates. They argued that such rights came at the expense of crime victims.¹¹⁵

While that attack was largely from the political rightwing, the emerging women's rights movement joined as well.¹¹⁶ Feminists focused on the shameful treatment of rape victims, not only by defense attorneys in rape cases, but the police.¹¹⁷ Prominent law professor and social commentator Susan Estrich captured the latter issue in an article and then a book in the 1980s.¹¹⁸ Her

¹⁰⁸ See generally *The Victim Impact Statements*, supra note 9. See also R. Ginsberg, *Victims Deserve the Best: Victims' Rights and the Decline of the Liberal Consensus* 1, 10-11 (Aug. 2013) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with the Carolina Digital Repository).

¹⁰⁹ *The Victim Impact Statements*, supra note 9.

¹¹⁰ Ginsberg, supra note 108, at 60.

¹¹¹ J. Israel, *Selective Incorporation: Revisited*, 71 in *Geo. L. J.* 253, 283 (1982) ("In the years following *Powell*, due process cases considering various Bill of Rights safeguards used an approach similar to that taken in the right-to-counsel").

¹¹² *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹¹³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹¹⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹⁵ See, e.g., L. Henderson, *The Wrongs of Victim's Rights*, in 37 *Nev. L. Rev.* 937, 948-49 (1986).

¹¹⁶ See generally A. Gruber, *#MeToo and Mass Incarceration*, in 17 *Ohio St. J. Crim. L.* 275 (2020) (analyzing the intersection between feminism and punishment).

¹¹⁷ See generally S. Estrich, *Rape*, 95 in *Yale L. J.* 1087 (May 1986) (describing her own experience with police after she was raped).

¹¹⁸ *Id.*

writings focused on her experience as a rape victim.¹¹⁹ Cases like hers helped advance reform in police departments.¹²⁰

Indeed, probably the most worthwhile achievement of the victims' rights movement has been greater attention paid to crime victims.¹²¹ Efforts have included development of police units to deal with victims of sexual violence;¹²² greater notification to crime victims about the status of the case against the offender charged with harming the crime victim;¹²³ and at least in some instances, the provision of some resources to help crime victims through their experience.¹²⁴

In part because the victims' rights movement spanned the political spectrum, it proved powerful in shaping criminal justice policy in the United States for most of four decades.¹²⁵ Starting in the 1970s, states moved from indeterminate sentencing, which focused on rehabilitation, to determinate sentencing and the reemergence of retributive sentencing.¹²⁶ Often, legislatures created mandatory minimum sentences for a variety of offenses.¹²⁷ The nation launched a war on drugs, which along with the other retributive policies, led to mass incarceration.¹²⁸ A new consensus in the United States recognizes that the

¹¹⁹ *Id.* at 1087-89.

¹²⁰ *Improving the Police Response to Sexual Assault, Police Executive Res. F.* (March 2012), <http://enforcerafelaws.org/wp-content/uploads/2015/10/improving-the-police-response-to-sexual-assault-2012.pdf>.

¹²¹ See *History of Victims' Rights, National Crime Victim L. Institute* (2011), https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ (reviewing all of the efforts of the victims' rights movement).

¹²² See M. Paula, *Inside the Special Police Unit That's Transforming How Cops Investigate Sexual Assault, Mother Jones* (2018), <https://www.motherjones.com/crime-justice/2018/09/inside-the-special-police-unit-thats-transforming-how-cops-investigate-sexual-assault/> (describing the New York State Police's Campus Sexual Assault Victims Unit).

¹²³ See Cassell & Garvin, *supra* note 98, at 109 (explaining the right to notice of case proceedings included in Florida's Marsy's Law).

¹²⁴ See, e.g., *Assistance and Resources for Victims, U.S. Dep't of Justice*, <https://www.justice.gov/enrd/assistance-and-resources-victims>. Not all states have followed through with the commitment to provide crime victims with resources. See Ginsberg, *supra* note 108, at 13 ("victims' services have not been a priority for the victims' rights movement, and consequently, have not been as successful").

¹²⁵ See *The Victim Impact Statements, supra* note 9, at 5-9 (generally reviewing the progress of the victims' rights movement from the 1970s to the present).

¹²⁶ See S. Kaddish, *Fifty Years of Criminal Law: An Opinionated Review*, in 87 *Cal. L. Rev.* 943, 978-79 (1999).

¹²⁷ *Id.* at 981.

¹²⁸ See generally M. Alexander, *The New Jim Crow*, New York, 2012 (analyzing how the United States used the War on Drugs in order to discriminate, oppress, and incarcerate a disproportionately large rate of African American men).

War on Drugs was a failure,¹²⁹ and that mass incarceration has devastated minority communities.¹³⁰ Americans have begun to recognize that the nation has spent unnecessary billions of dollars on prisons, unnecessary because the country could have achieved protection of the public without the expenses required by mass incarceration.¹³¹

The mixed record of the victims' rights movement provides a segue to the central question of this paper: are efforts to extend or eliminate statutes of limitations in child-sex offenses and sexual assault cases generally a success or failure? To explore that question, this section is divided into two parts. In the first section, I examine arguments made by victims' rights advocates to support their agenda.¹³² Thereafter, I expand the discussion to demonstrate how adherence to the victims' rights movement agenda increases the risk of criminalizing innocent defendants.¹³³

(A) Arguments advanced by the victims' rights movement

(I) Judges and juries need information caused by the crime

Victims' rights organizations focus on harm to crime victims.¹³⁴ Often, they ignore two fundamental principles of the criminal law: the importance of an offender's culpability¹³⁵ and the difference between the needs of society and of crime victims.¹³⁶ The use of victim impact evidence as part of the criminal sentencing process demonstrates the ways in which victims' rights advocates conflate criminal law and tort law principles.

One of the successes claimed by the victims' rights movement is the use of victim impact statements at the sentencing phase of a trial.¹³⁷ Professor Paul Cassell is one of the most important intellectual leaders of the victims' rights movement and one of the few proponents of the movement in the legal academy

¹²⁹ See generally M. Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, in *Cleveland St. L. Rev.* (forthcoming 2021).

¹³⁰ See D. Schultz, *Rethinking Drug Criminalization Policies*, in 25 *Tex. Tech L. Rev.* 151, 161-62 (1993) (reporting that "of the 1.2 million annual drug arrests, over 80% of those eventually prosecuted are [African] American males").

¹³¹ See *How to Save Billions of Dollars in Unnecessary Government Spending, Equal Justice Initiative* (Jan. 22, 2018), <https://eji.org/news/how-to-save-billions-in-unnecessary-government-spending/> (arguing that mass incarceration, which cost the United States \$80.7 billion in 2012, may actually increase crime rather than decreasing it).

¹³² *Infra* Part III(A).

¹³³ *Infra* Part III(B).

¹³⁴ *The Victim Impact Statements*, *supra* note 9, at 23.

¹³⁵ *Id.* at 22.

¹³⁶ *Id.*

¹³⁷ See *In Defense of Victim Impact Statements*, *supra* note 100, at 613.

in the United States.¹³⁸ Cassell has explained the importance of victim involvement in the process, in part, as follows: victim impact evidence “provide[s] information to the judge and jury about the harm caused by the crime, which may be helpful in determining an appropriate sentence. . . and they ensure fairness at sentencing because the State, the defendant, and the victim are all heard from.”¹³⁹

Cassell’s statement is reflective of a core principle of the victims’ rights movement. Victims’ rights groups and some feminist scholars focus on the harm to victims without attention to the mental element of the offender.¹⁴⁰ Prominent feminist scholar Catherine MacKinnon summed it up in rejecting the idea that a man’s mistake (even a reasonable mistake) as to consent should be relevant: “a woman [was] raped but not by a rapist.”¹⁴¹

Scholars like Cassell and MacKinnon make a fundamental mistake in their overemphasis on harm to victims. To put the problem in the context of sexual assault, American criminal law governing sexual assault have experienced a dramatic change since the 1970s.¹⁴² Then, rape cases typically involved only stranger-rape cases, often accomplished with the threat, or use of violence against the victim.¹⁴³ In the 1980s and beyond, courts and legislatures expanded sexual crimes to include instances where a woman experienced sex without consent, but in which the offender may have believed that he acted with consent.¹⁴⁴ That sets up the core philosophical debate between traditional criminal law scholars and victims’ rights supporters.

To start with, much of the language supporting victims’ participation in the criminal justice system conflates tort and criminal law.¹⁴⁵ Focus here on two

¹³⁸ See generally *id.*

¹³⁹ *The Victim Impact Statements*, *supra* note 9, at 15.

¹⁴⁰ *Id.* at 23. Not all feminist scholars agree. See Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration* (2020) in *The New Front* (describing feminists’ efforts to change laws governing date rape to increase convictions, without concerns for the defendant’s mens rea).

¹⁴¹ C. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, in 8 *Signs* 635, 654 (1983).

¹⁴² See generally M. Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, in 40 *Ariz. St. L. J.* 651 (2008).

¹⁴³ *Id.* at 658-59.

¹⁴⁴ See, e.g., *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1343 (1992) (highlighting that Pennsylvania law at the time did not require resistance for a finding of rape) and *State of New Jersey In the Interest of M.T.S.*, 609 A.2d 1266, 1279 (1992) (holding that the state need only show that sexual penetration was accomplished without affirmative and freely-given permission of the victim and requiring no additional force or resistance).

¹⁴⁵ *The Victim Impact Statements*, *supra* note 9, at 22 (discussing how the victims’ rights movement focuses on the harm to the victim and society, the focus of tort law, rather than offender culpability, the principle that is central to criminal law principles).

points raised by Professor Cassell: providing the judge and jury with relevant information and ensuring fairness at sentencing.

When Americans learned about Amanda Knox’s trial in an Italian court, they were incensed when they discovered that Patrick Lumumba, her former employer, was allowed to join his civil defamation suit with the government’s criminal trial.¹⁴⁶ That reaction reflects a basic difference in the American and Italian systems.¹⁴⁷ Early English common law conflated criminal and tort law.¹⁴⁸ But the two areas of the law separated hundreds of years ago.¹⁴⁹

Today, scholars recognize that the two systems have distinct purposes. Tort law involves risk-allocation.¹⁵⁰ Such a system can tolerate, for example, strict liability when a manufacturer sells a defective product.¹⁵¹ It can insure itself against such risks and pass along those costs to consumers.¹⁵² But criminal law, especially as it has evolved in the modern era, focuses on blameworthiness.¹⁵³ Strict liability in the criminal law is virtually unknown.¹⁵⁴ At times, courts construe statutes to include a mental element to avoid punishing an offender who may not have acted with a culpable mind.¹⁵⁵ Legislatures avoid strict liability offenses, except in minor crimes, where a fine may be the only punishment.¹⁵⁶ Scholars argue persuasively that strict liability offenses violate constitutional provisions.¹⁵⁷

¹⁴⁶ See D. Lenth, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, in 45 *McGeorge L. Rev.* 347, 354 (2013).

¹⁴⁷ See *id.*

¹⁴⁸ See K. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 in *Widener L. J.* 719, 719 (2008); D. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, in 76 *B.U. L. Rev.* 59, 59 (1996).

¹⁴⁹ See Simons, *supra* note 148, at 719.

¹⁵⁰ See D. Vetri, L. Levine, J. Vogel, & I. Gassama, *Tort Law and Practice*, North Carolina, 2016, 11-13.

¹⁵¹ See *id.* at 850-53 (explaining the history of strict products liability).

¹⁵² See *id.*

¹⁵³ Simons, *supra* note 148, at 723.

¹⁵⁴ See *id.*

¹⁵⁵ See, e.g., *Staples v. U.S.*, 511 U.S. 600, 605 (1994) (“we must construe the statute in light of the background rules of the common law . . . In which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principle of Anglo-American criminal jurisprudence”) (quoting *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978)). See also *Elonis v. United States*, 575 U.S. 723 (2015) (“the mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it”) (internal quotations omitted).

¹⁵⁶ See P. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, in 37 *Harv. J. L. & Pub. Pol’y* 1065, 1068-69 (2014) (listing minor offenses, such as illegal parking, that may result in merely a monetary fine).

¹⁵⁷ *Id.* at 1087, 1101 (positing that strict liability offenses may violate the Due Process and Cruel and Unusual Punishments Clauses of the Constitution).

In the 1950s and 1960s, the American Law Institute promulgated the Model Penal Code.¹⁵⁸ Its efforts to bring coherence to the criminal law is probably the most important development in the criminal law in American history.¹⁵⁹ Most of its drafters were subjectivists; that is, the organizing theme was the focus on culpability.¹⁶⁰

That brief history suggests one way in which the victims' rights movement's rhetoric is inconsistent with what has emerged as basic criminal law principles.¹⁶¹ Victims may experience harm; but, absent a culpable criminal mind, society should not punish the offender.¹⁶²

Another way to see the difference between the two systems, following directly from the previous example, is to realize that harm to an individual and harm to society may differ. Tort law compensates a person for her individual losses.¹⁶³ Social harm is more complex: incarcerating an offender who lacks culpability may deprive society of that person's labors and may leave the offender's family as wards of the state.¹⁶⁴

As noted above, some states have expanded or eliminated statutes of limitations in civil cases.¹⁶⁵ Forcing an offender to pay for harm caused, even long after the events, may be acceptable in the civil context.¹⁶⁶ More complicated is the justification for criminalizing an offender in such cases. Beyond the scope of this paper is an extensive discussion of justifications for punishment. Even a few words about the different justifying goals of punishment suggest why extending the statutes of limitations may be unwarranted. Criminologists have demonstrated that many offenders "age" out of their criminal years; in effect, they self-rehabilitate. As such, the criminal law no longer needs to intervene to rehabilitate such offenders.¹⁶⁷ Similarly, the idea

¹⁵⁸ See P. Robinson & M. Dubber, *The American Model Penal Code: A brief Overview*, in 10 *New Crim. L. Rev.* 319, 322-24 (2007).

¹⁵⁹ See *id.* at 320 (asserting that the Model Penal Code was "far and away the most successful attempt to codify American criminal law").

¹⁶⁰ See P. Robinson & J. Darley, *Objectivist vs. Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, in 18 *Oxford J. Legal Studies* 410, 413 (1998) (arguing that the drafters of the Model Penal Code took a subjectivist view of grading).

¹⁶¹ See Simons, *supra* note 148, at 722-23 (reviewing the basic fault principles of criminal law).

¹⁶² *Id.* at 723 (explaining that criminal law requires a higher level of minimal culpability than tort law).

¹⁶³ See Vetri, et al., *supra* note 150, at 2-3.

¹⁶⁴ *The Victim Impact Statements*, *supra* note 9 (describing ways in which harm to a victim may differ from harm to society generally).

¹⁶⁵ See *A Look at 15 States Making it Easier to Sue Over Sex Abuse*, *supra* note 21.

¹⁶⁶ *Supra* notes 150-57 and accompanying text.

¹⁶⁷ DiFonzo, *supra* note 15, at 1211. See also *No Easy Answers: Sex Offender Laws in the U.S.*, *Human Rights Watch* (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy->

that the prospect of facing criminal prosecution many years in the future would deter a prospective offender. Studies demonstrate that certainty of punishment is more important than severity of punishment.¹⁶⁸ In addition, experts know that young offenders are impulsive, not thinking about long-term consequences of their actions.¹⁶⁹ Retributive arguments point in different directions: perhaps, one must punish an offender long after the crime because he deserved punishment.¹⁷⁰ Alternatively, if a rehabilitated offender has become a “different” person, does the new person still deserve punishment for conduct done long ago?¹⁷¹ Importantly, however, the goals of the tort system and the criminal law are different and should not be conflated.¹⁷²

By way of summary, focus again on Professor Cassell’s explanations for victims’ participation in sentencing: the need to give judges and juries relevant evidence and to ensure fairness among the defendant, state, and victim.¹⁷³ The information provided by victim participation is relevant to harm to the victim; but that is personal harm, not the same as harm to society.¹⁷⁴ Further, it introduces arbitrariness and, at times, racial bias into sentencing of criminal offenders.¹⁷⁵ Imagine the realistic example of two perpetrators committing the

[answers/sex-offender-laws-us#](#) (reporting lower-than-expected recidivism rates for sex offenders and discussing how some young offenders age out of their behavior).

¹⁶⁸ See G. Antunes & A. Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, in 51 *J. Urban L.* 145 (1973) (summarizing studies that support this assertion); V. Wright, *Deterrence in Criminal Justice, The Sentencing Project* (Nov. 2010) (indicating that studies support the concept that certainty of punishment is more important than severity).

¹⁶⁹ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005) (highlighting the differences between juvenile and adult offenders), *Thompson v. Okla.*, 487 U.S. 815, 834-35 (1988) (prohibiting the execution of a 15-year-old and asserting that less culpability should attach to a crime committed by a juvenile because adolescents are less mature than adult offenders), and *Graham v. Fla.*, 560 U.S. 48, 82 (2010) (ruling the imposition of a life without parole sentence on juvenile offenders who did not commit homicide unconstitutional).

¹⁷⁰ See Immanuel Kant, *The Philosophy of Law* 194-98 (1887) in J. Dressler & S. Garvey, *Criminal Law: Cases and Materials*, 2019, 44-45.

¹⁷¹ See *No Easy Answers*, *supra* note 167.

¹⁷² See Simons, *supra* note 148, 719-25 (noting important differences between the tort and criminal law systems).

¹⁷³ *The Victim Impact Statements*, *supra* note 9, at 15.

¹⁷⁴ Simons, *supra* note 148, at 722-23. A dramatic example highlighting the difference between harm to victims and societal concerns can be seen in the Breonna Taylor case. Her family already settled a lawsuit against the city of Louisville for millions of dollars. Less clear is whether individual police officers committed any crimes during the events leading to her death. R. Callimachi, *Breonna Taylor’s Family to Receive \$12 Million Settlement From City of Louisville, N.Y. Times* (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html>.

¹⁷⁵ See generally S. Phillips & J. Marceau, *Whom the State Kills*, in *Harv. Civ. Rights – Civ. Liberties L. Rev.* (2020) (confirming that death sentences are imposed in cases with white victims much more often than in those with black victims). See also A. Alaka, *Victim Impact*

same crime with the same level of mens rea. In one instance, her victim is African American; in the other instance, the offender's victim is white. Further, imagine that the African American family is less well off, less articulate, less interested in vengeance than the family of the white victim. In one instance, participation by the victim's family leads to a term of life in prison and the death penalty in the second example.¹⁷⁶ A proper focus on offender culpability demonstrates where the victims' rights movement has distorted a fundamental principle of criminal law.¹⁷⁷

Professor Cassell's call for fairness to offenders, the state, and the victim also conflates tort and criminal law.¹⁷⁸ Tort law compensates victims. Criminal law should punish culpable offenders and protect society. The United States has not adopted a system like Italy has where the defendant's victim can join the public prosecution.¹⁷⁹

Hence, when victims' rights advocates argue that the act of rape does not change over time, the answer is that it depends. A victim may still experience the psychological harm of the offense.¹⁸⁰ The needs of society more generally may not require prosecution.¹⁸¹

(II) Many rapists are serial rapists

As cited above, victims' rights advocates argue that extending or abandoning statutes of limitations for sex offenses is warranted because sex offenders are serial rapists.¹⁸² As a result, even if an offender has avoided capture during the statutory period, he remains a threat to other victims.¹⁸³ The argument makes little sense for two reasons.

Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in Payne v. Tennessee, in 23 *Loyola Univ. Chi. L. J.* 581, 599, 611 (1992) (agreeing with the Booth Court's holding that the use of victim impact statements injects arbitrariness into penalty proceedings).

¹⁷⁶ See Phillips & Marceau, *supra* note 175. See also Alaka, *supra* note 175, at 599, 611 (discussing the arbitrariness of victim impact statements and the dangerous effect arbitrariness can have on juries).

¹⁷⁷ Simons, *supra* note 148, at 722-23 (reviewing the fundamental principles of blameworthiness that are central to the criminal law system).

¹⁷⁸ *The Victim Impact Statements*, *supra* note 9, at 15.

¹⁷⁹ See Lenth, *supra* note 146, at 354.

¹⁸⁰ *Supra* notes 89-94 and accompanying text.

¹⁸¹ As discussed above, individual harm and social harm may not overlap. Further, even if a person committed crime in the past but has "self-rehabilitated," society may have little need to punish that individual to protect against further crimes. DiFonzo, *supra* note 15, at 1211-12.

¹⁸² Singer, *supra* note 89.

¹⁸³ *Id.*

Writing to defend statutes of limitations in sex offenses, the late Professor DiFonzo addressed the concern about the repeat offender.¹⁸⁴ According to DiFonzo, “a chronic offender is more easily – and with greater likelihood of success – prosecuted for more recent crimes.”¹⁸⁵ While victims’ rights advocates may argue that deprives a victim of her day in court, that argument fails for reasons discussed above: the criminal justice system is about protecting society, not about addressing individual harm.¹⁸⁶ The latter in the United States is the province of the tort system.¹⁸⁷

The second fallacy in the repeat-offender argument is that rapists are more likely to be recidivists than are other offenders. Headline cases create that impression.¹⁸⁸ As I have observed elsewhere,

A young child vanishes from her home. After frantic efforts to locate the child, her body is found, with evidence of sexual assault. Police eventually arrest a convicted sex offender, who lives in her neighborhood. In another episode, police find an abducted child’s severed head. In yet another headline case, the police learn that the perpetrator, another convicted sex offender, buried his victim alive.

Who cannot react with outrage to such stories? Despite the infrequency of such abductions and murders, they command the public’s attention, often staying in the headlines for weeks. Cases like these, although statistical aberrations, have driven America’s policies for dealing with sexual offenders for over a decade.¹⁸⁹

Headline cases like these create a false impression about recidivism and sex offenders.

Sex offenders are not a homogenous group, as often assumed by the public and policymakers. Measuring recidivism is not a perfect science but, as recognized by some researchers, “sex offenders are relatively unlikely to commit future sexual offenses, and actually pose a greater risk of committing future nonsexual offenses.”¹⁹⁰

¹⁸⁴ J. DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, in 41 *Hous. L. Rev.* 1205 (2004).

¹⁸⁵ *Id.* at 11.

¹⁸⁶ See Simons, *supra* note 148, at 720.

¹⁸⁷ See Vetri, et al., *supra* note 150, at 2-3.

¹⁸⁸ See *Punishing Sex Offenders*, *supra* note 142, at 667.

¹⁸⁹ *Id.*

¹⁹⁰ F. Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending*, 2009, 29 (“When serious sex offenders are compared with those who commit theft or violent crimes, the prevalence of a distinct pathology is greater among sex offenders, but there is nevertheless substantial heterogeneity in almost every category of severe sex crime.”); J. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, in 3 *U. St. Thomas L.J.* 559, 569-70 (2006).

Again, once one recognizes that the criminal justice system is about protecting society, not compensating victims, extending the statutes of limitations cannot be justified based on the unsupported claim that “many rapists are serial rapists.” The claim is overstated: most sex offenders are not serial offenders.¹⁹¹ If they have not reoffended during the statutory period, they may have self-rehabilitated, no longer creating a risk to society.¹⁹² If they are serial rapists, their new offenses, occurring within the statutory period, means that they will spend years in prison.¹⁹³

(III) “[O]ur brains are actually wired to hold on to the details of stressful and traumatic experiences.”

Victims’ rights advocates who urge expanding statutes of limitations for sex offenses argue that memory of essential details does not fade over time.¹⁹⁴ That assertion is open to vigorous debate.¹⁹⁵

In an article summarizing the arguments for abandoning statutes of limitations in sex offense cases, the author cited Jim Hopper, a Harvard professor of psychology, as supporting the claim that our brains hold onto details occurring during stressful events.¹⁹⁶ But, even the cited article suggests that victims of trauma may not remember all details with precision.¹⁹⁷

Hopper argues that traumatic memories involve three processes. First is encoding, whereby the brain retains central details, but not peripheral details.¹⁹⁸ The second stage is storage.¹⁹⁹ Again, the brain retains central details more completely than peripheral details, which may be gone within a day of an incident.²⁰⁰ Finally, a person’s retrieval of details of traumatic events depends on whether the fact was central or peripheral. Thus, one can recall with some clarity central details, but not peripheral details.²⁰¹

Even Hopper’s discussion of memory raises questions about expanding statutes of limitations. In any given case, the victim will have focused on

¹⁹¹ H. Arkowitz & S. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not*, *Scientific American* (APR. 1, 2008), <https://www.scientificamerican.com/article/misunderstood-crimes/>.

¹⁹² DiFonzo, *supra* note 15, at 1211.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., Singer, *supra* note 89.

¹⁹⁵ See generally *Memory*, *supra* note 17; *The Myth of Repressed Memory*, *supra* note 18.

¹⁹⁶ Singer, *supra* note 89; Hopper, *supra* note 96.

¹⁹⁷ Hopper, *supra* note 96.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

different central details.²⁰² Whether those details will be essential to key issues in a given case is speculative. Focus on an example discussed below, involving two college students.²⁰³ If the critical issue at trial was the man's mens rea, the woman's memory of facts that may have led him to believe she consented would likely to be peripheral.²⁰⁴ One might recognize a second problem with that case and central vs. peripheral details. The woman was intoxicated, limiting her ability to form memories of essential details.²⁰⁵

Hopper's argument about memory is hardly accepted doctrine among psychologists and other researchers. For years, the leading scholar in the field has been Professor Elizabeth Loftus.²⁰⁶ Her early research focused on weaknesses of eyewitness identification. Relevant to this discussion, Loftus found that information received by witnesses after the event influenced their accounts.²⁰⁷

Even more directly relevant to this discussion are her later works involving false memories, even in cases where an event did not take place at all.²⁰⁸ Her work has dealt with false memories in trauma cases and her results, widely accepted, contradict Hopper's claims.²⁰⁹ Loftus served as a defense witness in a case involving a defendant accused of raping and murdering his daughter's childhood friend. Loftus suggested that the "memory," recovered during the daughter's therapy, was a false one, a product of suggestion and possible because of malleability of memory.²¹⁰ Elsewhere, she has described cases of memories "recovered" from young children that seem contradicted by the lack of any physical corroboration in instances where, had the events taken place, massive physical injuries would have occurred.²¹¹

Unable ethically to engage in research in which she would attempt to implant false memories of sexual abuse, Loftus conducted other research that established that one can implant false memories.²¹² She and her assistant used a "lost-in-the-mall" technique whereby they suggested to subjects that they had gotten lost in a mall as young children.²¹³ Significant percentages of participants

²⁰² *Id.*

²⁰³ *Infra* Part III(B)(II)

²⁰⁴ *See, e.g.,* Berkowitz, 609 A.2d at 1340.

²⁰⁵ *See Memory, supra* note 17, at 87-96.

²⁰⁶ *See id. See also The Myth of Repressed Memory, supra* note 18.

²⁰⁷ *Memory, supra* note 17, at 45-47.

²⁰⁸ *See generally The Myth of Repressed Memory* (outlining her work with women in whom false memories have been developed).

²⁰⁹ *See, e.g., Memory, supra* note 17, at 49.

²¹⁰ *The Myth of Repressed Memory, supra* note 18, at 40-76.

²¹¹ *See, e.g., id.* at 1-2.

²¹² *See E. Loftus, Lost-in-the-Mall: Misrepresentations and Misunderstandings, in Ethics & Behavior* 1-13 (1999) (clarifying the details of her Lost-in-the-Mall study).

²¹³ *Id.*

were convinced that the events had taken place, when in reality the memories were implanted by researchers.²¹⁴

A case arose in California in 2015, involving two intoxicated college students.²¹⁵ Stanford student Brock Turner was found engaging in some form of sexual conduct with a severely intoxicated young woman.²¹⁶ During the presentencing stage of the proceedings, a probation officer interviewed the victim, who at that time expressed hopes that Turner would get help and not have his life destroyed by incarceration.²¹⁷ However, the victim became a cause célèbre when Michele Dauber, a family friend, became involved.²¹⁸ Encouraged by Dauber and victims' rights supporters, the victim made various statements, inconsistent with her earlier statements.²¹⁹

An outsider cannot tell whether Dauber and others altered the victim's view of what occurred. But it takes little imagination to believe that a person might have her views of events altered by passionate advocates for a cause.²²⁰ Those advocates, consistent with Professor Loftus' work, might easily alter the victim's understanding of events.²²¹

Those concerns exist in cases involving adults. They are as compelling when the victims were children when events took place. Again, Loftus has worked with cases involving alleged victims of child sexual abuse.²²² The most notable and one of the longest trials in United States history involved

²¹⁴ *Id.* at 5.

²¹⁵ See M. Miller, *All-American Swimmer Found Guilty of Sexually Assaulting Unconscious Woman on Stanford Campus*, *Wash. Post* (Mar. 31, 2016, 3:41 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/all-american-swimmer-found-guilty-of-sexually-assaulting-unconscious-woman-on-stanford-campus/>.

²¹⁶ See *id.*

²¹⁷ Probation Report at 5, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 2016), available at <https://assets.documentcloud.org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf> (on file with The University of the Pacific Law Review).

²¹⁸ See J. Ioffe, *When the Punishment Feels Like a Crime*, *Highline* (June 1, 2018), <https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber/> (detailing Michele Dauber's involvement with the case).

²¹⁹ See, e.g., *Chanel Miller Reads Her Entire Victim Impact Statement*, *CBSNews* (Aug. 9, 2020), <https://www.cbsnews.com/news/chanel-miller-reads-her-entire-victim-impact-statement-she-wrote-to-address-brock-turner-60-minutes-2020-08-09/> (reporting the entire text of Chanel Miller's victim impact statement).

²²⁰ See Graber, *supra* note 140, at 178-90 (describing how the Stanford Law professor became involved in the Brock Turner case, changing the victim's view of how the court should punish the defendant).

²²¹ See *Memory*, *supra* note 17, at 47.

²²² See E. Loftus & K. Ketcham, *Witness for Defense: The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial*, New York, 2015, 8.

defendants who ran a preschool.²²³ The family members were accused of committing a host of sexual acts with the children, part of Satanic rituals.²²⁴ The long and expensive trial resulted in no convictions.²²⁵ The prosecution eventually dropped all charges against the family members.²²⁶ The child-witnesses confirmed a variety of perverse acts, but experts like Loftus challenged the suggestive techniques used to interview the children.²²⁷ The general consensus is that the interviews, using such techniques, resulted in false memories and testimony.²²⁸

Even timely interviews with crime victims can result in false memories and other distortions about critical events.²²⁹ Best law enforcement practices can reduce such risks.²³⁰ Beyond the scope of this paper is a larger concern within the criminal justice community: even apart from questions about extending statutes of limitations are concerns about interviewing techniques by the police generally. Critics of common police interviewing techniques argue that relying on the typical question-answer format of police interviews distorts facts towards the interviewers' version of the events.²³¹ Critics urge that best police practices include interviewing that asks witnesses and victims for narratives of events, rather than for responses to officer-framed questions.²³²

²²³ See C. Haberman, *The Trial That Unleashed Hysteria Over Child Abuse*, *N.Y. Times* (Mar. 9, 2014), <https://www.nytimes.com/2014/03/10/us/the-trial-that-unleashed-hysteria-over-child-abuse.html>.

²²⁴ See *id.*

²²⁵ *Id.*

²²⁶ See J. Mathews, *Most Charges Dropped in McMartin Case; Children Removed From Witness List*, *Wash. Post* (June 13, 1985), <https://www.washingtonpost.com/archive/politics/1985/06/13/most-charges-dropped-in-mcmartin-case/f6107810-ab1a-4f75-ac51-d9deaf1ba2c7/>; L. Timnick, *Charges Against Buckley Dismissed: McMartin Case: After Seven Years and Two Trials, All Molestation Counts Are Dropps Buckley Says He is Filing a Lawsuit*, *L.A. Times* (Aug. 2, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-08-02-me-1421-story.html> (reporting that, with the dismissal of charges against Ray Buckley, the McMartin case had finally come to a close).

²²⁷ L. Newberry, *Weinstein Hires Expert on Memories: Lawyers in New York Rape Trial to Call 'False Memory' Specialist to Cast Doubt on Accusers of Hollywood Mogul*, *L.A. Times* (Feb. 7, 2020), (highlighting, briefly, Loftus' work showing that therapists implanted false memories in the children of the McMartin case) (available on Westlaw).

²²⁸ See *id.*

²²⁹ See B. Snook, K. Luther, H. Quintana, & R. Milne, *Let 'em Talk!: A Field Study of Police Questioning Practices of Suspects and Accused Persons*, in *Crim. Just. & Behav.* (2012), <https://journals.sagepub.com/doi/full/10.1177/0093854812449216> (explaining how some law enforcement interview tactics can lead to incomplete or inaccurate accounts).

²³⁰ See *id.*

²³¹ See *id.*

²³² See *id.* Interestingly, civil litigators use the narrative technique when they are collecting information during depositions, but use leading questions during cross-examination when they seek to pin down a particular theory of the case.

My concern with extending statutes of limitations is that long gaps between events and prosecution leave putative victims open to unmeasurable influences that can distort memory.

(IV) Participation in the criminal process gives victims closure

One might argue that the criminal justice system should allow victims and their families to participate in the process because that participation benefits them psychologically.²³³ That seems to be the point when victims' rights advocates argue that participation – and in this context, extending or abandoning statutes of limitations to assure participation – provides “closure.”²³⁴ Media discussions of issues surrounding victim participation in the criminal justice process use the term “closure” as if it has a well-established meaning.²³⁵ That is not the case.²³⁶

The term began to appear in public discourse only about two decades ago as the victims' impact movement was gaining traction.²³⁷ Professor Susan Bandes, among others, has raised serious questions about the concept of “closure” generally and its influence in the criminal justice system, especially in capital murder cases.²³⁸ She has written, for example, that, “[c]losure is a term with no accepted psychological meaning. It is, in fact, an unacknowledged umbrella term for a host of loosely related and often empirically dubious concepts.”²³⁹

Despite the lack of recognition of “closure” among mental health professionals, advocates of the concept in the criminal justice system suggest that victims and families of criminal violence will experience closure by participating in the criminal justice system.²⁴⁰ Death penalty proponents have been especially vocal in urging that members of the decedent's family provide victim impact evidence at the sentencing stage a capital case.²⁴¹

²³³ Cassell, *supra* note 100, at 621-23.

²³⁴ See Bandes, *supra* note 100, at 2.

²³⁵ *Id.* at 1-2.

²³⁶ *Id.* at 1.

²³⁷ *Id.* at 1-2.

²³⁸ *Id.*

²³⁹ *Id.* at 1.

²⁴⁰ See, e.g., Cassell, *supra* note 100, at 622-23 (describing the idea that victim impact statements may bring therapeutic change to victims, regardless of whether full closure occurs); *Alison's Story*, RAINN, <https://www.rainn.org/survivor-stories/alison> (sharing the story of one sexual assault survivor who said, based on her own experience, that participation in the justice system brings victims closure).

²⁴¹ See Lepore, *supra* note 99 (describing the push for victim involvement in the trial of Timothy McVeigh).

The idea that participation in determining a criminal sentence advances victims' healing is open to serious questions. Although prosecutors routinely advance closure as a reason for victims to participate in the process,²⁴² as a practical matter, they are more interested in victim participation only when victims, for example, in capital cases favor the sentence sought by the prosecutor.²⁴³ The Boston bomber cases is illustrative: Dzhokhar Tsarnaev and his brother killed three people and injured hundreds of others when the brothers detonated a bomb during the Boston Marathon.²⁴⁴ Many families participated in urging the jury to impose the death penalty.²⁴⁵ Notably, the prosecutor refused to call victims not interested in seeing Tsarnaev executed.²⁴⁶

Beyond the way in which prosecutors are concerned about only some victims' ability to achieve closure is the reality that participation in the criminal justice system does not produce closure – if by closure, one means that the victim is emotionally repaired.²⁴⁷

Consider why not: criminal violence causes trauma.²⁴⁸ The victims most in need of help are suffering from post-traumatic stress disorder (PTSD).²⁴⁹ Even a cursory review of the literature concerning treatment modalities for PTSD indicates that effective treatment takes time with a skilled therapist.²⁵⁰ Mental health professionals have developed a variety of treatment modalities.²⁵¹ All require extensive treatment with a healthcare professional. For example, cognitive processing therapy involves 12 weeks, with each session taking between 60 and 90 minutes.²⁵² Other treatments may take longer.²⁵³

As indicated, extending or eliminating statutes of limitations, is more about prosecutorial power and perhaps vengeance on the part of victims than it is about healing victims. Assume that a rape victim received treatment to deal with her trauma, the state's pursuit of her victimizer years later may re-traumatize her by forcing her to relive the experience during a trial.

²⁴² See *id.* See also Bandes, *supra* note 100, at 21-24.

²⁴³ See Lepore, *supra* note 99, and Bandes, *supra* note 100, at 21-24.

²⁴⁴ See Lepore, *supra* note 99.

²⁴⁵ See *id.*

²⁴⁶ See *id.*

²⁴⁷ DiFonzo, *supra* note 15, at 1271-76.

²⁴⁸ See, e.g., *Common Reactions to Sexual Assault*, <https://www.loyola.edu/departments/counseling-center/services/students/concerns/sexual-assault/reactions>.

²⁴⁹ *Post-Traumatic Stress Disorder, Nat'l Inst. of Mental Health*, <https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml>.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

While allowing a victim to speak to her victimizer in open court might be part of a therapeutic regime, that is not what happens in the criminal justice system.²⁵⁴ Instead, the victim speaks her mind and is then back on her own.²⁵⁵ Although victims' rights proponents advocated for financial resources for victims, that is one area where the movement has not won out.²⁵⁶

Many crime victims lack resources to pay for psychological care.²⁵⁷ Even with the expansion of coverage under the Affordable Care Act ("Obamacare"),²⁵⁸ many Americans lack care or have limited coverage, with high deductibles and marginal access to mental healthcare.²⁵⁹

Thus, a result of the "success" of the victims' rights movement, the United States spends billions of dollars on prisons, far more than needed for social protection.²⁶⁰ At the same time, it provides healthcare begrudgingly.²⁶¹ The irony is that, at least according to some commentators, expanded healthcare helped lower crime rates after enactment of Obamacare.²⁶²

(B) Putting Innocent Defendants at Risk

Does extending or abandoning the statute of limitations create the risk of convicting innocent defendants? Here, one ought to focus on different kinds of

²⁵⁴ See Bandes, *supra* note 100, at 13-16

²⁵⁵ See Ginsberg, *supra* note 108, at 13.

²⁵⁶ See *id.*

²⁵⁷ M. McCart, D. Smith, & G. Sawyer, *Help Seeking Among Victims of Crime: A Review of the Empirical Literature*, in *Nat'l Inst. of Health* 8 (2010) (describing barriers that prevent crime victims from seeking mental health services, including lack of financial resources).

²⁵⁸ See *Affordable Care Act 101: Expanding Mental Health and Addiction Coverage*, *Mental Health Am.*, <https://www.mhanational.org/issues/affordable-care-act-101-expanding-mental-health-and-addiction-coverage> (summarizing how Obamacare expanded mental health coverage to Americans).

²⁵⁹ See *Mental Health in America – Access to Care Data 2018*, *Mental Health Am.*, <https://www.mhanational.org/issues/mental-health-america-access-care-data-2018> (reporting 55.8% of American adults with a mental illness received no treatment for various reasons, including lack of insurance, lack of available providers, and high copays).

²⁶⁰ See, e.g., C. Ingraham, *U.S. Spends Twice As Much on Law and Order As it Does on Cash Welfare, Data Show*, *Wash. Post* (June 4, 2020, 5:54 AM), <https://www.washingtonpost.com/business/2020/06/04/us-spends-twice-much-law-order-it-does-social-welfare-data-show/> (comparing public spending on police, prisons, and courts against that on social programs as share of national income).

²⁶¹ See J. Miller, *Most Americans Support Universal Health Care. But Can it Actually Happen?*, *Am. Magazine* (May 29, 2020), <https://www.americamagazine.org/politics-society/2020/05/29/most-americans-support-universal-health-care-can-it-actually-happen> (highlighting, among other things, American leaders' unwillingness to provide universal healthcare).

²⁶² See D. Scott, *The Striking New Evidence That Expanding Health Coverage Reduces Crime*, *Vox* (Oct. 10, 2017, 4:30 PM), <https://www.vox.com/policy-and-politics/2017/10/10/16455304/voxcare-expanding-health-coverage-reduces-crime>.

sexual assaults. The arguments about convicting innocent defendants looks different depending on the nature of the crime.

This section turns first to what seems like the strongest case for extending or abandoning statutes of limitations.²⁶³ The case in which the state has retained DNA evidence seems like one where victims' rights advocates have an airtight case. But, of course, scholars must ask whether that is true. The section then turns to sexual assault cases where the defendant and victim know each other. There, concerns about delay are particularly hard to overcome if one is serious about protecting innocent defendants.²⁶⁴

(I) DNA Evidence

As developed above, some states have extended or eliminated statutes of limitations when DNA evidence exists, even if they have not done so more generally.²⁶⁵ The argument for such statutes at first blush seems unassailable. DNA evidence is infallible; or at least, that is the generally held belief about DNA evidence.²⁶⁶

Imagine, for example, a defendant who has managed to avoid arrest until after the statute of limitations has run. Most commonly, in cases involving strangers, the victim may not have been able to identify her attacker. Through the DNA data base, police identify the defendant years after the rape took place.²⁶⁷

The typical response that defense attorneys make on behalf of their clients when the arrest comes long after the crime is that the defendant is unable to launch a defense.²⁶⁸ Witnesses may not be available; even if they are, their memories have faded; or even worse, so much time has passed that the defendant has no way to reconstruct where he was when the assault took place.²⁶⁹ But, in cases where the offender left DNA evidence at the scene and cannot plausibly claim consent,²⁷⁰ what difference does the time lapse make?

²⁶³ *Infra* Part III(B)(I).

²⁶⁴ *Infra* Part III(B)(II).

²⁶⁵ *Supra* note 20.

²⁶⁶ DiFonzo, *supra* note 15, at 1232-33.

²⁶⁷ See, e.g., Ruth Padawer, *Should Statutes of Limitations for Rape be Abolished?*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/magazine/should-statutes-of-limitations-for-rape-be-abolished.html>.

²⁶⁸ See, e.g., DiFonzo, *supra* note 15, at 1279 (outlining some of the challenges defense attorneys face when attempting to defend, for example, a twenty-year-old case).

²⁶⁹ See *Memory*, *supra* note 17, at 66-76 (explaining why memories fail).

²⁷⁰ For example, the offender may deny ever having contact with the victim, thereby, later preventing him from claiming consensual sex.

DNA techniques have improved, increasing reliability.²⁷¹ That, however, masks problems with DNA evidence. Take simple examples, without a suggestion of bad faith on the part of police or prosecutors. DNA may degrade.²⁷² DNA samples may be misidentified or contaminated.²⁷³ Such instances are real, not merely the stuff of scholarly debate.²⁷⁴

Also, not a matter of bad faith, some DNA technicians are not competent.²⁷⁵ The public and, more importantly, participants in the criminal justice system may believe in the infallibility of DNA testimony.²⁷⁶ That may even be the case among criminal defense lawyers.²⁷⁷ But poorly trained experts may get the testing wrong. As argued by one critic of DNA infallibility, “[s]o many of the people who give DNA testimony . . . went to two weeks of training by the F.B.I. . . . and they are miraculously transformed from beat policemen into forensic experts.”²⁷⁸ Often, the experts are aligned with the police and may be eager to read DNA samples to create false-positive readings.²⁷⁹ Scandal involving crime labs handling of DNA evidence should give one pause about adhering to its infallibility.²⁸⁰

Less frequent, one hopes, are instances not of incompetence but bad faith. Such examples exist.²⁸¹ Some instances involve experts who shade the truth to

²⁷¹ See C. Artaud, *Thirty Years of DNA Forensics: How DNA Has Revolutionized Criminal Investigations*, in 95 *Chem & Eng'g News* 16 (Sept. 18, 2017), <https://cen.acs.org/magazine/95/09537.html>.

²⁷² DiFonzo, *supra* note 15, at 1266 (noting that retesting is sometimes impossible, including when the sample has degraded over time).

²⁷³ *Id.* at 1246-47.

²⁷⁴ See, e.g., *id.* (offering a real-world example of the physical conditions of a crime lab leading to contamination or degradation of DNA samples).

²⁷⁵ DiFonzo, *supra* note 15, at 1254-55 (finding that often “technicians are poorly trained” in many DNA testing labs) (internal quotations omitted). See also K. Alexander, *Crime Lab in D.C. is Told to Halt DNA Tests*, *Wash. Post* (APR. 28, 2015), https://www.washingtonpost.com/local/crime/national-accreditation-board-suspends-all-dna-testing-at-district-lab/2015/04/26/2da43d9a-ec24-11e4-a55f-38924fca94f9_story.html. But see *Quality Assurance Standards for Forensic DNA Testing Laboratories*, <https://www.fbi.gov/file-repository/quality-assurance-standards-for-forensic-dna-testing-laboratories.pdf/view> (attempting to establish “standards describing the quality assurance requirements that laboratories performing forensic DNA testing or utilizing CODIS should follow to ensure the quality and integrity of the generated data,” effective July 1, 2020).

²⁷⁶ *Id.* at 1232-33.

²⁷⁷ *Id.* at 1262.

²⁷⁸ DiFonzo, *supra* note 15, at 1235. But see *Quality Assurance Standards for Forensic DNA Testing Laboratories*, *supra* note 277.

²⁷⁹ DiFonzo, *supra* note 15, at 1241.

²⁸⁰ *Id.* at 1246-47. See also *Cooper v. Brown*, 565 F. 3d 581, 582 (9th Cir. 2009) (Fletcher, J., dissenting).

²⁸¹ See generally, *Cooper*, 565 F. 3d at 582 (Fletcher, J., dissenting). See also M. Vitiello, *Personal Reflections on Connick v. Thompson*, in 11 *Ohio St. J. Crim. L.* 217 (2013).

make guilt more certain than justified.²⁸² Judge Willie Fletcher’s powerful dissent in *Cooper v. Brown* raised the real possibility that members of law enforcement intentionally used blood taken from Cooper after his arrest at the crime scene to cover up incompetence or criminal conduct on the part of law enforcement agents.²⁸³

Perhaps greater controls on the system can make such cases minuscule in number. But even in the best-case scenario for extending statutes of limitations in sexual assault cases, one ought to pause before endorsing such changes.

(II) He Said-She Said

As indicated above, prior to the late-1970s and early-1980s, sexual assault cases seldom involved date rape or other instances where the man and woman knew each other.²⁸⁴ That changed rapidly in the 1980s and beyond.²⁸⁵ Unlike cases reviewed immediately above, DNA evidence is likely irrelevant in such cases. The parties to the sex act agree that some form of sexual touching took place.²⁸⁶ The issues are likely to focus on whether the woman consented or, more often, whether the state proved the man’s mens rea.²⁸⁷ Extending or abandoning statutes of limitations in those cases poses a serious risk of criminalizing an innocent defendant.

Many leading criminal law casebooks include a case that arose in Pennsylvania.²⁸⁸ There, two college students had sexual intercourse.²⁸⁹ Defendant was initially convicted of violating the state’s rape statute, which included an element of “forcible compulsion.”²⁹⁰ Some uncontested facts included these: the woman involved had been drinking early in the day and went to the defendant’s dormitory room.²⁹¹ She was looking for the defendant’s roommate.²⁹² She ended up staying in the room.²⁹³ The defendant asked her to join him on his bed. She declined.²⁹⁴

During the interlude, the woman told the defendant, “no,” when he began

²⁸² DiFonzo, *supra* note 15, at 1240-41 (reporting that prosecution bias is evident at every stage of the forensic process) (internal quotations omitted).

²⁸³ *Cooper*, 565 F. 3d at 591 (Fletcher, J., dissenting).

²⁸⁴ *Supra* notes 142-44 and accompanying text.

²⁸⁵ *See, e.g.*, Berkowitz, 609 A.2d 1338 and *In the Interest of M.T.S.*, 609 A.2d at 1267.

²⁸⁶ *See, e.g.*, Berkowitz, 609 A.2d at 1339-41.

²⁸⁷ DiFonzo, *supra* note 15, at 1246-47.

²⁸⁸ *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994).

²⁸⁹ *Id.* at 1163.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

kissing and fondling her.²⁹⁵ As reported by the courts of appeals that reversed the defendant’s conviction, the act of intercourse followed this interaction:

Ten or fifteen more seconds passed before the two rose to their feet. Appellant disregarded the victim’s continual complaints that she “had to go,” and instead walked two feet away to the door and locked it so that no one from the outside could enter.

Then, in the victim’s words, “[appellant] put me down on the bed. It was kind of like—he didn’t throw me on the bed. It’s hard to explain. It was kind of like a push but no....” She did not bounce off the bed. “It wasn’t slow like a romantic kind of thing, but it wasn’t a fast shove either. It was kind of in the middle.”²⁹⁶

The act of intercourse followed once the defendant placed the woman on his bed.²⁹⁷

The court found that the preceding conduct did not amount to a sufficient act of force to bring the defendant’s conduct within the statutory term of “forcible compulsion.”²⁹⁸ That is, the only force was that incidental to an act of intercourse.

The case provides a good example of additional issues, including the importance of mens rea in sexual assault cases.²⁹⁹ The record included additional evidence about prior interactions between the defendant and the woman with whom he had intercourse.³⁰⁰ After a lecture at their university on sexual behavior, she inquired about the size of his penis.³⁰¹ On another occasion, she stopped by his room on more than one occasion. During one of those visits, “she had laid down on his bed. When asked whether she had asked [the defendant] again at that time what his penis size was, the victim testified that she did not remember.”³⁰²

Similar instances exist in many states in the United States.³⁰³ Such cases present difficult questions: a woman (typically, although male victims exist as

²⁹⁵ *Id.*

²⁹⁶ Berkowitz, 609 A.2d at 1340.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 1342.

²⁹⁹ See J. Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, in 46 *Cleveland St. L. Rev.* 409, 431-32 (1998).

³⁰⁰ Berkowitz, 609 A.2d at 1341.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ See *Dressler & Garvey, supra* note 170, at 467-73 (offering a detailed discussion of different instances in which consent may be an issue).

well)³⁰⁴ engages in intercourse without her consent. But, based on surrounding circumstances, a man may reasonably believe that he has acted with consent.³⁰⁵

What about cases like these if a state has abandoned or extended its statute of limitations for rape offenses? Victims' rights supporters contend that women, like the woman described above, often do not come forward for years.³⁰⁶ As argued by proponents of expanding statutes of limitations, victims may not trust the system and may not come to grips with their trauma for many years.³⁰⁷

Expanding the statute of limitations in such cases increases the risk of convicting innocent defendants. Imagine a case like that described above being tried many years after the events. A defendant might need to find friends of his accuser who might remember details relevant to the woman's conduct. For example, she inquired about the defendant's penis during a speaker-phone call with the defendant and his roommate, evidence relevant to his mens rea.³⁰⁸ Years later, would his roommate remember the phone call, even if the roommate would still be available to testify?³⁰⁹ What about other witnesses, like friends of the woman to whom she might have made statements relating to the events prior to or after the act of intercourse?

Also, as developed above, memory is malleable.³¹⁰ In the case described, already clouded by intoxication, the woman *might* have a good recall of the events. Years later, the events may be altered in ways described by cognitive psychologists like Professor Loftus.³¹¹ Unlike claims discussed above by some victims' rights supporters, trauma does not produce clear memories.³¹² Instead, memories are subject to manipulation and seem to become crystal clear despite the reality that the events did not take place as recalled.³¹³

³⁰⁴ *The 1 in 6 Statistic, 1in6*, <https://1in6.org/get-information/the-1-in-6-statistic/> (reporting that at least 1 in 6 men have experienced sexual abuse or assault at some point in their lives).

³⁰⁵ See M. Baron, "I Thought She Consented," in 11 *Phil. Issues* 1, 15-18 (2001) (offering examples of potentially reasonable mistakes as to consent).

³⁰⁶ See Singer, *supra* note 89. See also Hopper, *supra* note 91.

³⁰⁷ See Singer, *supra* note 89.

³⁰⁸ Berkowitz, 609 A.2d at 1341

³⁰⁹ See generally *Memory*, *supra* note 17, at 63-76 (explaining the various reasons people may forget past experiences).

³¹⁰ See generally *The Myth of Repressed Memory*, *supra* note 18 (reporting various incidents in which individuals had their memories altered and reformed through suggestion)

³¹¹ *Id.*

³¹² See D. Strange & M. Takarangi, *Memory Distortion for Traumatic Events: The Role of Mental Imagery*, *Frontiers in Psychol.* (Feb. 23, 2015), <https://www.frontiersin.org/articles/10.3389/fpsy.2015.00027/full> (explaining that memories for traumatic events are easily distorted).

³¹³ See *The Myth of Repressed Memory*, *supra* note 18, at 12-13 (telling the story of a woman who clearly remembered both of her parents sexually abusing her despite the fact that the events did not occur at all).

Cases like those pose a classic balancing act between competing, often compelling, goals. Protecting victims of sex assault is obviously an important goal. But the United States historically made a commitment to establishing rights of criminal defendants designed to protect the innocent from being convicted.³¹⁴ Extending statutes of limitations does not seem justified in light of that risk.³¹⁵

Part IV: Concluding Thoughts

Victims' rights advocates' arguments are appealing to members of the public. As suggested above, who can defend sexual abusers, especially child abusers?³¹⁶ The answer to that question is that legal scholars and those interested in protecting innocent defendants and developing sound public policy must do so.³¹⁷

Newspaper headlines do not make good public policy.³¹⁸ Anyone who knows the name Brock Turner will tell you, most likely, that he was the Stanford rapist who received an inappropriately low sentence because he was a spoiled college athlete.³¹⁹ Much of that is a false narrative.³²⁰

³¹⁴ The frequently quoted statement by English jurist William Blackstone comes to mind: "better that ten guilty persons escape, than that one innocent suffer." 4 W. Blackstone, *Commentaries* 352. See also *In Re Winship*, 397 U.S. 358, 361-64 (1970) (emphasizing the importance of guilt beyond a reasonable doubt to the U.S. criminal justice system and to a defendant's right to Due Process).

³¹⁵ This applies to cases involving children as well. See, e.g., *The Myth of Repressed Memory*, *supra* note 18, at 10-14 (offering an example of how childhood memories can be incredibly malleable).

³¹⁶ See, e.g., Yoon-Hendricks, *supra* note 12.

³¹⁷ Prominent Criminal Law Professor Franklin Zimring, among others, has lamented the rejection of expertise in development of criminal justice policy. F. Zimring, G. Hawkins, & S. Kamin, *Punishment and Democracy: Three Strikes and You're Out in California*, New York, 2001, 13. Unquestionably, the victims' rights movement relies on popular sentiment and repudiates experts' views. See, e.g., Ginsberg, *supra* note 108, at 67-68 (describing the work of Frank Carrington, who laid the foundation of the victims' rights movement while rejecting expertise and scientific knowledge).

³¹⁸ See, e.g., M. Vitiello, *Brock Turner: Sorting Through the Noise*, in 49 *U. Pac. L. Rev.* 631, 634-38 (2018) (comparing headlines covering the case to the facts of the case).

³¹⁹ See, e.g., L. Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, *N.Y. Times* (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html? r=0>.

³²⁰ See generally, *Brock Turner: Sorting Through the Noise*, *supra* note 320. For example, many members of the public believe that Turner raped his victim. The evidence did not support that "fact." Widely reported was the "fact" that Turner was committing his sexual assault behind a dumpster, creating a powerful image of an insensitive male treating his victim as garbage. Again, those were not the facts. He and the victim were found in front of a dumpster, visible to any passerby. See *Humane Justice, Collateral Damage: A Candid Look at*

As I have argued above, victims' rights advocates' proposals to expand statutes of limitations in sexual crimes will lead to the conviction of some innocent defendants.³²¹ Unlike popular misperceptions about sex offenders, most sex offenders are not repeat offenders and those who are most likely can be convicted on current charges without extending the statutes of limitations.³²²

The widely accepted notion that victims' participation in the criminal justice process gives them closure is questionable at best.³²³ Adhering to such "truths" has led to prison sentences longer than necessary for social protection.³²⁴ Mass incarceration has diverted billions of dollars from other, more socially useful programs.³²⁵ We might start with developing a better health care system that might genuinely assist crime victims.³²⁶

Defendants accused of sex offenses evoke little sympathy.³²⁷ Crime victims do.³²⁸ Allowing criminal justice policy to be based on popular sentiment comes with costs to basic values of our criminal justice system.³²⁹ Notably, the United States has touted adherence to principles like the presumption of innocence and guilt beyond a reasonable doubt as ways to protect defendants from erroneous conviction.³³⁰ Expansion of statutes of limitations increases the risk of convicting the innocent and, as I have argued above, cannot be justified by countervailing policies.³³¹

the Brock Turner Case and Recall of Judge Aaron Persky 14-17 (2020) (offering a factual account of the scene of the assault).

³²¹ *Supra* Part III(B).

³²² *Supra* Part II.

³²³ *Supra* Part III(A)(IV).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *See id.*

³²⁷ *See generally* E. Dockterman, *Can Bad Men Change? What It's Like Inside Sex Offender Therapy*, *Time* (May 14, 2018, 4:14 PM), <https://time.com/magazine/us/5272326/may-21st-2018-vol-191-no-19-u-s/> (describing opposition to efforts to challenge sex offender punishments).

³²⁸ *See, e.g.,* *Read Judge Rosemarie Aquilina's Powerful Statement to Larry Nassar*, *CNN* (Jan. 24 2018, 8:37 PM), <https://www.cnn.com/2018/01/24/us/judge-rosemarie-aquilina-full-statement>. *See also* S. Bandes, *Empathy, Narrative, and Victim Impact Statements*, in 63 *Univ. Chi. L. Rev.* 361 (1996) (analyzing the intersection of emotion and the law generally and, more specifically, in regard to victim impact statements).

³²⁹ *See supra* Part III(B).

³³⁰ *See id.*

³³¹ *See id.*

