

BETWEEN DUE PROCESS AND FORGIVENESS: REVISITING CRIMINAL STATUTES OF LIMITATIONS

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ABSTRACT

This Article examines whether and why the passage of time is significant for purposes of criminal liability. It seeks to explicate the purposes behind criminal statutes of limitations, especially in regard to extremely serious crimes. It examines the coherency and persuasiveness of possible rationales for such statutes that relate to due-process and forgiveness, focusing on personality change by the perpetrator as a possible explanation or justification for barring prosecution after the lapse of substantial time following the commission of a crime. The Article concludes that the passage of time by itself does not carry enough moral weight to overcome countervailing considerations, and that even personality change that relates to one's perception regarding the offense does not always offer strong enough justification to overcome extremely serious crimes.

TABLE OF CONTENTS

I. Introduction	424
II. Fairness of the Investigation and Trial	425
A. The Discovery of Truth and the Prevention of Wrongful Convictions	425
B. Promoting Diligence in Conducting the Investigation and the Trial	429
III. Forgiveness	430
A. Generally	430
B. Allowing Repose and Encouraging Reform	432
C. Decreased Need for Punishment	434
D. Personality Change and Repentance	437
IV. The Seriousness of the Offense	444
V. Conclusion	445

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I. INTRODUCTION

Most countries adopt statutes of limitations barring prosecution after a certain period of time from the occurrence of the crime.¹ The United States Supreme Court praised such statutes:

Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence.²

Customary conceptions view statutes of limitations as providing fairness to the defendant and as being productive for society.³ Scholars opine that they serve a number of useful purposes.⁴ Nevertheless, statutes of limitations present an intractable issue, and the rationales underlying them are not clear. The notion that offenders should escape punishment and proceed with their lives as though nothing happened just because time

1. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454 (1997). In Canada, the United Kingdom, and Australia, there are no statutes of limitations for major offenses. DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL, AND MORAL CONCERNS 58 (2000); see also Sanjeev S. Anand, *Should Parliament Enact Statutory Limitation Periods for Criminal Offences?*, 44 CRIM. L.Q. 8, 8 (2000) (discussing Canadian statutes of limitations). This is also the situation in several American jurisdictions. See PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 60–61 (2006) (noting five states with no felony statutes of limitations, two with minimal felony statutes of limitations, and eleven states with homicide offense exclusions). Some statutes of limitations bar prosecution even for serious offenses such as murder. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 38 (1998) (discussing Hungarian statutes of limitations for treason, premeditated murder, and deadly injury); see also Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 PAC. RIM. L. & POL'Y J. 579, 585–87 (2007) (discussing South Korean statutes of limitations).

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

3. Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 200 (1995).

4. See, e.g., WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 18.5(a), at 903 (5th ed. 2009) (“[Such statutes] prevent prosecution of those who have been law abiding for some years, avoid prosecution when the community’s retributive impulse has ceased, and lessen the possibility of blackmail. But foremost is the desirability of requiring that prosecutions be based upon reasonably fresh evidence so as to lessen the possibility of an erroneous conviction.”).

has passed may sound counterintuitive.⁵ Criticism is especially directed at the application of statutes of limitations in cases of gross human rights violations.⁶

This Article examines whether and why the passage of time is significant for purposes of criminal liability. In general, justifications for statutes of limitations are broken down into two major categories. The first category refers to due process of investigation and trial-related considerations. The second category refers to considerations for society extending forgiveness to the offender over time.

This Article examines the coherency and persuasiveness of possible rationales for statutes of limitations. Part II argues that due process considerations do not play a significant role in determining statutes of limitations and do not justify a categorical bar on prosecution. Part III argues that forgiveness requires a good reason. The passage of time by itself does not carry enough moral weight to overcome countervailing considerations supporting prosecution. A reason added to the lapse of time, such as personality change by the offender, must be indicated to forgive offenders for their deeds over time. Part IV argues that for extremely serious crimes, there is no reason strong enough to ignore the past and relinquish prosecution.

II. FAIRNESS OF THE INVESTIGATION AND TRIAL

A. *The Discovery of Truth and the Prevention of Wrongful Convictions*

The right to a fair trial and to the accuracy of a conviction seems *prima facie* to offer a major reason for statutes of limitations.⁷ Most kinds

5. For more on those who oppose statutes of limitations see ROBINSON & CAHILL, *supra* note 1, at 60. For a closer look at the problem of barring justified claims in civil suits, see Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 69–71 (2005). Malveaux discusses the civil suits for reparations brought by the thousands of victims of the notorious riots that took place in Tulsa, Oklahoma in 1921, which were time-barred by the state's statute of limitations. *Id.* at 69–70.

6. See N. Jeremi Duru, *Exploring Jethroe's Injustice: The Impact of an Ex-Ballplayer's Legal Quest for a Pension on the Movement for Restorative Racial Justice*, 76 U. CIN. L. REV. 793, 818–19 (2008); Jesús-María Silva Sánchez, *Doctrines Regarding "The Fight Against Impunity" and "The Victim's Right for the Perpetrator to Be Punished,"* 28 PACE L. REV. 865, 867 (2008); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 177–80 (2002).

7. See ROBINSON & CAHILL, *supra* note 1, at 58 (treating this rationale as

of evidence are ephemeral. Memories fade over time, and tracking down documents and witnesses may prove difficult or even impossible.⁸ As Ochoa and Wistrich emphasize, the legal system seeks to rely on fresh evidence for a number of related reasons: discovering the factual truth, preventing fraudulent or stale claims, reducing the costs and duration of litigation, and protecting the integrity of the legal system.⁹

At the criminal level, defendants may be unable to mount a defense many years after the offense.¹⁰ Although the passage of time may prevent the prosecution from establishing guilt beyond a reasonable doubt, the main concern relates to the inability of defendants (including the guilty) to establish their defense properly and to the risk of an erroneous conviction of the innocent.¹¹ This concern is valid even when the prosecution bases its case on forensic scientific evidence, which enables it to present *prima facie*

the primary rationale for permitting statutes of limitations); SHUMAN & SMITH, *supra* note 1, at 60–61; James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1209 (2004); Jennifer L. Hurley, *Has the Supreme Court “Wrench[ed] the Sixth Amendment from Its Proper Context?”*, 24 U. TOL. L. REV. 967, 997 (1993).

8. Stogner v. California, 539 U.S. 607, 615 (2003); Toussie v. United States, 397 U.S. 112, 114–15 (1970); ROBINSON & CAHILL, *supra* note 1, at 58; SHUMAN & SMITH, *supra* note 1, at 60–61; P.G. Barton, *Why Limitation Periods in the Criminal Code?*, 40 CRIM. L.Q. 188, 190 (1997); DiFonzo, *supra* note 7, at 1210; Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 141 (1993); Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 129 (2008); Gerald F. Uelman, *Making Sense out of the California Criminal Statute of Limitations*, 15 PAC. L.J. 35, 44–45 (1983); Meredith A. Bieber, Comment, *Meeting the Statute or Beating It: Using “John Doe” Indictments Based on DNA to Meet the Statute of Limitations*, 150 U. PA. L. REV. 1079, 1088–89 (2002); Sandee L. Chadwick, Comment, *The Disappearing Ex Post Facto Clause and Reviving Time-Barred Prosecutions*, 30 SW. U. L. REV. 197, 213–14 (2000); Jonathan W. Diehl, Comment, *Drafting a Fair DNA Exception to the Statute of Limitations in Sexual Assault Cases*, 39 JURIMETRICS J. 431, 433–34 (1999); Amy Dunn, Note, *Criminal Law—Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?*, 23 U. ARK. LITTLE ROCK L. REV. 839, 844 (2001); Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 632 (1954) [hereinafter *Penetrable Barrier*]; Frank B. Ulmer, Note, *Using DNA Profiles to Obtain “John Doe” Arrest Warrants and Indictments*, 58 WASH. & LEE L. REV. 1585, 1613–14 (2001).

9. Ochoa & Wistrich, *supra* note 1, at 471.

10. SHUMAN & SMITH, *supra* note 1, at 61.

11. Malveaux, *supra* note 5, at 76; Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 664–65 (2008).

reliable evidence.¹² Although DNA, for example, does not change, and its probative value is not compromised over time,¹³ scientific evidence can still be erroneous.¹⁴ Furthermore, the defendant may find it very difficult to offer a defense like an alibi or consent after a lapse of substantial time.¹⁵ In general, the defendant may face evidentiary problems in mounting a defense that relies on unwritten evidence.¹⁶

Statutes of limitations, however, create an arbitrary time limit on prosecution; they do not examine the damage caused to the defense because of the passage of time.¹⁷ Thus, the suggestion that the passage of time would not categorically bar prosecution, but rather, create a presumption that it is prejudicial to the defendant may make sense.¹⁸

At any rate, if the only justification for barring prosecution after a substantial lapse of time is to ensure fairness for defendants in terms of evidentiary concerns, then this explanation conflicts with other legal arrangements. For example, there are provisions tolling the limitation periods for specific offenses, such as serious sexual assaults committed against a minor—in child sexual abuse cases, fairness to the victims given their age and the degree of emotional trauma the victims experienced are taken into account.¹⁹ Furthermore, prosecutors in many states and in the

12. ROBINSON & CAHILL, *supra* note 1, at 58–59.

13. Bieber, *supra* note 8, at 1090; Lauren Kearns, Note, *Incorporating Tolling Provisions into Sex Crimes Statutes of Limitations*, 13 TEMP. POL. & CIV. RTS. L. REV. 325, 354 (2003).

14. Diehl, *supra* note 8, at 436–39; Dunn, *supra* note 8, at 852–53; *see also* Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43, 72–80 (2007).

15. Uelmen, *supra* note 8, at 48 (“The passage of time makes alibi witnesses more difficult to locate and also makes those witnesses less certain of specific times that may be crucial in a case.”); Andrew C. Bernasconi, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants’ Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 1000 (2001); Diehl, *supra* note 8, at 438; Dunn, *supra* note 8, at 861; Ulmer, *supra* note 8, at 1618–19.

16. *Penetrable Barrier*, *supra* note 8, at 637–38.

17. *See* Malveaux, *supra* note 5, at 115.

18. *See* ROBINSON & CAHILL, *supra* note 1, at 60; *see also* Anand, *supra* note 1, at 9–11 (advocating a policy of examining prejudice on a case-by-case basis due to the lapse of time); Powell, *supra* note 8, at 118, 147–49.

19. Adlestein, *supra* note 3, at 252; Ernsdorff & Loftus, *supra* note 8, at 150–53; Richard A. Leo, *The Social and Legal Construction of Repressed Memory*, 22 LAW & SOC. INQUIRY 653, 677 (1997); Kearns, *supra* note 13, at 329–30; Jodi Leibowitz, Note, *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse*, 25 CARDOZO L. REV. 907, 925–31 (2003); Jessica E. Mindlin,

federal system may file “John Doe” indictments or warrants, which allow describing an unknown offender by a DNA profile.²⁰ This procedure grants additional time for police and prosecutors to continue their efforts to identify the perpetrator without providing any notice to a specific person to preserve exculpatory evidence.²¹ Some states even toll their statutes of limitations any time the identity of the offender is unknown.²²

Additionally, evidentiary concerns notwithstanding, periods of limitations are not fixed in many countries, but they vary according to the seriousness or the class of the offense. Generally, the length of time increases as the seriousness of the offense rises.²³ This arrangement is not compatible with the rationale of enabling defendants to produce evidence in their defense.²⁴ There is no reason to think, of course, that witnesses may better remember over a long period of time the circumstances surrounding felony offenses compared to the circumstances surrounding misdemeanors.²⁵ Moreover, the passage of time that obscures memories and causes evidence to disappear may prove more harmful for defendants

Comment, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189, 197 (1990). Tolling provisions for such offenses exist in all states in the United States. LAFAVE ET AL., *supra* note 4, § 18.5(a), at 904.

20. LAFAVE ET AL., *supra* note 4, § 18.5(a).

21. *Id.*; Ted Robert Hunt, *Charging John Doe: Tolling the Criminal Statute of Limitations in Missouri Based on the Accused's DNA Profile*, 66 J. MO. B. 78, 78–79 (2010); Powell, *supra* note 8, at 127–28; Bernasconi, *supra* note 15, at 980 n. 5; Bieber, *supra* note 8, at 1079, 1086; Dunn, *supra* note 8, at 858–59; Kearns, *supra* note 13, at 346; Ulmer, *supra* note 8, at 1589, 1602, 1610.

22. See, e.g., Thomas L. Hudson, *Appellate Highlights*, ARIZ. ATT'Y, May 2007, at 46, 48 (regarding Arizona).

23. LAFAVE ET AL., *supra* note 4, § 18.5(a); Kearns, *supra* note 13, at 327; *Penetrable Barrier*, *supra* note 8, at 631. This is the case with the Model Penal Code. DiFonzo, *supra* note 7, at 1216.

24. *Penetrable Barrier*, *supra* note 8, at 636 (“In light of the rationale of statutes of limitations, there is little validity to the policy of relating the statutory period directly to the seriousness of the crime.”).

25. Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 134 (1955) (“[T]here is no reason to suppose that the statutory periods bear any actual relation to the duration of memory, continued availability of witnesses, or time for which documents are, or can be, preserved. Thus, [w]hy should it be supposed that witnesses can remember the circumstances of an alleged oral contract for six years, but those of an alleged false imprisonment only one; or that witnesses will become unavailable more quickly in one case than in the other? It is apparent that something other than availability, or lack of availability, of evidence lies back of the several different limitation periods which may appear in the statutes of a single jurisdiction.” (footnotes omitted)).

in serious offenses, as they face more severe penalties and worse damage to their reputation upon conviction than do those accused of misdemeanors.

Therefore, relinquishing prosecution due to the passage of time may be justified in some cases because of the inability of the defendant to receive a fair trial many years after the commission of the crime. However, given the many possibilities of bypassing the statutes of limitations and the connection between the seriousness of the offense and the period of limitations, it is difficult to argue that the main purpose of these statutes is to ensure reliance on fresh, rather than stale, evidence.

B. Promoting Diligence in Conducting the Investigation and the Trial

Defendants have a right to a speedy trial.²⁶ Putting people in the status or in fear of the status of defendants for many years interferes with routine life, and it may damage their reputation and compel them to invest heavily in resources for their defense.²⁷ Consequently, criminal proceedings must be held within a reasonable time.²⁸ The U.S. Supreme Court, however, strictly construed this right as applying only from the moment that a person is formally charged,²⁹ while giving defendants the option of claiming, based on the Fifth Amendment's due process guarantee, that preaccusation delay impairs one's right to a fair trial.³⁰

Beyond the right to a speedy trial, the Supreme Court emphasized that the role of statutes of limitations is to protect a person from preaccusation delay.³¹ Statutes of limitations thus encourage law enforcement agencies to be efficient in investigating and prosecuting crimes.³² Diligence in conducting the investigation and the trial enhances

26. U.S. CONST. amend. VI; M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 285 (1993).

27. Bassiouni, *supra* note 26, at 285–86.

28. *Id.*

29. *United States v. Marion*, 404 U.S. 307, 313 (1971) (“On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.”).

30. *Id.* at 322–24.

31. *Id.* at 323 (quoting *Toussie v. United States*, 379 U.S. 112, 114–15 (1970)).

32. *Toussie*, 379 U.S. at 114–15; SHUMAN & SMITH, *supra* note 1, at 121–22; Adlestein, *supra* note 3, at 261–62; DiFonzo, *supra* note 7, at 1210–11; Ernsdorff &

punishment objectives—especially the objective of deterrence.³³ By barring prosecution after a lapse of time, statutes of limitations “punish” law enforcement agencies for their inefficiency, thereby serving a punitive function similar to the exclusionary rule.

Periods of limitations, however, expire even if law enforcement agencies exercise due diligence yet do not solve the crime in a timely manner.³⁴ Sometimes, as in many child sexual abuse cases, the victim reports the crime to the police long after its occurrence.³⁵ Moreover, it may be argued that as long as the delay in investigation and prosecution has not impinged on the defendant’s ability to obtain a fair trial, then the delay should only lead to mitigation of the punishment in a case of conviction, and the delay should not preclude conducting a criminal trial.³⁶

Having denied the force of due-process considerations, I next examine possible reasons for forgiveness.

III. FORGIVENESS

A. Generally

Scholars maintain that statutes of limitations mean to express forgiveness, metaphorically speaking (metaphorically, because only the victim has standing to forgive the offender),³⁷ after a lapse of time.³⁸

Sometimes a policy of amnesty is implemented from the pragmatic perspective of achieving some collective goal, such as seeking peace, smoothing the transition to democracy, preventing further abuse of human rights, or gaining public support.³⁹ Thus, in South Africa, Nelson Mandela

Loftus, *supra* note 8, at 148; Powell, *supra* note 8, at 116; Uelmen, *supra* note 8, at 48; Bieber, *supra* note 8, at 1091; Dunn, *supra* note 8, at 862; *Penetrable Barrier*, *supra* note 8, at 633; Ulmer, *supra* note 8, at 1616.

33. Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 100–01 (2002).

34. Adlestein, *supra* note 3, at 260; Bieber, *supra* note 8, at 1092.

35. David Viens, Note, *Countdown to Injustice: The Irrational Application of Criminal Statutes of Limitations to Sexual Offenses Against Children*, 38 SUFFOLK U. L. REV. 169, 188 (2004).

36. Wistrich, *supra* note 11, at 665.

37. KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 187 (1989).

38. *Leading Cases*, 117 HARV. L. REV. 226, 277 (2003).

39. See MINOW, *supra* note 1, at 52–56 (examining amnesty in exchange for truth to confront the past and move forward); CARLOS SANTIAGO NINO, *RADICAL*

adopted a policy of reconciliation.⁴⁰ The Truth and Reconciliation Commission led by Archbishop Desmond Tutu reflected this policy; its advocates believing that it offered the “moral and political reconstruction of society.”⁴¹

This kind of amnesty, of course, has nothing to do with statutes of limitations—it may even be granted a short time after the commission of the crime. Statutes of limitations reflect a policy of forgiveness that is directed at the general population regardless of political considerations or of the potential defendant’s personality. The New Testament admonishes: “Do not judge, or you too will be judged. For in the same way as you judge others, you will be judged, and with the measure you use, it will be measured to you.”⁴² No one can be sure of passing the test of strict justice.⁴³ This is one of the reasons for adopting a policy of forgiveness in due cases.

But forgiveness, at any rate, needs a good reason to be invoked, apart from a person’s propensity to sin.⁴⁴ Unconditional forgiveness does not necessarily occupy an exalted position. If the battered woman always forgives her husband, it may testify to the fact that she does not properly value her dignity, that she is powerless to cope with the harm caused, or that she absorbs the message of inferiority that her husband conveys through violence.⁴⁵

EVIL ON TRIAL, at x–xi, 118–19 (1996) (noting the role of amnesty in preventing further abuses and in balancing transitions of power); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 221, 243 (1997) (regarding the nonprosecution of Japan’s Emperor Hirohito to prevent unrest); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT’L L. REV. 293, 305 (2005) (theorizing amnesty encourages regime change, thus preventing further abuses); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2629–30 (1991) (discussing the creation of a limited amnesty for due obedience to calm rebellion and subsequent pardons by the successor regime to reconcile factions within the country).

40. SHUMAN & SMITH, *supra* note 1, at 8. It should be noted that the South African amnesty was an accountable amnesty because amnesty was conditioned on admission of the crimes. Slye, *supra* note 6, at 246.

41. ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA 7 (2007) (footnote omitted).

42. *Matthew* 7:1–2 (New International).

43. See Harry James Cargas, *The Symposium*, in SIMON WIESENTHAL, THE SUNFLOWER: ON THE POSSIBILITIES AND LIMITS OF FORGIVENESS 124–25 (Harry James Cargas & Bonny V. Fetterman eds., H.A. Pichler trans., Schocken Books rev. & expanded ed. 1998) (1969).

44. MINOW, *supra* note 1, at 17–18.

45. See JORAM GRAF HABER, FORGIVENESS 78 (1991); JEFFRIE G. MURPHY,

Does the passage of time since the commission of the offense justify the extension of forgiveness? I will next address possible reasons for the connection between the passage of time and granting forgiveness.

B. *Allowing Repose and Encouraging Reform*

People wish for renewal and for casting aside barriers.⁴⁶ There is an axiom that every person should be able to make a fresh start.⁴⁷ At the civil level, people may be able to estimate their obligations and to allocate resources efficiently,⁴⁸ and the inability to estimate obligations inhibits commercial intercourse.⁴⁹ At the criminal level, people should be able to proceed with their lives after the lapse of a certain period,⁵⁰ and statutes of limitations provide such repose for potential defendants.⁵¹ By relieving criminals of the burden of fear and uncertainty,⁵² they can now leave the past behind and look forward to the future.⁵³ Arguments concerning offenders' eligibility for a new start, however, do not stand on their own feet, because one may wonder why the offender is not entitled to start anew immediately after the commission of the offense. Perhaps Oliver Wendell Holmes best summed up the doubts raised about the desirability of allowing repose and a new start by asking: "[W]hy is peace more

GETTING EVEN: FORGIVENESS AND ITS LIMITS 10 (2003); Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 331 (2007); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1822 (1999); Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L. 389, 413–14 (2007).

46. See HABER, *supra* note 45, at 89.

47. See Malveaux, *supra* note 5, at 75–76.

48. *Id.* at 76; Ochoa & Wistrich, *supra* note 1, at 466–67; see also *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments*] (noting that a defendant should be able to expect old obligations will end).

49. GRAEME MEW, *THE LAW OF LIMITATIONS* 12–13 (2d ed. 2004); *Developments*, *supra* note 48, at 1185.

50. Barton, *supra* note 8, at 190.

51. *Toussie v. United States*, 397 U.S. 112, 114–15 (1970); Malveaux, *supra* note 5, at 75–76; Ochoa & Wistrich, *supra* note 1, at 460 (discussing the quadruple meanings of repose: “In the context of limitation of actions, ‘repose’ includes at least four distinct but overlapping concepts: (a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims”); Powell, *supra* note 8, at 115–16.

52. SHUMAN & SMITH, *supra* note 1, at 121; Chadwick, *supra* note 8, at 212; *Penetrable Barrier*, *supra* note 8, at 634.

53. Chadwick, *supra* note 8, at 212.

desirable after twenty years than before?”⁵⁴ Why is a person not entitled to a fresh start a day after the commission of a murder?

One aspect of the fresh start argument emphasizes the incentive that statutes of limitations grant to reform and rehabilitate oneself.⁵⁵ A person who disconnects himself or herself from a crime by not repeating the misdeed is, or should be, especially entitled to peace of mind, to living “free from the threat of prosecution or blackmail.”⁵⁶ As for habitual offenders, it would be easier to catch and charge them for recent crimes.⁵⁷

However, statutes of limitations are not supposed to protect people from blackmail, from which an individual is in any case protected, since it is a criminal offense subject to prosecution.⁵⁸ Moreover, against the argument that imposing punishment upon a self-rehabilitated person makes very little sense,⁵⁹ some scholars maintain that self-rehabilitation is a matter for mitigation of punishment, not for exemption from punishment.⁶⁰ Withdrawal from criminal conduct should not exempt one from liability for past crimes. Rehabilitation and the other side of the coin, incapacitation, are not the only considerations for meting out criminal punishments.⁶¹ In some cases, they are clearly secondary considerations.⁶² Thus, a life sentence without the possibility of parole is a punishment that clearly overcomes any consideration of rehabilitation.⁶³ Additionally, the prosecution occasionally charges nondangerous criminals. A husband who kills his wife does not necessarily pose any additional risk to society; however, society brings people to justice not only to prevent future dangers, but for retributive and deterrent reasons as well.⁶⁴

Furthermore, the answer to the question of whether repose and peace

54. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

55. Ulmer, *supra* note 8, at 1615; see Ochoa & Wistrich, *supra* note 1, at 460–61.

56. Ernsdorff & Loftus, *supra* note 8, at 148 (footnote omitted); see also Chadwick, *supra* note 8, at 212.

57. DiFonzo, *supra* note 7, at 1211; Dunn, *supra* note 8, at 845.

58. Diehl, *supra* note 8, at 436.

59. DiFonzo, *supra* note 7, at 1211; *Penetrable Barrier*, *supra* note 8, at 633–34, 638; Ulmer, *supra* note 8, at 1616; see Kearns, *supra* note 13, at 327.

60. See, e.g., ROBINSON & CAHILL, *supra* note 1, at 59.

61. SHUMAN & SMITH, *supra* note 1, at 28–30.

62. See, e.g., Viens, *supra* note 35, at 186–87.

63. SHUMAN & SMITH, *supra* note 1, at 28–30.

64. *Id.*

of mind in the form of statutes of limitations should be preferred over the expectations of victims and society seeking justice is far from obvious.⁶⁵ From a victim's perspective, on the one hand, many studies affirm the connection between forgiveness and healing, personal restoration, and psychological health.⁶⁶ Similarly, there is "no research linking conviction or harsh punishment with the victim's recovery."⁶⁷ On the other hand, many survivors of abuse may feel a certain relief in knowing that the violator was brought to justice and punished even after the passage of a long period of time.⁶⁸ Victims "still feel the pain of what was done to them."⁶⁹ The trauma may last forever, and wounds may be unaffected by the passage of time.⁷⁰ Posttraumatic stress disorder may become part of life.⁷¹ In light of these consequences, it seems that the "right" to repose should be qualified. Perpetrators of extremely serious crimes should not be entitled to calmness while their victim and the relatives of the victim suffer from permanent damage and have no peace of mind in their lifetime.⁷²

C. Decreased Need for Punishment

The connection between periods of limitations and the seriousness of the offense may be justified by society's diminishing interest in pursuing punishment with the passage of time;⁷³ in serious crimes there is a greater need for deterrence.⁷⁴ From a retributive perspective, public denunciation fades over time.⁷⁵ Lapse of time has the effect of reducing anger. I can be

65. See Malveaux, *supra* note 5, at 112–13.

66. SHUMAN & SMITH, *supra* note 1, at 12.

67. DiFonzo, *supra* note 7, at 1275 (quoting SHUMAN & SMITH, *supra* note 1, at 105) (internal quotation marks omitted).

68. See SHUMAN & SMITH, *supra* note 1, at 3.

69. *Id.* at 3–4.

70. See DiFonzo, *supra* note 7, at 1272; Sánchez, *supra* note 6, at 868–69; Viens, *supra* note 35, at 186.

71. DiFonzo, *supra* note 7, at 1272.

72. See Gregory G. Gordon, Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1373 (1993) (regarding civil suits in cases of childhood sexual abuse).

73. Diehl, *supra* note 8, at 435; Dunn, *supra* note 8, at 845; Christopher D. Stone, Note, *Conspiracy, Concealment and the Statute of Limitations*, 70 YALE L.J. 1311, 1335 (1961).

74. LAFAVE ET AL., *supra* note 4, § 18.5(a), at 903.

75. SHUMAN & SMITH, *supra* note 1, at 119; Slye, *supra* note 6, at 232; Uelmen, *supra* note 8, at 56; Diehl, *supra* note 8, at 435; Kearns, *supra* note 13, at 327; Penetrable Barrier, *supra* note 8, at 636; Ulmer, *supra* note 8, at 1616.

very upset today because a seller sold me defective merchandise or spoke to me rudely, but in a few days, I will probably forget the event. Violations of the social order that occurred many years ago no longer seem relevant. The body has already healed itself, and the social order was restored.⁷⁶

Sometimes, though, public outrage remains alive. The public may still be concerned about bringing criminals to justice even after a considerable time lapse. Law enforcement agencies may be ready and even eager to spend time and money on long past offenses because of their seriousness.⁷⁷ Scholars maintain that the seriousness of the crime compels retribution even given the distance of time,⁷⁸ and that the message of law enforcement agencies should be that justice will be served “however long it may take and however much it may cost.”⁷⁹ Punishment affirms the definition of society as a moral community, and its imposition is necessary to stress this notion even if the harm to the victim has already attenuated.⁸⁰ A crime such as murder cannot grow stale; the victim’s blood continues to cry out from the ground.⁸¹ Egregious crimes, such as those committed during World War II, stir up public fury long after they were committed.⁸²

In the case of war crimes or crimes of genocide, the significance of what happened is so profound that the pain persists, sometimes over generation. . . . We simply cannot remove them to the irrelevant past because that would be seen as a denial of the suffering of the victims and a turning away from what is a central moral lesson of this time.⁸³

Moreover, sometimes society feels that prosecuting old crimes is essential to its fabric. It offers a way to go back to the past and to deal with it differently. Thus, when Byron de la Beckwith was convicted in 1994 of the 1963 murder of Medgar Evers, a well-known African-American civil rights leader from Mississippi, the “verdict became a form of community exorcism: an act of cleansing, of rubbing out the relics of a shameful era.”⁸⁴

76. *Leading Cases*, *supra* note 38, at 277.

77. *See* ROBINSON & CAHILL, *supra* note 1, at 59 (discussing a fifteen year old case with new evidence regarding the rape and beating of a teenage girl).

78. *See, e.g.*, Adlestein, *supra* note 3, at 266; Uelmen, *supra* note 8, at 56; Leibowitz, *supra* note 19, at 938; Viens, *supra* note 35, at 186.

79. ROBINSON & CAHILL, *supra* note 1, at 60.

80. SHUMAN & SMITH, *supra* note 1, at 24.

81. *See* Genesis 4:10.

82. Slye, *supra* note 6, at 233.

83. SHUMAN & SMITH, *supra* note 1, at 123.

84. Todd Taylor, Book Note, *Exorcising the Ghosts of a Shameful Past: The Third Trial and Conviction of Byron de la Beckwith*, 16 B.C. THIRD WORLD L.J. 359,

The feeling was that now “society can atone for its crimes and move forward.”⁸⁵

In some cases the victims’ suffering persists even long after the crime was committed. Such cases overcome Professor Shawn Bayern’s original defense of statutes of limitations, expressed in terms of the loss of benefits that the criminal enjoyed in consequence of the crime or the loss of any relation to those benefits.⁸⁶ According to Bayern, after a lapse of time a criminal may have lost any memory of the benefits they received.⁸⁷ Hence, any unfair advantage the criminal gained no longer exists with the passage of time.⁸⁸ Bayern explains:

[I]t is easy for material benefits (and their psychological enjoyment) to be lost: money is spent, tangible goods wear down, and the benefit from services fades. As time passes, it becomes less likely that an offender retains any spoils from a crime. Indeed, even the memory of crime (and its possible enjoyment) fades over time. Accordingly, a view that focuses either on spoils or on an offender’s psychological enjoyment will likely need to be circumspect about punishing offenders in the distant future following their crime. Is it likely that thirty years after a small theft, for instance, the thief retains any noticeable financial or psychological benefit from the crime?⁸⁹

However, the benefits the criminal did gain from the crime may remain in some cases: the murder got rid of a rival; the theft led to affluence. Bayern maintains that such cases are a rarity, whereas statutes of limitations reflect the perception that any tangible or abstract fruits of the crime usually disappear over time.⁹⁰ However, the fact that an offender receives no benefit from an offense may only lead to the mitigation of the sentence; it is not a matter of impunity.⁹¹ Raskolnikov, the protagonist of Dostoevsky’s *Crime and Punishment*, was devastated after robbing and

377 (1996) (quoting MARYANNE VOLLERS, GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH 330 (1995)) (internal quotation marks omitted).

85. *Id.* at 379.

86. Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment*, 12 NEW CRIM. L. REV. 1, 25 (2009).

87. *Id.* at 27.

88. *Id.* at 27, 38–39.

89. *Id.* at 36.

90. *Id.* at 37, 41.

91. *Id.* at 41.

killing his victims.⁹² He became ill, frightened, and lonely;⁹³ he clearly did not enjoy or use the spoils of his crime.⁹⁴ A clumsy thief who stole an empty wallet and was caught immediately after the theft may think that crime does not pay. Is there a strong argument to wholly exempt such offenders from punishment just because they obtained no advantage from the offense and because the memory they have of taking more liberty than others is a negative one? When victims or their relatives still suffer as a result of the crime, it would certainly be unfair to them to claim that the lapse of time bars prosecution simply because no advantage is bestowed on the criminal.

D. Personality Change and Repentance

Scholars have connected statutes of limitations with significant personality changes.⁹⁵ Carlos Nino, who has engaged as a philosopher and statesman in bringing abusers of human rights to justice, held that there is no right granted to defendants charged with mass violations of human rights for statutes of limitations; however, the question of whether it is just to punish somebody for crimes done in the distant past when that person has meanwhile changed significantly should be considered.⁹⁶ Personality change is indeed a candidate for justifying statutes of limitations.⁹⁷ People (or perhaps human behavior) change over time.⁹⁸ Conducting a law-abiding life over a long period of time may shed light on crimes committed in the past.⁹⁹ For example, if I know that my polite old neighbor who is a professor of history committed a murder yesterday, I would think that I probably do not know his real face. But, if I hear that he had committed the murder thirty years ago, I would probably assume that he has significantly changed since the murder and conclude he is no longer the same person. Donald Regan and Derek Parfit suggest the following examples that exemplify the connection between statutes of limitations and personality change. According to Regan,

92. See FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* 61–71, 75–89, 98–109 (Barnes & Noble, Inc. 1994) (1866).

93. *Id.* at 75–89, 98–109.

94. *See id.*

95. *See, e.g.,* NINO, *supra* note 39, at 182–83.

96. *Id.*

97. *See* SHUMAN & SMITH, *supra* note 1, at 30–34.

98. *See* Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 122 (Rolf Sartorius ed., 1983).

99. *See* Alwynne Smart, *Mercy*, in *THE PHILOSOPHY OF PUNISHMENT* 212, 223–24 (H.B. Acton ed., 1969).

Suppose that, ten years after the occurrence of an act of embezzlement, we finally discover the identity of the embezzler. Suppose also that we hold a retributivist view of punishment. A crime has been committed. We have at last identified the criminal. It would seem that she should be punished. But when we consider the person before us, the “criminal” we are supposed to punish, we discover that she is a different person from the person she was ten years ago. She squandered her ill-gotten gains in the first six months. Since then she has lived a blameless life. She has punctiliously fulfilled all obligations of trust. She has not (in this hypothetical case) repaid the money she originally embezzled, but that is because her blameless life has been a modest one, and she has had no funds to spare. I think we would be most reluctant to punish in this case. Although the criminal was (and perhaps timelessly is) deserving of punishment, the criminal is no longer accessible to us. Inhabiting the criminal’s body and social role, we find a new woman.¹⁰⁰

It seems unfair to punish the reformed embezzler because, as Regan explains, “in each [such] case the person who suffers is not the person who (arguably) deserves to.”¹⁰¹

Parfit presents a similar case: “Suppose that a man aged ninety, one of the few rightful holders of the Nobel Peace Prize, confesses that it was he who, at the age of twenty, injured a policeman in a drunken brawl. Though this was a serious crime, this man may not now deserve to be punished.”¹⁰²

Personality change, however, is definitely not the reason for applying statutes of limitations in most offenses. Many statutes provide short time periods for prosecution.¹⁰³ The general federal criminal statute of limitations for noncapital felonies is five years.¹⁰⁴ For misdemeanors, the time periods are usually shorter.¹⁰⁵ Although it is impossible to answer the question of what length of time should elapse before personality change

100. Regan, *supra* note 98, at 122 (footnote omitted).

101. *Id.*

102. DEREK PARFIT, REASONS AND PERSONS 326 (1984).

103. Adlestein, *supra* note 3, at 255.

104. DiFonzo, *supra* note 7, at 1216; Powell, *supra* note 8, at 116; Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447, 1477 (1988).

105. LAFAYETTE ET AL., *supra* note 4, § 18.5(a), at 903 (“For felonies the times usually range between three and six years; for misdemeanors they are ordinarily somewhere between one and three years.”).

occurs, people normally do not undergo radical alterations within a period of about two or three years.¹⁰⁶

If statutes of limitations assume that the passage of time by itself leads to personality change, then it could be argued that a person who committed a grave offense would normally need more time to undergo this alteration than someone who carried out a less serious offense. However, if personality change underlies statutes of limitations, one may wonder why these laws, at least in regard to serious crimes, are not contingent on such a change. Why do statutes of limitations apply to wrongdoers who decline to express remorse¹⁰⁷ and even to career criminals?¹⁰⁸ Why, if personality change matters for criminal liability, does a sincere repentance that is expressed and a personality change that is produced soon after the commission of an offense not normally excuse the offender from liability?

Nevertheless, the question of whether the person who now stands before us is the same person who committed the crime is a central inquiry for purposes of statutes of limitations.¹⁰⁹ Of course, if we do not assume a unitary personal identity over time, then we cannot inflict punishment on a person who is different from the one who committed the offense in the past.¹¹⁰ After all, it is immoral to punish a later self for offenses committed by an earlier self.¹¹¹

Questions of what makes us the same person and what shapes our personal identity inform the debate revolving around bodily-continuity versus psychological-continuity theories.¹¹² Does, for instance, memory of past experiences play a role in defining ourselves? If so, are we the same

106. See Robert R. Holt, *Forcible Indoctrination and Personality Change*, in PERSONALITY CHANGE 289, 315 (Philip Worchel & Donn Byrne eds., 1964) (“A person’s identity is . . . complex, . . . slowly changing.”).

107. See Ochoa & Wistrich, *supra* note 1, at 462 (noting that wrongdoers who likely feel the least remorse are unlikely to be troubled by long limitations periods).

108. See ROBINSON & CAHILL, *supra* note 1, at 59 (explaining how the statute of limitations can bar a career criminal’s early crimes, allowing the criminal to be treated as a first-time offender).

109. See SHUMAN & SMITH, *supra* note 1, at 30.

110. Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 421–22 (1990).

111. See PARFIT, *supra* note 102, at 326 (explaining how “[w]hen some convict is now less clearly connected to himself at the time of his crime, he deserves less punishment”).

112. See, e.g., PERSONAL IDENTITY (Ellen Frankel Paul et al. eds., 2005); PERSONAL IDENTITY (John Perry ed., 1975); SYDNEY SHOEMAKER & RICHARD SWINBURNE, PERSONAL IDENTITY (1984); Dresser, *supra* note 110.

person now as we were at age three, given the fact that we do not remember events from our earliest childhood? In contrast to Parfit and theories of psychological continuity, Joel Feinberg insists that “the earlier self and the later are the same self, not morally distinct people, but rather one person at different times.”¹¹³ Furthermore, denying one’s identity with the wrongdoer implies evading responsibility for one’s deeds.¹¹⁴

The personal identity conundrum will likely not be solved in discussions regarding statutes of limitations. Yet, intuitively, we may be prepared to accept the conclusion that “[t]he statement ‘I am not the same person’ does not strike us as meaningless.”¹¹⁵ We know from our life experience that people do change. Perhaps I was an insecure person when I met John at age twenty and was glad that he controlled my life. But at age thirty, after obtaining a management position in a large company, I disapprove of his domineering nature. John, it seems, has not changed. But I have.¹¹⁶

Parfit demands sufficient connections between the person of today and the person of the past for purposes of punishment.¹¹⁷ For Parfit, retribution for past misdeeds is a matter of degree that depends on our psychological connectedness to the past—between the potential defendant now and the person he or she was when committing the crime.¹¹⁸ Since identity continuity admits degrees, punishment is justified if the present potential defendant has enough in common with the past offender to be responsible for his or her misdeeds.¹¹⁹

Society treats a significant change in character as “a morally relevant factor.”¹²⁰ However, the regular case falls short of a loss of personal identity.¹²¹ There have been cases in which a person underwent a

113. 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 83 (1986).

114. *Id.* at 87.

115. SHUMAN & SMITH, *supra* note 1, at 31.

116. For a different example taken from marriage life that expresses the same idea see Neal E. Miller, *Some Implications of Modern Behavior Theory for Personality Change and Psychotherapy*, in *PERSONALITY CHANGE*, *supra* note 106, at 149, 167.

117. PARFIT, *supra* note 102, at 326.

118. *Id.*

119. *Id.*; see also Regan, *supra* note 98, at 124–25; Dresser, *supra* note 110, at 423.

120. JOHN KLEINIG, *PATERNALISM* 46 (1984) (footnote omitted).

121. See Allen Buchanan, *Advance Directives and the Personal Identity Problem*, 17 PHIL. & PUB. AFF. 277, 281 (1988) (finding loss of personal identity in

personality change similar to that of Raskolnikov in *Crime and Punishment*.¹²² For example, Karla Faye Tucker, who was executed in Texas in 1998, was undoubtedly someone who had experienced a dramatic change in personality while in prison.¹²³ Most people, however, do not experience such dramatic character transformations during their lifetime. Rather, a human being is a complex entity, who harbors many sides at the same time.¹²⁴ The same person can be cruel yesterday and merciful today, nervous yesterday and relaxed today. Indeed, one's behavior may change daily.

As part of this human complexity, when we assess whether a person has changed, we must remember that *prima facie* normal people are capable of committing atrocities under certain circumstances. Simon Wiesenthal tells us, based on his rich experience, that he has

fairly detailed knowledge of the life story of many Nazi murderers. Few of them were born murderers. They had mostly been peasants, manual laborers, clerks, or officials, such as one meets in normal everyday life. In their youth they had received religious instruction; and none had a previous criminal record. Yet they became murderers, expert murderers by conviction.¹²⁵

Because of a change of circumstances, the Nazis went back to leading law-abiding lives (although sometimes under a false identity). The fact that human rights violators returned to normative life after the war had ended—or that the husband continued his routine life after murdering his wife—does not testify to personality change. The potential defendant could be the same person that he had been many years before; it is just that the change of circumstances does not offer him opportunities to commit more

individuals suffering from vegetative states and severe neurological damage that disrupts psychological continuity).

122. See *supra* notes 92–94.

123. Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY 36, 42–43 (Austin Sarat & Nasser Hussain eds., 2007); Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455, 456–57 (2007). Karla Faye Tucker, convicted of two brutal murders, reportedly experienced a conversion to Christianity while in prison, claiming to have become a “new person” and garnering much public support in her (denied) plea for clemency. Kobil, *supra*, at 42–43.

124. Ian Steedman & Ulrich Krause, *Goethe's Faust, Arrow's Possibility Theorem and the Individual Decision-Taker*, in THE MULTIPLE SELF 197, 199–200 (Jon Elster ed., 1989).

125. WIESENTHAL, *supra* note 43, at 96.

crimes.

Was Adolf Otto Eichmann, who was working under the name Ricardo Klement, another person?¹²⁶ His new routine and dull life probably influenced his post-war personality. But Eichmann, “a primary architect of the Final Solution,”¹²⁷ who was clearly responsible, *inter alia*, for deporting almost half-million of Hungarian Jews between April and July 1944, never repented.¹²⁸ He kept insisting that he should bear no liability because he had just been following the orders of his superiors.

Byron de la Beckwith was an old, relatively unhealthy man when he stood trial for a murder committed about thirty years earlier.¹²⁹ While in jail, he entertained his visitors by telling racist jokes.¹³⁰ The Beckwith awaiting trial did not differ from the person who had committed the murder in terms of attitude to the crime. When a person is psychologically connected to his past personality, then according to theories of psychological continuity, imposing punishment for past offenses is justified.¹³¹

At any rate, the passage of time weakens connections. It is only natural that we have fewer connections to the person we were twenty years ago in terms of habits, expectations, occupation, family life, and personality traits.¹³² Do such changes constitute a moral factor to justify the barring of prosecution?

Without repentance and without changing one’s perception regarding the offense, the events that occur during one’s life—whether studies, a change of occupation, marriage, parenthood, and more—do not constitute moral factors in support of the view that punishment is inappropriate to the moral situation in which the potential defendant is currently ensconced.¹³³

Repentance may be a good reason for forgiveness. The offender’s sincere repentance can return to the victim a sense of respect and

126. See *Adolf Eichmann*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007412> (last updated May 11, 2012). Eichmann, after escaping United States custody in 1946, fled to Argentina and lived under multiple aliases, including Ricardo Klement. *Id.*

127. See NINO, *supra* note 39, at 14.

128. See *id.* 14–15; DEBORAH E. LIPSTADT, *THE EICHMANN TRIAL* 107 (2011).

129. Taylor, *supra* note 84, at 359.

130. *Id.*

131. Dresser, *supra* note 110, at 428, 445.

132. *Id.* at 399–400; PARFIT, *supra* note 102, at 206.

133. See PARFIT, *supra* note 102, at 326.

equality;¹³⁴ the contrite offender responds to and respects the victim's resentment.¹³⁵ When the offender succeeds in acknowledging the victim's distress and internalizing his or her own moral failure, the shame the criminal experiences constitutes suffering. Processing his or her moral failure can cause the offender hard pangs of conscience, and the offender is often humiliated by engaging in apology, repentance, and suffering.¹³⁶

But should the law forgive, through statutes of limitations, a wrongdoer who did not beg for forgiveness and did not express repentance? The prevailing opinion is that forgiveness on the part of the victim is considered proper only in light of an expression of true repentance on the part of the offender.¹³⁷ Transferring the interpersonal process of repentance and forgiveness to the criminal justice field means that acceptance of responsibility and genuine repentance must normally constitute a necessary precondition for institutional forgiveness. The passage of time by itself does not convey the same message that repentance does.

If the intervening years have not generated any moral change in the offender, it is difficult to see why the passage of time by itself, and the changes it produces, should exempt a criminal from punishment, especially in regard to extremely serious crimes, when the public interest in bringing their perpetrators to justice still exists.

Even in cases of sincere repentance accompanied by a favorable change in moral values, it would be difficult to dissociate the person of today from the individual of the past. The victim may be ready to accept a sentence of remorse, such as "I apologize for what I have done to you; I cannot recognize myself. It seems to me like someone else committed the offense." Meanwhile, the victim would likely reject an apology that goes like this: "When I caused you harm I was another person, and therefore I cannot be responsible for the offense of another person, and cannot apologize on his behalf." For purposes of accepting responsibility we must assume a personal identity continuity between the criminal of the past and the repentant individual of today.¹³⁸ As Feinberg argues,

134. MURPHY, *supra* note 45, at 35.

135. HABER, *supra* note 45, at 99.

136. Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14, 27–28 (1988).

137. MURPHY, *supra* note 45, at 35.

138. See Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 739 (1992) ("We use the

Genuine repentance, as well as such states as contrition, remorse, the feeling of guilt, and the desire for atonement, all require some sense of continuity with the past and self-identity with an earlier wrongdoer. The essence of these states is the deliberate taking of *responsibility* for an earlier doing. To deny one's identity with the wrongdoer is to evade or deny responsibility for his crimes, quite another thing from repentance.¹³⁹

IV. THE SERIOUSNESS OF THE OFFENSE

In serious crimes, forgiveness should be conditioned on sincere repentance and on an attitude change with regard to the crime.¹⁴⁰ Even sincere repentance, however, cannot overcome shocking crimes. There is a view that a radical wrong cannot be forgiven, and that "it should be punished whenever it is discovered, even decades after the event."¹⁴¹ There are crimes that are beyond human understanding, and they are not subject to forgiveness or to exemption from punishment. Hannah Arendt opines that radical evil—acts that are beyond the pale of human comprehension—are neither punishable nor forgivable: "men are unable to forgive what they cannot punish and . . . they are unable to punish what has turned out to be unforgivable."¹⁴² Genocide and massacres are unworthy of absolution. The opinion has been expressed in regard to Nazi conduct that "since the crimes in question were so terrible that humanity has never known anything like them before, there was no justification for putting a time limit on their prosecution, allowing the passage of time to atone for crimes which cannot be forgiven."¹⁴³ Albert Speer, the minister of armaments and war production for the Third Reich during part of World War II, admitted that

[e]ven after twenty years of imprisonment in Spandau, I can never forgive myself for recklessly and unscrupulously supporting a regime that carried out the systematic murder of Jews and other groups of people. My moral guilt is not subject to the statute of limitations, it

concept of responsibility to link the past, present, and future actions of the individual . . .").

139. FEINBERG, *supra* note 113, at 85.

140. See Eva Fleischner, *The Symposium*, in WIESENTHAL, *supra* note 43, at 138, 140.

141. SHUMAN & SMITH, *supra* note 1, at 4.

142. HANNAH ARENDT, *THE HUMAN CONDITION* 217 (1958).

143. Moshe Bejski, *The Symposium*, in WIESENTHAL, *supra* note 43, at 111, 117.

cannot be erased in my lifetime.¹⁴⁴

Reflecting this attitude, many countries assign no limitations period to murder,¹⁴⁵ crimes against humanity, or war crimes.¹⁴⁶ Putting the past behind us in those cases may even be immoral.

V. CONCLUSION

Statutes of limitations are based on the decrease of the public outrage toward the commission of the offense over time. Levels of public outrage may justify the connection between the length of differing periods of limitations and the seriousness of the offense. The lapse of a substantial period of time may heal wounds and blunt public interest in pursuing justice for long past offenses. There is normally no public interest in reviving old occurrences when less serious offenses are involved. The attitude of “let bygones be bygones” does not fit, however, the public sense of justice in regard to extremely serious crimes.

Statutes of limitations extend forgiveness to the criminal. In serious crimes, forgiveness should be conditioned on sincere repentance and on an attitude change in regard to the crime. An offender who moves, morally speaking, from where he or she was once situated merits consideration. It is this kind of change that should be recognized as a relevant measure in our attitude toward this person. Personality changes experienced by a person during a lifetime, including one’s perception in relation to the offense, can reduce public anger, even when a relatively serious offense is considered.

Despite what has been said, and subject to considerations of due process, even in the case of personality change by the offender, certain

144. Albert Speer, *The Symposium*, in WIESENTHAL, *supra* note 43, at 245.

145. See LAFAVE ET AL., *supra* note 4, § 18.5(a), at 903 (“It is commonly provided that a few of the most serious offenses, usually murder and treason, have no statute of limitations.”); ROBINSON & CAHILL, *supra* note 1, at 61 (noting that “all [U.S.] states exclude murder from any limitations period”); SHUMAN & SMITH, *supra* note 1, at 24 (finding crimes of homicide so significant that they are typically never barred); Adlestein, *supra* note 3, at 251–52 (noting that almost all statutes of limitations exclude “capital offenses and noncapital murder”); Slye, *supra* note 6, at 234 (“Almost every jurisdiction that adopts statutes of limitation precludes their application to the crime of murder.”).

146. See Slye, *supra* note 6, at 234; see also Rome Statute of The International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90 (providing that genocide, crimes against humanity, and war crimes are not subject to any statute of limitations); OSIEL, *supra* note 39, at 193 (indicating that France abolished statutes of limitations for crimes against humanity in 1964).

crimes cannot be defined as long-forgotten events. Gross traumas cannot simply evaporate. Some crimes that exceed human understanding are beyond forgiveness. Time does not always dull memories; “[a]trocities . . . refuse to be buried.”¹⁴⁷ The soul is sometimes torn anew every day. The victims cannot get on with their lives and free themselves of tortured memories. The historical truth is not always relevant to our current life, but sometimes it is. We cannot always put our personal and collective past behind us. “Remembering and telling the truth about terrible events”¹⁴⁸ may be essential tools for relieving pain, for restoring the social order, and for depicting the whole life of the victims as real people.¹⁴⁹ The refusal to forgive can, in certain circumstances, also manifest a noble, moral attitude, according to which recognition of the healing of the passing of time is immoral.¹⁵⁰

A mere personality change cannot in itself justify a time limit for prosecution of extremely serious crimes. Even a personality change that relates to one’s perception regarding the offense does not always offer sufficient justification to overcome countervailing considerations in such crimes. Had the Nobel Prize winner of Parfit’s example not only injured the policeman but also murdered him, perhaps we might not have thought that the radical change in his life should completely exempt him from responsibility for his crime. When the crime is extremely serious, the slate cannot always be wiped clean by future good deeds.

147. Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345, 1346 (1995).

148. *Id.* at 1346.

149. See OSIEL, *supra* note 39, at 68.

150. THOMAS BRUDHOLM, RESENTMENT’S VIRTUE: JEAN AMÉRY AND THE REFUSAL TO FORGIVE 130 (2008).