Rethinking the Balance of Interests in Non-Exculpatory Defenses

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RETHINKING THE BALANCE OF INTERESTS IN NON-EXCULPATORY DEFENSES

PAUL H. ROBINSON,* JEFFREY SEAMAN,** AND MUHAMMAD SARAHNE***

Most criminal law defenses serve the criminal law’s goal of shielding blameless defendants from liability. Justification defenses, such as self-defense and law enforcement authority, exculpate on the ground that the defendant’s conduct, on balance, does not violate a societal norm. Excuse defenses, such as insanity and duress, exculpate on the ground that, while the defendant may well have violated a societal norm, it was done blamelessly. That is, it is the excusing conditions, not the defendant, that is to blame. In contrast, a third group of general defenses, which have been called “non-exculpatory defenses,” bar liability in instances where the defendant may have clearly violated a societal norm with full blameworthiness yet nonetheless is exempt from criminal liability because giving the exemption advances some societal interest independent of—and in conflict with—the criminal law’s goal of imposing deserved punishment in proportion to an offender’s blameworthiness. Non-exculpatory defenses openly sacrifice doing justice in order to promote the competing non-justice interest.

A wide variety of non-exculpatory defenses are commonly recognized, including, for example, statutes of limitation, executive and legislative

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immunities, double jeopardy, diplomatic immunity, and the doctrines of the legality principle. Each of these defenses let blameworthy offenders go free even for serious crimes because such restraint promotes or protects some non-desert societal interest. Our examination of the doctrines suggests, however, that those balances of competing interests are commonly misaligned. This occurs in some instances because societal circumstances have significantly changed since the initial formulation of the defense, without any corresponding revision of the doctrine. In other instances, there is reason to suspect that no thoughtful balancing of the competing interests ever took place, perhaps because at the time there was insufficient appreciation of the practical importance of doing justice and the societal costs of regular failures of justice.

In this article, we illustrate the problem by examining the three most commonly used non-exculpatory defenses: statutes of limitation, the double jeopardy rule, and the legality principle’s rule of strict construction. We acknowledge that each of these defenses was created to promote or protect an important societal interest. But we show that in each instance the societal circumstances have changed, altering the balance of competing interests, yet the formulation of the doctrines has not been adjusted accordingly. Our larger conclusion is that non-exculpatory defenses, based as they are upon a balance of competing societal interests, rather than principles of societal harm and personal blameworthiness, require constant re-examination and adjustment in ways that justification and excuse defenses do not.

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INTRODUCTION

Most criminal law defenses serve the criminal law’s goal of shielding blameless defendants from liability. Justification defenses, such as self-
defense and law enforcement authority, exculpate on the ground that the defendant’s conduct does not violate a societal norm. Excuse defenses, such as insanity and duress, exculpate on the ground that even if the defendant violated a societal norm, it was done blamelessly. That is, the excusing conditions are to blame rather than the defendant. In contrast, a third group of general defenses, what has been called “non-exculpatory defenses,” bar liability in instances where the defendant may have clearly violated a societal norm with full blameworthiness yet Nonetheless is exempt from criminal liability. Specifically, in these instances giving the exemption advances some societal interest independent of—and in conflict with—the criminal law’s goal of imposing deserved punishment in proportion to an offender’s blameworthiness. Non-exculpatory defenses openly sacrifice doing justice in order to promote the competing non-justice interest. 2

A wide variety of non-exculpatory defenses are commonly recognized, including diplomatic immunity, statutes of limitation, executive and legislative immunities, double jeopardy, and the doctrines of the legality principle. Each of these defenses let blameworthy offenders go free even for serious crimes on the grounds that such restraint promotes or protects some non-desert societal interest. Our examination of the doctrines suggests, however, that those balances of competing interests are commonly misaligned. This occurs in some instances because societal circumstances have significantly changed since the initial formulation of the defense, without any corresponding revision of the doctrine. In other instances, there is reason to suspect that no thoughtful balancing of the competing interests ever took place, perhaps because at the time there was insufficient appreciation of the practical importance of doing justice and the societal costs of regular failures of justice.

In this article, we illustrate the problem by examining the three most commonly used non-exculpatory defenses: statutes of limitation, the double jeopardy rule, and the legality principle’s rule of strict construction. We acknowledge that each of these defenses was created to promote or protect an important societal interest. But we show that in each instance the societal

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In Part I, we demonstrate the significant societal costs of regular failures of justice, especially when they are brought about intentionally by criminal law rules. The larger point here is that crime-control utilitarians, and not only desert retributivists, should be concerned about regular justice-failures. Even crime-control utilitarians ought to be concerned because intentionally letting blameworthy offenders go free for serious crimes undermines the criminal law’s moral credibility with the community, thereby eroding its crime-control effectiveness.

Parts II, III, and IV examine in turn each of our three illustrative non-exculpatory defenses. For each of the defenses we explain how the doctrine works, give case examples, articulate the competing interests, document public complaints about application of the defense, then describe some of the reforms that have been or could be undertaken, ending with the specific reform recommendation that we think would be most useful.

There is a particular need to address the issue of failures of justice—where offenders escape the punishment they clearly deserve—because academic attention has focused almost exclusively on the problem of injustices, i.e., instances of undeserved liability or overly harsh punishment. This focus is entirely understandable. Avoiding injustice is critical not only for its own sake, but it is also necessary if one is to improve the criminal law’s moral credibility with the community and thereby its crime control effectiveness. However, academia’s exclusive focus on problems of injustice does not take into account the reality that Americans deeply desire a criminal justice system that achieves justice by holding serious offenders responsible. The general public’s commitment to justice is exemplified by

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4 This Article uses “justice-failures” and “failures of justice” interchangeably to refer to a guilty person escaping deserved punishment. “Injustices” refer to those cases where an innocent person is punished or a guilty person is punished overly harshly. “Justice” is used in its common language sense of deserved punishment, as ordinary people would use the term, rather than in its broader sense of “social justice” or “distributive justice” as some academics might use the term.


6 The authors decide to use the term “criminal justice system,” a term widely used in the literature and the practice, as it encompasses all three major actors—law enforcement
the fact that the majority of Americans view false convictions and false acquittals as errors of equal magnitude. As the following analyses show, a modern liberal society that seeks to improve the life and circumstances of all its members must take seriously both its moral obligation and the practical crime-control consequences of imposing just punishment, and not simply avoiding unjust punishment.

I. THE SOCIETAL COSTS OF FAILURES OF JUSTICE

Failures of justice within the criminal justice system are not unusual. They are the norm. Most killers get away with murder. In 2020, there were 24,576 homicides in America, and police solved just 10,115 of those—41.1%. Commonly, less than half of these solved cases result in a homicide conviction. Even more troublingly, homicide has the best victimization-conviction ratio of any offense. Most other crimes are rarely punished. Of more than 920,000 aggravated assaults annually, only 8.9% lead to a conviction. Of 463,000 rapes and sexual assaults annually, 97.5% end in no

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9 The government stopped publishing data on state murder conviction rates in 2006. At that time, there were 17,309 murders of which 10,507 were officially cleared. America’s Declining Homicide Clearance Rates 1965–2022, supra note 8. Of those cleared, 6,240 resulted in a homicide conviction. See SEAN ROSENMERKEL, MATTHEW DUREO & DONALD FAROLE, JR., U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES, at 2 (2006), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/D4UM-N62G].
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felony conviction. Every year, the justice system allows hundreds of thousands of murderers, assaulters, and rapists to walk free, and fails to deliver justice for the victims.

A. RACIAL AND ECONOMIC DISPARATE EFFECTS OF JUSTICE-FAILURES

One factor that makes the societal cost of justice-failures all the more tragic and unjust is its disparately large impact on racial minorities and the economically disadvantaged. This disparate impact plays out in several ways.

First, the violent crime rate is disproportionately higher in poor neighborhoods, and the people who live in those areas are often racial minorities. Thus, the criminogenic effect of lost credibility from justice-failures is highest in these neighborhoods and disproportionately suffered by minorities. For example, several studies, including one by the Department of Justice, found that from 2008 through 2012, Americans living in households at or below the Federal Poverty Level (less than $15,000 for a couple) had more than double the rate of violent victimization as persons in higher-income households ($75,000 or more). This means that even if police have the same clearance rates and prosecutors have the same conviction rates for crimes in poor neighborhoods as they do for crime in wealthier neighborhoods, poor communities would experience dramatically more failures of justice simply by virtue of the fact that more crime is happening in their neighborhoods.

But the reality is much worse. Crime clearance rates are significantly lower in poorer areas with high minority populations than they are in

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white middle-income and high-income areas. The recent decline in nationwide murder clearance rates is almost entirely due to failures to solve the killings of Black victims. A Washington Post investigation of current murder trends found that “Black people made up more than 80 percent of the total homicide victims in 2020 and 2021,” and most of these murders will go without any arrest. A Washington Post investigation from 2018 of 52 of the U.S.’ largest cities found that police arrested someone in 63% of homicides that killed white victims, compared with just 47% of homicides of Black victims, a 16% difference in clearance rates. The same investigation found that in the preceding decade, 26,000 murders have gone without an arrest in major American cities. Of those, more than 18,600 of victims were black. Data from Chicago indicates that homicide cases involving a white victim are solved 47% of the time, cases involving a Hispanic victim are solved 33% of the time, and cases involving a Black victim have a clearance rate of just 22%. Commentators point to several factors that likely contribute to these disparities (such as the type of killing, with street shootings being especially hard to solve), but regardless of the causes, the

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19 Id.


effect is clear: poor neighborhoods and minority communities suffer failures of justice at highly disproportionate rates.  

Finally, the problem of justice-failures is exacerbated by the fact that poorer communities tend to be less equipped with resources to help people cope with and recover from the costs of justice-failures. Underfunded schools serving low-income children are far less likely to have adequate counseling available for children dealing with trauma, and healthcare facilities typically cannot provide the individualized level of care that victims receive in wealthier neighborhoods. Families with lower incomes are also less likely to have health insurance, adding yet another barrier to providing victims of justice-failures with needed treatment. So not only are the poor more likely to experience failures of justice, the mental and emotional harms that result from such failures are likely to be greatest for poorer communities. For anyone who takes racial and economic justice seriously and wishes to close unjust disparities, tackling failures of justice is essential. Too often the same advocates protesting police violence and decrying the injustices caused by systemic racism in the legal system are hardly vocal on the issue of solving and punishing serious crime.

B. THE PERSONAL COSTS OF JUSTICE-FAILURES

Failures of justice carry enormous costs to society that justify making their reduction a policy priority. One set of costs is moral, as those who believe in deserved punishment as a moral imperative see justice-failures for

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22 Black Murders, MURDER ACCOUNTABILITY PROJECT, supra note 16 (demonstrating that clearance rates for Black murder victims in American are significantly lower than white victims).


serious offenses as a grave wrong that must be put right. But aside from these abstract morality costs, failures of justice also have clear practical societal costs that any good utilitarian should be concerned about. These costs affect victims, families, neighborhoods, and society generally.

1. Costs to Victims and Families

Many serious, violent crimes leave victims alive but scar them with emotional trauma, especially when justice is not served. Surviving a rape or attempted murder is merely the beginning of suffering for most victims. A victim may well find some measure of solace and healing in the thought that their attacker has been caught and punished, but most victims of serious crime never experience that comfort, as the abysmal conviction rates discussed above show. It is difficult to quantify the suffering that victims experience when their victimizers escape justice, but the cost is real and significant.

Depression, self-harm, post-traumatic stress disorder (PTSD), and panic attacks are all common among survivors of violent crime, and at least 75% of all victims of sexual assault suffer from socioeconomic problems following the crime. These traumatizing effects of rape are exacerbated when justice fails. Studies have found that rape victims are more likely to experience post-traumatic stress disorder if they have “negative experiences with the criminal justice system” compared with those who have positive experiences with the system or even those who had no interaction with the system. Over 50% of survivors of sexual assault have described their experiences with the system as “harmful, unsatisfactory, unfair, and in some cases, more harmful than the assault itself.”

Though victims’ distressing experiences with the criminal justice system may have a variety of causes,
knowledge that one’s attacker still walks free can be infuriating and crippling to many victims.

Sexual assault is not the only crime with enormous personal costs, especially with a failure of justice. When a murderer or other serious violent offender gets away without deserved punishment, the victims’ families and friends (often referred to as “co-victims,” a term that acknowledges that victimization extends far beyond the person killed\(^{32}\)), commonly respond with anger, upset, and fear dealing with the constant knowledge that the killer is free.\(^{33}\)

A failure of justice can also prevent surviving family members from mourning the death of their loved one and may only deepen their pain when the case is not “resolved in a manner that appeals to the co-victim’s sense of justice, further complicating their emotional and psychological reactions.”\(^{34}\) Some co-victims are simply unable to begin mourning until “the court ha[s] passed its final judgement,” which may delay the process indefinitely for some.\(^{35}\)

Just as victims may experience increased trauma due to justice-failures, co-victims may as well. Some co-victims isolate themselves from their communities,\(^{36}\) battling debilitating depression spurred first by the murder and again by the lack of closure from justice-failures. Studies reveal co-victims who experience failures of justice are more likely to experience anxiety, depression, and other mental health problems, including post-traumatic stress disorder.\(^{37}\) Unsolved murders also cause enormous personal trauma to co-victims beyond post-traumatic stress disorder, including “eating

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\(^{32}\) CTR. FOR VICTIM RESEARCH, LOSING A LOVED ONE TO HOMICIDE: WHAT WE KNOW ABOUT HOMICIDE CO-VICTIMS FROM RESEARCH AND PRACTICE EVIDENCE 1 (2019), https://justiceresearch.dspacedirect.org/server/api/core/bitstreams/879bb0ce-3fc7-4215-b2ba-68de3bae9090/content [https://perma.cc/2VQA-7M5K].


\(^{34}\) CTR. FOR VICTIM RESEARCH, supra note 32, at 12.


\(^{36}\) CTR. FOR VICTIM RESEARCH, supra note 32, at 6, 10–11.

and digestive problems, difficulty sleeping, frequent crying, heart palpitations and flashbacks that leave one dwelling on the past.”

Young co-victims are emotionally damaged by justice-failures in unique ways. Studies have shown that “teenage family members deal with suffering with an impulse to act and take action, resulting in violent behaviors driven by the desire for revenge, quest for justice and suffering relief.” The increased need for “retaliation” and “revenge” among young co-victims prevents youth from properly processing the grief that comes from murder and failures of justice and can have long-term mental health impacts. Co-victims of cold cases have reported feeling that their “loved one was devalued,” increasing the existing trauma and grief. A sense that the system is indifferent to justice and certainly an outright failure of justice may contribute to the “revictimization” or “secondary victimization” of co-victims.

When justice is delivered, co-victims can find closure—closure which helps decrease the risk of trauma and long-lasting mental health problems. A “strong correlation has been established between survivors’ level of satisfaction with the disposition of the criminal case and their levels of clinical depression and anxiety.” Ultimately, justice represents society’s attempt to bring some balance out of the horrific moral and emotional disruption of crime, but when justice fails, those scales remain unbalanced forever, a hanging reminder of a harm never punished and a hurt never healed.

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40 Id.


42 Id.

2. Costs to the Neighborhood

Failures of justice can also co-victimize entire neighborhoods when people begin to fear that the justice system is unable or unwilling to help them. While a single failure of justice can have painful consequences, a series of justice-failures can inflict deep, lasting wounds on an entire community. One case study examined the tightknit community of Five Points, Colorado, which saw some of the highest homicide rates and lowest clearance rates in the state between 2010 and 2017, and found community-wide emotional and physical responses to justice-failures that inflicted terror and grief. As one researcher explained, “[c]hildren exposed to the adversity and trauma of an unsolved murder when their brains are still forming can develop ongoing stress, known as toxic stress.” Trauma over unresolved crimes has also manifested in a form of post-traumatic stress disorder, impacting people’s appetite, ability to sleep, mental function, and cardiac function.

As discussed earlier, minority communities disproportionately experience ineffective policing and low clearance rates for violent crimes, making them at particular risk of experiencing community-wide trauma. Such trauma and disillusionment with the justice system can be passed down generationally, fostering a sense of powerlessness. These feelings commonly result in decreased crime reporting within these communities, which further exacerbates failures of justice and increases community suffering.

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44. Despite the disproportionately high amount of suffering associated with failures of justice in African-American communities, the available research on the effects of homicide on co-victims has largely ignored this population. The majority of the relevant studies sample from white and middle-class populations. 

45. Martinez, supra note 38.


47. Id.

48. Id.


C. SOCIETAL COSTS: REDUCING THE CRIMINAL LAW’S MORAL CREDIBILITY WITH THE COMMUNITY MEANS MORE CRIME

While the personal costs to victims, co-victims, and neighborhoods add an enormous sum to the social cost of justice-failures, even more significant costs come from the effects of the criminal justice system’s loss of credibility with the community generally. Communities that witness repeated justice-failures commonly lose faith in the criminal justice system, which undermines the criminal law’s ability to gain compliance, deference, and assistance and, perhaps most importantly, to get people to internalize its norms.51 Instead of inspiring cooperation, a criminal justice system with reduced credibility provokes resistance, subversion, and rejection. This leads to increased lawbreaking and can provoke a justice-seeking backlash in the form of vigilantism where members of the community take the law into their own hands and undertake to do justice where the system seems unwilling or unable to do it.52 Of all the pernicious effects of failures of justice, the criminal justice system’s loss of moral credibility with the community may be the most damaging because it creates a vicious cycle in which lost credibility produces more crime and less justice, which in turn reduces the system’s credibility further.53

1. The Disillusionment-Noncompliance Dynamic

The disillusionment-noncompliance dynamic, in which a community loses its respect for the criminal justice system and responds with increased lawbreaking, has been repeatedly demonstrated by historical events as well as experiments in social psychology. Various historical moments illustrate the strong causal connection. For example, in the 1920s, the American public’s trust in the law plummeted during the Prohibition Era. As citizens sought alcohol illegally, experienced little or unjust enforcement of the unpopular law, and witnessed government officials and many of their fellow citizens partaking in the illegal distribution of alcohol, laws far beyond the scope of the Eighteenth Amendment lost their credibility and individuals committed an increasing number of crimes unrelated to alcohol.54

Various social psychologists have undertaken controlled experiments that demonstrate the existence of the disillusionment-noncompliance

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51 See generally Robinson & Holcomb, Criminogenic Effects, supra note 27 (addressing the ramifications of justice-failures).
54 Id. at 141–48.
dynamic. Numerous studies have found that even a small increase in one’s trust in the legal system results in a large increase in the likelihood that one will believe that deference to the law is a good thing.55 Perhaps more importantly in our context, the studies show that even small decreases in the system’s credibility with the community produce predictable reductions in compliance. For example, in a 2010 study, subjects were asked questions relating to the various ways in which the criminal justice system’s moral credibility is believed to affect deference, compliance, and internalization of the law’s norms. The researchers then disillusioned the subjects by showing them a series of actual criminal cases in which the punishments were too high or too low. The subjects were asked the questions a second time, and their answers showed a marked decrease in deference, compliance, and internalization of the law’s norms. For example, after learning about the cases, subjects were less likely to believe that life sentences meant a criminal’s conduct was heinous and less likely to go back to a restaurant and pay after mistakenly forgetting.56

As studies have shown, failures of justice chip away at the criminal justice system’s credibility and erode the public’s willingness to comply. To prevent the massive costs of increased crime, a society ought to place great importance on those measures that will avoid failures of justice and thereby improve the system’s credibility with the community. Losses of credibility can quickly lead to a downward spiral as more crime leads to more failures of justice and further losses of credibility.

2. Sparking Vigilantism

One final cost of failures of justice is vigilantism. In addition to the classic form of vigilantism, in which the citizen takes the law into their own hands to impose punishment, there exists another form that has been called “shadow vigilantism,” in which people disillusioned by failures of justice do not openly punish the unpunished offender themselves, but rather subvert and manipulate the criminal justice system to bring about the justice that they think is deserved.57 Shadow vigilantism can take a number of forms. One example is “testilying,” where police officers lie or shade the truth during in-court testimony to ensure that incriminating evidence is not excluded on what the officers consider to be a mere technicality.58 Prosecutors can perform shadow vigilantism through overcharging and judges through abuses of their

55 See Robinson & Holcomb, Criminogenic Effects, supra note 27, at 285.
58 Id. at 467–68.
discretion in sentencing. But shadow vigilantism is not limited to institutional players in the criminal justice system. Ordinary citizens can engage in shadow vigilantism in the jury room by ignoring their legal instructions and substituting their own notions of justice, on the streets through witness intimidation, and at the ballot box by voting for laws that impose unjust draconian punishments that many people would never support if the system was perceived as already doing justice.

The special danger of shadow vigilantism comes partly from the fact that it is impossible to fully measure or quantify. Since shadow vigilantism is generally unseen, it can introduce arbitrariness and disparities among similar cases that are difficult to detect, let alone prevent or deter. Even if an individual instance of shadow vigilantism seems morally justified, it contributes to undermining the criminal justice system’s moral credibility. When shadow vigilantism is at work, it is necessarily inconsistent in where and whether it is applied, and the system naturally will be seen as more inconsistent and unpredictable. This increased arbitrariness undermines the criminal justice system’s credibility, which in turn subverts compliance and internalization of its norms, which in turn increases the motivation for further shadow vigilantism.

D. THE SPECIAL PROBLEM OF NON-EXCULPATORY DEFENSES

Non-exculpatory defenses have a unique place in the criminal law because they are instances in which the system discharges a defendant even if they are fully blameworthy for a serious offense. Ordinary people understand that the criminal justice system cannot catch all offenders and even those who are caught cannot all be convicted because of the challenges of proving guilt beyond a reasonable doubt. Thus, the criminal justice system can maintain its moral credibility with the community as long as it demonstrates that it is doing its very best to do justice. Whatever the system’s ultimate success in convicting blameworthy offenders is, its absolute commitment to doing justice is what counts in establishing its moral credibility with the community.

What is known about making and keeping reputations means that the system’s intentions regarding doing justice count enormously. So long as the system seems committed to trying to do justice, accidental or unavoidable injustices or failures of justice may be forgiven. But when it is revealed that

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59 Id. at 469–71.
60 Id. at 462.
61 Id. at 404.
62 Id.
the system intends deviations from desert, then even one case can have detrimental consequences. The system’s only protection is to indeed try to do justice as best it can, admitting that there are some limitations on how perfect it can be in practice.63

But the recognition of non-exculpatory defenses flies in the face of that public commitment to doing justice. Non-exculpatory defenses knowingly allow even fully blameworthy offenders who have committed serious offenses to go completely free, unpunished. In other words, recognition of such defenses by their nature has an obviously damaging effect on the criminal law’s moral credibility with the community, a problem unique to non-exculpatory defenses. Justification and excuse defenses, in contrast, enhance the criminal law’s credibility by showing sophistication and care in judging an offender’s blameworthiness. People may argue about the proper formulation of the insanity excuse or exactly what conditions should justify use of force in self-defense, but disagreement with the resulting formulations simply signals a dispute over the exact borderline of blameworthiness. The existence of non-exculpatory defenses will seem to many ordinary people to announce the criminal justice system’s indifference to blameworthiness and doing justice.

Given the profound impact failures of justice have on individuals, communities, and public trust in the criminal justice system, it follows that non-exculpatory defenses ought to be formulated in a way that minimizes the number of justice-failures to the greatest extent possible, especially in serious cases, and should be available only where the societal costs of granting impunity are outweighed by the competing non-justice interests. In the section that follows, we will show that the most commonly used non-exculpatory defenses of today do not meet this test. Our goal in each instance will be to answer these two questions:

1. In weighing the societal costs of the justice-frustrating rule against the benefits it provides, is the rule still justified?
2. If so, is there a non-justice-frustrating or a less-justice-frustrating way of protecting the interests at stake?

II. STATUTES OF LIMITATION

Statutes of limitation specify the length of time during which a crime may be prosecuted and after which it may not, regardless of the available

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63 See ROBINSON, INTUITIONS OF JUSTICE, supra note 5, at 183; see also Paul H. Robinson & John M. Darley, The Utility of Desert, 91 NW. U. L. REV. 453, 495–96 (1997) (“T]he criminal law’s reputation may depend on its public commitment to never intentionally deviating from the principles of perceived desert, while conceding that inadvertent deviations are unavoidable”).
evidence of guilt. American statutes of limitation originated from early English practice.\textsuperscript{64} Centuries ago, physical evidence could not be preserved in a reliable manner, and old cases were difficult to defend or prosecute because of the fading memories and unavailability of witnesses, justifying the need for statutes of limitation. Interestingly, murder has never had a statute of limitation due to its seriousness, which suggests statutes of limitation were always an attempt to balance justice against other interests.\textsuperscript{65}

The practical situation has changed with time. Fairer trial procedures now make it much easier for defendants to discredit old evidence or evidence such as witness statements that have become unreliable over time.\textsuperscript{66} Additionally, advances in forensic science, such as the advent of DNA analysis, make it possible to show guilt with high certainty even in old cases. Thus, the original justifications for statutes of limitation may no longer apply.\textsuperscript{67}

Many people now argue that statutes of limitation for serious crimes have outlasted their usefulness, and the decision to prosecute should be made solely on the quality of the evidence instead of on how much time has elapsed since the crime.\textsuperscript{67} Why should the perpetrator of a rape or a debilitating aggravated assault go free simply because he has escaped detection and capture for five years while a similar offender goes to prison for committing the same offense four years ago? Why should eluding investigators for a fixed period entitle an offender to walk free for his crime? With an increasing number of crimes being solved after the statute of limitation has expired due to the advent of modern technologies and more organized police forces,\textsuperscript{68} the


\textsuperscript{68} Robinson, \textit{Justice Can Never Come Too Late}, supra note 64.
societal costs of such statutes are rising, making a reconsideration of the balance of interests essential.

Consider a case example. On September 11, 1993, thirty-six-year-old Donna Palomba puts her two young children to bed and goes to sleep in her house in Waterbury, Connecticut. Her husband is away on a trip. Around 1:00 am, a masked man breaks into her house and binds her with her own stockings before brutally raping her. After he leaves, Palomba calls the police and goes to the hospital for a forensic examination. The investigation goes nowhere. Finally, in 2004, police arrest John Regan, a former friend of Palomba’s husband, for attacking one of his female employees. Regan’s DNA matches that of Palomba’s rapist, and, in fact, he proves to be a serial rapist. But Connecticut’s statute of limitation for rape is five years, so Regan is never punished for raping Donna Palomba. When faced with horrific stories like Ms. Palomba’s, one has to question whether the passage of time by itself justifies a clearly dangerous criminal walking free without any punishment.

A. COMPETING INTERESTS

One can identify valid interests in support of retaining statutes of limitation and interests in support of abolishing or lengthening them.

1. Interests Supporting Keeping Statutes of Limitation

Efficiency. Statutes of limitation increase efficiency by making the justice system focus on recent crimes instead of working on older cases. There are limited investigative resources, so it makes sense to focus on more recent cases that are likely easier to solve and where the perpetrator is more likely to be active. Statutes of limitation also encourage victims to report crimes earlier rather than later and force prosecutors to act in a timely fashion.

Reducing False Charges and Convictions. Statutes of limitation can reduce charges and convictions based on false or misremembered claims about occurrences long ago. Memories become less reliable as time passes.

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Moreover, crucial witnesses may not be available after long periods of time. Statutes of limitation can also prevent malicious harassment in the form of false accusations leading to charges for long-ago supposed crimes.

**Finality and Repose.** Statutes of limitation provide finality and repose for those who have committed crimes or fear that they may have been charged with a crime. On the other hand, the societal interest in finality decreases as the seriousness of the crime increases, and it is likely only an important societal interest in more minor cases. While it may be in the interest of society for citizens not to worry about loitering 20 years ago, it is likely not in the interest of society for a citizen not to worry about a rape committed 20 years ago.

**Rehabilitation.** Some argue that after a long enough period of time, the offender may have been rehabilitated, reformed, or incapacitated so as to pose no future threat. As the years pass, the offender may become a different person. Punishing long-past wrongdoing in such cases may not serve larger societal interests and might sabotage the offender’s chances to reintegrate into society. Though this argument is plausible on its own, it often cannot outweigh society’s interest in delivering justice for victims. Perhaps most problematic for this interest is the fact that nothing in statutes of limitation inquires into whether the offender has been rehabilitated or not. An offender who has committed a serious crime every six months for several years will still escape conviction for older offenses under such statutes.

2. **Interests Supporting Abolishing or Lengthening Statutes of Limitation

**Justice.** Statutes of limitation sometimes prevent clearly guilty criminals from being punished for even serious offenses. The blameworthiness of an offender and the seriousness of a crime do not decay over time, so it makes little sense that a criminal should escape deserved punishment simply because he was lucky enough to be caught only after an arbitrary amount of time. The importance of doing justice is such that no statute of limitation exists for murder, so why should it thwart justice for rape, aggravated assault, or other serious crimes? Although murder is the more heinous of crimes, one cannot ignore the grave and everlasting impacts of other serious crimes—like rape or aggravated assault—on the victims, their families, and the public generally, that warrant elimination or prolonging statutes of limitation.

**New and Reliable Forms of Evidence in Old Cases.** The development of new forms of evidence conclusively proving guilt in long past crimes, such

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70 Ochoa & Wistrich, *supra* note 65, at 456, 474.
as DNA, and better storage of old evidence mean statutes of limitation are blocking vastly more easily prosecutable cases today than when they were first introduced. Perhaps statutes of limitation struck an appropriate balance of interests in the past, but circumstances have fundamentally changed. Other legal rules have been changed to reflect advances in science, and updating statutes of limitation may be another example of legal changes called for by scientific advances.

**Trust in the Justice System.** The public is outraged when the justice system is unable to accomplish its primary role of delivering justice because of an arbitrary deadline. For example, when rapists escape due to statutes of limitation, victims and the public are likely to lose faith in the justice system. This loss of trust results in a drop in the criminal law’s ability to gain compliance and internalization of its norms.

**Protecting Society from Criminals.** Statutes of limitation allow dangerous criminals to walk free, at times to commit more crimes. Prosecuting such offenders would better protect society by incapacitating known, dangerous offenders and removing them from the community. Some statutes of limitation also endanger society by increasing certain types of crime, like child sex abuse, that is unlikely to be reported within the existing limitation period.

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71 See Matt DeLisi, Mark Ruelas & James E. Kruse, Who Will Kill Again? The Forensic Value of 1st Degree Murder Convictions, 1 FORENSIC SCI. INT’L: SYNERGY 11, 11–17 (2019) (“[T]he United States is in the midst of an emerging justice paradigm where cold cases—often decades old—are being solved with the proliferation of genetic data that are publicly available. A non-trivial number of these offenders had 1st degree murder arrests or convictions in their offending history.”).

72 Science has changed statutory bars to prosecution in the past such as with the repeal of the “year and a day rule” which prevented a murder conviction if the victim died over a year after the violent act. Due to modern science, determining the cause of death is easier today and all states besides Alabama have either abolished or amended the rule to prevent failures of justice caused by it. See, e.g., CAL. PENAL CODE § 194 (West 2014).


74 See Rinat Kitai-Sangero, Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations, 61 DRAKE L. REV. 423, 430 n. 35 and accompanying text (2013); id. at 427 n.19.
B. THE NATURE AND EXTENT OF THE PROBLEM

Investigative technologies have improved dramatically since statutes of limitation were first formulated, but many state variations of the doctrine have remained stagnant. If this trend continues, the number of known guilty offenders who walk free despite reliable evidence against them will only increase. This will have an increasingly profound impact on the public’s perception of the criminal justice system and its commitment to achieving justice, as shown by the public outrage mentioned later following high-profile cases resulting in justice-failures due to statutes of limitations.

1. Diversity in Statutes of Limitation

There is significant diversity in how states formulate their statutes of limitation, perhaps reflecting the lack of a clear justification for them. Seven states have dropped a statute of limitation for all felonies (Kentucky, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming), and nineteen states have no statute of limitation for any form of homicide (manslaughter remains statutorily limited in all other states). Ten states have eliminated statutes of limitation for all felony sex crimes, nineteen states have limitation of twenty-one years or more for their most serious felony sex crime, and nine jurisdictions (including D.C.) have a limit of eleven to twenty years. Some states, like Arkansas, have abolished statutes of limitation for specific crimes such as rape or sexual assaults against a minor while retaining them for most other serious crimes. Statutes of limitation also vary based on whether or not the victim reported the crime promptly. At the federal level, statutes of limitation do not exist for crimes

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76 Id.


78 See RAPE, ABUSE, & INCEST NAT’L NETWORK, RECOMMENDATIONS FOR EFFECTIVE STATUTES OF LIMITATIONS, supra note 66, at 7.

79 Padawer, supra note 69 (“Washington State, for example, has a 10-year statute of limitations for rape, but if the victim doesn’t report the incident within a year of the crime, prosecution is barred three years after it. But 10 states—California, Delaware, Illinois, Kentucky, Maryland, North Carolina, South Carolina, Virginia, West Virginia and Wyoming — now have no time limit for filing charges for all or nearly all felony sexual assaults, no matter the victim’s age.”).
that can carry the death penalty, terrorism, or sex offenses. The majority of other federal crimes have a five-year statute of limitation.\textsuperscript{80}

\textbf{2. Exceptions to Limitation Period}

In addition to diversity in the length of statutes of limitation, states also vary by whether they allow exceptions. So far, twenty-eight states have adopted a variety of exceptions to statutes of limitation.\textsuperscript{81} These include an exception suspending the statute of limitation for crimes where DNA evidence is discovered,\textsuperscript{82} a crimes-against-minors exception abolishing the time limit or granting additional time to report, a confession exception allowing a confession to obviate the statute of limitation,\textsuperscript{83} and a special rule for crimes like fraud that starts the time limit clock only after discovery of the offense.\textsuperscript{84}

The ways these exceptions are implemented also vary by state. For example, in Indiana the statute of limitation is only extended to one year after the state first discovers DNA evidence sufficient to charge the perpetrator.\textsuperscript{85} In Connecticut, if the crime has been reported within five years, and the identity of the perpetrator has been established through DNA evidence, then there is no time bar.\textsuperscript{86}

In the vast majority of states, if the offender leaves the state, the statutes of limitation are tolled (suspended) until the offender returns.\textsuperscript{87} Similarly,

\textsuperscript{80} CHARLES DOYLE, CONG. RSRCH. SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 3 (2017), https://sgp.fas.org/crs/misc/RL31253.pdf [https://perma.cc/WQA5-MTA7].


\textsuperscript{82} Id.


\textsuperscript{84} See, e.g., MODEL PENAL CODE § 1.06(3)(a)–(b); FLA. STAT. ANN. § 775.15(4) (West 2017); ROBINSON & CAHILL, CRIMINAL LAW, supra note 2, at 415.


certain states suspend or change the statute of limitation when the defendant is “actively concealing himself or evidence of the crime.”\textsuperscript{88} For example, in Tennessee, the law states that “no period during which the party charged conceals the fact of the crime, or during which the party charged was not usually and publicly resident within the state, is included in the period of limitation.”\textsuperscript{89}

Some states have resisted any form of modernization of their statutes of limitation and retain shockingly restrictive time periods. For example, Texas has a ten-year statute of limitations for sexual assault when the victim is eighteen or older.\textsuperscript{90} Such short time periods are particularly frustrating due to the nationwide backlogs in rape kit testing that may lead to a suspect being identified only after the statute of limitation has run.\textsuperscript{91} Even in states with relatively long statutes, such as Ohio, where the time limit for rape is twenty-five years,\textsuperscript{92} prosecutions are still regularly foiled by statutes of limitation. For example, Maryellen, a mother in Akron, Ohio was in her home when a man broke in and sexually assaulted her. Twenty-one years later, her rape kit was processed and matched to Derrick Fischer. Fischer had previously been convicted of rape, was currently serving prison time for domestic violence, and was under indictment for two additional rape cases when the match to Maryellen was discovered. As Fischer’s attack of Maryellen occurred 21 years prior to the match, prosecution is not possible.\textsuperscript{93} And Maryellen’s case is not unique—the Sexual Assault Kit (SAK) testing initiative in Ohio, which ended in 2018, revealed a total of sixty-one sexual assault cases with DNA matches that could not be pursued due to the statute of limitation.\textsuperscript{94}


\textsuperscript{89} TENN. CODE ANN. § 40-2-103 (West 2017).

\textsuperscript{90} TEX. CODE CRIM. PROC. § 12.01(2)(E) (West, Westlaw through the end of the 2023 Reg., 2d, 3d, and 4th Sessions of the 88th Leg., and the Nov. 7, 2023 general election).

\textsuperscript{91} NAT’L CTR. FOR VICTIMS OF CRIME, supra note 88.

\textsuperscript{92} See, e.g., Tobias, supra note 67.


3. Old Laws in Search of a Justification

With the increasing use of DNA evidence and other forensic advances, the number of known guilty offenders who are able to walk free due to the statutes of limitation will only increase. Rapists—especially child predators—are particularly likely to benefit from states retaining tight statutes of limitation. While estimating the number of justice-failures caused by statutes of limitation is difficult, it may be as high as in the tens of thousands, with many more victims discouraged from even reporting in the first place. Simply extending the time limit for some crimes may not be enough. For example, one-third of victims of childhood sexual abuse come forward much later in life (the median age being fifty-two), long after the statute of limitation has expired even in states that have extended their limitation period for crimes against minors.

The fact that there is such diversity among state statutes of limitation suggests that the justifications for such statutes are less than clear. As noted above, the assumption that delay increases the chance of wrongful conviction no longer stands. Under modern trial and evidence rules, the passage of time makes delayed prosecution harder for prosecutors, not defense counsel, because the prosecutor has the burden of proving the offense beyond a reasonable doubt. The justification that the passage of time may have resulted in the offender’s reform or rehabilitation is simply inconsistent with existing statutes of limitation which apply to the recidivist and the rehabilitated equally. The offender who has been committing the same offense regularly during the limitation period will still escape justice. This justification is also inconsistent with the fact that some states have extremely short limitation periods during which a serious offender is unlikely to have reformed.

The only justification that seems to have any continuing traction is the very general sense that society should not be obsessed with minor wrongs in the past, wrongs that even the victims are no longer concerned with. But that rationale would seem to support a statute of limitation for only lesser offenses. Because the justifications for statutes of limitation appear so lacking or limited, it is no surprise that state laws vary so widely in attempting to implement these uncertain justifications. In truth, most existing state statutes of limitation simply reflect the persistence of an old law that would never be enacted today.

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95 See Rinat Kitai-Sangero, Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations, 61 DRAKE L. REV. 423, 427 n. 19 (2013); see also id. at 430 n. 35 and accompanying text.

C. PUBLIC COMPLAINTS

Since so many failures of justice caused by statutes of limitation involve sexual assault cases, public complaints have commonly focused on calls to reform or abolish time limits that make it easier for rapists to escape justice. As society moves to take sexual assault more seriously and new forms of evidence become more common, there has been increasing public support for ending or extending statutes of limitation for sexual assault, often driven by victim complaints that such statutes are an unjustifiable relic of the past. Statutes of limitation on child sex abuse have provoked particular frustration. As one sexual abuse survivor and advocate put it: “It is undeniable that statutes of limitation do nothing to protect children and show no respect for survivors.”

Many in the public feel that statutes of limitation devalue survivors who must bear the costs of abuse their entire lives while their perpetrators receive a free pass from society after an arbitrary amount of time. Calling for the reform of statutes of limitation is almost universal among sexual assault survivor advocacy groups and has gained some bipartisan support at both state and federal levels. Public complaints about statutes of limitation are almost entirely on the side calling for reform, with the opposition mainly coming from political inertia rather than any counter advocacy or public opinion. This inertia has angered many victims. “We’re not going to take this anymore. Sexual abuse is as important as murder. And we’re going to find out who you are and we’re going to come after you,” said William Dinkel, a child sexual abuse survivor and advocate for reforming statutes of limitation.

High-profile cases of justice-failures caused by statutes of limitation have also sparked public ire and motivated change. Serial abusers and rapists

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such as Harvey Weinstein\textsuperscript{100} and Bill Cosby\textsuperscript{101} largely escaped accountability for many of their crimes due to statutes of limitation on sexual assault that left prosecutors with only one or no cases to pursue against men who had attacked dozens of women.

Victims are sometimes successful at turning their complaints into reform. For example, Donna Palomba, the Connecticut woman denied justice in the case example above, launched a lobbying campaign to change Connecticut’s law in 2007, leading the state to create a DNA exception to its statute of limitation.\textsuperscript{102} This sort of victim advocacy has also led to other reforms in states such as Indiana and Florida.\textsuperscript{103}

D. REFORMS

There have been several implemented or proposed reforms to statutes of limitation that strike a balance between the competing interests more in favor of doing justice.

\textit{Eliminating or Extending Statutes of Limitation for Serious Crimes.}

As the tide of public opinion and advocacy slowly advances, more states are abolishing or extending their statutes of limitation for rape and child sexual assault. For example, in 2019, Illinois enacted a law eliminating the statute of limitation for rape.\textsuperscript{104} And “since 2002, at least 29 states have amended their prosecution deadlines so victims of child sexual abuse have more time to pursue criminal cases as adults—including 15 states that now have no cutoff for prosecuting any felony sexual assault of a minor.”\textsuperscript{105} In

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\textsuperscript{100} Padawer, \textit{supra} note 69.
\textsuperscript{102} Padawer, \textit{supra} note 69.
\textsuperscript{103} In Florida, for example, Danielle Sullivan, a victim of rape who reported the crime four years and forty-three days after the limitations period had passed, lobbied to extend Florida’s statute of limitation. Eventually, the legislature doubled the statute of limitations for first and second degree adult rape from four to eight years. In Indiana, a thirty-nine-year-old man walked into the police office in 2014 and confessed to raping Jenny Wendt a decade earlier. Wendt expressed her desire to press charges. This, however, was not possible due to the state’s five-year statute of limitations for most rapes at that time. Wendt began to lobby and led legislators to approve some exception to the tight time limit, including if the perpetrator confesses or in case of a DNA match. Padawer, \textit{supra} note 69.
\textsuperscript{105} Padawer, \textit{supra} note 69.
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October 2021, a bipartisan bill was introduced in the U.S. Senate to incentivize states to abolish their statutes of limitation for child sex abuse, but it did not pass.106 Ten states have also abolished the statute of limitation for all felony sex crimes.107 Other states are likely to follow.108

Something important to note about changes to statutes of limitation is that they do not apply retroactively to crimes whose time limit has already passed, but they can apply to crimes that at the time of the reform are still prosecutable under the old statute of limitation. This makes reforming statutes of limitation an urgent issue as every year that passes puts more cases permanently beyond the reach of justice.

**Use of John Doe Warrants.** Even in states with strict statutes of limitation, policies have been put in place by some local officials to reduce the practical effect of the statute of limitation.109 Because the statute of limitation clock stops when an arrest warrant is issued even if the arrest is made later, police can obtain warrants for unknown suspects based solely on their DNA to keep a case open beyond the statute of limitation. Such a John Doe warrant is “an arrest warrant issued for a suspect who is identified only by genetic information. In lieu of the suspect’s name, the warrant will be filed against ‘John Doe’ and will cite only the DNA profile.”110 This has the effect of stopping the statute of limitation clock: “Once an individual is matched to the DNA profile, the suspect may be apprehended and charged with the crime at any time.”111 At least 10 states have used John Doe warrants in cases where DNA evidence is available.112 This is an ingenious way for investigators to circumvent statutes of limitation, and the process has been upheld in various courts, but it only works in cases where DNA evidence is discovered within the statute of limitation period.

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107 See RAPE, ABUSE, & INCEST NAT’L NETWORK, RECOMMENDATIONS FOR EFFECTIVE STATUTES OF LIMITATIONS, supra note 67 (describing the various state statutes of limitations).
109 NAT’L CTR. FOR VICTIMS OF CRIME, supra note 88; See also State v. Dabney, 663 N.W.2d 366, 366 (Wis. Ct. App. 2003) (upholding the use of “John Doe” warrants in Milwaukee, the first jurisdiction to use this method).
111 NAT’L CTR. FOR VICTIMS OF CRIME, supra note 88.
112 Emily Clarke, Tolling Time: How John Doe DNA Indictments are Skirting Statutes of Limitation and Crippling the Criminal Justice System, 56 AM. CRIM. L. REV. ONLINE 7, 7 (2019).
E. RECOMMENDATION: ABOLISH LIMITATION PERIODS FOR SERIOUS FELONIES, AND FOR OTHERS RESTART THE CLOCK UPON ANY NEW FELONY

In reforming statutes of limitation, we think it is best to honor both sets of competing interests through clear new rules as opposed to creating workarounds or narrow exceptions that paper over the archaic nature of many such statutes. We recommend a two-part reform that would see statutes of limitation abolished for serious crimes while preserving the statutes of limitation for lesser crimes. However, even where the statute of limitation is kept, its time clock would restart at any point that the offender commits a new felony—or at least a violent, sexual, or similar felony, depending on the legislature’s decision—during the limitation period, thus making clear that the passage of time has not brought rehabilitation (one of the underlying justifications offered in support of statutes of limitation).

The first part of the reform is warranted because some crimes are sufficiently serious that it is always in the interest of society to pursue their prosecution, no matter how much time has passed. Historically, this was the reason murder was never statutorily limited despite concerns about deteriorated evidence. Given the vast improvements in evidence and trial procedures, it makes sense to expand the list of serious crimes exempt from the statute of limitation. The exact crimes included on such a list may vary, but it should at least include all forms of murder, attempted murder, kidnapping, forcible rape, and child sex abuse—in other words, crimes whose gravity outweighs the rationales upon which statutes of limitations are founded. Indeed, the limitation period might well be abolished for all felonies, or at least all violent felonies. Such a reform would avoid the kind of justice-failures seen in the cases of Donna Palomba and Lori Kustudick discussed above.

Such a reform is by no means unprecedented as some states have already abolished statutes of limitation for all felonies, while others have already abolished them for select serious crimes such as kidnapping and forcible rape, and as mentioned earlier, ten states have abolished statutes of limitation for all felony sex crimes. American states are not alone in adopting statute of limitations reform. Internationally, several European countries—such as Germany, Spain, and Sweden—have also enacted laws that abolish statutes of limitation on the exceptionally serious crimes.

113 See RAPE, ABUSE, & INCEST NAT’L NETWORK, RECOMMENDATIONS FOR EFFECTIVE STATUTES OF LIMITATIONS, supra note 67 (describing the various state statutes of limitations).

The second part of our proposed reform seeks to honor those societal interests of finality, efficiency, and recognition of past offenders’ possible rehabilitation, by keeping limitation periods for lesser crimes but allowing the time limit to restart if the offender commits a new felony. The new-felony provision would be triggered by prosecutors proving that the offender committed a new felony during the limitation period of the original offense. For example, if an offender commits third-degree sexual assault that has a statute of limitation of five years, then commits a felony during that five-year period, the limitation clock on the original offense would restart from the date of the new felony and give prosecutors five years from that time to prosecute the original third-degree sexual assault. It seems clear that an offender who commits a new felony is not rehabilitated. This clock-restarting mechanism is similar in some respects to existing provisions that allow post-offense conduct to alter the running of the limitation clock, such as when the clock is tolled while the offender is out of state.

Such a provision would allow for the chaining of prosecution periods to punish serial offenders such as Harvey Weinstein or Bill Cosby. However, such a provision would not threaten any offender who had indeed been rehabilitated by remaining felony free during the limitation period. The reform would also have the useful effect of discouraging offenders from committing an additional offense that would extend their period of exposure to prosecution for their past offense.

III. DOUBLE JEOPARDY

Double jeopardy is a legal rule that protects a person from being tried twice for the same crime.\footnote{115} The doctrine was a component of Roman law, became a cornerstone of English common law, and is enshrined in the Fifth Amendment to the U.S. Constitution, which provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”\footnote{116} Notably, while the Fifth Amendment bars prosecution where the defendant has already been acquitted of the crime,\footnote{117} it does not prevent both the state

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\footnote{115} Robinson, The Moral Vigilante, supra note 52, at 443.
\footnote{116} Id.; U.S. CONST. amend. V.
\footnote{117} Interestingly, where the defendant has previously been charged with the crime but ultimately convicted only for a lesser offense, the jury’s rejection of the more serious offense is treated as an acquittal. Robinson, The Moral Vigilante, supra note 52, at 443. On the other hand, conviction for an assault does not prohibit subsequent conviction for homicide when the victim later dies. See United States v. Peel, 595 F.3d 763, 767 (7th Cir. 2010).
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and federal governments from prosecuting a person independently for the same criminal conduct if it violates both state and federal law.\footnote{Kenneth G. Coffin, Double Take: Evaluating Double Jeopardy Reform, 85 Notre Dame L. Rev. 771, 772 n.11 (2010).}

Unlike in the United Kingdom and some Commonwealth countries, the American rule of double jeopardy has been interpreted to mean that there is no compelling-new-evidence exception, and so once a criminal is acquitted, no number of smoking guns or bragging confessions can bring a murderer to justice. The double jeopardy rule in the United States has also been interpreted to mean that jury acquittals are not subject to appeal, even if a legal error has been made by the trial judge during the proceedings and that error caused the wrongful acquittal.\footnote{Robinson, The Moral Vigilante, supra note 52, at 443; Evans v. Michigan, 568 U.S. 313, 313 (2013) (holding that a midtrial directed verdict and dismissal, based on a trial court’s erroneous requirement of an extra element for the charged offense, was an acquittal for double jeopardy purposes).}

When first formulated in the Roman Empire, and even later when adopted in the U.S. Constitution, double jeopardy was a cutting-edge legal innovation created during periods when the justice system was often the domain of vindictive rulers more concerned with punishing the individual than the crime. The rule rarely caused justice-failures because the lack of professional and systematic investigative police forces meant that the chance of turning up new evidence years after the commission of a crime was negligible. There were no police bureaus to keep cases open and no effective ways to store evidence or keep track of suspects and witnesses. A second prosecution for the same crime would almost certainly have been an attempt to obtain a different verdict on the same evidence. Such an attempt would likely be an individual official trying to override the decision of a jury of which they disapproved, and so double jeopardy was a way to uphold the power of juries and protect individuals from powerful vindictive governmental actors. While changes in the legal system professionalizing most investigative and prosecutorial decisions have made the concerns behind double jeopardy less relevant, they still serve to signify the power of the jury and to shield defendants against potential government harassment.

But the double jeopardy rule has become more justice-frustrating due to the increasing likelihood of finding new reliable evidence in old cases, making it appropriate to revisit the rule.\footnote{NAT’L INST. OF JUSTICE, NCI 200005, ADVANCING JUSTICE THROUGH DNA TECHNOLOGY 3 (2003), https://www.ojp.gov/pdffiles1/Digitization/200005NCJRS.pdf [https://perma.cc/D76N-53G8] [hereinafter NAT’L INST. OF JUSTICE, ADVANCING JUSTICE]; Paul H. Roberts, Double Jeopardy Law Reform: A Criminal Justice Commentary, 65 MODERN L. REV. 393, 393–420 (2002).} As noted in the previous
subchapter on statutes of limitation, DNA has allowed for even decades-old cold cases to be solved. DNA analysis is not the only innovation raising the costs of double jeopardy. Something as simple as a photograph or video establishing guilt might be discovered today. The ever-increasing interconnectedness of police forces, the proliferation of new long-lasting evidence, and the ability of police to store evidence and keep cases open for decades mean wrongful acquittals are far easier to identify and prove than in the past. As a result, it seems likely that the number of cases where known offenders are escaping justice because of double jeopardy is rising. Victims and their families often ask what form of justice is served when conclusive evidence arises linking an acquitted murderer or rapist to their crimes, and the justice system stands by, incapable of delivering justice or protecting society.

Consider two case examples:

**Melvin Ignatow.** On September 24, 1988, fifty-year-old Melvin Ignatow is angry because his fiancé, thirty-six-year-old Brenda Schaeffer, has broken off their relationship. Schaeffer does not feel safe around Ignatow, but he is able to lure her into a last meeting in Louisville, Kentucky. Ignatow has enlisted the help of a previous girlfriend, Maryanne Shore, to teach Schaeffer a lesson. Ignatow tells Shore that Schaeffer was “frigid” during their relationship. He wants to use Shore’s house to administer some “sex therapy” to his former fiancé. Schaeffer is brutally attacked by Ignatow while Shore takes pictures. When the torture session is over, Ignatow kills Schaeffer and buries her body in Shore’s backyard. The police investigation quickly centers on the two, and Shore agrees to testify against Ignatow in exchange for being charged with only evidence tampering. Ignatow’s defense fabricates a claim that Shore is a bitter ex-girlfriend who murdered Schaeffer by herself to get revenge on the younger woman for stealing her boyfriend. The jury is taken in by the defense’s lies and acquits Ignatow. Months later, the photographs of the rape and torture are discovered in a heating duct by

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the new owners of Ignatow’s house, conclusively proving his guilt for the crime. Double jeopardy nevertheless shields him from being retried for the brutal rape and murder.

**Michael Lane.** On February 10, 1991, Jennifer Watts leaves her two-year-old son, PJ, in the care of her boyfriend, twenty-seven-year-old Michael Lane, who is secretly using meth, while she goes to church in Salt Lake City.\(^\text{124}\) Despite promising to take good care of PJ, Lane becomes furious when the child’s crying prevents him from sleeping. Exasperated, Lane grabs the little boy and smashes him into the floor repeatedly until the noise stops. Watts comes home to find her dead son in his crib, while her boyfriend is asleep in another room. All evidence points to Lane, but Watts stands by him at trial, and her emotional testimony persuades the jury to acquit. By 2005, Lane has become religious and is troubled by his memories of his crime. He goes to the police and confesses everything, saying he is willing to go to jail that very day. However, due to double jeopardy, Lane cannot be tried again.

### A. COMPETING INTERESTS

There are a variety of legitimate interests that ought to be considered when deciding how the constitutional double jeopardy protection should be interpreted.

1. **Interests Supporting the Current Interpretation of Double Jeopardy**

   **Finality.** The concept of finality in the legal system means that a criminal case should have a clear conclusion at which point no further action can be taken on it. Finality prevents government harassment in the form of continual new trials for the same offense and reduces the chance of politicians weaponizing the legal system against their enemies through reviving an old case for another trial. It also upholds the preeminence of jury trial by making a single jury the definitive and final decider of guilt. Additionally, finality encourages prosecutors to direct their attention to more current cases instead of constantly re-evaluating whether to revive old cases for another trial.\(^\text{125}\)


\(^{125}\) Recall that statutes of limitation also relied in part upon a finality rationale. *Supra* Part II.A.1.
Efficiency. The double jeopardy rule promotes efficiency as well. When the government knows it only has one chance at prosecution, it is unlikely to bring a case too quickly before conducting a full and thorough investigation. This encourages the government to hire qualified investigators and competent prosecutors and to build strong cases before proceeding to trial. If double jeopardy did not exist, prosecutions might become less efficient as more unripe cases would be rushed to trial with the knowledge that any case ending in a false acquittal could always be retried with more effort. The “one strike and you’re out” rule of prosecution forces the government to be efficient at when and how it brings cases to trial.

Justice and Fairness. Double jeopardy ensures that the prosecution does not wield an unfair leverage over the defendant through jury shopping and continual strategy refinement. Otherwise, prosecutors could keep trying a case in hopes of finding the right combination of jury and arguments necessary to secure conviction. If the prosecution was allowed to jury shop, it would almost certainly lead to more innocent people being wrongfully convicted—all it would take is a prosecutor mistakenly convinced of a defendant’s guilt to keep trying a case until a successful conviction is secured. More probably, such a determined prosecutor could get an innocent defendant to agree to a plea bargain simply to end the continual trials.

2. Interests Supporting Loosening the Current Double Jeopardy Rule

Justice. Double jeopardy currently protects acquitted criminals from being brought to justice for their crimes even when compelling new evidence is discovered. The inflexibility of double jeopardy in the U.S. means no amount of additional evidence can bring even the most heinous murderer or rapist to justice. As a fairness matter, some argue that if a convicted defendant may file a motion for a new trial on the grounds of newly discovered material evidence, then by the same token the state should be allowed, under certain circumstances, to retry an acquitted defendant because of new evidence.126

Protecting Society from Criminals. Double jeopardy allows dangerous criminals to walk free, commit more crimes, and continue posing a threat to public safety. Permitting re-prosecution in some instances would better protect innocent civilians by removing dangerous offenders from society.127

Public Trust in the Justice System. Every time a clearly guilty criminal evades justice, the credibility of the justice system suffers. The public wants

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126 Defendants are allowed to petition for a new trial in several states. See, e.g., TEX. CODE CRIM. PROC. ANN. § 40.001 (“A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial.”).

127 Creekpaum, supra note 122, at 1189.
INTERESTS IN NON-EXCULPATORY DEFENSES

2024] 35

Studies estimate that 6.7% to 19% of all acquittals at trial are of guilty individuals. While there is no completely accurate way to determine the true percentage, these estimates are calculated based on “the levels of disagreement in acquittal decisions between juries and the presiding judges in those trials.” Studies show that “[j]uries acquit 19% of defendants that the judge would have convicted instead,” providing basis for an upper bound of the estimate. The lower bound derives from the 6.7% of jury acquittals that the presiding judge views as totally “without merit” and is unable to understand how or why the jury reached their decision.

Of course, these estimates of wrongful acquittals do not even consider the many cases where a guilty offender is acquitted with both judge and jury agreeing there is insufficient evidence presented at trial, but where compelling evidence might later appear. This is especially a problem in cases hinging primarily on conflicting testimony. 65% of rapists who go to trial are

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128 Id.
129 Id.
130 Id.
131 Id.
acquitted,\textsuperscript{132} and since it seems unlikely that so many victims in cases that make it to trial lie, many if not most of these acquitted rape defendants are likely to be guilty yet are protected by double jeopardy. Similarly, 40% of robbery defendants who go to trial are acquitted and 61% of assault defendants are acquitted.\textsuperscript{133} Given that prosecutors generally only go to trial with cases that have been thoroughly vetted (with unconvincing cases being dropped), the actual percentage of guilty acquittals would probably be significantly higher than the previous estimates, but it is impossible to know how high.

Of course, in only a small percentage of such wrongful acquittals does compelling incriminating evidence later come to light, so the cost to justice in absolute terms from double jeopardy is probably more measurable in hundreds of serious criminals escaping rather than thousands. However, better forensic technology—either DNA testing or future technologies not currently known—means those numbers will rise. But perhaps more damaging to society is the loss of credibility the justice system suffers from high-profile failures of justice caused by double jeopardy.

2. A Constitutional Problem

Remedying the problems caused by double jeopardy is especially difficult because protection against double jeopardy in America is based upon a constitutional provision rather than a procedural rule or legislative enactment. This makes it extraordinarily difficult to make any reform to double jeopardy through the legislative process since the number of cases where justice is perverted by the rule would likely not generate the political will needed to pass a constitutional amendment. This contrasts with the UK, which was able to change its double jeopardy rule purely through an act of parliament.\textsuperscript{134}

The U.S. double jeopardy rule, however, is capable of change through judicial reinterpretation. Notice that the constitutional language is in fact very broad: No person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” It is the courts, not the constitutional language itself, that created the contours of the modern American double jeopardy rule. The judicially designed double jeopardy rule recognizes a wide variety of exceptions. For example, as noted earlier, both state and federal courts can


\textsuperscript{133} Id. at Table 21.

\textsuperscript{134} See infra Part III.D.
convict an offender for the same offense. As another example, if a defendant’s conviction is reversed on appeal, he can commonly be retried for the same offense without violating the double jeopardy rule—even though the constitutional language itself provides no basis for recognizing such an exception. Commentators stress that “Retrials in these instances are justified by society’s interest in punishing the guilty. Defendants’ countervailing interests are considered inferior when a conviction rendered by twelve jurors is overturned for reasons unrelated to guilt or innocence.” Courts have also read into the double jeopardy clause a protection against prosecutors appealing an acquittal (even if the trial judge erred on a matter of law), showing how open the clause is to interpretation. Evidently, courts, using logic and taking account of practical consequences, recognize some exceptions to the double jeopardy rule. Why not recognize an exception for something as important as compelling evidence only recently discovered through no fault of the prosecutor?

C. PUBLIC COMPLAINTS

There commonly has been a public outcry against the double jeopardy rule when it causes a confirmed failure of justice. In Britain, public complaints were a key driver behind the reform that loosened the double jeopardy rule. In America, which has made no such reform, public complaints against the rule continue. Some of the most poignant protests arose after fourteen-year-old Emmett Till, a Black boy, was lynched by two

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135 This precedent was recently re-established in 2019 in *Gamble v. United States*, 587 U.S. 678, 682 (2019), which allowed the defendant, Terance Martez Gamble, to be charged with possession of a firearm in both Alabama state court and federal court.


white men for whistling at a white woman in 1955. His murderers were acquitted but later confessed to his killing in a 1956 magazine article (for which they were paid $4,000).\footnote{Zain Murdock, *Emmett Till’s Killer Got Paid $4,000 to Confess the “Truth” About his Death*, \textit{PUSHBLACK} (Jan. 23, 2022), \url{https://www.pushblack.us/news/emmett-till-s-killers-got-paid-4000-confess-truth-about-his-death} [https://perma.cc/4PLP-34PV].} It was a confession with little consequence, however, as the double jeopardy rule prevented a retrial. Even fifty years later, Till’s family still finds the murderers’ bragging confessions and justice system’s inability to act as “salt” rubbed into their “still-fresh wounds.”\footnote{Shemir Wiles, *Column: Till’s Murderers Shouldn’t Have Gone Free*, \textit{THE ORACLE} (Apr. 5, 2007), \url{https://www.usforacle.com/2007/04/05/tills-murderers-shouldnt-have-gone-free} [https://perma.cc/S9M6-7MRN].}

Another case that spurred debate and public complaint regarding double jeopardy was that of OJ Simpson.\footnote{Dorning, \textit{supra} note 138.} When Simpson was acquitted after being tried for the murder of his ex-wife Nicole Brown Simpson and her friend Ron Goldman, much of the public was suspicious and outraged. They had been quite certain of his guilt, and their hunch was seemingly confirmed when he was found liable for the murders at a civil trial. Another round of public outrage was sparked when it was revealed that Simpson was writing a book titled \textit{If I Did It}, which included descriptions of how the murders could have “hypothetically” occurred had Simpson been the perpetrator. As familiarity with the DNA evidence implicating Simpson increased over time, many wondered why an obviously guilty man should go free no matter how compelling the evidence might become.\footnote{\textit{Id}.}

The most obvious supporters of reform are victims and their families who feel betrayed when their demands for justice are tossed aside in favor of protecting defendants from theoretical abuses. The UK’s reform allowing re-prosecutions in narrow circumstances has brought many families hope of finally bringing justice to the killers of their loved ones. One mother, whose daughter was murdered, previously felt “let down by the criminal justice system.”\footnote{White, \textit{supra} note 140.} However, after the UK’s reforms to the double jeopardy rule, she felt that families can now “eventually see justice.”\footnote{\textit{Id}.}

D. REFORMS

A re-examination of the balance of competing interests in light of changing circumstances has led to a number of double jeopardy reforms in
other countries. Indeed, the United Kingdom, from which the American rule originated, has adopted double jeopardy reforms.

**Double Jeopardy Reform in Other Countries.** As noted above, in 2003, the United Kingdom passed the Criminal Justice Act which permitted acquittals to be reversed and the acquitted to be retried in England and Wales if new evidence emerged. Such evidence could be blood tissue, DNA, witness testimony, or confessions. Only crimes with a significant impact on the victim or on society are eligible for a retrial (such as homicide, kidnapping, and sex offenses). The British reform applied retroactively, and Britain’s first murder retrial occurred in 2005, sentencing William Dunlop, who murdered his ex-girlfriend in 1989, to life in prison.

That reform is especially useful in the wake of the development of technology that allows for crimes to be solved with DNA testing. For example, Russell Bishop was originally acquitted for the double murder of nine-year-old girls Karen Hadaway and Nicola Fellows in 1986. However, when DNA testing confirmed Bishop was the killer, the revision of the UK’s double jeopardy rule allowed Bishop to finally be convicted for the murders in 2018. The UK reform has been critical in bringing murderers to justice.

Other Commonwealth countries have followed the UK’s lead, with Australia and New Zealand adopting similar reforms. In Canada, prosecutors can reopen a case under the consideration of three factors: whether the submission of new evidence would significantly affect the case’s outcome; whether reopening the case would lead to the possibility of the opposing party calling evidence in reply; and whether the court’s consideration of the relevance and necessity of the proposed evidence, as well as the effect that reopening the case, will impact the integrity of the trial process.

Furthermore, many other Western countries have different versions of a double jeopardy rule that minimizes the chance of failures of justice in the first place. In France, the prosecution can appeal an acquittal, while in Germany, retrials of acquitted defendants are allowed in certain circumstances, such as a later credible confession by the offender or the

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147 Criminal Justice Act 2003, c. 44, Explanatory Notes ¶ 310 (UK).
149 NAT’L INST. OF JUSTICE, ADVANCING JUSTICE, supra note 120, at 2; Roberts, supra note 120, at 420.
discovery of new evidence in certain highly serious crimes. While Common Law countries are updating their double jeopardy rule to recognize the increasing chance of being able to prove guilt following a wrongful acquittal, no such reforms have been implemented or even seriously considered in the United States. This is because the constitutionalization of the rule has frozen it in place, leaving it to judges to take it upon themselves to update the rule to adapt to changed circumstances.

E. RECOMMENDATION: RECOGNIZE AN EXCEPTION FOR COMPELLING NEW EVIDENCE OF A SERIOUS FELONY ONLY RECENTLY DISCOVERED THROUGH NO FAULT OF THE PROSECUTION

We support adoption of the double jeopardy reform implemented by the United Kingdom and other Commonwealth countries, which show that it is possible to remedy the identifiable justice-failures caused by the rule without significantly undermining the rule’s protections. The interests protected by double jeopardy are important, and there is no doubt that, to avoid governmental harassment or abuse, retrying an acquitted defendant should be allowed solely in limited circumstances targeting clearly guilty defendants. We propose a retrial be allowed only when the following conditions are met:

1. A prosecutor obtains compelling evidence not known to the prior prosecution through no fault of the government.
2. The case in question is a serious felony (for example, murder or rape).
3. The prosecutor obtains approval to request a retrial from the jurisdiction’s attorney general.
4. A judge grants a motion for retrial after reviewing the nature of the crime and certifying the new compelling evidence would likely change the verdict. (The defendant can, of course, appeal this court decision.)
5. After a retrial occurs, if the defendant is acquitted, the government must pay the defendant’s legal fees and is barred from any further attempt to retry the case.

This proposed reform, based closely on the proven UK model, would have allowed trial and conviction in both the Melvin Ignatow and Michael Lane cases in the examples above. At the same time, it does not appear to open any significant avenue for harassment of innocent defendants or allow jury shopping on the part of prosecutors.

153 See supra note 148 and accompanying text.
Such a reform could be adopted as an appropriate interpretation of the Constitution’s broad double jeopardy language, just as the federal courts have done for a variety of other specific exceptions, as discussed above.\textsuperscript{154} Such a compelling-new-evidence exception would take a page from other constitutional provisions like the Fourth and Fourteenth Amendments that have been broadened in response to changing circumstances in order to honor the intended extent of their protections. The double jeopardy clause was meant to protect the innocent from government harassment, so a stringent new evidence exception would not interfere with that original purpose. The courts should be urged to update the interpretation of the double jeopardy rule just as they have with other constitutional protections.

IV. THE LEGALITY PRINCIPLE’S RULE OF STRICT CONSTRUCTION

In addition to the above constitutional and statutory bars to prosecution, there is a broader principle that serves to prevent culpable actors from facing deserved punishment. The legality principle in its original Latin reads “\textit{nullum crimen sine lege, nulla poena sine lege},”\textsuperscript{155} which means “no crime without law, no punishment without law.”\textsuperscript{156} In its modern form, the legality principal only allows criminal liability and punishment when the activity violated a legislative enactment that was expressed with adequate precision and clarity. The principle is not itself a legal rule, but rather a legal concept embodied in a series of rules and doctrines, such as the constitutional prohibition against \textit{ex post facto} laws and the constitutional void-for-vagueness rule.\textsuperscript{157} These doctrines impose important procedural safeguards governing when and how the government can criminalize behavior.\textsuperscript{158}

Most aspects of the legality principle are unquestionably essential to a just and ordered society. Together, the rules embodying this fundamental principle impose important limitations on the government’s ability to use its most powerful mechanism of control, the threat of criminal liability. Few people will want to dispute that the balance of interests favors keeping most legality principle doctrines. But one of the doctrines—the rule of lenity—could be refined in a way to better avoid failures of justice.

\begin{footnotes}
\item[154] See supra notes 135–39 and accompanying text (providing examples of judicially recognized exceptions to the double jeopardy rule).
\item[156] ROBINSON & WILLIAMS, MAPPING CRIMINAL LAW, supra note 75, at 64.
\item[157] Id.
\end{footnotes}
A. COMPETING INTERESTS IN THE LEGALITY PRINCIPLE

The interests in favor of the legality principle are fivefold: \(^{159}\)

1. Interests Supporting the Legality Principle

*Fair Notice.* Fair notice ought to be required as to the contours of a criminal prohibition if a person is to be punished for its violation. Laws are meant to guide individual decisions so they align with societal judgements of permissible behavior. And it would be unfair to punish someone unless the person had a chance to decide their course of behavior in light of the law.

*Compliance.* Unless an action is unequivocally criminalized by a clear statute, it is less likely that the law can gain compliance because people simply will not be able to know the nature and scope of the prohibited conduct.

*Democratic Accountability.* It makes sense to reserve criminalization decisions to a legislature that represents the will of society as opposed to unelected judges. There is a separation of powers concern that if judges are allowed to make criminalization decisions, they will be performing a legislative function. Requiring the codification of criminal laws ensures that the legislature will retain control of criminalization decisions.

*Uniformity.* Uniformity in application is important to uphold because the entire criminal justice system loses credibility if different judges apply different views of what constitutes an offense. Uniformity in application is difficult without a single codified definition of crimes that governs all criminal adjudications.

*Avoiding Judicial Abuse.* The interest in uniformity ties into the additional interest of avoiding the abuse of judicial discretion. If the criminalization of an act is based on non-legislative discretion, all sorts of potential abuses of discretion arise. For example, a judge could take into account characteristics of the defendant such as their race, gender, or class—a problem already seen in judicial sentencing, but one that would be even more serious when deciding what conduct is punishable in the first place.

2. Interests Opposing the Legality Principle (In Some Cases)

The interests against the legality principle’s application chiefly rest on the idea that justice should be served for egregious wrongs even without a codified law as long as the person knew or should have known that their conduct was reprehensible. The legality principle prohibits criminal liability

even if the condemnable nature of the conduct is clear to all, including the offender. If a person’s moral blameworthiness is clear to all, including the offender, the criminal justice system’s failure to impose deserved punishment not only undermines future enforcement but also damages the criminal law’s moral credibility and thereby its crime-control effectiveness. Therefore, violating the legality principle—as in the Nuremberg example below—may sometimes be the correct way to satisfy society’s demands for justice and to minimize the harm done to the law’s credibility.

Consider two case examples that illustrate the justice-frustrating operation of the principle. One example deals with strict construction and the other deals with the prohibition against ex post facto laws.

**Ray Marsh.** Marsh owns a crematorium in Georgia that breaks down in 1997. Rather than fixing it, Marsh simply begins to toss the dead bodies into the woods behind the crematory. He believes that what he is doing is illegal, but he continues to stack the dead on the dead for years until a local dog pulls up a skull and authorities are alerted. Authorities find nearly 300 discarded bodies, and the community is outraged. (Police have Marsh wear a bulletproof vest at court appearances out of fear that he will be shot.) People are adamant that Marsh must pay for his crime, which has made many families terribly upset. However, the court applies the rule of strict construction when interpreting the statute against defacing corpses. It reads the statute as requiring a body to be “defaced” in a technical sense and concludes that Marsh did not actually “deface” the dead bodies in this narrow sense (as he left them to rot instead). Thus, Marsh cannot be criminally convicted for his shocking treatment of the bodies.\(^1^6^0\)

**Nuremberg Tribunal.** With the invasion of Poland in 1939, Nazi Germany under the leadership of Adolf Hitler brings forth a new type of warfare—a warfare that wipes out entire classes of people, uses massive amounts of slave labor, and slaughters POWs. When Nazi leaders are brought to justice before an international tribunal at Nuremberg (excluding Hitler, 

who kills himself rather than facing trial), the most serious charge is that of aggressive war-making. But complicating matters is the fact that, before the war, aggressive war-making had not been recognized by international law as a crime. Thus, convicting the Nazi leaders of it would violate the legality principle because it would be an *ex post facto* application of criminal law. Faced with the choice of allowing Nazi leaders to go unpunished for this most fundamental offense or setting aside the legality principle (which requires that the conduct be declared a crime before the offense occurred), the tribunal elects to convict the leaders.\(^{161}\) If the legality principle had not been set aside at the Nuremberg trials, some of the worst crimes in modern history might have gone unpunished.

As appealing as the legality principle may be, there is one legality-based rule that is controversial and deserves close examination: the so-called “rule of strict construction” (also referred to as the “rule of lenity”). The rule states that, if there is any ambiguity in the statutory definition of an offense, courts must interpret the offense narrowly—in other words, as best benefits the defendant. An alternative interpreted rule—the “rule of fair import”—has been adopted by many modern criminal codes.\(^{162}\) As with the other non-exculpatory defenses discussed above, it would seem that the time has passed for the justice-frustrating strict-construction rule.

### B. THE RULE OF STRICT CONSTRUCTION VERSUS THE RULE OF FAIR IMPORT

When faced with an ambiguity in the definition of an offense, the law traditionally applied a special rule for interpreting criminal statutes: The rule of strict construction directs that any ambiguity in a penal statute be resolved against the state and in favor of the defendant. This “rule of lenity” can regularly lead to failures of justice. For instance, in *People v. Nunez*,\(^ {163}\) a prisoner injured a guard during an escape while awaiting transport to a state prison to serve a life sentence. He was charged with an offense under the California Penal Code that punishes assault by a “person undergoing a life sentence in a state prison.”\(^ {164}\) However, the appellate court applied the rule of lenity and quashed his conviction because although he assaulted someone

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\(^{162}\) *Model Penal Code* § 1.02(3) (1985).


\(^{164}\) *Id.* at 283.
while he was sentenced to serve life in state prison, the prisoner was at the
time of the assault not yet “in a state prison,” but only on his way there.  

A sexual assault example is the Curtis Davis case. Jane Doe, a thirteen-
year-old who is wheelchair-bound, is at home alone with her father, Curtis 
Davis, when he sexually assaults her. Davis takes his daughter into the 
bedroom, picks her up from her wheelchair, and places her on the bed. She 
resists, strikes her father, and screams for help. Davis sexually assaults her 
multiple times. Doe reports the incident to the police, and Davis is arrested 
and charged with the rape of a person who is “physically helpless.” At trial, 
the jury finds Davis guilty. Davis appeals, claiming that he was accused 
under the wrong law, since his victim is not “physically helpless.” While Doe 
has muscular dystrophy and may be “physically helpless” in one sense, she 
is not “physically helpless” in the narrow sense that the court gives the 
statutory language. Davis’s conviction is overturned. In place of his sixty-
year sentence, he is convicted of misdemeanor battery with a sentence of time 
served, and released. 

The Model Penal Code (a model code drafted by the American Law 
Institute that has been the model for criminal code reform in three-quarters 
of U.S. states) tries to mitigate the failures of justice produced by the rule 
of strict construction by providing a code with greater clarity and precision. 
In doing so, the Model Code drafters felt it was appropriate to switch the rule 
of strict construction to what is commonly called the “rule of fair import.” 
The rule directs courts to interpret the code’s provisions “according to the 
fair import of their terms but when the language is susceptible of differing 
constructions it shall be interpreted to further the general purposes stated in 
this Section and the special purposes of the particular provision involved.” 
In other words, instead of interpreting any ambiguity in favor of the 
defendant, no matter how awkward that would be, ambiguities are to be 
interpreted according to the fair meaning of the terms and the legislative 
intent of the law.

165 Id. at 284.
168 MODEL PENAL CODE § 1.02(3) (1985).
169 It is hard to know just how frequently the rule of strict construction is applied to 
frustrate justice, as in the Davis and Marsh examples above, because no statistics are kept on 
the subject.
C. PUBLIC COMPLAINTS

Failures of justice from the rule of strict construction are often the kinds of cases that outrage people because it confirms for them, yet again, how the law is obsessed with technicalities and indifferent to the importance of doing justice. Complaints from members of the public in the case examples mentioned above reflect this public distrust of the criminal justice system. For example, Lee Curtis Davis’s acquittal by technicality for the rape of his daughter sparked widespread outrage, with editorials condemning the legal system’s reliance on technicalities. One infuriated columnist called the legal system “helpless” to do justice and dared its defenders to tell the thirteen-year-old victim that “the system works.”

D. REFORMS

While the legality principle itself is not in need of reform and no one has seriously proposed eliminating it, the rule of strict construction has attracted proposals to soften its application. For example, the rule only applies if there is an ambiguity, and it is for the court to decide whether an ambiguity exists in the first place. Thus, a court could cut down on the justice-failures that the rule produces by setting a higher standard of what counts as an ambiguity that will trigger application of the rule.

Similarly, the rule of lenity can and has been tempered by recognizing that a statute is “not to be construed so strictly as to defeat the obvious intention of the legislature” or “to override common sense.” Nor is it necessary that a statute be given its narrowest possible meaning or a “forced, narrow or overstrict construction.” Still further, the Supreme Court has limited the application of the rule of lenity by applying it only after all efforts to ascertain the statute’s meaning—such as canons of construction and legislative history—have been exhausted, leaving ineradicable ambiguity.

In our view, however, there exists a significantly better means of avoiding the justice-failures of the rule of strict construction. The circumstances that first gave rise to the rule—regularly and hopelessly

171 See ROBINSON & WILLIAMS, MAPPING CRIMINAL LAW, supra note 75, at 84–85.
175 See Callanan v. United States, 364 U.S. 587, 596 (1961) (“The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.”).
ambiguOUS CRImINAL CODES—no longer exist in a majority of American jurisdictions and need not exist in any. The American Law Institute’s Model Penal Code, whose drafting forms have been adopted in three-quarters of the states, has demonstrated that careful drafting using systematic forms and plain language with defined terms can provide a level of clear guidance that makes the rule of strict construction no longer appropriate.

E. RECOMMENDATION: ADOPT THE FAIR IMPORT TEST (AFTER ADOPTING A CODE USING MPC’S MODERN DRAFTING TECHNIQUES)

Our recommendation, then, is to replace the rule of strict construction with the more flexible fair-import rule, a reform already adopted by many states. This reform is desirable, of course, only if the jurisdiction has adopted a code designed to provide clear guidance as to what is criminal, but this can easily be done by using the modern drafting techniques of the American Law Institute’s Modern Penal Code. Such criminal code improvement is an essential aspect of this proposal, as the adoption of the rule of fair import without the clarity and specificity of a modern code could create significant confusion. However, with a modern code in place, adoption of the fair-import test can avoid the justice-frustrating failures of strict construction without opening the way for confusion or unfairness.

For an example of the significant difference in clarity between a Model Penal Code drafting approach and older techniques, consider section 850 in title 11 of the Delaware Code, which defines the offense of “use, possession, manufacture, distribution and sale of unlawful telecommunication and access devices.”176 The text is long, complex, and messy and runs to more than 2,000 words. Beyond its verbose and technical language, the provision also relies upon a series of special definitions created only for this offense such as “telecommunication service,” “telecommunication service provider,” “telecommunication device,” “manufacture or assembly of any unlawful access device,” “manufacture and assembly of unlawful telecommunication device,” and “unlawful access device.” Each of these definitions is very long, complex, and wordy, and differs in meaning from when the same term is used in other contexts. In contrast, using the modern drafting techniques of the Model Penal Code, the gravamen of this offense could be captured in a simpler and clearer codification by criminalizing, as the Draft Delaware Criminal Code proposes, whoever “knowingly obtains without consent

176 Del. Code Ann. tit. 11, § 850 (West 2010)
services that the person knows are available only for compensation.” 177 The terms used here have their ordinary meaning or have a legal definition that applies to all instances in which the term is used in the criminal code.

Both the Ray Marsh case in Georgia and the Lee Curtis Davis case in Florida ended as failures of justice because of the rule of strict construction, 178 and would have come out differently under a rule of fair import. For example, recall that in the Curtis Davis case, a man who repeatedly sexually assaulted his daughter with muscular dystrophy could not be convicted because under the rule of strict construction, his daughter was not held to be “physically helpless” as the statute required. However, under the fair import rule, courts would have been able to look beyond a claimed ambiguity in the strict meaning of the phrase “physically helpless” and instead look at the overall sense of what the law demands. 179 Additionally, adopting the rule of fair import would end the problem of differing judicial opinions on whether ambiguity exists resulting in disparate case outcomes in the same jurisdiction. Unfortunately, as of this writing, several states still use the rule of strict construction. 180

CONCLUSION

The justice system needs to take doing justice more seriously. While academics focus much of their attention on the rights of criminal defendants, empirical studies show Americans view failures of justice—where criminals escape punishment—as unjust as wrongful convictions or overly harsh sentences. Many scholars are rightly concerned with how injustices can undermine the law’s reputation or disproportionately impact historically marginalized communities. However, intentionally failing to punish serious criminals also disproportionately impacts poor and minority communities and sews distrust of the criminal justice system among all segments of society.

As part of taking justice more seriously, the non-exculpatory defenses of statutes of limitation, double jeopardy, and the rule of strict construction—


179 Moreover, if the Model Penal Code had been adopted, section 213.1 on rape and other offenses could have been invoked in order to convict Davis of a first-degree felony. See MODEL PENAL CODE § 213.1 (1985).

180 Robinson, Two Kinds of Legality, supra note 160, at 346–47.
all of which allow serious criminals to escape justice—need re-examination. And the re-evaluation that we provide here suggests that while these defenses once struck an appropriate balance of interests, that balance has gone out of whack as circumstances have changed. As a result, it is time to update these defenses, to make them less justice frustrating, in accordance with the specific reform recommendations that we present above. Policymakers ought to care about failures of justice as much as the general public does and reforming these non-exculpatory defenses would help bring the criminal justice system back in line with the primary purpose of doing justice.