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## Limiting Identity in Criminal Law

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# LIMITING IDENTITY IN CRIMINAL LAW

MIHAILIS E. DIAMANTIS

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# LIMITING IDENTITY IN CRIMINAL LAW

MIHAILIS E. DIAMANTIS\*

**Abstract:** People change with time. Personalities, values, and preferences shift incrementally as people accrue life experience, discover new sources of meaning, and form or lose memories. Eventually, accumulated psychological changes not only reshape how someone relates to the world about her, but also who she is as a person. This transience of human identity has profound implications for criminal law. Previous legal scholarship on personal identity has assumed that only abrupt tragedy and disease can change who we are. Psychologists, however, now know that the ordinary processes of growth, maturation, and decline alter us all in fundamental respects. Many young adults find it hard to identify with their adolescent past. Senior citizens often reflect similarly on their middle years. However tightly we hold on to the people we are today, at some tomorrow we inevitably find ourselves changed.

Criminal justice has not come to grips with this aspect of the human condition. The law—by imposing lengthy sentences, allowing enduring consequences of conviction, and punishing long bygone violations—assumes that people’s identities remain fixed from birth to death. If people do change with time, these policies must violate criminal law’s most basic commitment to prosecute and punish present-day people only for crimes they (and not some different past person) committed.

Drawing on contemporary psychology and philosophy of personal identity, this Article concludes that criminal law punishes too often and too severely. Lengthy prison terms risk incarcerating people past the point at which their identity changes. Elderly inmates who have languished on death row for decades should have a new claim for release—that they are now different people, innocent of the misdeeds of yesteryear. One-time felons should recover lost civil rights sooner. And defendants should benefit from juvenile process well into their twenties, when personal identity first begins to stabilize. By confronting the challenges posed by the limits of personal identity, the criminal law can become more just and humane.

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\* Associate Professor of Law and (by courtesy) Philosophy, University of Iowa. For invaluable feedback at various stages, I owe special thanks to John Anderson, Stephanos Bibas, Deborah Denno, Chad Flanders, William Laufer, Mark Osiel, Kathleen Wallace, participants at the Junior Criminal Law Theory Workshop (University of Toronto) and CrimFest 2019 (Brooklyn Law School), and a spirited auditorium of students at the Mississippi College School of Law. I am also grateful to my research assistants Katie Alfus, Jessica Bowes, Emma Diver, and Thomas Roster.

“You didn’t get [the scholarship]. You were never gonna get it . . . . You made a mistake and they are never forgetting it. As far as they’re concerned, your mistake is just, it’s who you are.”

—Jimmy McGill, *Better Call Saul*<sup>1</sup>

“Get back in your cell . . . . I came to kill Neegan, and you’re already worse than dead.”

—Maggie Greene, *The Walking Dead*<sup>2</sup>

## INTRODUCTION

Inattention to the effects of time is a major contributor to several pathologies in the U.S. criminal justice system,<sup>3</sup> from overcriminalization to overincarceration.<sup>4</sup> We let some people waste away in prison. We leave others in a timeless limbo on death row. We convict for crimes from long long ago. And we prosecute children who have not reached the time of adulthood. By heeding the moral significance of time, we could uncover a more unified framework for addressing these and other injustices. This Article argues that the key to this moral significance is a deeper appreciation for the temporal limits of personal identity.<sup>5</sup> “Time is a powerful force that transforms people’s preferences, reshapes their values, and alters their personalities.”<sup>6</sup> Ineluctably, the march of time changes all of us. Our refusal to recognize this distorts criminal justice.

Sometimes time changes identity in obvious, stark, and tragic ways. Consider portraits of two men:

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<sup>1</sup> *Better Call Saul: Winner* (AMC television broadcast Oct. 8, 2018).

<sup>2</sup> *The Walking Dead: What Comes After* (AMC television broadcast Nov. 4, 2018).

<sup>3</sup> This Article is meant to supplement rather than challenge other important accounts of these pathologies; inattention to the effects of time in the criminal justice system is an outgrowth of broader social systems that work to systematically disadvantage racial minorities. See, e.g., TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 3 (2007) (describing how the increases in criminalization and incarceration disproportionately affect marginalized communities); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 151 (2004) (studying the lifetime risks of imprisonment across race and educational achievements).

<sup>4</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* 8–9 (rev. ed. 2012); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–45 (2008) (providing a detailed account of the various mechanisms in which we over-prosecute individuals).

<sup>5</sup> This Article is not the only account for why the passage of time is significant for criminal punishment. See, e.g., Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment*, 12 NEW CRIM. L. REV. 1, 42 (2009) (arguing that as time passes, the benefits that a criminal realizes from a crime fade, and correspondingly, so too should the severity of their punishment).

<sup>6</sup> Jordi Quoidbach et al., *The End of History Illusion*, 339 SCI. MAG. 96, 96 (2013).

[Man 1] killed [a police officer] during a domestic dispute. At the request of [Man 1's] neighbors, [the officer] was protecting [Man 1's] ex-girlfriend and her 11-year-old daughter while [Man 1] moved out of their house. After pretending to leave, [Man 1] retrieved a pistol, crept behind the car where [the officer] was sitting, and fired two shots into the back of [the officer's] head . . . . After shooting [the officer], [Man 1] shot his ex-girlfriend in the back as she tried to run away.<sup>7</sup>

[Man 2] has a history of physical and mental impairments. He is legally blind, cannot walk independently, is incontinent, and has slurred speech. He has also suffered at least two recent strokes . . . [one of which] was severe, and affected [his] vision while also causing substantial deficit in motor coordination. After this stroke, he showed signs of memory loss, repeatedly asking that his mother be informed that he had a stroke despite the fact that she had passed away several years earlier . . . . [Man 2] report[s] frequently urinating on himself . . . although he has a toilet [nearby].<sup>8</sup>

Man 2 faces execution for Man 1's crime. Both men respond to the name "Vernon Madison," but, due to a series of strokes and a degenerative brain disorder, Man 2 (age sixty-eight) cannot recall being Man 1 (age thirty-four).<sup>9</sup> Despite the very palpable sense that these must be two different men, the law currently treats them as though they were one and the same<sup>10</sup>—that only the passage of time separates them. This would immediately strike many psychologists and philosophers of identity as suspect.<sup>11</sup> In addition to time, a psychological gulf separates the two. Memory in particular has been thought to play a crucial role in connecting past and present selves into a single coherent identity.<sup>12</sup> Under the current legal framework, Man 2 will be executed unless he can somehow persuade the courts that killing him would be cruel and unusual.<sup>13</sup> If Man 2 does not share Man 1's identity, he should instead be able to argue that he is innocent of Man 1's crimes.

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<sup>7</sup> Brief of Respondent at 3, *Madison v. Alabama (Madison I)*, 139 S. Ct. 718 (2019) (No. 17-7505), 2018 WL 3655848.

<sup>8</sup> *Madison v. Comm'r, Ala. Dep't of Corr. (Madison II)*, 851 F.3d 1173, 1179 (11th Cir. 2017).

<sup>9</sup> *Id.* at 1177.

<sup>10</sup> See *Madison I*, 139 S. Ct. at 722 ("[A] person lacking such a memory [of the time of his crime] may still be able to form a rational understanding of the reasons for his death sentence [and therefore his execution need not violate the Eighth Amendment.]").

<sup>11</sup> See *infra* notes 58–174 and accompanying text.

<sup>12</sup> See John Locke, *Of Identity and Diversity*, in *PERSONAL IDENTITY* 33, 51 (John Perry ed., 1975) (emphasizing the role memory plays in personal identity).

<sup>13</sup> Brief of Petitioner at 1, *Madison I*, 139 S. Ct. 718 (2019) (No. 17-7505), 2018 WL 2383228. The Supreme Court held that regardless of whether a person remembers his crime, he may still face execution under the Eighth Amendment if he can reasonably understand the justifications for his sentence. *Madison I*, 139 S. Ct. at 726. The case was remanded to the state court to determine Madison's competency. *Id.* at 731.

A very long stretch of time and debilitating illness stand between Vernon Madison and his past self.<sup>14</sup> This Article embraces,<sup>15</sup> where some others have demurred,<sup>16</sup> the relevance of personal identity to capital sentencing in cases like Madison's. The significance of time for criminal justice reaches far beyond extreme cases like Madison's. Natural and often unnoticed changes in personal identity affect us all, over shorter time scales, and usually without the intervention of tragic disorders. The ubiquitous transience of personal identity implicates everyone.

Psychologists have demonstrated how personal identity changes and why it is often hard for us to see or acknowledge this. Reflect for a moment: on a scale from zero (not at all) to ten (totally), how much do you think you will change as a person over the next decade? Most people think their personality, values, and preferences will remain relatively stable into the future. They answer close to zero.<sup>17</sup> Now reflect for a second moment: how much have you changed as a person in the last decade? Most people answer this question very differently; looking backward, they recognize that a process of personal growth brought them to who they presently are.<sup>18</sup> The law review editors working on this article (assuming they are in their late twenties) will tend to answer close to 9, 5.5, and 4 for how much they changed in terms of values, preferences, and personality, respectively, over the last decade.<sup>19</sup> Scientists call this discrepancy between the past change people observe in themselves and the forward-looking stability they predict the "end of history illusion."<sup>20</sup>

This Janus-faced perspective people have toward their own identities can also influence how people think about others' identities. The epigraphs featured at the top of this Article illustrate two common and conflicting thoughts we have all likely entertained. In the first, Jimmy McGill explains to a young student why a scholarship committee rejected her application.<sup>21</sup> She had a minor shoplifting infraction in her recent past.<sup>22</sup> In the eyes of the committee members, she would always be the thief, and such a person would not benefit from, let alone deserve, a scholarship.<sup>23</sup> In the second, Maggie Greene, bent on

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<sup>14</sup> *Madison II*, 851 F.3d at 1177.

<sup>15</sup> See *infra* notes 421–579 and accompanying text.

<sup>16</sup> See, e.g., Chad Flanders, *Time, Death, and Retribution*, 19 U. PA. J. CONST. L. 431, 464–66 (2016) (arguing that it is unrealistic to expect criminal law to adapt by incorporating identity changes in determining proper punishments).

<sup>17</sup> Quoidbach et al., *supra* note 6, at 97.

<sup>18</sup> See *id.* at 96 ("Young people, middle-aged people, and older people all believed that they changed a lot in the past but would change relatively little in the future.").

<sup>19</sup> *Id.* at 97.

<sup>20</sup> *Id.* at 96.

<sup>21</sup> *Better Call Saul*, *supra* note 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

vengeance against the man who had brutally murdered her husband, finds him locked in a holding cell, a broken and subdued shadow of the arrogant tyrant he once was.<sup>24</sup> Though she recognizes his face, she no longer sees the culprit she sought to destroy.<sup>25</sup>

These two perspectives on personal identity—that it is either fixed from crib to grave or that it changes over time—have important implications for criminal law. Attributions of criminal responsibility presuppose that the present-day defendant must be identical to whoever committed the past crime. This so-called “identity principle” is a requirement of basic morality: it stands for the notion that responsibility tracks identity.<sup>26</sup> Punishing one person for another’s crime is harmful to the criminal justice system<sup>27</sup>—it violates constitutional guarantees of due process<sup>28</sup> and offends fundamental common law notions of justice.<sup>29</sup> Therefore, it matters to law and morality whether identities change despite continuity in physical DNA, physiognomy, fingerprints, social network, social security number, et cetera.

Despite the central importance of the identity principle, current criminal law lacks a coherent approach to personal identity. Jurists have largely overlooked identity and its implications for criminal law. Not a single court case cites to Derek Parfit, the modern philosopher whose name has been synonymous with personal identity theory for decades.<sup>30</sup> The identity principle does

<sup>24</sup> *The Walking Dead*, *supra* note 2.

<sup>25</sup> *Id.*

<sup>26</sup> JOSEPH BUTLER, *THE ANALOGY OF RELIGION, NATURAL AND REVEALED* 335–43 (6th ed. 1764); Thomas Reid, *Of Memory*, in *ESSAYS ON THE INTELLECTUAL POWERS OF MAN* 253, 264–67 (Derek R. Brookes ed., 2002); Locke, *supra* note 12, at 51; Derek Parfit, *Later Selves and Moral Principles*, in *PHILOSOPHY AND PERSONAL RELATIONS: AN ANGLO-FRENCH STUDY* 137, 142–44 (Alan Montefiore ed., 1973).

<sup>27</sup> Although there may appear to be exceptions—e.g. co-conspirators, parents responsible for the crimes of their children, and accomplices responsible for each other’s crimes—these are not true cases of vicarious liability. See *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (holding that a co-conspirator is responsible for the actions taken by another co-conspirator if the acts are in furtherance of the conspiracy); *Williams v. Garcetti*, 853 P.2d 507, 508 (Cal. 1993) (describing a statute that holds a parent criminally liable for causing, encouraging, or contributing to a dependent’s criminal activity); MODEL PENAL CODE § 2.06(2)(c) (AM. LAW INST. 1985) [hereinafter MODEL PENAL CODE I] (stating that a person is considered guilty of another’s criminal action if he or she is an accomplice). Although the criminal result is necessary for liability, so is the criminal act or omission of the vicariously liable defendant—e.g. a criminal agreement, criminal aid, a failure to supervise, or failure to exercise reasonable care and control over their children. See, e.g., MODEL PENAL CODE I § 2.06(3)(a)(ii) (stating that a person is an accomplice of another if, with the intent to facilitate the offense, he or she helps another to commit the crime; *id.* § 5.03(1) (describing when a person is guilty of conspiracy with another). The defendants in these cases stand trial for their own responsibility in relation to the harm.

<sup>28</sup> U.S. CONST. amends. V, XIV.

<sup>29</sup> See 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*276 (1830) (“[I]t is better that ten guilty persons escape, than that one innocent suffer.”).

<sup>30</sup> The *Stanford Encyclopedia of Philosophy* article on personal identity and ethics uses Derek Parfit’s name fifty-one times. David Shoemaker, *Personal Identity and Ethics*, in *STANFORD ENCY-*

not assert which theory of identity is correct, just that identity and responsibility go hand-in-hand. Although theorists dispute exactly how identity works, it cannot be both fixed and changing. Currently, criminal law draws inconsistently from both views. All jurisdictions allow for life sentences,<sup>31</sup> and some states indefinitely remove basic civil rights from convicted felons.<sup>32</sup> Such policies suggest that criminal law treats personal identity as stable throughout life. All jurisdictions also have features that, as argued below, are best understood as recognizing that identity changes and has natural temporal limits. The special criminal process accorded to juveniles<sup>33</sup> may be an implicit acknowledgment that adults often share little common identity with the children they once were.<sup>34</sup> Furthermore, statutes of limitations<sup>35</sup> may be an implicit concession

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CLOPEDIA OF PHILOSOPHY, §§ 1–2, 4–6 (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/entries/identity-ethics/> [<https://perma.cc/NKN6-L942>].

<sup>31</sup> MODEL PENAL CODE I § 6.06(1) (“A person who has been convicted of a [first degree] felony may be sentenced to . . . life imprisonment.”); Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, THE SENT’G PROJECT, 1, 10 (May 2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf> [<https://perma.cc/M9JF-TCTV>] (offering a comprehensive analysis of individuals serving life sentences across all fifty states).

<sup>32</sup> See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding state disenfranchisement of convicted felons); Amy Heath, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote After Serving Their Sentences*, 25 AM. U. J. GENDER, SOC. POL’Y & L. 327, 329 (2017) (“[N]early 6.1 million ex-felons . . . face nearly insurmountable barriers when trying to gain back their right to vote. Six states currently disenfranchise more than seven percent of its adult population.”); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (“Thirteen million people, including about thirty percent of black men, are banned for life from jury service because they are felons.”). Florida recently changed its policy of indefinitely disenfranchising felons. FLA. CONST. art. VI, § 4; Patricia Mazzei, *Florida Felons Once Denied Rights Begin Registering to Vote*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/florida-felons-voting-rights.html> [<https://perma.cc/4JNC-PPNK>]. Many other states, however, retain such a policy. Heath, *supra*, at 329. Additionally, the U.S. Code makes it illegal for convicted felons to possess a firearm. 18 U.S.C. § 922(g) (2012).

<sup>33</sup> Anne Teigen, *Automatically Sealing or Expunging Juvenile Records*, LEGISBRIEF (Nat’l Conf. of St. Legislatures, Washington, D.C.) (July 2016), <http://www.ncsl.org/LinkClick.aspx?fileticket=J94ePAC8WFw%3d&tabid=30515&portalid=1> [<https://perma.cc/C66X-G3RS>] (“All states have some sort of procedures that allow juveniles to petition to either seal or expunge their records in certain cases.”).

<sup>34</sup> Peter Anderson, *Assessment and Development of Executive Function (EF) During Childhood*, 8 CHILD NEUROPSYCHOL. 71, 77 (2002) (“Research indicates that the executive domains mature at different rates.”); Avshalom Caspi & Brent W. Roberts, *Personality Development Across the Life Course: The Argument for Change and Continuity*, 12 PSYCHOL. INQUIRY 49, 61 (2001) (“The evidence does not support the conclusion that personality traits become fixed at a certain age in adulthood. Rather the existence of personality change well into adulthood, though often small in magnitude, contradicts attempts to claim that personality traits are fixed or unchanging.”); Rodica Ioana Damian et al., *Sixteen Going on Sixty-Six: A Longitudinal Study of Personality Stability and Change Across 50 Years*, 117 J. PERSONALITY & SOC. PSYCHOL. 674, 674 (2018) (“Our findings suggest that personality has a stable component across the life span, both at the trait level and at the profile level, and that personality is also malleable and people mature as they age.”).



that human identity continues to change even past the age of majority—after a period, the risk of prosecuting a now-changed person for a past crime becomes too great.

The criminal justice system needs to take personal identity seriously and adopt an informed position. If, as argued below, personal identity evolves over time for all of us, then the stakes are very high. We routinely prosecute and punish present-day people for crimes that different, past versions of themselves committed. Vernon Madison is just one stark example. The courts and attorneys in his case focused on whether executing him is cruel and unusual because he cannot recall his crime.<sup>36</sup> Madison should have a stronger due process claim.<sup>37</sup> The intervening thirty-eight years since the murder,<sup>38</sup> his worsening vascular dementia,<sup>39</sup> and his inability to recall his crime<sup>40</sup> constitute new evidence that he is a different person from the man who pulled the trigger.<sup>41</sup> Psychological changes (though, if fortunate, not like those that beset Madison) affect and accrue for everyone. At some point, everyone should be able to argue innocence for past crimes.

This Article has several theses that build to several novel criminal justice reforms. The earlier theses are more general and should stand independently of those that come later. Part I of this Article draws on psychology and philosophy to argue that personal identity changes over time, and that this should con-

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<sup>35</sup> 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 202(a) (2019) (“Nearly every American jurisdiction has some form of time limitation within which a criminal prosecution must be instituted . . .”).

<sup>36</sup> U.S. CONST. amend. IX (“[N]or [shall] cruel and unusual punishments [be] inflicted.”); *Madison II*, 851 F.3d at 1188, 1190 (“We therefore conclude that the state court’s decision that Mr. Madison is competent to be executed rests on an unreasonable determination of the facts. . . . Mr. Madison is incompetent to be executed.”); Brief of Petitioner, *supra* note 13, at 17–29 (arguing that due to his illness, the Eighth Amendment’s prohibition on cruel and unusual punishment bars the state from executing Madison); Brief of Respondent, *supra* note 7, at 27–40 (arguing that the Eighth Amendment does not bar the state from executing a murderer who has no memory of his offense). In briefing before the Supreme Court, Madison newly raised the question of whether his dementia, irrespective of its effect on his memory, should bar his execution. *See Madison I*, 139 S. Ct. at 731 (Alito, J., dissenting) (“After persuading the Court to grant review of [the] question [concerning Madison’s memory loss], counsel abruptly changed course.”).

<sup>37</sup> U.S. CONST. amend. XIV (“[N]or shall any state deprive any person of life . . . without due process of law . . .”).

<sup>38</sup> *Madison v. State*, 545 So. 2d 94, 96 (Ala. Crim. App. 1987) (“[Madison was] convicted of the capital offense of the murder of a police officer . . . [He was] sentenced to death.”).

<sup>39</sup> Brief of Petitioner, *supra* note 13, at 5 (“[Madison] now suffers from vascular dementia and corresponding long-term severe memory loss, disorientation and impaired cognitive functioning.”).

<sup>40</sup> *Madison II*, 851 F.3d at 1177 (“[Madison] has no memory of committing the murder—the very act that is the reason for his execution.”).

<sup>41</sup> *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“[I]f the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.”).

cern the criminal law.<sup>42</sup> Part I also offers a specific account of the concept of personal identity that is relevant to criminal law—that it is tied to and changes with moral character.<sup>43</sup> Part II argues that this characterological account of personal identity already has some resonances in criminal law.<sup>44</sup> Contrary to the received wisdom that “[t]he statute of limitations is clearly a nonexculpatory defense,”<sup>45</sup> Part II argues that statutes of limitations only make sense as an implicit recognition of the exculpatory impact time can have on identity.<sup>46</sup>

Part III discusses several broad-ranging implications for criminal law recognizing how personal identity changes.<sup>47</sup> Though these arguments are framed in terms of the characterological account of personal identity in Part II, analogous concerns would arise for any theory according to which identity is not static. For example, limitations periods should restrict how long punishment may last, not only when prosecution may be initiated; if there is a point after which prosecution would violate the identity principle, punishment would also violate it after that point. Part III also argues that statutes of limitations should differ depending on the age of the culprit, because the rate at which people change varies predictably over their lives.<sup>48</sup> Finally, this Article concludes by reflecting on whether a criminal justice system that broadly takes the limits of personal identity seriously is attractive and sustainable.

The general upshot of the arguments that follow is that there are more innocent people in communities, courts, and prisons than the law currently has the conceptual tools to acknowledge. If people change enough to undergo a break in whatever interest the criminal law has in their personal identity, a guilty person may become an innocent person. These arguments will be of interest to anyone concerned about criminal justice reform. Consider the following facts:

- The United States has the largest prison population and the highest incarceration rate in the world.<sup>49</sup> The current trend is upward,<sup>50</sup> and has been for decades.<sup>51</sup>

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<sup>42</sup> See *infra* notes 58–174 and accompanying text.

<sup>43</sup> See *infra* notes 175–232 and accompanying text.

<sup>44</sup> See *infra* notes 233–420 and accompanying text.

<sup>45</sup> ROBINSON, *supra* note 35, § 202(b).

<sup>46</sup> See *infra* notes 361–420 and accompanying text.

<sup>47</sup> See *infra* notes 421–579 and accompanying text.

<sup>48</sup> See *infra* notes 424–472 and accompanying text.

<sup>49</sup> Inst. for Criminal Policy Research & World Prison Brief, *Highest to Lowest—Prison Population Rate*, PRISONSTUDIES.ORG, [http://www.prisonstudies.org/highest-to-lowest/%20prison-population-total/trackback?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/%20prison-population-total/trackback?field_region_taxonomy_tid=All) [<https://perma.cc/JC7S-MRYJ>].

<sup>50</sup> NAT’L RES. COUNCIL OF THE NAT’L ACAD., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1* (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (“After decades of stability from the 1920s to the early 1970s, the rate of incarceration

- Average prison terms continue to grow.<sup>52</sup> The percentage of inmates who are elderly—and who consequently pose very low social threat—grew by 1300% between 1980 and 2012.<sup>53</sup>
- Legislatures across the nation have aggressively extended statutes of limitations for various crimes to reach deeper, often indefinitely, into the past.<sup>54</sup>

There are many possible explanations behind these figures. Scholars have pointed to the war on drugs,<sup>55</sup> racially-motivated sentencing policies,<sup>56</sup> and a shift in the 1970s to a retributive punishment philosophy.<sup>57</sup> This Article expands the list of explanations and adds another arrow to the advocate's quiver: the law has yet to reflect seriously on the nature of personal identity. It consequently punishes people whom it should regard as innocent of the past misconduct currently attributed to them.

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tion in the United States more than quadrupled in the past four decades.”); THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS, 1 (2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/A2XV-SG2V>] (graphing the increasing number of incarcerated people in U.S. state and federal prisons).

<sup>51</sup> NAT'L RES. COUNCIL OF THE NAT'L ACAD., *supra* note 50, at 2 (“From 1973 to 2009, the state and federal prison populations that are the main focus of this study rose steadily, from about 200,000 to 1.5 million, declining slightly in the following 4 years.”).

<sup>52</sup> See Janice Williams, *Serving Time: Average Prison Sentence in the U.S. Is Getting Even Longer*, NEWSWEEK (July 22, 2017), <https://www.newsweek.com/prison-sentences-increased-2017-jail-639952> [<https://perma.cc/2DV2-2LEU>] (stating that the average time prisoners spend incarcerated has greatly risen).

<sup>53</sup> AM. CIVIL LIBERTIES UNION, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY, at i (2012), [https://www.aclu.org/files/assets/elderlyprisonreport\\_20120613\\_1.pdf](https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf) [<https://perma.cc/M3WQ-QDH5>].

<sup>54</sup> See Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 124–28 (2008) (explaining how legislatures have lengthened and passed exceptions to statutes of limitations).

<sup>55</sup> Lauren Carroll, *How the War on Drugs Affected Incarceration Rates*, POLITIFACT (July 10, 2016), <https://www.politifact.com/truth-o-meter/statements/2016/jul/10/cory-booker/how-war-drugs-affected-incarceration-rates/> [<https://perma.cc/YAW6-H74Z>] (examining Senator Cory Booker's claim that the war on drugs led to “a 500 percent increase in incarceration” and finding that “state and federal prison population[s] remained fairly stable through the early 1970s, until the war on drugs began. Since then, it has increased sharply every year.”).

<sup>56</sup> NAT'L RES. COUNCIL OF THE NAT'L ACAD., *supra* note 50, at 3 (“Mandatory prison sentences, intensified enforcement of drug laws, and long sentences contributed not only to overall high rates of incarceration, but also especially to extraordinary rates of incarceration in black and Latino communities.”).

<sup>57</sup> See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 11–14 (2003) (explaining how penology changed following the 1960s with greater emphasis on increased punishments).

## I. THE PHILOSOPHY AND PSYCHOLOGY OF DIACHRONIC CRIMINAL IDENTITY

Only a thin thread of legal scholarship over the last three decades explores the potential significance of personal identity for criminal law. Some scholars cut the discussion short by citing what they take to be criminal law's disinterest in the matter.<sup>58</sup> Others have done meaningful work on identity, but the reach of their work is limited by two factors. First, they consider identity change only in very limited contexts: futuristic capabilities,<sup>59</sup> extreme cases of mental illness,<sup>60</sup> dramatic instances of identity breakdown,<sup>61</sup> late stage dementia,<sup>62</sup> and "severe permanent disabilities."<sup>63</sup> As a result, these scholars tend to think that the circumstances in which personal identity could be relevant to criminal law are "narrow" or "quite rare,"<sup>64</sup> as where "a person . . . commits an offense, gets in an accident, suffers amnesia, totally changes from a bad to a good person, and does not get caught for decades."<sup>65</sup> Second, the discussions tend to be anecdotal, philosophical, and hypothetical.<sup>66</sup> Untethered from psychological facts that underlie identity formation and change, previous scholarship lacks the perspective to make concrete policy proposals. Instead, past proposals have tended to be quite conservative by justifying present doctrine against challenges from personal identity, rather than embracing reform.<sup>67</sup>

This Article aims to show that personal identity should be a ubiquitous concern for criminal law, even in the absence of illness, tragedy, and science

<sup>58</sup> See, e.g., Flanders, *supra* note 16, at 465 (discussing how the criminal justice system is content in discounting identity changes).

<sup>59</sup> See, e.g., O. Carter Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1243 (2011) (focusing on "the speculative and projected application of memory modification techniques for healthy individuals").

<sup>60</sup> See, e.g., Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. DAVIS L. REV. 383, 388–89 (1992) (focusing on people who suffer from multiple personality disorder).

<sup>61</sup> See Kimberly Kessler Ferzan, *Patty Hearst Reconsidered: Personal Identity in the Criminal Law*, 15 OHIO ST. J. CRIM. L. 367, 372, 382, 385 (2018) (discussing "brainwashing," "narrow" cases where a person has no identity at all, and "profound break[s] in identity" like sleepwalking).

<sup>62</sup> Annette Dufner, *Should the Late Stage Demented Be Punished for Past Crimes?*, 7 CRIM. L. & PHIL. 137, 149 (2013).

<sup>63</sup> See Sean Hannon Williams, *Self-Altering Injury: The Hidden Harms of Hedonic Adaptation*, 96 CORNELL L. REV. 535, 538, 556 (2011) (discussing tort victims whose injuries lead to a loss of identity).

<sup>64</sup> Ferzan, *supra* note 61, at 382, 388.

<sup>65</sup> *Id.* at 388.

<sup>66</sup> One notable exception is Snead, *supra* note 59. Its detailed treatment of the psychology and neuroscience of memory is the standard to which this present Article aspires.

<sup>67</sup> See generally Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 445 (1990) (concluding that because most people maintain their psychological connections to their past crimes, deterrence and incapacitation are justified).

fiction. To that end, this Part characterizes the relevant notion of personal identity and why it should interest the criminal law.<sup>68</sup> Section A presents the most plausible and widely accepted philosophical framework for personal identity—namely that it tracks psychological connections between present people and their past selves.<sup>69</sup> Section B turns to recent work in psychology that adds further detail to the framework discussed in Section A.<sup>70</sup> It focuses on data supporting the theory that personal identity is subject to a gradual yet constant process of evolution and change. Section C then adapts the theory to the criminal context.<sup>71</sup> It proposes that personal identity, for purposes of criminal law, should track characterological dispositions toward criminality. When those dispositions decrease sufficiently over time, the law should treat past criminals, for all intents and purposes, as new people, immune to prosecution or punishment.

### A. *The Philosophy*

Criminal law applies to *people*.<sup>72</sup> As such, the jurisdiction of the criminal law must be circumscribed by its views on what people are, and where/when people start/end. Federal law defines “person” to include “individuals;”<sup>73</sup> but that simple substitution of terms masks a wide range of conflicting views about what makes up an individual and what makes an individual who she is. If criminal law is to have a truly studied view, it must turn to the subject matter that philosophers call “personal identity.”<sup>74</sup>

There are really two issues of personal identity.<sup>75</sup> The first is the matter of “synchronic identity,” which asks what makes up a person at any given single moment in time.<sup>76</sup>

<sup>68</sup> I have previously written about personal identity for corporate criminals and will draw on corporate analogies to make the individual case more intuitive. See Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2050–51 (2016) (arguing that *respondet superior* is both over- and under-inclusive).

<sup>69</sup> See *infra* notes 72–132 and accompanying text.

<sup>70</sup> See *infra* notes 133–172 and accompanying text.

<sup>71</sup> See *infra* notes 173–232 and accompanying text.

<sup>72</sup> See MODEL PENAL CODE I § 2.01 (specifying the “General Principles of Liability” in terms of conditions that a “person” might satisfy).

<sup>73</sup> Dictionary Act, 1 U.S.C. § 1 (2012).

<sup>74</sup> See generally Eric T. Olson, *Personal Identity*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/entries/identity-personal/> [<https://perma.cc/YV9A-9G8Q>] (explaining that personal identity addresses the “philosophical questions that arise about ourselves by virtue of our being people”); Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3, 3–4 (1971) (introducing the concept of “personal identity”).

<sup>75</sup> Actually, there are many more than two. See Olson, *supra* note 74, § 1 (stating that there are a number of issues regarding personal identity). For purposes of zeroing in on the issue of personal identity at issue here, distinguishing the two that follow is sufficient.

**Synchronic Identity:** The identity relation that holds between a thing and itself in a single reference time.

A theory of synchronic identity should specify which things in the world are parts of a person (brain, hands, feet, nose, et cetera) and how they must relate to each other (attached as normal, rather than strewn about the room) to constitute her.<sup>77</sup> Two things that have all those same parts in the same arrangement at the same time are synchronically identical to each other.

Having a view on synchronic identity is important to criminal law. One basic purpose of a trial is to confirm questions of synchronic identity. To illustrate: “There was a man in a mask who shot the victim; the evidence shows that man was Joe!” Synchronic identity is also important to criminal theory—by specifying where the person ends and the rest of the world begins, it sets conditions on what a person can be responsible for. The law must distinguish which causal forces proceed from the defendant (for example, volitional acts)<sup>78</sup> and those that do not (for example, intervening acts of others, psychotic episodes, epileptic seizures, remote and unforeseeable turns of events).<sup>79</sup> The law generally only punishes people for the former.<sup>80</sup> To do so, it must be able to say *what* the defendant is. Historically, there has been relatively little controversy in criminal law about what makes up individual people. People are roughly defined by reference to a biological understanding of what constitutes and individuates living members of the species *Homo sapiens*.<sup>81</sup>

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<sup>76</sup> Andre Gallois, *Identity Over Time*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 30, § 1, <https://plato.stanford.edu/entries/identity-time/> [<https://perma.cc/H52F-ZMM7>] (“By synchronic identity we mean an identity holding at a single time.”).

<sup>77</sup> Harold Noonan & Ben Curtis, *Identity*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, § 4 (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/entries/identity/> [<https://perma.cc/U4RA-CBUL>] (“A criterion of synchronic identity, by contrast, will typically specify how the parts of an *F*-thing existing at a time must be related, or how one *F* at a time is marked off from another.”).

<sup>78</sup> See MODEL PENAL CODE I § 2.01(1) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act . . .”).

<sup>79</sup> See *id.* § 2.01(2) (“The following are not voluntary acts . . . (a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor.”). See generally Donald Davidson, *Actions, Reasons, Causes*, 60 J. PHIL. 685, 685–86 (1963) (explaining that not all actions have a rational explanation behind them); Harry G. Frankfurt, *The Problem of Action*, 15 AM. PHIL. Q. 157, 157 (1978) (stating that the “causal approach” does little to explain the “nature of action”); Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 6 (1971) (declaring that one of the most important features separating humans from other species is their will).

<sup>80</sup> WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.2(c) (2d ed. 1986) (indicating that “liability requires that the activity in question be voluntary”).

<sup>81</sup> Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735–36 (8th Cir. 2008) (finding the statutory definition of a living human being as “an individual living member of the species of *Homo sapiens*” was clear) (internal quotations omitted); see MODEL PENAL CODE § 210.0(1) (AM.

It may be easier to conceptualize the importance of synchronic identity when it comes to a different kind of person—the corporation.<sup>82</sup> There are two prominent controversies about synchronic corporate identity. First, scholars disagree about what the constituent parts of corporations are. According to traditional views, the constituents of a corporation are its shareholders, directors, managers, and employees.<sup>83</sup> Newer “stakeholder” views would—at least for some purposes—expand the corporate constituency to include customers, suppliers, and creditors.<sup>84</sup> After settling *what* the constituent parts are, a second question of corporate synchronic identity arises—*when* are they constituent parts? Employees, for example, are people in their own right. Sometimes they act as parts of corporations, and sometimes they act solely on their own account, taking a “frolic of [their] own.”<sup>85</sup> Under the *ultra vires* doctrine, the law once held that employees are not parts of their corporate employer anytime they do something not authorized in the corporate charter.<sup>86</sup> Over a century ago, criminal courts adopted the modern line between corporate identity and

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LAW INST. 1980) (“[H]uman being’ means a person who has been born and is alive . . . .”) [hereinafter MODEL PENAL CODE II].

<sup>82</sup> 1 U.S.C. § 1 (defining “person” to include “corporations”).

<sup>83</sup> Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1096 (2000) (“The modern trend in state law is to view the corporation as a ‘nexus of contracts’ involving various constituents, including shareholders, directors, managers, and employees.”).

<sup>84</sup> Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 676 (2006) (“A long-running debate exists in corporate law between those who believe the corporation’s sole or primary purpose is to maximize shareholder profit, the ‘shareholder primacy’ theory, and those who believe a corporation must honor all of its constituents’ interests, including the concerns of employees, creditors, customers, and society at large, the ‘stakeholder’ theory.”). No one has argued, as far as I know, that corporations can act through these constituent groups that stakeholder theorists would include. For example, a car rental company is not responsible for reckless driving by its customers. John P. Ludington, *State Regulation of Motor Vehicle Rental (“You Drive”) Business*, 60 A.L.R. 4th 784, § 50 (1988).

<sup>85</sup> *Dowd v. Webb*, 337 F.2d 93, 97 (3d Cir. 1964) (“The sum of the Rhode Island decisional law is that where a wilful [sic] tort of a servant is not merely a ‘frolic of his own’ but occurs in relation to his master’s business, then the master will be responsible for his wilful [sic] assault upon another if there is an express authorization to use force, or if it can be implied.”).

<sup>86</sup> JOHN W. SALMOND, *THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES* 58 (3d ed. 1912); Mark M. Hager, *Bodies Politic: The Progressive History of Organizational ‘Real Entity’ Theory*, 50 U. PITT. L. REV. 575, 594–95 (1989); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 540–42 (2010). Over time, however, the courts found the *ultra vires* doctrine less persuasive regarding corporate tort liability. See, e.g., *Phila., Wilmington, & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 209–10 (1858) (holding that a corporation is responsible for its agent’s conduct if such conduct was performed in the ordinary course of business and for the corporation); *Nims v. Mt. Hermon Boys’ Sch.*, 35 N.E. 776, 777 (Mass. 1893) (stating that it is no shield from liability for a corporation to argue that its corporate charter does not authorize tortious conduct).

employee identity<sup>87</sup> using *respondeat superior*.<sup>88</sup> According to that doctrine, employees act as parts of a corporation only when working within the scope of their employment and intending to benefit the corporation.<sup>89</sup> Controversy remains about whether *respondeat superior* correctly defines corporate synchronic identity—whether as a matter of metaphysics<sup>90</sup> or of sound policy.<sup>91</sup>

This Article focuses on a different question of personal identity: “diachronic identity.” While synchronic identity refers to what a person is at a single moment, diachronic identity looks across time.<sup>92</sup>

**Diachronic Identity:** If  $T_1$  and  $T_2$  are two different times, and A exists at  $T_1$ , and B exists at  $T_2$ , then A is diachronically identical to B if and only if they are the same thing (albeit at different times).

Synchronic identity draws a line around something, separating it from the world, whereas diachronic identity draws a line between past and present, describing when something starts, when it ends, and when it changes so much that it becomes something new. One famous illustration of the difficulties of diachronic identity is the ship of the ancient Greek hero, Theseus.<sup>93</sup> At the end of every adventure, Theseus’s crew inspected the ship and replaced worn parts.<sup>94</sup> After many years, not a single part of the original ship remained; everything had been replaced.<sup>95</sup> Was it still the same ship despite having none of its original parts? If different, at which point did it change?

Diachronic identity of people is, like synchronic identity, an essential concern for criminal justice.<sup>96</sup> Punishment always comes sometime after a

<sup>87</sup> N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493–94 (1909).

<sup>88</sup> See, e.g., The “Scotland,” 105 U.S. 24, 30–31 (1882) (declaring that *respondeat superior* pertains to the corporations); Phila. & Reading R.R. Co. v. Derby, 55 U.S. (14 How.) 468, 486–87 (1853) (describing *respondeat superior*); RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006) (defining *respondeat superior*).

<sup>89</sup> JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 157 (6th ed., 2016) (indicating that corporations are only liable for their agents’ acts while the agents are acting in the scope of actual or apparent authority and with some purpose to benefit the corporation).

<sup>90</sup> John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1345 (2009).

<sup>91</sup> Diamantis, *supra* note 68, at 2057–58 (arguing that *respondeat superior* has little effect in criminal law due to the modern corporate setting of diminished employee responsibility).

<sup>92</sup> Gallois, *supra* note 76, § 1 (“By diachronic identity we mean an identity holding between something existing at one time and something existing at another.”).

<sup>93</sup> PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS 8 (R. M. Hutchins ed., 1952).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Peter A. French, *Complicity: That Moral Monster, Troubling Matters*, 10 CRIM. L. & PHIL. 575, 579 (2016) (“Usually the crucial question for diachronic responsibility is whether the agent whose responsibility for A at  $t_2$  (or at any  $t_1 + n$ ) is to be assessed as the same agent who was synchronically responsible for A at  $t_1$ .”).



crime is committed<sup>97</sup> (though science fiction writers<sup>98</sup> and theorists<sup>99</sup> imagine different possibilities). This means that there will always be a temporal gap between the two events. According to the identity principle,<sup>100</sup> the state must ensure that the present-day person it sanctions is the same as the past person who committed the crime.<sup>101</sup> This is a question of diachronic identity. As explained below, there are compelling philosophical and psychological reasons to think that personal identity is not stable, especially over long periods of time.

To get a sense of the issue and the stakes, consider again an analogy to the corporate person. Corporations can change in many more ways than natural people: they can merge with other corporations, spin off divisions, change headquarters, and gain and lose shareholders/directors/managers.<sup>102</sup> Suppose, for example, Corporation A commits an as-yet-undiscovered crime and then merges with Corporation B. Upon uncovering the crime, the law must say whether the composite corporation is identical to A, and hence liable for its crimes, or identical to B, and hence not liable.<sup>103</sup> Corporate law uses the doctrine of successor liability to answer the question of diachronic corporate identity. A corporation could change every one of its shareholders<sup>104</sup> or its employees<sup>105</sup> and remain the same corporation so far as corporate criminal law is concerned. In the case of a merger, the law considers the resulting corporation to

<sup>97</sup> John J. DiIulio, Jr., *Help Wanted: Economists, Crime and Public Policy*, 10 J. ECON. PERSP. 3, 16–17 (1996) (discussing some young men’s difficulty in delaying present gratification to avoid punishment for their wrongs); John S. Strahorn, Jr., *Criminology and the Law of Guilt*, 84 U. PA. L. REV. 491, 491–97 (1936) (explaining the commonalities between the theories of punishment, including guilt following some act worthy of punishment).

<sup>98</sup> See Anthony Lane, *Who Will Have Dunit*, NEW YORKER (June 23, 2002), <https://www.newyorker.com/magazine/2002/07/01/whowillhavedunit> [<https://perma.cc/98EU-P5TG>] (reviewing the film *Minority Report*, which was adapted from a short story that depicts a futuristic world where the state can predict a murder before it happens and punish those for their intent to murder).

<sup>99</sup> See, e.g., Gabriel S. Mendlow, *Why Is It Wrong to Punish Thought?*, 127 YALE L.J. 2342, 2345 (2018) (stating that criminal thoughts are as precarious as criminal action and justify punishment).

<sup>100</sup> See *supra* notes 72–99 and accompanying text.

<sup>101</sup> See *infra* notes 173–232 and accompanying text.

<sup>102</sup> See generally Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REG. 1, 4 (2019) (discussing the various ways corporations can change their identities).

<sup>103</sup> ELLEN S. PODGOR ET AL., *WHITE COLLAR CRIME* 42 (2d ed. 2018) (“Whether via dissolution, bankruptcy, mergers, or sales, the original corporation may no longer be present and it may be necessary to determine whether the criminal matter can proceed.”).

<sup>104</sup> *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (“A corporation and its stockholders are generally to be treated as separate entities.”); 19 C.J.S. *Corporations* § 804 (2019) (“A change in ownership and control of a corporate defendant does not preclude corporate criminal liability for offenses committed prior to that change.”).

<sup>105</sup> *Respondeat superior* makes no exception for former employees. See, e.g., Hiroko Tabuchi et al., *6 Volkswagen Executives Charged as Company Pleads Guilty in Emissions Case*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/business/volkswagen-diesel-vw-settlement-charges-criminal.html> [<https://perma.cc/R4MQ-5TFQ>] (explaining that Volkswagen was prosecuted based on acts of former officers).

be identical to *both* A and B—and hence liable for the past acts of both.<sup>106</sup> Refusing to acknowledge the possibility for a break in corporate identity is not only metaphysically unsound,<sup>107</sup> but also has bad consequences. Successor liability thwarts criminal justice (by sanctioning unsuspecting shareholders for other corporations’ misconduct)<sup>108</sup> and undermines basic policy objectives, such as encouraging corporations to self-report.<sup>109</sup>

Criminal law undermines its own objectives by paying insufficient attention to diachronic identity for natural people. Philosophers offer two main perspectives.<sup>110</sup> One perspective subscribes to:

**Bodily Continuity:** Two people at different times are the same person if they have the same body.<sup>111</sup>

This class of views captures some intuitive judgments about personal identity.<sup>112</sup> It explains, for example, the intuition that everyone was once a fetus and may someday become elderly. Criminal law often seems to assume a bodily continuity view. The trial process concludes that if a present-day person has

<sup>106</sup> See DEL. CODE ANN. tit. 8, § 259 (2011 & Supp. 2018) (“[A]ll rights of creditors and . . . liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.”); *United States v. Alamo Bank of Tex.*, 880 F.2d 828, 830 (5th Cir. 1989) (holding that a corporation “cannot escape punishment by merging with [another corporation] and taking [its] corporate persona”); MODEL BUS. CORP. ACT § 11.07(4) (AM. BAR ASS’N 2016) (“[A]ll debts, obligations and other liabilities of each domestic or foreign corporation or eligible entity that is a party to the merger, other than the survivor, are debts, obligations or liabilities of the survivor . . .”).

<sup>107</sup> See Mihailis E. Diamantis, *Corporate Essence and Identity in Criminal Law*, 154 J. BUS. ETHICS 955, 964–65 (2018) (arguing that a newly merged or spun-off corporation from a criminal corporation should be held criminally responsible, despite a corporate entity change, if its essential criminal identity persists).

<sup>108</sup> Diamantis, *supra* note 102, at 19–20.

<sup>109</sup> *Id.* at 18–19.

<sup>110</sup> 22 PERSONAL IDENTITY, at vii–viii (Ellen Frankel Paul et al. eds., 2005). There is actually a third class of views—soul-based approaches—that say that a person is eternally identical to their immaterial and indestructible soul. See, e.g., BUTLER, *supra* note 26 (stating that personal identity requires consciousness); Reid, *supra* note 26, at 264 (“My personal identity, therefore, implies the continued existence of that indivisible thing which I call myself.”). Because these have fallen out of favor in contemporary philosophy, I do not discuss them here.

<sup>111</sup> See, e.g., ERIC T. OLSON, THE HUMAN ANIMAL: PERSONAL IDENTITY WITHOUT PSYCHOLOGY 16 (1997) (“I would put biology in place of psychology, and one’s biological life in place of one’s mind, in determining what it takes for us to persist: a biological approach to personal identity.”); Judith Jarvis Thomson, *People and Their Bodies*, in READING PARFIT 202, 202 (Johnathan Dancy ed., 1997) (“The simplest view of what people are is that they are their bodies.”); B.A.O. Williams, *Personal Identity and Individuation*, 57 PROC. ARISTOTELIAN SOC’Y 229, 230 (1957) (“[B]odily identity is always a necessary condition of personal identity.”).

<sup>112</sup> See OLSON, *supra* note 111, at 11–21 (arguing throughout that personal identity rests in the biological organism).

the same fingerprints, DNA, and face as a past person, she must be that person.<sup>113</sup> Congress and many states have passed statutes allowing prosecutors to file so-called “John Doe indictments,” which identify an otherwise unknown defendant solely by her DNA profile.<sup>114</sup> When authorities eventually (perhaps decades later) find the person with matching DNA, that person is substituted by name into the indictment.<sup>115</sup> This approach only makes sense if diachronic identity tracks bodily continuity.

Bodily continuity may provide a serviceable heuristic for diachronic identity over short time periods. Its day-to-day utility may explain why it seems intuitive. For example, if someone visits the laundromat to pick up her dry cleaning, she readily assumes that the person who looks like the person she handed her dry-cleaning to the day before is that same person. A person’s body helps us pick her out of the crowd, and the probability that an identity-altering change occurred within any twenty-four hour period is very small.

Considering cases that reach beyond day-to-day life, however, can put serious strain on the intuitive plausibility of bodily-continuity views. As criminal law recognizes, after a person dies, her body remains, but the person does not.<sup>116</sup> Death tends to exempt one from prosecution. Cases of dissociative identity disorder present another challenge: two or more people, distinct from each other, inhabit the same body.<sup>117</sup> Again, criminal law recognizes this. Some courts will not convict a defendant with dissociative identity disorder if the personality in control at the time of the crime differs from the one in control at the time of trial.<sup>118</sup>

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<sup>113</sup> Joseph Peterson et al., *The Role and Impact of Forensic Evidence in the Criminal Justice Process*, NAT’L INST. OF JUST., 11–12 (2010) <https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf> [<https://perma.cc/AH23-VQFA>] (extensively studying the role forensic evidence plays in criminal trials).

<sup>114</sup> Scott Akehurst-Moore, *An Appropriate Balance? A Survey and Critique of State and Federal DNA Indictment and Tolling Statutes*, 6 J. HIGH TECH. L. 213, 242–47 (2006); see, e.g., Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 18 U.S.C. § 3282 (2012) (allowing an indictment of an individual whose identity is unknown but who has a DNA profile); Justice for All Act of 2004, 18 U.S.C. § 3297 (2012) (“In a case in which DNA . . . implicates an identified person in the commission of a felony, no statute of limitations . . . shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.”).

<sup>115</sup> See, e.g., *Commonwealth v. Dixon*, 938 N.E.2d 878, 883 (Mass. 2010) (stating that the suspect was indicted with his DNA profile acting as a “placeholder” until an identity was found).

<sup>116</sup> Some philosophers dispute this claim. See, e.g., David Mackie, *Personal Identity and Dead People*, 95 PHIL. STUD.: INT’L J. PHIL. ANALYTIC TRADITION 219, 219 (1999) (“I am not the first to claim that people can continue to exist, as corpses, after their deaths.”).

<sup>117</sup> Saks, *supra* note 60, at 408 (arguing that those suffering from multiple personality disorder “seem to consist of different people”).

<sup>118</sup> See, e.g., *United States v. Denny-Shaffer*, 2 F.3d 999, 1016–17 (10th Cir. 1993) (finding that there was enough evidence to show the defendant suffered from multiple personality disorder and, as a result, did not meet the necessary *mens rea* of the statute); *Parker v. State*, 597 S.W.2d 586, 587, 589

The most persuasive critique of bodily continuity views may come from intuition-pumping narratives like the Netflix series “Altered Carbon.” In the show, people’s psychological traits are loaded in digital format on small disks called “stacks,” which can be removed from their “sleeves” (i.e. bodies) and inserted into new ones.<sup>119</sup> Seamlessly, the audience tracks characters even as they move from one body to the next, changing age and sex.<sup>120</sup> Science fiction writers<sup>121</sup> and philosophers<sup>122</sup> have long drawn on similar themes of digitized consciousness or brain-swapping experiments. Under the strain of such arguments, philosophers today generally disfavor bodily continuity views.<sup>123</sup>

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(Ark. 1980) (affirming the defendant’s conviction because the trial judge properly found that the defendant failed to prove her defense that she was legally insane because it was her other personality that committed the crime); *see also* IAN HACKING, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND THE SCIENCES OF MEMORY* 48–50 (1995) (wondering to what extent multiples should be criminally responsible); JENNIFER RADDEN, *DIVIDED MINDS AND SUCCESSIVE SELVES: ETHICAL ISSUES IN DISORDERS OF IDENTITY AND PERSONALITY* 140–42 (1996) (discussing whether it is fair to hold a multiple who did not participate in the crime liable); Stephen E. Braude, *Multiple Personality and Moral Responsibility*, 3 PHIL., PSYCHIATRY, & PSYCHOL. 37, 48 (1996) (pointing out that courts must consider the issue of when a person with multiple personality disorder should be held criminally liable for the persuasions of their alternative personalities); Walter Sinnott-Armstrong & Stephen Behnke, *Criminal Law and Multiple Personality Disorder: The Vexing Problems of Personhood and Responsibility*, 10 S. CAL. INTERDISC. L.J. 277, 279 (2001) (stating that depending on which personality is dominant at the time of the crime helps determine whether a person should be held criminally responsible); Kathleen V. Wilkes, *Multiple Personality and Personal Identity*, 32 BRITISH J. PHIL. SCI. 331, 344 (1981) (“Applying these considerations to [a person with multiple personality disorder], we see that the various personalities were *not* counted as persons at all . . . despite the fact that each could be blamed or praised for her own activities but not for those of the others.”).

<sup>119</sup> *Altered Carbon: Out of the Past*, NETFLIX.COM, <https://www.netflix.com/watch/80097140?tcx=1%2C0%2C%2C%2C> [<https://perma.cc/6DE2-Y4G5>].

<sup>120</sup> *Id.*

<sup>121</sup> *See, e.g.*, Anthony Lane, “*Ghost in the Shell*” and “*Graduation*,” *NEW YORKER* (Mar. 31, 2017), <https://www.newyorker.com/magazine/2017/04/10/ghost-in-the-shell-and-graduation-reviews> [<https://perma.cc/3K9E-BDUH>] (describing the movie *Ghost in the Shell*, which features a future world in which consciousness has been digitized).

<sup>122</sup> *See, e.g.*, Locke, *supra* note 12, at 41 (posing the question of whether a person has the same identity after a total change in physical composition); Peter Unger, *Survival of the Sentient*, in *PHILOSOPHICAL PERSPECTIVES* 325, 328 (James Tomberlin ed., 2000) (describing brain-swapping scenarios); Bernard Williams, *The Self and the Future*, 79 PHIL. REV. 161, 161 (1970) (presenting an imagined plot of two people switching bodies).

<sup>123</sup> For present-day criminal law, bodily continuity may remain relevant to, but not determinative of personal identity. In the real world, where people’s brains tend to stay in their heads and consciousness remains biologically encoded, bodily continuity may still serve as a *necessary* condition for personal identity—if two people do not have the same body, then they must be different people. Under this approach, a DNA match between a defendant and a past criminal cannot be dispositive of guilt, but a DNA mismatch would be dispositive of innocence. *See* THE INNOCENCE PROJECT, <https://www.innocenceproject.org/about/> [<https://perma.cc/2MNQ-JXUA>] (“The Innocence Project . . . exonerates the wrongly convicted through DNA testing and reforms the criminal justice system to prevent future injustice.”).

Philosophers of diachronic personal identity<sup>124</sup> prefer to look for a psychological relationship between past and present selves.<sup>125</sup> By focusing on psychology, these views can explain why death terminates identity (psychology ceases), how multiple personalities can inhabit one body (the alternate personalities are psychologically discrete), and why intuitions about identity follow “stacks” rather than “sleeves.” Identity theorists who focus on psychological relationships differ regarding which psychological traits and relationships they think are relevant for establishing diachronic identity. For example, one traditional approach, commonly traced to John Locke, looks to memory—an earlier person is identical to a later person if the latter can remember having been the former.<sup>126</sup>

Psychological approaches to diachronic personal identity, however, also face possible pathologies. Focusing on memory as an identity-making connection, one famous objection points out that the view can lead to transitivity failures that violate the logical structure of the identity relationship.<sup>127</sup> For example, suppose that a teen, T, remembers being a child, C. Suppose further that adult, A, remembers being T, but cannot remember anything about her childhood. According to the memory criterion, A is the same person as T, T is the same person as C, but (impossibly) A is not the same person as C.

There are different strategies to solving such transitivity failures. The most prominent approach is to distinguish between two different ways psychological traits might tie together temporal parts of the same person.<sup>128</sup> One is:

Psychological Connectedness: An earlier person is psychologically connected to a later person if the latter has her psychological state largely because of the psychological state the former was in.<sup>129</sup>

Connectedness is like the relationship between adjacent links in a steel chain. In the above example, T is psychologically connected (by memory) to C because T’s memories are due to C’s experiences. For the same reason, A is psychologically connected (by memory) to T. A and C, however, are not psychologically connected (none of A’s memories are due to C’s experiences). It should be noted that because psychological connectedness is not a transitive

<sup>124</sup> Olson, *supra* note 74, § 3 (“The most popular [approaches among philosophers when answering questions about personal identity] are *psychological-continuity views*.”).

<sup>125</sup> See, e.g., Parfit, *supra* note 74, at 14–18 (discussing the role of memory in personal identity); Sydney Shoemaker, *Persons and Their Pasts*, 7 AM. PHIL. Q. 269, 284 (1970) (stating that a person’s memory is vital in assessing self-identity).

<sup>126</sup> David P. Behan, *Locke on Persons and Personal Identity*, 9 CANADIAN J. PHIL. 53, 55 (1979).

<sup>127</sup> John Perry, *The Problem of Personal Identity*, in PERSONAL IDENTITY, *supra* note 12, at 10–12.

<sup>128</sup> Sydney Shoemaker, *Personal Identity: A Materialist’s Account*, in PERSONAL IDENTITY 67, 77–79 (Sydney Shoemaker and Richard Swinburne eds., 1984).

<sup>129</sup> DEREK PARFIT, REASONS AND PERSONS 204–05 (1984).

relationship, it cannot, strictly speaking, be a criterion of formal identity. Nevertheless, it may still be what we really care about when we, albeit confusedly, ask whether two people at different times are the “same.”

The second relevant psychological relationship that philosophers distinguish is:

Psychological Continuity: An earlier person is psychologically continuous with a later person if a chain of psychologically connected people links them together.<sup>130</sup>

Continuity is like the relationship that all links in a single steel chain have to each other. In the above example, C, T, and A are all psychologically continuous with each other. A and C are psychologically continuous because they are linked by connections to T. If a senior citizen S can recall being A but not being T or C, S would nonetheless be psychologically continuous with all three prior states.

The distinction between continuity and connectedness may help resolve transitivity failures. This is because “personal identity” may refer ambiguously to either psychological connectedness or psychological continuity depending on the context. Only continuity is a transitive relationship; connectedness is not. The traditional formulation of the memory criterion runs into transitivity failures because it conceives of identity solely in terms of connectedness, which is not a transitive relationship.

Assuming psychological accounts of diachronic identity are preferable, the relative roles of connectedness and continuity remain debatable. So far as holding present-day people responsible for past acts is concerned—as the criminal law does when it convicts and punishes—most theorists seem to accept that psychological connectedness is the more important relationship.<sup>131</sup> Where the framing question is whether a present-day person is identical to a past criminal, transitivity failures are not a concern—there are only two relevant time frames, and three are needed for a transitivity failure.

There are strong intuitions backing the relative importance of connectedness for responsibility attribution. Imagine that a person commits a crime and then mentally degenerates over several years—forgetting memories, losing independent desires, shedding any idiosyncratic personality traits—until she becomes a borderline case of a person. The present person and the past criminal are fully continuous, but very loosely connected, if connected at all. Despite full continuity, the strong intuition is that punishing the present-day per-

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<sup>130</sup> *Id.* at 204–06.

<sup>131</sup> *Id.* at 326 (“When some convict is now less closely connected to himself at the time of his crime, he deserved less punishment. If the connections are very weak, he may deserve none.”).

son would be inappropriate. One might reply that the better explanation of this intuition is that the present-day person is not competent to be punished. Now imagine, however, that a doctor administers a medicine to the person so that she regains competence, but does not regain her former psychology—she forms memories, aspirations, and personality anew. The newly-competent person would still be fully continuous with the former criminal, but the strong intuition remains that punishment for the past crime would be inappropriate.<sup>132</sup>

Accordingly, the remainder of this Article assumes that some type of psychological connectedness is the relevant criterion for diachronic personal identity in criminal law.

### B. *The Psychology*

One danger of purely philosophical methods is that they can lose their grounding in reality. Recent empirical data, however, confirms that people's ordinary intuitions support the philosophical view that diachronic identity is about psychological connections.<sup>133</sup> For example, in one recent study, participants were asked about two versions of a scenario in which "Jim" underwent a procedure to transplant his brain into a new body.<sup>134</sup> In one version of the scenario, Jim's memories were preserved and in another they were erased during the transplant.<sup>135</sup> Subjects were asked whether the patient who woke up was "still Jim," and reported in the first version that he was, despite changing bod-

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<sup>132</sup> Annette Dufner offers another compelling illustration:

Imagine we are trying to determine the extent to which the punishment of two different dementia patients in the earlier stages of the disease is justified. The first patient has clear recollections of having plotted and committed the crime, but there is a brief time period in between the crime and the present for which the patient is already drawing a complete blank. The second patient also remembers the crime, and there is no period of amnesia in between the crime and the present time. The first case differs from the second in an important respect. In the first case, there is a direct *connection* to the crime, but no *continuity* between the present and the time of the crime. Continuity is a transitive notion. If there is a period in someone's past that the patient does not even in principle have the capacity to remember anymore, then there is no transitive chain, and therefore no continuity anymore.

Dufner, *supra* note 62, at 149.

<sup>133</sup> Shaun Nichols & Michael Bruno, *Intuitions About Personal Identity: An Empirical Study*, 23 PHIL. PSYCHOL. 293, 307 (2010) ("Over the course of our experiments, we found that intuitions favoring a psychological approach to personal identity are resilient across significant changes in the cases. Those intuitions also converge with the judgments people make when simply asked an abstract question about what is required for persistence.").

<sup>134</sup> Sergey Blok et al., *Individuals and Their Concepts*, in CATEGORIZATION INSIDE AND OUTSIDE THE LABORATORY 127, 133 (Woo-kyoung Ahn et al. eds., 2005).

<sup>135</sup> *Id.* at 133–34.

ies.<sup>136</sup> Subsequent studies confirm this result for similar scenarios presented from a first-personal (rather than third-personal) perspective.<sup>137</sup> Researchers also asked participants, in the abstract, what matters for personal identity.<sup>138</sup> The responses show that connected psychological states such as memory, personality traits, beliefs, and values can all play a role.<sup>139</sup>

If diachronic personal identity is a matter of psychological connectedness, then available data confirms the first major thesis of this Article: Everyone's personal identity changes over time.<sup>140</sup> All psychological connections between future and past selves dissipate with time. Casual observation is confirmation enough that some psychological states—such as desires, intentions, and ambitions—are inherently unstable. These states form, persist, and expire after they are satisfied. Other mental states, like memories, are more durable by nature. Still, they have a half-life. People lose memories all the time, and the older the memory, the more likely it is to go unremembered.<sup>141</sup> All things being equal, people remember more about yesterday than about a day a month ago, and more about a day last month than a day last decade. People also form new memories daily—short, medium, and long term—as they have new experiences and learn new things. Because these mental states, despite lasting for some period, are nonetheless in constant flux, whatever psychological connection they provide between past and present selves must grow more attenuated with time. This is not to deny that some of these mental states may last a lifetime. Someone may always long for her childhood home or recall her father's embrace. Still, the total number of these psychological connections diminishes over time.

Even connections among more stable psychological features—like characterological traits and the personalities, values, and preferences that underlie them—continuously evolve throughout life.<sup>142</sup> The study introduced at the start

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<sup>136</sup> *Id.* at 134–35.

<sup>137</sup> Nichols & Bruno, *supra* note 133, at 299–300.

<sup>138</sup> *Id.* at 304.

<sup>139</sup> *Id.*; see also Richard M. Gale, *A Note on Personal Identity and Bodily Continuity*, 29 ANALYSIS 193, 194 (1969) (“It seems to me that our ordinary concept of personal identity is not founded upon any logical one-one relation, but upon a number of non-logical one-one relations, such as being bodily continuous with, having the same ostensible memories (personality, character, abilities, skills, physical appearance, *etc.*) as. No one of these relations is either necessary or sufficient, but satisfaction of several of them is necessary and sufficient for personal identity.”).

<sup>140</sup> See *supra* notes 133–139 and accompanying text.

<sup>141</sup> Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561, 1604 (2006) (“Memories have a natural rate of decay . . .”).

<sup>142</sup> See Daniel K. Mroczek & Christian M. Kolarz, *The Effect of Age on Positive and Negative Aspect: A Developmental Perspective on Happiness*, 75 J. PERSONALITY & SOC. PSYCHOL. 1333, 1333 (1998) (explaining that personality traits must be considered to fully assess the relationship between age and happiness); Kimberly M. Prenda & Margie E. Lachman, *Planning for the Future: A*



of this Article asked thousands of participants, aged twenty-eight to sixty-eight, to report how much they had changed in the previous ten years.<sup>143</sup> There were three questions, one each about personality, values, and preferences.<sup>144</sup> All age groups reported for all three questions that they had changed.<sup>145</sup> Although the magnitude of the reported change decreased for older age groups, it never reached zero.<sup>146</sup> The researchers verified that the personal changes participants reported were not a product of faulty memory.<sup>147</sup> To measure this, the researchers compared their results to a large preexisting database (the MacArthur Foundation Survey of Midlife Development in the United States)<sup>148</sup> of personality test responses that people had filled out at ten-year intervals.<sup>149</sup> The two sets of results matched.<sup>150</sup> Numerous other studies demonstrate other predictable psychological developments that naturally occur as people age, such as changing levels of emotional regulation<sup>151</sup> or changing positive/negative affect.<sup>152</sup>

Not all psychological connections matter equally for identity. Social psychologists working in this area build on previous results in cognitive science about identity more generally.<sup>153</sup> One early discovery was that people naturally distinguish between “accidental” and “essential” traits, where only changes to

*Life Management Strategy for Increasing Control and Life Satisfaction in Adulthood*, 16 PSYCHOL. & AGING 206, 206 (2001) (summarizing a study on how future planning changes over time based upon a number of factors including age and feelings of control).

<sup>143</sup> Quoidbach et al., *supra* note 6, at 96.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 97.

<sup>146</sup> *Id.* at 96–97.

<sup>147</sup> *Id.* at 96 (considering whether it was “possible that the discrepancy . . . was due entirely to the erroneous memory of reporters”).

<sup>148</sup> MARGIE E. LACHMAN & SUZANNE L. WEAVER, THE MIDLIFE DEVELOPMENT INVENTORY (MIDI) PERSONALITY SCALES: SCALE CONSTRUCTION AND SCORING 2 (1997), <https://www.brandeis.edu/psychology/lachman/pdfs/midi-personality-scales.pdf> [<https://perma.cc/8T3U-QYR7>] (“The MIDI includes 6 personality trait scales: Neuroticism, Extraversion, Openness to Experience, Conscientiousness, Agreeableness (Communion), and Agency. These traits were measured using self-ratings of 30 adjectives.”). See generally *History & Overview of MIDUS*, MIDLIFE IN THE UNITED STATES: A NATIONAL LONGITUDINAL STUDY OF HEALTH & WELL-BEING, <http://midus.wisc.edu/scopeofstudy.php> [<https://perma.cc/NSE3-DMS7>] (providing background on the Midlife Development in the United States survey).

<sup>149</sup> Quoidbach et al., *supra* note 6, at 96.

<sup>150</sup> *Id.* (“[T]he magnitude of reported personality change in our sample was almost identical to the magnitude of actual personality change in the MIDUS sample . . .”).

<sup>151</sup> See, e.g., Gisela Labouvie-Vief & Fredda Blanchard-Fields, *Cognitive Ageing and Psychological Growth*, 2 AGEING & SOC’Y 183, 195–99 (1982) (discussing how adults seek logical solutions when confronting the complexities, nuances, and ambiguities present in various moral dilemmas).

<sup>152</sup> See, e.g., Mroczek & Kolarz, *supra* note 142, at 1333 (discussing how age related to positive or negative effects in the study).

<sup>153</sup> Lance J. Rips, Sergey Blok, & George Newman, *Tracing the Identity of Objects*, 113 PSYCHOL. REV. 1, 2–7 (2006).

the latter amount to changes in identity.<sup>154</sup> Accidental traits tend to be surface level, whereas essential traits tend to be deeper and possibly hidden from view.<sup>155</sup> Essential traits also tend to be those that are causally efficacious.<sup>156</sup> Further studies revealed that normative valence—i.e. whether a trait is perceived as being good or bad, rather than neutral—also plays an important role in identity.<sup>157</sup> Traits that have a normative valence are more likely to be judged as essential. Combining the insights about the importance of causal efficacy and normative valence suggests that essential psychological traits are those that cause people to do good or bad things. In other words, the most important psychological connections for establishing diachronic identity are connected traits bearing on moral character.<sup>158</sup>

Recent studies confirm precisely this.<sup>159</sup> Earlier results from studies asking people to assess changes in their own identity were mixed.<sup>160</sup> Neuroscientific studies show how complex the process of self-assessment is,<sup>161</sup> and how the end of history illusion<sup>162</sup> and other mental impairments can confound people's first-personal judgments.<sup>163</sup> Third-personal assessments about change and stability in others' identities are more reliable. Initial work on third-personal

<sup>154</sup> Nina Strohminger & Shaun Nichols, *The Essential Moral Self*, 131 COGNITION 159, 159–60 (2014).

<sup>155</sup> Sergey Blok et al., *Inferences About Personal Identity*, in PROCEEDINGS OF THE TWENTY-THIRD ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 80, 84–85 (Johanna D. Moore & Keith Stenning eds., 2001); D. Geoffrey Hall et al., *Preschoolers' Use of Form Class Cues to Learn Descriptive Proper Names*, 74 CHILD DEV. 1547, 1547 (2003).

<sup>156</sup> Lance J. Rips & Susan J. Hespos, *Divisions of the Physical World: Concepts of Objects and Substances*, 141 PSYCHOL. BULL. 786, 789 (2015).

<sup>157</sup> George E. Newman, Paul Bloom, & Joshua Knobe, *Value Judgments and the True Self*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 203, 203 (2014); George Newman, Julian De Freitas & Joshua Knobe, *Beliefs About the True Self Explain Asymmetries Based on Moral Judgment*, 39 COGNITIVE SCI. 96, 99 (2015).

<sup>158</sup> See Michael Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 45 (1989) (“I think it is obvious that, in some sense, we are responsible for being the kind of people that we are—i.e. for our characters. This includes responsibility for traits like greediness and honesty . . . .”); Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 100 (1996) (“[B]ad character in this context means a settled disposition . . . to commit acts that violate the law.” (internal quotation marks and footnote omitted)).

<sup>159</sup> See, e.g., Nina Strohminger & Shaun Nichols, *Neurodegeneration and Identity*, 26 PSYCHOL. SCI. 1469, 1469 (2015) (stating that moral traits are the most important aspect of identity).

<sup>160</sup> See generally Roy F. Baumeister, *The Self*, in HANDBOOK OF SOCIAL PSYCHOLOGY 680, 724 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (“The executive function of the self is a mechanism that initiates, alters, and directs behavior. . . . Social psychology has not understood the executive function as well as other aspects of the self.”).

<sup>161</sup> Lindsey J. Powell et al., *Dissociable Neural Substrates for Agentic Versus Conceptual Representations of Self*, 22 J. COGNITIVE NEUROSCI. 2186, 2193 (2009).

<sup>162</sup> Quoidbach et al., *supra* note 6, at 96.

<sup>163</sup> M.L. Eustache et al., *Sense of Identity in Advanced Alzheimer's Dementia: A Cognitive Dissociation Between Sameness and Selfhood?*, 22 CONSCIOUSNESS & COGNITION 1456, 1456 (2013).

assessments showed that moral character plays a central role in forming people's synchronic conceptions of each other.<sup>164</sup> The most recent work focusing on diachronic identity establishes:

The Essential-Moral-Self Hypothesis: A person's "moral capacities are the most central part of [her] identity;"<sup>165</sup> a sufficient change in these amounts to a change in personal identity.

Researchers asked family members of patients suffering from neurodegenerative disorders such as amyotrophic lateral sclerosis (ALS), Alzheimer's disease, and frontotemporal dementia, whether the patients were "still the same person underneath."<sup>166</sup> ALS and frontotemporal dementia result in moral impairments, like increased dishonesty and reduced empathy.<sup>167</sup> Alzheimer's patients suffer a number of other impairments, for example, to memory, but not moral impairments.<sup>168</sup> Family members also filled out a Morality-Personality Scale survey about the patient, reflecting how much the patient had changed across sixty-four different traits.<sup>169</sup> The researchers discovered a strong correlation between reported identity change and change in "moral" traits—like honesty, altruism, trustworthiness, and humility<sup>170</sup>—but not with respect to "non-moral" traits—like amnesia, disorientation, compulsivity, hygiene, and depression.<sup>171</sup> The researchers concluded: "the moral faculty contributes to perceived identity more than does memory or nonpsychological neural faculties such as voluntary motor control . . . ."<sup>172</sup>

To summarize, this Part is working toward a criterion for determining when a present-day defendant is identical to a past criminal for purposes of conviction and punishment. The most promising philosophical perspective on diachronic personal identity focuses on psychological connections between past and present selves. This is enough to show that people's identities are al-

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<sup>164</sup> Geoffrey P. Goodwin et al., *Moral Character Predominates in Person Perception and Evaluation*, 106 J. PERSONALITY & SOC. PSYCHOL. 148, 148 (2013); Bogdan Wojciszke et al., *On the Dominance of Moral Categories in Impression Formation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1251, 1251 (1998).

<sup>165</sup> See Jessie Prinz, *An Empirical Case for Motivational Internalism*, in MOTIVATIONAL INTERNALISM 61, 80–82 (Gunnar Björnsson et al. eds., 2015) (discussing how moral judgment motivates actions and choices). See generally Strohminger & Nichols, *supra* note 159.

<sup>166</sup> Strohminger & Nichols, *supra* note 159, at 1470, 1472.

<sup>167</sup> Steven W. Anderson et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCI. 1032, 1032 (1999).

<sup>168</sup> Strohminger & Nichols, *supra* note 159, at 1475–76.

<sup>169</sup> *Id.* at 1471.

<sup>170</sup> *Id.* at 1469, 1475–76.

<sup>171</sup> *Id.* at 1475. With respect to amyotrophic lateral sclerosis, there was also a weaker positive effect for aphasia. *Id.* at 1477.

<sup>172</sup> *Id.* at 1472.

ways changing, given that time reduces the psychological connections everyone has to their past selves. Recent work also shows that connections among moral character traits play the largest role in identity assessments. As such, a present-day defendant and a past criminal are more likely to be identical if they are connected by a sufficient number of moral character traits. “Sufficient” is a vague term, and Section I.C discusses what it should mean in the context of criminal law.

### *C. As Adapted to Criminal Law*

How is the above philosophy and psychology relevant for the criminal law? This Article is not a discourse about the most metaphysically defensible theory of personal identity. Rather, it is concerned with what approach to personal identity is best suited to the concerns of criminal law. That is to say, the question is not, “when are people at different times actually different people?” but, “when should criminal law treat them as being different?” Of course, if they *really are* different, then criminal law should treat them as such. Nevertheless, short of a present-day person losing every last psychological connection to the criminal they once were, it is unclear where the line marking “real difference” starts.

Vernon Madison, whose case opened this Article, seems to be very different from the man he was three decades ago despite the fact that he still has *some* psychological connections to his earlier self. Madison could not remember his crime but still remembered his mother, who was alive at the time.<sup>173</sup> Madison’s case illustrates two points. First, a person does not have to lose all psychological connection to a past self to have a different identity. Second, relationships of psychological connectedness, and hence of personal identity, come in degrees: a person can retain more or fewer connections to their past selves.<sup>174</sup> It is unlikely that philosophers and psychologists will ever find a persuasive account of where, metaphysically speaking, the absolute line between same and different selves lies. Perhaps no such line exists. Rather than rigid line drawing, the question should focus on whether the psychological connections between a past criminal and a present-day defendant are *sufficiently attenuated* that criminal law should treat the defendant as being different from the past criminal.

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<sup>173</sup> *Madison II*, 851 F.3d at 1179.

<sup>174</sup> See Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 990 (1992) (“Given the self’s scalarity, we can think of defenses in continuous and relative terms . . .”).

## 1. An Account Limited to Criminal Law

Although the motivation for this Article stems from the science and theory of personal identity generally, it is concerned with identity in just one context—criminal law. There is no pretense that the conclusions reached below hold meaningfully outside of criminal law; indeed, there is good reason to suspect they do not.<sup>175</sup> Depending on the normative context of evaluation, a different sense of personal identity may be more appropriate.<sup>176</sup>

Up to this Section, “personal identity” has been discussed as a seemingly unitary concept. It may be more appropriate, however, to talk about “personal identities.” Social psychologists have long understood that people assume different identities in different contexts.<sup>177</sup> Who a person is as an employee may differ dramatically from who she is as a parent, friend, or lover.<sup>178</sup> Multiple identities may coincide within a single body, and they must be tracked by reference to the context in which they arise. In pathological cases like dissociative identity disorder, these identities are psychologically sealed off from each other, so that one identity cannot access experiences or memories of the other.<sup>179</sup> In the ordinary case, the multiple socio-psychological identities are more porous. For example, an employee may longingly recall the last weekend she spent with her child.

Sometimes, a traumatic event can alter a person so jarringly that it causes a break in many of his identities.<sup>180</sup> Phineas Gage’s story is an example that continues to fascinate neuroscientists.<sup>181</sup> Gage was a railroad worker in the nineteenth century who, while tamping some black powder into a hole, acci-

<sup>175</sup> Indeed, other criminal law scholars discussing identity seem to agree. *See, e.g.*, Saks, *supra* note 60, at 389 (asking, “what are our criteria of personal identity *for purposes of the criminal law?*” (emphasis added)).

<sup>176</sup> Ferzan, *supra* note 61, at 380 (proposing to “disambiguate identity questions which might yield different answers to distinct normative questions”).

<sup>177</sup> *See generally* MICHAEL A. HOGG & DOMINIC ABRAMS, *SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES* 6–7 (1988) (offering a comprehensive account of the social identity approach first developed by Henri Tajfel and John Turner); Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7–9 (Stephen Worchel & William G. Austin eds., 2d ed. 1986) (discussing how various social settings and groups can yield “extreme” behavior).

<sup>178</sup> *See* WALTER MISCHEL, *PERSONALITY AND ASSESSMENT* 156–57 (1968) (arguing that, counter to the widely held belief, an individual’s behavior may be highly dependent on the situation she is in).

<sup>179</sup> *See* Sarah K. Fields, *Multiple Personality Disorder and the Legal System*, 46 WASH. U. J. URB. & CONTEMP. L. 261, 262–68 (1994) (explaining the psychological details of multiple personality disorder).

<sup>180</sup> *See, e.g.*, Steve Twomey, *Phineas Gage: Neuroscience’s Most Famous Patient*, SMITHSONIAN MAG. (Jan. 2010), <https://www.smithsonianmag.com/history/phineas-gage-neurosciences-most-famous-patient-11390067/> [<https://perma.cc/F8PC-B4U5>].

<sup>181</sup> *Id.*

dentally caused an explosion that blasted a steel rod through his skull.<sup>182</sup> Although he miraculously survived, he had irreparable brain damage.<sup>183</sup> Before the accident, Gage “possessed a well-balanced mind, and was looked upon by those who knew him as a shrewd, smart business man, very energetic and persistent in executing all his plans of operation.”<sup>184</sup> After recovery, “his physical health [wa]s good,”<sup>185</sup> but his personality had altered so much “that his friends and acquaintances said he was ‘no longer Gage.’”<sup>186</sup> He became “fitful, irreverent, indulging at times in the grossest profanity (which was not previously his custom), manifesting but little deference for his fellows . . . pertinaciously obstinate, yet capricious and vacillating.”<sup>187</sup> It seemed that little of the pre-accident Gage remained, regardless of social context.

It may also be possible for just one social identity to change, leaving the others intact. This is likely the more ordinary case, happening in response to familiar and relatively pedestrian life developments. The super-star employee may begin to miss his child so much that he becomes unreliable at work to the point that his employer no longer recognizes him. The opposite may happen too, as the once playful and attentive father may find a new commitment to work and begin neglecting his child.

A person’s various legal identities can also change independently of one another. Witness protection is perhaps the most striking example. Through the United States Federal Witness Protection Program, the United States Marshal has issued new legal identities and documents to approximately twenty-thousand endangered witnesses and their family members.<sup>188</sup> There is no pretense that the program literally changes every legal aspect of who the participants are; however, in many legal respects, people protected by the program become new people.

Bankruptcy is another familiar example.<sup>189</sup> The language of bankruptcy has always been about “death,” “rebirth,” “fresh starts,” and “clean breaks.”<sup>190</sup>

<sup>182</sup> JOHN M. HARLOW, RECOVERY FROM THE PASSAGE OF AN IRON BAR THROUGH THE HEAD 4–5 (1868), [https://archive.org/stream/66210360R.nlm.nih.gov/66210360R\\_djvu.txt](https://archive.org/stream/66210360R.nlm.nih.gov/66210360R_djvu.txt) [<https://perma.cc/6G2H-K4VU>].

<sup>183</sup> *Id.* at 17 (“[The tamping rod’s] passage and exit must have produced serious lesion of the brain substance—the anterior and middle left lobes of the cerebrum—disintegrating and pulpifying it, drawing out a considerable quantity of it at the opening in the top of the head, and lacerating unquestionably the upper aspect of the falx major and the superior longitudinal sinus.”).

<sup>184</sup> *Id.* at 14.

<sup>185</sup> *Id.* at 13.

<sup>186</sup> *Id.* at 14.

<sup>187</sup> *Id.* at 13.

<sup>188</sup> 18 U.S.C. §§ 3521–3528 (2012); *Witness Security Program*, U.S. MARSHALS SERVICE, <https://www.usmarshals.gov/witsec/> [<https://perma.cc/HPP6-GW3M>].

<sup>189</sup> 11 U.S.C. §§ 101–1330 (2012).

Functionally, bankruptcy offers a break in financial identity by dissociating a debtor from earlier debts, making them uncollectible.<sup>191</sup> This affords a debtor a break in financial legal identity as a borrower. Although the bankruptcy debtor may receive a “new life free from debt[s],”<sup>192</sup> other legal identities remain intact. Post-bankruptcy, the debtor is still the spouse and aunt she was before bankruptcy, with all the rights and duties those legal statuses bring. Her identity as a potential criminal defendant also remains unchanged—bankruptcy does not discharge her liability for earlier criminal mischief.

Just as bankruptcy law only purports to track a person’s financial identity, the proposals developed below only purport to track a person’s *criminal* identity. Considerations that bear on whether criminal law should recognize a change in identity may not translate to civil contexts. These bodies of law have fundamentally different purposes.<sup>193</sup> Considerations of justice and deterrence are central to criminal law,<sup>194</sup> whereas civil law attends more to matters of social efficiency,<sup>195</sup> like optimal risk allocation<sup>196</sup> or efficient breach.<sup>197</sup> As such, the

<sup>190</sup> *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015) (stating that bankruptcy “allows a debtor to make a clean break from his financial past”); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) (“[A] main purpose of the act, [is] to aid the unfortunate debtor by giving him a fresh start in life, free from debts . . . .”); BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 255 (2002) (“The fundamental dilemma of bankruptcy law has always been whether it is about death or rebirth.”). See generally Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) (explaining how freedom from debts gives an individual a new beginning).

<sup>191</sup> *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (“To that end [of providing a fresh start], the Bankruptcy Code contains broad provisions for the discharge of debts, subject to exceptions.”).

<sup>192</sup> *In re Cacioli*, 463 F.3d 229, 234 (2d Cir. 2006).

<sup>193</sup> See, e.g., Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2442, 2444 (1995) (“Notwithstanding [a] modern blurring of civil and criminal law, criminal law retains certain distinguishing core features. The most significant is its sanction, from which most of criminal law’s other features flow. . . . [C]riminal law is more appropriate for redressing violations of absolute duties, whereas tort law is better suited for redressing violations of relative duties.”).

<sup>194</sup> See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950, 983 (2003) (explaining that deterrence has been a primary focus of criminal law reform and discussing its relationship to another central concern of criminal law—justice).

<sup>195</sup> See, e.g., Michael D. Green, *Negligence = Economic Efficiency: Doubts >*, 75 TEX. L. REV. 1605, 1605–06 (1997) (“The *Restatement (Second) of Torts* . . . provid[es] a risk-benefit test for unreasonable conduct and negligence.”). But see Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982) (“[T]he considerations that ground a claim to recompense need not coincide with those that ground the obligation to repair.”); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1648 (2009) (“I have outlined a personal sovereignty theory of the foundation of promissory morality and argued that it largely reconciles contract and promise. It explains why contract law’s failure to enforce some promises is consistent with the demands of promissory morality, and why most of the doctrines alleged to diverge from promissory morality in fact correspond to it. . . . [M]any of contract law’s remedial default rules can be under-

notion of personal identity appropriate to criminal law and its interests may be very different from that which is appropriate to other contexts.

Criminal Identity (general statement): Diachronic identity defined by reference to those features of a person, the persistence over time of which are relevant to criminal law's purposes.

A break in criminal identity need not signal a break in a person's identity as a tortfeasor or a contractual counterparty—she may still be liable for past negligence and promises made in those capacities. In what follows below, any mention of “personal identity” refers to the notion pertinent to criminal law, without carrying any implication for other legal or social “identities” a person may have.

Philosophically speaking, once talk of a person's various identities (plural) enters the picture, the conversation might have shifted from the formal meaning of identity to the so-called “characterization” meaning.<sup>198</sup> Philosophers are careful to distinguish the two notions of identity.<sup>199</sup> The latter approach views the self as a cumulative process through time that, at any given moment, has various characterizations.<sup>200</sup> So long as the self-constituting process remains the same, formal identity is maintained, even as various characterizations of the self change. On such a view, criminal identity would be one characterization of the self—along with identity as a spouse, a parent, an employee, et cetera—that can change even as the underlying self remains the same.<sup>201</sup> This Article is about criminal identity, and not about the self (if such exists) that *has* a criminal identity. So far as the criminal law is concerned, criminal identity is the only identity that matters. For simplicity, in what follows, I speak of “personal identity” as though it reduces to criminal identity. In

stood as enforcing the corresponding remedial moral rights and duties to which breach of promise gives rise.”).

<sup>196</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.”).

<sup>197</sup> See Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 977–78 (2005) (explaining how some condone breaching a contract when it is more efficient to do so than fulfilling the contract).

<sup>198</sup> See generally MARYA SCHECHTMAN, *THE CONSTITUTION OF SELVES* 73–78 (1996) (distinguishing formal identity from the characterization meaning of identity).

<sup>199</sup> KATHLEEN WALLACE, *THE NETWORK SELF: RELATION, PROCESS, AND PERSONAL IDENTITY* 63 (2019).

<sup>200</sup> See generally *id.* at 66–79 (discussing the theory of “numerical unity” where the “self is one process, such that its past is a constituent of, relevant of, who or what the self is in the present”).

<sup>201</sup> See generally *id.*



different contexts, “personal identity” might more aptly correspond to different characterizations of the self or to the self itself (again, if such exists).

## 2. Criminal Disposition as Criminal Identity

It may not be immediately apparent why diachronic personal identity should be a pressing concern for criminal law. Does the law not get by fairly well in relative ignorance of the philosophy and psychology of personal identity? Criminal law’s ordinary process ties personal identity to bodily continuity: punishing the right person is a matter of finding whose body committed the crime.<sup>202</sup> Where short time intervals are concerned, bodily continuity generally brings with it the psychological connections that are the other candidate criteria for identifying past and present selves.<sup>203</sup> The cases where bodily continuity obviously fails as a criterion—for example, dissociative identity disorder or personality-altering brain trauma—seem to be rare enough that no special doctrines have been developed to handle them.

If the arguments of Sections I.A and I.B are correct, the apparent reliability of the bodily continuity as a criterion for personal identity is mistaken. The end of history illusion shows that we fall into error when making predictions about our future identities. Like all illusions, the error is not self-presenting. We cannot see that it is an error, even after it is pointed out to us. The present concern is that “criminal law[’s] presuppos[ition] that we are one person over time,” is the product of a similar illusion.<sup>204</sup> Just as we cannot observe our own future identities, we cannot directly observe anyone else’s past or present identities. If we entertain an illusory confidence about the stability of our own unobservable future identities, perhaps we mislead ourselves about other people’s unobservable past identities.

For the criminal law to adhere to the identity principle and punish only those who commit crimes, it must confront the possibility that bodily continui-

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<sup>202</sup> Ferzan, *supra* note 61, at 384 (“[W]e see at least a very thin metaphysical account of personal identity that is presupposed by the criminal law. The defendant’s body must be the same body as that of the person who committed the offense. We look to fingerprints and DNA to see if this is so. If the defendant’s body is not the body of the person who committed the offense, then the defendant did not commit the offense.”).

<sup>203</sup> Saks, *supra* note 60, at 404 (“[S]ince bodily continuity supports psychological continuity in the real world, common sense need not distinguish, much less decide between the Psychological Criteria and the Bodily Criterion of Personal Identity.”). Philosophers have raised fanciful examples where the relationship would fail over short time intervals. *See, e.g.*, THOMAS NAGEL, MORTAL QUESTIONS 148–51, 154–64 (1979) (discussing transitivity problems that arise for hemispheric division, an epilepsy treatment that involves severing the corpus callosum, which connects the two halves of the brain); Parfit, *supra* note 74, at 4–6 (discussing the disposition of personal identity following a brain transplant or disconnection of brain hemispheres).

<sup>204</sup> Ferzan, *supra* note 61, at 374.

ty is an unreliable guide to personal identity.<sup>205</sup> If the law is prepared to set aside bodily continuity for cases of severe brain damage and dissociative identity disorders,<sup>206</sup> it should be equally prepared to do so when natural processes, by greater or lesser degrees, bring about similar changes.<sup>207</sup> As discussed, a greater focus on psychological criteria for diachronic identity better aligns criminal law with people's considered intuitions. The few criminal law scholars who have addressed personal identity almost uniformly agree that psychological criteria—particularly psychological connections—should be the focus of concern.<sup>208</sup> This Article proceeds on that assumption.

The question confronting criminal law is not, “when do our naturally evolving personal identities make us into categorically different people?” Rather it is, “when do we become different *enough* so that criminal law loses its legitimate interest in us for past crimes?” In other words, “how long and what does it take for a person to lose her criminal identity?” Psychological connectiveness, even when limited to connections of moral character, comes in degrees.<sup>209</sup> A present-day person can have more or fewer psychological connections with a past self, and those connections generally dissipate as the time gap increases. Supposing, as suggested above, that a person's criminal identity changes at some point before the last psychological connection is severed, the issue enters the world of vagueness where bright metaphysical lines prove evasive. If criminal law is to confront the challenge posed by personal identity, it needs a framework for ordering the vague landscape.<sup>210</sup> Where metaphysics is vague, normative considerations—in this case, those relevant to criminal

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<sup>205</sup> Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105, 109 (1999) (“The most important moral signature of retribution is its exceptionless protection of the innocent from conviction.”).

<sup>206</sup> Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded (“Brainwashed”) Defendant*, 63 MINN. L. REV. 1, 17–19 (1978) (arguing that for dissociative identity disorder criminal cases, it does not matter that the two personalities inhabit the same body); see also Allen Buchanan, *Advance Directives and the Personal Identity Problem*, 17 PHIL. & PUB. AFF. 277, 280–81 (1988) (arguing that entering a permanent vegetative state ends a person's identity).

<sup>207</sup> Saks, *supra* note 60, at 412 (“Does our intuition change critically when unconscious psychological mechanisms . . . instead of an outsider, bring about the alteration?”).

<sup>208</sup> See, e.g., Dresser, *supra* note 67, at 427–44; Saks, *supra* note 60, at 410 (“[W]e care, for criminality, about persons as psychological beings, not as bodies.”); Snead, *supra* note 59, at 1227 (“[M]emory is crucial to the integration and awareness of one's *personal identity*.”). Perhaps the lone dissenting voice is Joel Feinberg. 3 JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW: HARM TO SELF* 83 (1986), (“[T]he earlier self and the later are the same self, not morally distinct persons, but rather one person at different times.”).

<sup>209</sup> Dan-Cohen, *supra* note 174, at 965 (“Scalarity contrasts with a binary, all-or-nothing conception of the self. . . . Whatever the glue that keeps the self together, be it memory, consciousness, or even bodily continuity, it is more likely to have a variable force.”) (footnote omitted).

<sup>210</sup> Ferzan, *supra* note 61, at 368 (“Is there a point in time at which one person is not sufficiently the same person so that she may not be fairly held accountable for her prior actions?”).

law—can help fill in the gaps.<sup>211</sup> Just as what we are responsible for depends on who and what we are, what and who we are can depend on what we are responsible for.<sup>212</sup>

A theory of criminal identity that looks to psychological connections must answer two questions: what psychological connections count, and when are there enough (or few enough) of them that a present-day person is, so far as criminal law should be concerned, identical to (or different from) a past criminal? As to the first question, this Article has pointed to empirical studies showing that people's intuitions tend to give primacy of place among psychological connections to those that relate to moral character. If, as Oliver Wendell Holmes observed, "[t]he law can ask no better justification than the deepest instincts of man,"<sup>213</sup> this should be enough to make a *prima facie* case.

Of course, the legitimate scope of criminal law's interest in personal moral character cannot be entirely open-ended. It must be circumscribed by the legitimate scope of criminal law. In general, theorists tend to think that there are some matters of merely private morality (for example, being courteous to strangers or attending church regularly) and others where criminal law appropriately gets involved (for example, stealing things or hitting people). This Article does not seek to enter the frays of the debate about what behavior legitimately interests criminal law. Instead, this Article proposes that criminal law's legitimate interest in personal character is limited to those character traits that dispose people to do things in which criminal law has a legitimate interest. For example, physical assault is surely one of those things. Character traits that dispose someone to commit physical assault, if not checked by counterbalancing traits of restraint, are of interest to criminal law. Rudeness is surely not one of those things, so character traits that dispose someone to disregard common social graces are of no legitimate interest to criminal law. The sorts of psychological connections that matter for a theory of criminal identity, then, are character traits that dispose people to criminal conduct (legitimately defined).

The approach to criminal identity that is beginning to emerge has obvious resonances with character theories of punishment.<sup>214</sup> On these theories, the purpose of criminal law is to punish people whose criminal conduct manifests bad character. If, for some reason, seemingly criminal conduct does not provide evidence of a person's bad character—perhaps the person was acting under duress or with a reasonable mistake of fact—then criminal law can have no

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<sup>211</sup> *Id.* at 381 ("I submit that the best approach to personal identity is to sever the metaphysical question from the normative one.").

<sup>212</sup> See Dan-Cohen, *supra* note 174, at 961 (discussing how responsibility and personal identity intersect).

<sup>213</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

<sup>214</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 799–807 (1978).

interest in prosecuting her.<sup>215</sup> Similarly, it should follow that if a present-day person no longer shares character traits with a past criminal, the past criminal's misconduct cannot provide evidence of the present-day person's bad character.<sup>216</sup>

Process of elimination also strengthens the case that character traits are the most plausible anchor for criminal identity. Some mental states—like intentions and desires—are too fragile to identify present with past criminals. The criminal act itself may extinguish whatever intentions and desires motivated it. At the opposite extreme, some criminal law theorists have proposed anchoring criminal identity to a so-called “formal agency.”<sup>217</sup> The pseudo-religious notions that cloak this supposedly inextinguishable psychological process, however, cannot have much claim on criminal law in a pluralist society. A more common intermediate approach focuses instead on memories.<sup>218</sup> Although memories have the formal advantage of some durability without being inextinguishable, the case for tying identity to memories is hard to motivate. Why would memory matter for attributing past crimes to present-day people? Imagine a person who has such a casual attitude toward her horrific crimes that she soon forgets them. It is implausible that she now deserves no punishment due to that fact alone.

Among the salient psychological alternatives discussed in the literature, this leaves moral character as the most plausible tether for criminal identity, along with all the enduring personality traits, preferences, and value commitments that help constitute it.<sup>219</sup> Unlike intentions, character traits have some

<sup>215</sup> MODEL PENAL CODE I § 2.04 (discussing mistake of fact as a defense); *id.* § 2.09 (discussing the defense of duress).

<sup>216</sup> See Dan-Cohen, *supra* note 174, at 974 (“I am responsible for my character in the sense that my character’s emanations and manifestations are simply generated by *me*.”); Ferzan, *supra* note 61, at 389 (“When an individual develops a new character that is different from her character when she committed the crime, she is ‘not herself’ and does not deserve blame.”).

<sup>217</sup> See, e.g., ALAN BRUDNER, PUNISHMENT AND FREEDOM 69 (2009) (“Whatever fundamental changes characters undergo, the identity that persists through them is that of their formal agency . . . . [B]ecause the agent is so abstract and characterless, it can persist throughout changes of character, so that judicial punishment is not undeserved just because the character clothing the agent has changed or because the agent chose an action unreflective of its character.”).

<sup>218</sup> See, e.g., Locke, *supra* note 12, at 49 (“For whatsoever any substance has thought or done, which I cannot recollect, and by my consciousness make my own thought and action, it will no more belong to me, whether a part of me thought or did it, than if it had been thought or done by any other immaterial being anywhere existing.”); Snead, *supra* note 59, at 1198 (“[T]his Article will argue that there is a deep relationship between memory and the foundational principles justifying how punishment should be distributed.”).

<sup>219</sup> Saks, *supra* note 60, at 412 (“In discussing psychological personhood I have focused on continuity of memory, as well as of other psychological characteristics: beliefs, intentions, traits of personality. . . . But . . . character, and not just the momentary mental state animating an act, plays an important role in criminality.”).

stability. Unlike formal agency, character can be scientifically described. And unlike memory, the moral and criminal justice significance of character is plain to see: “asserting subject-responsibility for character affirms [one’s] identity with [one’s] character as that by virtue of which [one is] the author of certain objects and events,” including crimes.<sup>220</sup> The person with a casual attitude toward horrific crimes she soon forgets is still condemnable *precisely because* her casual attitude continues to manifest a morally repulsive endorsement of the past conduct and a present disposition to reoffend.

Having settled on criminal character traits as the relevant psychological connections, the second question that needs answering for a complete theory of criminal identity is: when are there few enough connections between a present person and a past criminal such that criminal law should recognize a break in identity? As noted above, previous theorists have supposed that a criminal must undergo drastic psychological changes as a consequence of tragedy or disease to lose her criminal identity. Although tragedy and disease can alter character, so can natural developments over the course of life. Additionally, it is not obvious that the magnitude of the psychological change always needs to be drastic. Of course, at the extreme end of the spectrum, a change sufficient to remove any criminal characterological disposition should be sufficient to extinguish criminal identity. It may be an open question whether any characterological change short of that could also be sufficient—a weakening rather than a removal of disposition. As a general rule, the extent of the necessary change should be a function of criminal law’s normative interest in the crime at issue. The more serious the criminal violation, the greater criminal law’s interest, and the more characterological change should be required to signal a break in identity. The less serious, the less needed change.

In sum, the account of diachronic criminal identity defended here for use in criminal law is as follows:

Criminal Identity (detailed statement): If a present-day person retains enough of the character traits that disposed a past person to commit a crime, the two share a criminal identity. As a general rule, if a present-day person retains none of those traits, she is not identical to the past criminal. Also, as a general rule, the degree of characterological change required for a break in criminal identity is inversely related to the magnitude of criminal law’s normative interest in the underlying crime.

The implications of this account of criminal identity for criminal law are potentially vast. For it to have purchase, however, it will help to show that a sig-

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<sup>220</sup> Dan-Cohen, *supra* note 174, at 974.

nificant aspect of criminal law already embraces it. A preexisting inroad could serve as a catalyst for change. Part II uncovers that inroad.<sup>221</sup> First, though, this Part closes by addressing an important objection.

### 3. One Important Criminal Policy Objection

One concern about tying criminal identity to connections of moral character—indeed, about any theory of criminal identity according to which it can change—is that it opens the door to stratagems for avoiding punishment.<sup>222</sup> As one paper put the challenge to a related theory of identity: “If a continuous personality were required for personal identity, and if personal identity were required for punishment, then one could escape punishment by changing one’s personality after committing a crime. Criminals who plan such an escape should not be excused.”<sup>223</sup> Imagine, for example, a pill that could change a person’s criminal identity. Should criminals be able to avoid punishment simply by taking it?<sup>224</sup> And if they could, would that not undermine criminal justice?

There are two lines of response. One is the path of practical compromise. The objection focuses on “planned” changes in identity. Perhaps those changes should be treated differently from others that occur naturally, or through unexpected disease or tragedy. This approach would preserve the general significance of criminal identity, without incentivizing strategic criminal behavior.

A stronger line of response would confront the objection head on. The objection rests on a question-begging confusion. In asking whether someone, after taking the pill, should be excused from punishment for their past crimes, it assumes that the person’s identity survives the medication. According to the theory developed here, the person would—for all intents and purposes relevant to criminal law—become a different person. There would then be no crime from which they could be excused—a different person committed it. Although, in a sense, this approach would frustrate some objectives of criminal law—a past crime would go unpunished—that result is not unusual in criminal law. Self-destruction has always been, and always will be, an effective means of escaping criminal justice.

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<sup>221</sup> See *infra* notes 233–420 and accompanying text.

<sup>222</sup> I respond to a similar sort of objection in the context of corporate criminals. See Diamantis, *supra* note 102, at 28–29 (advocating for using successor identity in corporate criminal law and explaining that it would not increase corporations’ abilities to avoid punishment).

<sup>223</sup> Sinnott-Armstrong & Behnke, *supra* note 118, at 291.

<sup>224</sup> Such a pill may not be so far-fetched, at least so far as memory-based theories of identity are concerned. See generally Kolber, *supra* note 141, at 1603, 1615 (discussing memory altering medications and personal identity).

The objector might criticize the analogy between the character-altering pill and suicide. The pill only changes criminal identity, something considerably short of suicide (destruction of the body) or the termination of all psychological connections (only characterological connections would change). Maybe this introduces unique criminal justice and strategic concerns that suicide does not.

The best approach for developing a response is to step systematically through criminal law's most important concerns. Criminal law is typically thought to have four basic purposes: retribution, deterrence, rehabilitation, and incapacitation.<sup>225</sup> As argued, any retributive worry is impossible to motivate without begging the question of whether the same person is available for punishment. So far as rehabilitation and incapacitation are concerned, someone who transforms their criminal identity—whether by taking a pill or otherwise—has already completed criminal law's work for it. A break in criminal identity, by definition, involves a removal of criminal disposition. That leaves nothing in need of reform or incapacitation.

The most salient criminal justice concern with the present proposal is deterrence. If people can commit crimes and avoid punishment by changing their criminal identity, will they really be deterred? This concern assumes that criminals will not hesitate to take a character-altering pill if it helps them escape punishment. It is not certain, however, that this is a decision people would take lightly. Even though character alteration is certainly something short of biological death, it is a profound alteration of identity. If criminals are attached to their sense of self, the prospect of significantly changing who they are will not be an attractive alternative.

To the extent criminals *are* willing to take the criminal-identity-altering pill, giving them strong incentives to take the pill *may be the best way to achieve the goals of deterrence*. Consider available statistics on first-time and repeat crimes. The numbers behind high recidivism rates are familiar: “68 percent of released state prisoners [a]re arrested within three years, 79 percent within six years and 83 percent within nine years.”<sup>226</sup> Somewhat less familiar is the figure these recidivism rates necessarily imply: most of the crime committed in the United States is repeat crime. According to the most recent statistics from the United States Sentencing Commission, approximately fifty-five

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<sup>225</sup> LAFAVE & SCOTT, *supra* note 80, § 1.5(a).

<sup>226</sup> *5 out of 6 State Prisoners Were Arrested Within 9 Years of Their Release*, BUREAU OF JUST. STAT. (May 23, 2018), <https://www.bjs.gov/content/pub/press/18supr9yfup0514pr.cfm> [<https://perma.cc/26NX-SENU>].

percent of all arrestees have two or more criminal history points.<sup>227</sup> Only some fraction of the remaining forty-five percent has no criminal history points.<sup>228</sup> Having even one criminal history point means that a criminal has previously been convicted and a) the conviction was for a crime of violence, b) the conviction resulted in imprisonment of at least sixty days, or c) the conviction resulted in a criminal justice sentence during the pendency of which the criminal committed another crime.<sup>229</sup>

If most crimes are repeat crimes, an effective preventive strategy would focus on repeat offenses rather than first offenses. Criminal law already tries to do this to some extent by imposing increasingly harsh sentences for people with longer criminal histories.<sup>230</sup> The high recidivism rates, however, show just how ineffective this strategy is in isolation. Its preventive effects could be enhanced if it were paired with positive incentives for those criminals who could credibly demonstrate the sort of change necessary for a break in criminal identity—a lost disposition toward criminality. If a pill could make this process easy and credible, so much the better for assuring the effectiveness of the policy. The availability of a criminal-identity-altering pill combined with excusing any criminals who take it could lead to a dramatic reduction in crime.

One might worry that the pill, even if it reduces repeat crime, might increase the number of first-time offenses. To offset a reduction in the number of repeat offenses, the number of first-time offenders would have to increase by more than double.<sup>231</sup> In other words, the number of people who presently refrain from criminal conduct only because they are deterred by the threat of sanction and who are willing to take a character-altering pill would have to exceed the number of present first-time offenders. As others have persuasively argued, though, the number of people who refrain from crime just because they are deterred by the threat of sanction is likely small; most people avoid crime because they agree that crime is wrong.<sup>232</sup> The portion of people who avoid crime just because they are deterred and who are also prepared to alter their identities in fundamental ways would necessarily be smaller still. So, the concern that the present theory of criminal identity would lead to a dramatic rise in first-time offenders is likely unfounded.

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<sup>227</sup> *The Criminal History of Federal Offenders*, U.S. SENT'G COMM'N 1, 9 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517\\_criminal-history.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180517_criminal-history.pdf) [<https://perma.cc/F2P9-UPBG>].

<sup>228</sup> *Id.* at 8.

<sup>229</sup> *Id.* at 7.

<sup>230</sup> *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL, § 5.A (2018) (providing a table that gives longer sentences for criminals with longer criminal histories).

<sup>231</sup> *The Criminal History of Federal Offenders*, *supra* note 227, at 8.

<sup>232</sup> *See* PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 206 (2013).



In short, the present theory of criminal identity would improve criminal law's effectiveness with respect to all its purposes, including reducing the incidence of crime. Seemingly paradoxically, the remainder of this Article argues that the present theory would accomplish this with fewer prosecutions and less punishment.

## II. STATUTES OF LIMITATIONS AS LIMITATIONS ON CRIMINAL IDENTITY

The fact that one in every eleven inmates is serving a life sentence is a stark reminder that criminal law frequently views personal identity in terms of bodily continuity.<sup>233</sup> Every U.S. jurisdiction (except Alaska) allows sentences of life without parole.<sup>234</sup> Until 2010, most states even permitted such sentences for juveniles convicted of non-homicide offenses.<sup>235</sup> By indefinitely imprisoning the same body, society seems to assume that it can indefinitely imprison the same person.

Are there any doctrinal threads that imply a different conclusion: that personal identity is linked to psychology and can change over time? Other scholars have expressed skepticism: "the picture of personal identity generally in place in our criminal justice system does not buy into the 'change in identity' theory."<sup>236</sup> This Part suggests that there is more room for optimism. In at least one important respect—a commitment to statutes of limitations—criminal law seems to countenance that people's identities can change over time. Courts and commentators almost universally regard statutes of limitations as policy compromises that conserve scarce justice resources and protect process integrity.<sup>237</sup> This Article argues, however, that traditional rationales cannot explain two basic features of statutes of limitations: that they bar prosecution and that more serious crimes have longer limitations periods.<sup>238</sup> The "identity limiting ac-

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<sup>233</sup> Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010). Of those serving life sentences, about thirty percent will never be eligible for parole. *Id.*

<sup>234</sup> *Id.* at 28.

<sup>235</sup> *Graham v. Florida*, 560 U.S. 48, 74 (2010), *as modified* (July 6, 2010) (holding that life sentences without the possibility of parole for juveniles are cruel and unusual); ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 32–33 (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf> [<https://perma.cc/4HN6-VCNX>]. See generally Leslie Patrice Wallace, "And I Don't Know Why It Is That You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in *Graham v. Florida* Now Requires States to Give Juveniles Hope for a Second Chance, 20 B.U. PUB. INT. L.J. 35, 78 (2010) (summarizing the effect *Graham v. Florida* will have on criminal law's treatment of juvenile crime).

<sup>236</sup> Flanders, *supra* note 16, at 465.

<sup>237</sup> ROBINSON, *supra* note 35, § 202(b).

<sup>238</sup> CHARLES DOYLE, CONG. RES. SERV., STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW, 1, 3 (2017), <https://fas.org/sgp/crs/misc/RL31253.pdf> [<https://perma.cc/6783->

count” of statutes of limitations, proposed below, handles both features easily. According to that account, statutes of limitations serve implicitly to recognize that criminal identity changes with time. After a period, it would be unjust to prosecute anyone for a past crime because doing so would necessarily target someone who is of no legitimate interest to the criminal justice system. If criminal law is willing to countenance the fact that criminal identity changes over time where statutes of limitations are concerned, this may be an opening for reform elsewhere.

### A. History and Background

Statutes of limitations are “law[s] that bar[] claims after a certain period of time passes after an injury.”<sup>239</sup> For civil actions, they trace back to Roman times.<sup>240</sup> Parliament passed the earliest Anglo-American statute of limitations in 1236; it applied only to actions for real property.<sup>241</sup> The civil statutes of limitations that would come in the following centuries prohibited actions depending on when they arose in relation to a single fixed date, like the coronation of a new king.<sup>242</sup> The Limitations Act of 1623 launched the modern approach to limitations on actions by specifying generally applicable *periods*, rather than *dates*, within which actions had to commence.<sup>243</sup>

The defining feature of modern criminal statutes of limitations is:

**First Basic Feature of Criminal Statutes of Limitations:** Once the limitations period runs after a crime, the state may not prosecute anyone for that crime.

Criminal statutes of limitations also trace back to Rome, which imposed a twenty-year limitations period for most prosecutions.<sup>244</sup> The common law never developed criminal statutes of limitations,<sup>245</sup> and England still has none that apply generally.<sup>246</sup> This is because of the enduring influence of the common

JTLC] (explaining that the seriousness of certain crimes provides the rationale for extending the statute of limitations beyond the typical five-year period).

<sup>239</sup> *Statute of Limitations*, LEGAL INFO INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/statute\\_of\\_limitations](https://www.law.cornell.edu/wex/statute_of_limitations) [<https://perma.cc/GT24-KVCW>].

<sup>240</sup> *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177–79 (1950).

<sup>241</sup> 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 81 (2d ed. 1898).

<sup>242</sup> *Developments in the Law: Statutes of Limitations*, *supra* note 240, at 1177.

<sup>243</sup> *Id.* at 1178.

<sup>244</sup> 1 FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* § 444a (7th ed. 1874).

<sup>245</sup> JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 160 (London, Valpy 1816).

<sup>246</sup> *Developments in the Law: Statutes of Limitations*, *supra* note 240, at 1179.

law doctrine, *quod nullum tempus occurrit regi*—time does not run against the King (in whose name criminal actions were brought).<sup>247</sup>

Despite English reluctance, criminal statutes of limitations have been a fixture of American law since early in its history.<sup>248</sup> Massachusetts had a one-year limitations period for most crimes as early as 1652.<sup>249</sup> New Jersey introduced its first criminal limitations period in 1796, soon after the American founding.<sup>250</sup> The forebear of the current federal statute of limitations was passed in 1790.<sup>251</sup> Now, almost every U.S. jurisdiction has general limitations periods applicable to all misdemeanors and felonies,<sup>252</sup> excepting murder<sup>253</sup> and other capital offenses.<sup>254</sup> Only South Carolina and Wyoming have no criminal limitations periods at all.<sup>255</sup> Five states—Kentucky,<sup>256</sup> Maryland,<sup>257</sup> North Carolina,<sup>258</sup> Virginia,<sup>259</sup> and West Virginia<sup>260</sup>—have limitations periods for misdemeanors, but no general limitations statute applicable to felonies. These five, however, still have limitations periods for selected felonies.<sup>261</sup>

<sup>247</sup> *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 96 (2006); 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 1–2 (London, MacMillan & Co. 1883) (“The maxim of our law has always been ‘Nullum tempus occurrit regi,’ and as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time.”).

<sup>248</sup> *See, e.g.*, N.J. REV. STAT. § 263 (1820) (enacted in 1796) (providing statutes of limitations for offenses other than murder); WILLIAM H. WHITMORE, THE COLONIAL LAWS OF MASSACHUSETTS 163 (1889) (stating that no one shall be indicted for a non-capital offense unless that indictment be within one year of the commission of the offense).

<sup>249</sup> WHITMORE, *supra* note 248, at 163.

<sup>250</sup> N.J. REV. STAT. § 263.

<sup>251</sup> 18 U.S.C. §§ 3281–3282 (2012) (setting limitations period of five years for all felonies except capital offenses); Crimes Act of 1790, § 32, 1 Stat. 112, 119 (setting limitations period of three years for capital offenses and two years for all others).

<sup>252</sup> ROBINSON, *supra* note 35, § 202(a).

<sup>253</sup> MODEL PENAL CODE I § 1.06(1) (“A prosecution for murder may be commenced at any time.”).

<sup>254</sup> *See, e.g.*, 18 U.S.C. § 3281 (“An indictment for any offense punishable by death may be found at any time without limitation.”); Gerald D. Robin & Richard H. Anson, *Is Time Running Out on Criminal Statutes of Limitations?*, 47 CRIM. L. BULL. 1, 2 (2011) (“Almost all states have prescribed limitations periods for the major felonies, expect [sic] for murder.”).

<sup>255</sup> Jocelyn B. Lamm, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2198 n.76 (1991) (“South Carolina and Wyoming have no statutes of limitations for any crimes . . .”).

<sup>256</sup> KY. REV. STAT. ANN. § 500.050 (LexisNexis 2013).

<sup>257</sup> MD. CODE ANN., CTS. & JUD. PROC. § 5-106 (LexisNexis 2013 & Supp. 2018).

<sup>258</sup> N.C. GEN. STAT. § 15-1 (2017).

<sup>259</sup> VA. CODE ANN. § 19.2-8 (2015 & Supp. 2019).

<sup>260</sup> W. VA. CODE § 61-11-9 (2019).

<sup>261</sup> *See, e.g.*, VA. CODE ANN. § 19.2-8 (providing limitations periods for selected felonies, including cruelty to animals and tax evasion).

For criminal statutes of limitations, the period begins to run from the time of the offense.<sup>262</sup> Courts mark the time of the offense from the moment the crime is complete,<sup>263</sup> i.e. “when every element occurs.”<sup>264</sup> The exceptions to this rule are “continuing offenses,”<sup>265</sup> such as conspiracy,<sup>266</sup> welfare fraud,<sup>267</sup> and failing to register as a sex offender.<sup>268</sup> For these, the limitations period begins to run “when the course of conduct or the defendant’s complicity therein is terminated.”<sup>269</sup> Calculating the expiry of a limitations period is not always a straightforward matter of counting days on a calendar. Various events and circumstances, such as the defendant fleeing from justice<sup>270</sup> or being absent from the jurisdiction,<sup>271</sup> can “toll” the limitations period, effectively extending it.

Few generalizations characterize the length of limitations periods. Although the periods for felonies tend to range from three to six years and for misdemeanors from one to three,<sup>272</sup> “there is considerable variation in statutes of limitations for identical crimes across jurisdictions within the United

<sup>262</sup> Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 229–30 (1982). Some jurisdictions utilize a “discover rule,” according to which “the limitation period commenc[es] when the crime is discovered as opposed to when the offense was committed.” Jodi Leibowitz, *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse*, 25 CARDOZO L. REV. 907, 915 (2003).

<sup>263</sup> *Pendergast v. United States*, 317 U.S. 412, 418 (1943) (“Statutes of limitations normally begin to run when the crime is complete.”).

<sup>264</sup> MODEL PENAL CODE I § 1.06(4).

<sup>265</sup> ROBINSON, *supra* note 35, § 202(c) (“[M]any jurisdictions explicitly provide that where the offense is a continuing one, that is, when it encompasses a continuing course of conduct, the period of limitation begins only after the defendant’s activities cease.”); Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 NW. J.L. & SOC. POL’Y 219, 221 (2012).

<sup>266</sup> *United States v. Kissel*, 218 U.S. 601, 605 (1910) (establishing that conspiracy could be a continuing offense).

<sup>267</sup> *John v. State*, 278 N.W.2d 235, 237 (Wis. Ct. App. 1979), *aff’d*, 291 N.W.2d 502 (Wis. 1980) (“This court concludes that [welfare fraud] must be construed to constitute a continuing offense.” (citation omitted)).

<sup>268</sup> George L. Blum, *Validity, Construction, and Application of State Statutes Imposing Criminal Penalties for Failure to Register as Required Under Sex Offender or Other Criminal Registration Statutes*, 33 A.L.R. 6th 91, § 2 (2008) (“[T]he courts . . . addressed the effect of the limitations period upon an action related to a registration duty and the impact of classifying such a duty as a ‘continuing offense.’”).

<sup>269</sup> MODEL PENAL CODE I § 1.06(4); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.5(a) (6th ed. 2017) (“Certain crimes are properly characterized as continuing offenses, and as to them the time begins to run only when the course of conduct or defendant’s complicity therein terminates.”).

<sup>270</sup> 18 U.S.C. § 3290 (2012) (“No statute of limitations shall extend to any person fleeing from justice.”).

<sup>271</sup> *United States v. Singleton*, 702 F.2d 1159, 1169 (D.C. Cir. 1983).

<sup>272</sup> LAFAVE ET AL., *supra* note 269, § 18.5(a).

States.”<sup>273</sup> For example, Ohio’s limitations period for arson is twenty years,<sup>274</sup> whereas Iowa’s is three.<sup>275</sup> Georgia has a fifteen-year statute of limitation for rape,<sup>276</sup> whereas Arkansas’ is six.<sup>277</sup>

There is, however, one universal feature of limitations periods in the United States:

Second Basic Feature of Criminal Statutes of Limitations: The “length of [the limitations period] increases as the seriousness of the offense rises.”<sup>278</sup>

For example, the Model Penal Code’s limitations periods range from a six-month period for petty misdemeanors up to six years for first-degree felonies.<sup>279</sup> This correlation between crime seriousness and length of limitations periods is so universal that it holds internationally across civil law jurisdictions as well.<sup>280</sup>

Only one paper, whose authors conducted an impressive cross-state survey, disputes the relationship between crime seriousness and period length.<sup>281</sup>

<sup>273</sup> Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 100 (2002).

<sup>274</sup> OHIO REV. CODE ANN. § 2901.13 (West 2009 & Supp. 2019) (listing aggravated arson as an offense in which prosecution “shall be barred unless it is commenced within twenty years after the offense is committed”); *id.* § 2909.02.

<sup>275</sup> IOWA CODE § 802.3 (2019) (“[A]n indictment or information for a felony or aggravated or serious misdemeanor shall be found within three years after its commission.”).

<sup>276</sup> GA. CODE ANN. § 17-3-1 (2013 & Supp. 2019) (“[P]rosecution for the crime of forcible rape shall be commenced within 15 years after the commission of the crime.”).

<sup>277</sup> ARK. CODE ANN. § 5-14-103(c)(1) (2013 & Supp. 2017) (defining rape as a Class Y felony); *id.* § 5-1-109(b)(1)(A) (giving a six-year statute of limitation to Class Y felonies).

<sup>278</sup> Rinat Kitai-Sangero, *Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations*, 61 DRAKE L. REV. 423, 428 (2013); *see* Handel v. Artukovic, 601 F. Supp. 1421, 1430 (C.D. Cal. 1985) (“[T]he length of the statute of limitations bears a necessary relation to the heinousness of the crime.”); Frank B. Ulmer, Note, *Using DNA Profiles to Obtain “John Doe” Arrest Warrants and Indictments*, 58 WASH. & LEE L. REV. 1585, 1611 n.165 (2001) (“[L]imitations periods are based primarily on the seriousness of the crime and the difficulties in bringing prosecution . . . .”); Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 636 (1954) (criticizing “the policy of relating the statutory period directly to the seriousness of the crime”) [hereinafter Note, *The Statute of Limitations*]; 1 NAT’L COMM’N ON REFORM OF FED. CRIM. LAWS, WORKING PAPERS 289 (1970) (discussing the widespread policy of “grading of periods in accordance with the severity of offenses”) [hereinafter WORKING PAPERS].

<sup>279</sup> MODEL PENAL CODE I § 1.06(2).

<sup>280</sup> *See, e.g.*, SCHWEIZERISCHES STRAFGESETZBUCH, CODE PENAL SUISSE, CODICE PENALE SVIZZERO [Swiss Criminal Code] § 78 (1998) (Switz.) (providing a range of limitations periods from three years for misdemeanors up to thirty years for crimes punishable by life imprisonment).

<sup>281</sup> Robin & Anson, *supra* note 254, at 13 (“The common belief that time limits imposed on prosecution by statutes of limitations are systematically and coherently related to crime severity finds little empirical support in this state-by-state survey of 11 major felonies and each state’s misdemeanor stat[utes] of limitation.”).

As the authors demonstrate, states often apply a single limitations period to felonies that, they argue, differ in their seriousness.<sup>282</sup> As they note, however, their results are likely due to the legislative shorthand of “lump[ing] together different offenses in the same broad ‘Class’ or ‘Degree’ category.”<sup>283</sup> When a state defines two felonies as being of the same degree, it presumptively sees them as being equally serious, i.e. as deserving similar punishment.<sup>284</sup> Therefore, it would make sense that the state would apply similar limitations periods to them both. As the study’s authors concede, all states uniformly apply shorter limitations periods to misdemeanors than to felonies.<sup>285</sup>

### B. Inadequacy of Traditional Justifications

“[W]hy is peace more desirable after twenty years than before?”<sup>286</sup> Oliver Wendell Holmes’ nonplussed question a century ago continues to perplex scholars today. The mere passage of time is unrelated to the traditional interests of criminal justice, such as retribution, deterrence, and rehabilitation.<sup>287</sup> The age of a crime, standing alone, has no direct bearing on whether it deserves punishment.<sup>288</sup> A rape that occurred ten years ago is just as reprehensible today. Deterring rape by punishing its incidence is just as important now as it was in the past.<sup>289</sup> Society has just as much interest in rehabilitating a sex offender, regardless of whether his criminal disposition arose yesterday or yesterday.<sup>290</sup>

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 16.

<sup>284</sup> MODEL PENAL CODE I § 6.03 (allocating fine magnitude to degree of offense); *id.* § 6.06 (keying term of imprisonment to magnitude to degree of offense).

<sup>285</sup> Robin & Anson, *supra* note 254, at 1 (“Statutes of limitations for misdemeanors are much shorter and more uniform across jurisdictions because almost all state legislatures consider misdemeanors to be categorically less serious offenses than felonies.”).

<sup>286</sup> Holmes, *supra* note 213, at 476.

<sup>287</sup> See 18 U.S.C. § 3553(a)(2) (2012) (detailing factors the courts may consider, such as “the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”); Alschuler, *supra* note 57, at 1 (listing “retribution, deterrence, incapacitation, and rehabilitation” as the “textbook purposes of criminal punishment”).

<sup>288</sup> Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 500–09 (1997) (laying out the argument against statutes of limitations and for adjudicating claims strictly on the merits).

<sup>289</sup> Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 413 (2010) (describing the decades-long efforts of federal, state, and local legislators to reduce the prevalence of sexual crimes).

<sup>290</sup> ROGER PRZYBYLSKI, U.S. DEP’T OF JUST., *RECIDIVISM OF ADULT SEXUAL OFFENDERS* 1, 4–5 (July 2015), <https://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf> [<https://perma.cc/SR2U-ZTXJ>] (stating that recidivism reduction must be a critical aspect of criminal justice and find-

Because statutes of limitation are keyed to time, but time seems irrelevant, they “always have vexed the philosophical mind.”<sup>291</sup> One of the leading commentators on statutes of limitations put the apparent absurdity of the situation in stark terms: although a criminal “has committed the offense, caused the harm sought to be prevented by the statute, and has no claim that his conduct is justified or excused, [he] may nonetheless have a defense.”<sup>292</sup> Congress has offered little justificatory insight; despite there being several statutory enactments—new limitations, extensions, modifications, et cetera—the legislative history is sparse.<sup>293</sup> Academic articles with titles referencing confusion, like “The Puzzling Purposes of Statutes of Limitations,”<sup>294</sup> predominate the literature, alongside calls to abolish criminal statutes of limitations entirely.<sup>295</sup> Even Congress itself, through its frequent extension of limitations periods for various crimes in the last few decades, may be evincing skepticism.<sup>296</sup>

And yet, as the Supreme Court has noted, “[s]tatutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. . . . An important public policy lies at their foundation.”<sup>297</sup> It is a public policy that statutes of limitations are uniquely positioned to serve. The other backstop to stale criminal charges—due process<sup>298</sup>—is a very weak safeguard.<sup>299</sup> Courts and scholars have tried to offer accounts of what the “important public policy” behind crim-

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ing that, although sexual recidivism rates are lower than recidivism for general crimes, certain types of sex offenders have different rates of recidivism and some may increase in time).

<sup>291</sup> Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 313 (1945).

<sup>292</sup> See Robinson, *supra* note 262, at 230.

<sup>293</sup> Powell, *supra* note 54, at 128 (“Congress has for the most part been silent about the basis for its decisions. Instead, the reasons for the rule have long been supplied by courts and commentators . . .”).

<sup>294</sup> Ochoa & Wistrich, *supra* note 288, at 453.

<sup>295</sup> See, e.g., PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN’T GIVE PEOPLE WHAT THEY DESERVE 60 (2006); Robin & Anson, *supra* note 254, at 1 (“This article contends that [statutes of limitations] should be abolished in their entirety because they unjustifiably protect culpable offenders.”).

<sup>296</sup> Powell, *supra* note 54, at 127 (“In general, the exceptions [extending criminal limitations periods] appear to be motivated only by a vague but firm notion that, when it comes to criminal periods of limitation, longer is better.”).

<sup>297</sup> Wood v. Carpenter, 101 U.S. 135, 139 (1879).

<sup>298</sup> U.S. CONST. amends. V, XIV.

<sup>299</sup> Powell, *supra* note 54, at 119 (“[T]he role of the Due Process Clause in protecting defendants against prejudicial delay is very limited.”). The defendant must show *both* that a pre-indictment delay caused actual prejudice *and* that the prosecution intentionally used the delay to secure a strategic advantage. United States v. Lovasco, 431 U.S. 783, 789 (1977); United States v. Marion, 404 U.S. 307, 324 (1971). Conceivably, a more robust reading of the demands of due process could take the place of statutes of limitations. Canada has adopted such an approach. R. v. L. (W.K.) [1991] 1 S.C.R. 1091, 1099 (“[P]rosecutions [in Canada] initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence.”).

inal statutes of limitations might be.<sup>300</sup> All seem to agree that whatever that public policy is, it must be unique to the criminal context because civil statutes of limitations serve different goals.<sup>301</sup>

Despite the absence of legislative history, statutes of limitations seem to “represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice.”<sup>302</sup> Available justifications for statutes of limitations fall into two categories: those according to which prosecuting old crimes is “unproductive for society”<sup>303</sup> and those according to which such prosecution is “unfair to the perpetrator.”<sup>304</sup> As the Supreme Court has noted: “Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. . . . [Others seek] to achieve a broader system-related goal, such as facilitating the administration of claims . . . or promoting judicial efficiency.”<sup>305</sup> According to both types of justification, the passage of time is not itself directly relevant to the interests of criminal justice; rather, time correlates with factors that are relevant to those interests. Regardless, as argued below, none of the available justifications can explain the two basic features of criminal statutes of limitations: that they prevent the state from punishing crime and that limitations periods are longer for more serious crimes.<sup>306</sup>

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<sup>300</sup> *Wood*, 101 U.S. at 139.

<sup>301</sup> Alan L. Adlestein, *Conflict of Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 259 (1995) (“The criminal limitations statute is only partially similar in form and purpose to its civil counterpart and is clearly different in its overall place and function in the law.”); *Developments in the Law: Statutes of Limitations*, *supra* note 240, at 1185–86 (“In ordinary private civil litigation, the public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse . . . . Somewhat different considerations present themselves in disputes between a private person and the sovereign.”).

<sup>302</sup> *Marion*, 404 U.S. at 322.

<sup>303</sup> Adlestein, *supra* note 301, at 220.

<sup>304</sup> *Id.*; see *Developments in the Law: Statutes of Limitations*, *supra* note 240, at 1186 (“Where the legislature puts a limit on criminal prosecutions, it recognizes the defendant’s special interest in not being compelled to put his freedom and his reputation at the hazard of what is likely to be the parol evidence of imperfectly remembered events, while at the same time it denies the social utility of punishing crimes long past.” (footnote omitted)).

<sup>305</sup> *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (citations omitted).

<sup>306</sup> Some scholars propose that these features should be modified. See, e.g., Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitations*, 50 WM. & MARY L. REV. 607, 611–13 (2008) (discussing the “serious flaws” of the current statutes of limitations system and their harm to justice and society). This Article takes statutes of limitations as they are and historically have been.



## 1. Prosecuting Old Crimes as Unfair to the Defendant

One group of justifications for statutes of limitations focuses on the potential unfairness to the defendant of prosecuting stale offenses.<sup>307</sup> These justifications emphasize that as time passes, a potential defendant's interest in being free from prosecution grows and eventually outweighs whatever interest the state could have in bringing the case. In the words of the Model Penal Code commentary, "[a]fter a period of time, a person ought to be allowed to live without fear of prosecution."<sup>308</sup> Justifications in this group differ regarding the grounds upon which the defendant's interest lies—access to the best evidence or the right of repose.

According to the first approach, the "[f]oremost [objective of limitations provisions] is the desirability of requiring that prosecutions be based upon reasonably fresh evidence."<sup>309</sup> The underlying assumption here is that evidence is "fragile."<sup>310</sup> "With the passage of time memory becomes less reliable, witnesses may die or become otherwise unavailable; physical evidence becomes more difficult to obtain, more difficult to identify and more likely to become contaminated."<sup>311</sup> At some point, the available evidence becomes so unreliable, the argument goes, that no fair trial is possible.<sup>312</sup> Even DNA evidence, which does not spoil and can provide nearly incontrovertible proof of physical acts, cannot speak to critical elements of mind and circumstance.<sup>313</sup>

Although it is certainly true that older evidence is less reliable, it is unclear why this should mean "it will be more difficult . . . to defend . . . against [old] charges."<sup>314</sup> In a criminal trial, the burdens of proof are not evenly distributed between prosecution and defense.<sup>315</sup> Because the prosecution must

<sup>307</sup> *Developments in the Law: Statutes of Limitations*, *supra* note 240, at 1185 ("The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant.").

<sup>308</sup> MODEL PENAL CODE § 1.07 (current version at § 1.06) cmt. 16–17 (AM. LAW INST., Tentative Draft No. 5, 1956) [hereinafter MODEL PENAL CODE § 1.07, Tent. Draft No. 5].

<sup>309</sup> *Id.* at cmt. 16.

<sup>310</sup> *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.* 321 U.S. 342, 349 (1944) (after a time, "evidence has been lost, memories have faded, and witnesses have disappeared"); *Thiggen v. Smith*, 792 F.2d 1507, 1514 (11th Cir. 1986) ("[E]vidence is, by its nature, fragile and susceptible to destruction over time, as memories fade and witnesses die or become otherwise unavailable.").

<sup>311</sup> MODEL PENAL CODE § 1.07, Tent. Draft No. 5, *supra* note 308, at cmt. 16.

<sup>312</sup> *Marion*, 404 U.S. at 322 ("[Statutes of limitations] specify[] a limit beyond which there is an ir rebuttable presumption that a defendant's right to a fair trial would be prejudiced.").

<sup>313</sup> See generally Erin Murphy, *DNA in the Criminal Justice System: A Congressional Research Service Report* (\*From the Future), 64 UCLA L. REV. DISCOURSE 340, 345–47 (2016) (offering a summary of DNA practices as it relates to criminal justice).

<sup>314</sup> DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL, AND MORAL CONCERNS 61 (2000).

<sup>315</sup> WAYNE R. LAFAVE, CRIMINAL LAW § 1.8(a) (6th ed. 2017) (describing the burdens of proof in a criminal trial).

prove its case beyond a reasonable doubt,<sup>316</sup> any doubts about the overall quality of evidence favor the defendant.<sup>317</sup> The trial process itself—from the criminal rules of evidence,<sup>318</sup> to the right to confront witnesses,<sup>319</sup> to the mechanics of cross-examination<sup>320</sup>—is oriented toward excluding unreliable evidence.<sup>321</sup> Far from increasing the risk of convicting the innocent, the general effect of time on evidence is to increase the risk of letting the guilty go free.<sup>322</sup>

The fresh evidence account also cannot explain why limitations periods should be longer for more serious crimes. Evidence that spoils with time should spoil equally for all crimes.<sup>323</sup> Assuming, as the fresh evidence account requires, that the passage of time increases the risk of a wrongful conviction, it would do this for heinous and trivial crimes alike.<sup>324</sup> What does vary between crimes of different seriousness is the defendant's interest in fairness—a person has a much greater stake in accuracy when the potential penalties are higher.<sup>325</sup>

<sup>316</sup> *Id.*

<sup>317</sup> Michael Rowe, *Contemporary Prosecutions of Civil Rights Era Crimes: An Argument Against Retroactive Application of Statute of Limitations Amendments*, 101 J. CRIM. L. & CRIMINOLOGY 699, 722 (2011) (“[E]vidence spoliation typically has a disproportionate effect on the prosecution rather than the defense since the state is charged with meeting the reasonable doubt standard.”).

<sup>318</sup> *See, e.g.*, FED. R. EVID. 401 (requiring only relevant evidence to be admitted); *id.* 403 (excluding relevant evidence for prejudice, confusion, waste of time, or other reasons); *id.* 803 (omitting unreliable evidence based on hearsay); *see* ROBINSON, *supra* note 35, § 202(b) (“[T]rial process and the rules of evidence are specifically designed either to exclude unreliable evidence or to assure that the jury is aware of any such unreliability.”).

<sup>319</sup> Crawford v. Washington, 541 U.S. 36, 51 (2004) (explaining the common law origins of the Confrontation Clause and the important evidentiary purpose it holds).

<sup>320</sup> Pointer v. Texas, 380 U.S. 400, 404 (1965) (“[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.”).

<sup>321</sup> Adlestein, *supra* note 301, at 265 (“The criminal trial process is specifically designed by its rules of evidence, by its strong commitment to the power of cross-examination, and, most importantly, by its requirement of proof beyond a reasonable doubt, to exclude or discredit unreliable evidence.” (footnotes omitted)).

<sup>322</sup> Wistrich, *supra* note 306, at 664–65.

<sup>323</sup> Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 134 (1955). (“[T]here is no reason to suppose that the statutory periods bear any actual relation to the duration of memory, continued availability of witnesses, or time for which documents are, or can be, preserved. . . . It is apparent that something other than availability, or lack of availability, of evidence lies back of the several different limitation periods which may appear in the statutes of a single jurisdiction.” (footnotes omitted)).

<sup>324</sup> *See* SHUMAN & SMITH, *supra* note 314, at 88–91 (discussing the limitations and weaknesses of human memory over long stretches of time despite however heinous a crime was); Kitai-Sangero, *supra* note 278, at 428 (“There is no reason to think, of course, that witnesses may better remember over a long period of time the circumstances surrounding felony offenses compared to the circumstances surrounding misdemeanors.”).

<sup>325</sup> Note, *The Statute of Limitations*, *supra* note 278, at 636 (“Where a crime is especially serious and the punishment is correspondingly great it would seem particularly important to protect the defendant's right to garner reliable information for a defense and prevent the use of stale evidence against him.”).

As a consequence, the fresh evidence account should instead demand *shorter* limitations periods for more serious crimes.

The Supreme Court has offered a second interest that might justify statutes of limitations: the right of repose.<sup>326</sup> According to the Court, there is a “long-standing congressional ‘policy,’” “fundamental to our society and our criminal law,” of eventually granting potential defendants the peace of mind that the past is behind them.<sup>327</sup> As such, “statutes of limitations are to be liberally interpreted in favor of repose.”<sup>328</sup>

Yet the right to repose is a flawed basis for statutes of limitations. As one commentator bluntly put the matter, “[p]erpetrators of extremely serious crimes should not be entitled to calmness while their victims and the relatives of victims suffer from permanent damage and have no peace of mind in their lifetime.”<sup>329</sup> Even for less serious crimes, it is far from clear what entitles criminals to the peace of mind that they will not be prosecuted. To the extent unprosecuted criminals do have an interest in repose, they have a very easy way to secure it for themselves—they can deliver themselves to authorities and accept the coming sanction.<sup>330</sup> After that, they have a constitutional guarantee of repose in the Double Jeopardy Clause,<sup>331</sup> which proscribes twice punishing a criminal for the same offense.<sup>332</sup> This repose is an even stronger assurance than the mere statutory protection of a limitations period.<sup>333</sup>

Furthermore, as with the fresh evidence account, the right of repose cannot explain why more serious crimes have longer limitations periods. Surely any interest in repose increases proportionately with the threat from which the repose would protect. Because more serious crimes carry greater sanctions, one would expect the right of repose would also demand a shorter limitations period.

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<sup>326</sup> *Toussie v. United States*, 397 U.S. 112, 115 (1970).

<sup>327</sup> *Bridges v. United States*, 346 U.S. 209, 215–16 (1953).

<sup>328</sup> *Marion*, 404 U.S. at 322 n.14.

<sup>329</sup> Kitai-Sangero, *supra* note 278, at 434.

<sup>330</sup> 18 U.S.C. § 3501(a) (2012) (“In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, *shall* be admissible in evidence if it is voluntarily given.” (emphasis added)).

<sup>331</sup> U.S. CONST. amend. V (“[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

<sup>332</sup> *Green v. United States*, 355 U.S. 184, 187 (1957) (“The constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.”).

<sup>333</sup> *Wheeler v. Jackson*, 137 U.S. 245, 255 (1890) (“It is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced.”).

## 2. Prosecuting Old Crimes as Unproductive for Society

A second group of justifications for statutes of limitations argues that with the passage of time, something changes that diminishes society's interest in prosecution.<sup>334</sup> The criminal justice process is not costless. Scarce judicial and prosecutorial resources must be allocated.<sup>335</sup> The act of punishment itself imposes costs on the state, on the convict, and collaterally on those who rely on the convict.<sup>336</sup> At some point, the reasoning goes, the balance of costs and benefits tips against prosecution.<sup>337</sup> There are three prominent approaches to justifying statutes of limitations in terms of balancing social costs and benefits: retributive, economic, and procedural.<sup>338</sup> The following discusses each in turn.

According to the first line of argument, what decreases with time is society's retributive interest in punishment.<sup>339</sup> Unfortunately for this approach, no one has offered a theoretical or empirical framework that might support the claim. Although there is some ambiguity as to what "retributive interest"

<sup>334</sup> See, e.g., Rowe, *supra* note 317, at 713 ("The individual standing trial is not the only party whose substantive rights are affected by a change in the statute of limitations. The government has a substantial interest in ensuring justice in incarcerating criminals to prevent them from committing subsequent offenses. Additionally, the family members of the victims have substantive interest in seeing justice come to bear on those responsible for the deaths of their relatives.").

<sup>335</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (noting that "[c]ourts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case'"); *Brady v. United States*, 397 U.S. 742, 752 (1970) (justifying a state's interest in securing guilty pleas because "with the avoidance of trial, scarce judicial and prosecutorial resources are conserved"); Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 746 (1978) (explaining the need for an efficient allocation of the scarce resources of the judiciary); Crystal S. Yang, *Resource Constraints and the Criminal Justice System: Evidence from Judicial Vacancies*, 8 AM. ECON. J. 289, 289–92 (2016) (studying the effects resource constraints have on the criminal justice system and finding that prosecutors dismiss cases more often under vacancies).

<sup>336</sup> See Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 486 (2009) ("Because prison saps the limited economic and interpersonal resources of families with a loved one behind bars, both the families and the neighborhood stay impoverished." (quoting CLEAR, *supra* note 3, at 5)); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 659 (2006) ("[S]cholars have articulated the various ways in which criminal convictions can marginalize these individuals and constrain their economic, legal, and social opportunities."); Torin McFarland, Note, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 SUSQUEHANNA U. POL. REV. 46, 46 (2016) ("Each death penalty inmate [costs] approximately \$1.12 million (2015 USD) more than a general population inmate.").

<sup>337</sup> See Listokin, *supra* note 273, at 100–01 (discussing how statutes of limitations can be justified by the time point where prosecution costs more than its benefits yield).

<sup>338</sup> Christian Mott, *Statutes of Limitations and Personal Identity*, in 2 OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY 243, 243–44 (Tania Lombrozo et al. eds., 2014).

<sup>339</sup> See *Constitutional Law*, 117 HARV. L. REV. 268, 277 (2003) (discussing how there is a point where "the fabric of community will have mended itself" after which society no longer requires punishment).

means, the result is the same under any disambiguation. One way to gauge retributive interest could be to focus on the individual criminal and what that person deserves for her conduct. However, there is no theory of just deserts according to which they shrink with time.<sup>340</sup>

A different way to gauge society's retributive interest could be to focus on the people impacted by the crime. The keenness of their desire for retribution may become muted with time.<sup>341</sup> The Model Penal Code endorses this approach: "as time goes by the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten."<sup>342</sup> Underlying this claim is a psychological hypothesis about retributive impulses. It is almost certainly wrong. The injuries victims suffer cannot always be forgotten; indeed, the injuries themselves may last indefinitely.<sup>343</sup> Physical wounds mend, but they can leave lifelong scars behind. The emotional consequences can go deeper still.<sup>344</sup> When the injury is still very present for the victim, it is hard to see her retributive impulse waning.

A more sophisticated justification for statutes of limitations draws on behavioral economics to demonstrate that what diminishes with time is society's deterrent interest, not its retributive interest. For an expected sanction to deter a potential criminal, it must exceed the benefits the criminal expects from committing the crime.<sup>345</sup> On simple models, the expected sanction is just the magnitude of the sanction multiplied by the probability that the criminal will

<sup>340</sup> ROBINSON & CAHILL, *supra* note 295, at 60 (pointing out that retribution is needed even for long passed crimes, "however long it may take and however much it may cost").

<sup>341</sup> *Constitutional Law*, *supra* note 339, at 277 ("[C]riminal statutes of limitations may function to recognize that the wrong done to society has faded and that the most beneficial attitude in this instance is not vindictiveness but forgiveness.").

<sup>342</sup> MODEL PENAL CODE § 1.07, Tent. Draft No. 5, *supra* note 308, at cmt. 16.

<sup>343</sup> David Viens, Note, *Countdown to Injustice: The Irrational Application of Criminal Statutes of Limitations to Sexual Offenses Against Children*, 38 SUFFOLK U. L. REV. 169, 169, 175–79 (2004) ("When these children reach adulthood they will suffer a myriad of dysfunctions, ranging from troubled relationships, poor self-esteem, substance abuse and self-destructive behavior.")

<sup>344</sup> James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1225–26 (2004) ("There is no statute of limitations on anguish. . . . [B]ecause the trauma suffered by victims can often last a lifetime, there should be no arbitrary time limit on seeking justice." (footnote omitted)).

<sup>345</sup> Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1538 (1998) ("Economic analysis of this question typically starts from the premise that potential offenders will be deterred from criminal acts if the expected costs of those acts exceed their expected benefits." (footnote omitted)); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1088 (2000) ("If criminals are rational utility maximizers, society can deter crime by raising these expected costs above the expected benefits of crime.").

be caught and convicted.<sup>346</sup> More advanced economic models recognize that people discount future value.<sup>347</sup> For instance, having to pay five dollars in a year may be equivalent to paying two dollars now. Although the benefits of crime are often realized immediately, sanctions are imposed sometime later. As a result, a potential criminal's future rate of discounting must be factored in when calculating the expected costs from criminal sanctions. Psychological research also suggests that criminals are "present-oriented," meaning they have high future discount rates.<sup>348</sup> When the prospect of an applicable penalty is far in the future, its present disvalue can become small enough that it cannot be an effective deterrent.<sup>349</sup> Because imposing punishments is not costless to society, it is socially wasteful to sanction criminals that long after their misconduct.<sup>350</sup>

This is a powerful argument for statutes of limitations. Yet it has three critical flaws. First, it focuses exclusively on the deliberations of individual criminals (specific deterrence) rather than criminals as a whole (general deterrence).<sup>351</sup> As such, it significantly underestimates the social benefits of punish-

<sup>346</sup> Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1062 (2001) ("[T]he expected sanction is a function of the probability of getting caught multiplied by the magnitude of the penalty . . .").

<sup>347</sup> Howard Rachlin, *Economics and Behavioral Psychology*, in LIMITS TO ACTION: THE ALLOCATION OF INDIVIDUAL BEHAVIOR 205, 208 (J.E.R. Staddon ed., 1980) ("Common sense, psychology, and economics all offer the same answer. The value, positive or negative, of events at a later time is discounted in the present.").

<sup>348</sup> See MARK S. FLEISHER, BEGGARS AND THIEVES: LIVES OF URBAN STREET CRIMINALS 214 (1995) (stating that "street culture" is focused on the now as opposed to the future); JAMES Q. WILSON & RICHARD HERRNSTEIN, CRIME AND HUMAN NATURE 44–45 (1985) (explaining that although not committing crime has future benefits, many criminals commit a crime for the fast and easily discernible reward). As an aside, it is worth noting that this may not be particular to criminals; many non-criminals (perhaps all of us) are very present-oriented. See EDWARD C. BANFIELD, *Present Orientedness and Crime*, in HERE THE PEOPLE RULE: SELECTED ESSAYS 313, 313 (Edward C. Banfield ed., 2d ed. 1991) ("Since the seventeenth century, political philosophers have maintained that an irrational bias toward present as opposed to future satisfactions is natural to both men and animals . . .").

<sup>349</sup> Listokin, *supra* note 273, at 100–01 ("Suppose, for example, that potential criminals care nothing for events and expenditures that take place more than 5 years from the present, while society values expenditures 5 years hence at some finite amount. This implies that punishment for a crime more than 5 years after its commission is inefficient from a deterrence perspective. The punishment has positive costs but achieves no deterrence.").

<sup>350</sup> *Id.* at 100 ("If criminals discount the future at a higher rate than society . . . and punishing crimes is costly for society, then, at times well after the commission of a crime, punishing a crime is inefficient from a deterrence perspective."). As the parenthetical quote shows, Listokin's argument is somewhat more sophisticated than I have presented; it considers society's future discount rate too. The framework I have presented, however, captures the nuts and bolts and is enough to show the deficiencies of the general approach.

<sup>351</sup> *General Deterrence*, 1 BOUVIER LAW DICTIONARY (desk ed. 2012) ("General deterrence is the use of the threat of legal punishment not to punish the wrongdoer but to use the wrongdoer as an example to discourage others from similar conduct."); *Specific Deterrence (Personal Deterrence)*, BOUVIER LAW DICTIONARY, *supra* ("Specific deterrence is the discouragement of an individual criminal or tortfeasor from repeating the type of wrong that the wrongdoer is known to have done.").

ing old crimes. Whereas threatening to punish a potential criminal at a future date may not effectively deter *that* individual, punishing her after that date nonetheless sends a message to other criminals about the consequences of crime.<sup>352</sup> Other potential criminals cannot assume that they too will be sanctioned only long after their crimes; for all they know, the state may catch them before the time at which their future discount rate would tilt the present-day cost-benefit analysis. Once the effects of general deterrence enter the picture, the argument for having statutes of limitations weakens under the economic model.

There is another reason that the economic model cannot support statutes of limitations—it is equally an argument for increasing penalties. The parameters of the model assume that limitations periods are variable while available sanctions remain fixed.<sup>353</sup> But if the basic problem is that penalties are ineffective deterrents after the discount rate is applied over enough years, three economic solutions are available. One is to have statutes of limitations, so that crimes must be punished, if at all, before discounting drives the present-day disvalue of the penalty down too far. Another solution is to raise the size of the penalty. A higher penalty would increase the time-period within which it could effectively deter. The most economically effective solution is a third approach: to have variable penalties<sup>354</sup> that *increase* over time so that, even after they are discounted in light of their future application, they remain effective present-day deterrents.<sup>355</sup> There would be no need to time-bar any prosecutions, and all crime would be effectively deterred, even if the criminal expects to be able to evade justice for a long period of time.

Finally, despite its claims to the contrary, the economic model also struggles to explain why limitations periods should be longer for more serious

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<sup>352</sup> See Zachary Hoskins, *Deterrent Punishment and Respect for Persons*, 8 OHIO ST. J. CRIM. L. 369, 373 (2011) (“In a system of punishment aimed at general deterrence, sentences are not imposed to inflict suffering on the offender, but rather to maintain a credible threat to the public generally.”).

<sup>353</sup> Listokin, *supra* note 273, at 104 (“[T]he statute of limitations should be chosen by the same criterion used to choose any other tool of law enforcement—to minimize social costs. Raising the statute of limitations has both marginal benefits and marginal costs.”).

<sup>354</sup> Some scholars have proposed variable penalties in other contexts, e.g. penalties that increase for any given crime in inverse proportion to the probability of the criminal getting caught. See, e.g., Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. 93, 113 (2018) (“If penalties are very low, then the probability of getting caught must be very high to encourage compliance. If enforcement rates are very low then penalties must be very severe to reach the same result.”).

<sup>355</sup> This would be the opposite recommendation of another very interesting behavioral economics approach to statutes of limitations that argues for an “incremental approach,” according to which value of claims decreases over time. Wistrich, *supra* note 306, at 649. This is premised on the psychology of how people relate to deadlines. *Id.* at 649–50. Regrettably, there is not space in one article to consider every argument that merits attention.

crimes.<sup>356</sup> The period after which sanctions become ineffective is where future discounting would erode their present disvalue below the expected benefits of crime. The length of the limitations period, therefore, depends on the discount rate and the spread between the expected criminal gains and the actual criminal gains. The relative length of the efficient limitations periods for more serious crimes versus less serious crimes, therefore, depends on the spread for each. Without a reason to think the spread is greater for more serious crimes, there is no reason to conclude that limitations periods for serious crimes should be longer. In fact, so far as most optimal deterrence theorists are concerned, the spread should be the same (just shy of zero) regardless of how serious a crime is.<sup>357</sup>

Some courts and commentators justify statutes of limitations in terms of a third social interest: promoting effective allocation of scarce enforcement resources.<sup>358</sup> These process arguments assume that investigating more recent crimes should be higher priority. Similar to the exclusionary rule in evidence, by barring prosecution of stale offenses, statutes of limitations incentivize the “allocation of enforcement resources . . . on recent wrongs.”<sup>359</sup>

Even if this line of argument can support its assumption that recent wrongs should be a higher enforcement priority, it cannot explain why more serious crimes have longer limitations periods.<sup>360</sup> The argument applies equally to misdemeanors as it does to felonies. If anything, there should be more urgency to investigating and prosecuting more serious crimes. In that case, properly calibrating enforcement incentives would require limitations that vary inversely with seriousness—shorter limitations for felonies, and longer limitations for misdemeanors.

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<sup>356</sup> Listokin, *supra* note 273, at 105 (“Crimes that cause more harm should have a longer statute of limitations for prosecution.”).

<sup>357</sup> PAUL ROBINSON ET AL., *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 81 (2017) (“Punishment imposes costs on the state as well as on the person punished; accordingly, the punishment should be set just high enough to maximize deterrence (or, more precisely, to achieve the efficient rate of deterrence, where the net benefit of crime prevention relative to its cost is highest), but no higher.”).

<sup>358</sup> *See, e.g., Toussie*, 397 U.S. at 114–15 (“Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.”).

<sup>359</sup> WORKING PAPERS, *supra* note 278, at 281; *see* Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 *GEO. L.J.* 1, 13 (2013) (“Traditionally, the exclusionary rule has successfully deterred police from violating privacy rights of both the guilty and innocent alike.”).

<sup>360</sup> This Section reflects my skepticism. *See supra* notes 286–359 and accompanying text.



### C. A New Rationale: Limiting Identity

Scholars have struggled to make sense of even the first basic feature of statutes of limitations: “after a certain time, no quantum of evidence is sufficient to convict.”<sup>361</sup> Perhaps part of the problem is that commentators have been too willing to accept that “[t]he statute of limitations is clearly a nonexculpatory defense.”<sup>362</sup> As a result, the justifications commentators offer “are not based on a lack of culpability of the defendant. They are purely public policy arguments.”<sup>363</sup> Section I.B argued that these policy arguments fail to account for the most basic features of limitations periods.

Perhaps scholars have been too hasty in their assumption that statutes of limitations are not about culpability. If the running of the limitations period could somehow undermine a criminal’s culpability, that would explain why “no quantum of evidence is sufficient to convict.” Innocence is the lone circumstance that everyone agrees takes conviction off the table. What may be needed, then, is a view according to which statutes of limitations serve as a doctrinal mechanism for establishing innocence.

Accounting for statutes of limitations in terms of personal identity offers just that. The proposal defended here is:

The Identity Limiting Account: Statutes of limitations are an implicit recognition that people’s criminal identities evolve over time.

After enough time has passed, criminals’ identities can change enough that they become, so far as criminal law should be concerned, new people.<sup>364</sup> “[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.”<sup>365</sup> When Justice Jackson wrote that sentence in his dissent in *Korematsu v. United States*, he was referring to heritability from ancestors.<sup>366</sup> It could equally apply to the guilt of any person from the past, even remote and non-identical past selves. A present-day person must be innocent—so far as criminal law is concerned—of past crimes if enough time has elapsed for her criminal identity to change.

<sup>361</sup> *Stogner v. California*, 539 U.S. 607, 615 (2003).

<sup>362</sup> ROBINSON, *supra* note 35, § 202(b).

<sup>363</sup> Robinson, *supra* note 262, at 230.

<sup>364</sup> Some legal scholars have defended a related proposition for radical personal changes over long periods of time. See, e.g., Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97, 165–66 (1986) (summarizing Reductionist versus non-Reductionist viewpoints regarding identity changes). This Article is the first to discuss the significance of more nuanced identity changes on smaller time scales, and the relevance they have for criminal law. See *id.* at 167–69.

<sup>365</sup> *Korematsu v. United States*, 323 U.S. 214, 243–44 (1944) (Jackson, J., dissenting).

<sup>366</sup> *Id.*

The identity limiting account can explain the prosecution-limiting feature of statutes of limitations from the perspective of all the major purposes of criminal justice: retribution, deterrence, incapacitation, and rehabilitation.<sup>367</sup> If as argued above, a person's identity changes over time, retributivists should take note. Only by barring prosecution in such cases—as statutes of limitations do—can retributivists hope to punish people only when retributively appropriate. Ignoring changes in identity guarantees that some innocent present-day people will be punished for the crimes of guilty past people. From this perspective, limitations periods should be tied to generalized observations of human psychology about how long it typically takes for identity to change. After that time passes, the risk that any indictment would run afoul of retributive interests becomes too great. Recent experimental studies about people's ordinary moral intuitions confirm this commonsense perspective.<sup>368</sup> One study found an inverse relationship between people's judgments about the appropriateness of punishing criminals<sup>369</sup> and the length of time between the commission of crime and its discovery.<sup>370</sup> Participants in the study also read scenarios in which criminals underwent different changes after they committed their crimes but before being punished.<sup>371</sup> “[J]udgments about the connectedness of the [present-day person to the past criminal he was] play a significant role” mediating judgments about how appropriate punishment would be.<sup>372</sup>

There are also powerful deterrence-based arguments for statutes of limitations on the identity limiting account.<sup>373</sup> To see why, it is important first to recall the discussion about continuing offenses—offenses like conspiracy or welfare fraud that can continue even after every element of the crime is satisfied.<sup>374</sup> The limitations periods for these are tolled until the criminal conduct ceases.<sup>375</sup> In general, all repeated offenses are treated that way. A criminal who commits a crime multiple times can be prosecuted for all instances assuming there was no gap between instances that exceeded the applicable limitations

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<sup>367</sup> See Mott, *supra* note 338, at 266.

<sup>368</sup> *Id.* at 248–49 (describing recent studies affirming that people look to identity connections between a past and present person in determining whether that person deserves punishment for past crimes).

<sup>369</sup> *Id.* at 249–51.

<sup>370</sup> *Id.* at 252.

<sup>371</sup> *Id.* at 257–58.

<sup>372</sup> *Id.* at 265.

<sup>373</sup> Some of the arguments offered in this paragraph should also be available to self-rehabilitation accounts.

<sup>374</sup> *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939) (“A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an uninterrupted force, however long a time it may occupy.”).

<sup>375</sup> *Toussie*, 397 U.S. at 115 (“[T]he continuing offense doctrine . . . for all practical purposes, extends the statute [of limitations] beyond its stated term.”).

period.<sup>376</sup> The limitations period tolls until the most recent occurrence of the offense. The way the law tolls limitations periods for continuing or repeat offenses makes sense on the identity limiting account. In such cases, a continued pattern of criminality is solid evidence of a sustained criminal disposition and, hence, a continued criminal identity. Conversely, a person who refrains from criminal conduct during the entire limitations period has a good claim to having shed her criminal disposition and, as a result, undergone a change in her criminal identity.<sup>377</sup> Limitations periods create a presumption that a relevant change in identity has taken place. The presumption can be overcome by a showing that the defendant continued the offense or repeated it during the relevant period.

These observations about continuing crimes help to show how statutes of limitations, on the identity limiting account, allocate criminal justice resources to achieve effective deterrence. Given what is known about recidivism, the best predictor of a person's present-day disposition to criminality is a recent history of criminality.<sup>378</sup> Three-quarters of inmates nation-wide reoffend within five years of release.<sup>379</sup> Additionally, an exceedingly large number of criminals remain at large.<sup>380</sup> Only about forty-five percent of violent crime is reported to police,<sup>381</sup> and police clear only forty-six percent of reported cases.<sup>382</sup> These striking figures suggest that one effective deterrent strategy is to target the incentives of people who have committed crime but are not yet in the criminal justice system. This is exactly what statutes of limitations do on the identity limiting account. They incentivize at-large criminals not to continue or repeat

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<sup>376</sup> See, e.g., *United States v. Smith*, 373 F.3d 561, 564, 568 (4th Cir. 2004) (ruling that the defendant's recurring embezzlement of government funds was a continuing offense and affirming that the earliest offenses were not barred by the statute of limitations).

<sup>377</sup> MODEL PENAL CODE § 1.07, Tent. Draft No. 5, *supra* note 308, at cmt. 16 ("If the person refrains from further criminal activity, the likelihood increases with passage of time that he has reformed, diminishing *pro tanto* the necessity for imposition of the criminal sanction.").

<sup>378</sup> Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331 (2009) ("Studies on recidivism consistently demonstrate that those who have offended in the past will have the highest probability of reoffending within several years, and the probability will decline steadily afterward.") (citation omitted).

<sup>379</sup> MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (Apr. 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/9BBS-JLRP>].

<sup>380</sup> John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RES. CTR. (Mar. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/> [<https://perma.cc/K82A-FLQB>] (discussing the clearance rate of crimes once they are reported to the police); JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 2015, at 6, (Oct. 2016), <https://www.bjs.gov/content/pub/pdf/cv15.pdf> [<https://perma.cc/T7E8-ZU6Q>] (providing statistics for the percentage of certain crimes that are reported to police).

<sup>381</sup> Truman & Morgan, *supra* note 380, at 6.

<sup>382</sup> Gramlich, *supra* note 380, at 6.

their crimes. In so doing, criminals build a claim to having shed their criminal dispositions and to having a changed criminal identity. In return, statutes of limitations eventually promise immunity from prosecution for past crimes.

Insofar as it links prosecution to criminal disposition, the identity limiting account resonates with criminal law's rehabilitative and incapacitative purposes. A rehabilitated criminal is one who has shed her criminal disposition, i.e. has undergone a change in criminal identity. As explained, statutes of limitations can incentivize criminals to self-rehabilitate, which removes the need for the law to rehabilitate or incapacitate.<sup>383</sup> Although criminals can engage in projects of self-change, the natural course of time—and all the personal growth and development it brings—can do the same.<sup>384</sup> This can explain why statutes of limitations are tied to time periods rather than personal effort. Although commentators have tended to balk at seeing rehabilitation as a justification for statutes of limitations, that purpose meshes well with the identity limiting account.<sup>385</sup>

So far, this Section has shown that the identity limiting account offers a justifying explanation of the first basic feature of statutes of limitations—that they prohibit prosecution after a period.<sup>386</sup> The account can also provide an elegant explanation of the second basic feature of statutes of limitations—that more serious crimes have longer limitations periods.<sup>387</sup> The explanation proceeds from two observations. The first is that more serious crimes tend to reflect deeper-rooted anti-social character traits.<sup>388</sup> The second is that such traits generally take longer to change than the more superficial traits that drive people to commit less serious violations. If true, these two general observations imply that the criminal identity of someone who commits a more serious crime should generally take longer to change. So, it makes sense on the identity limiting account to have longer statutes of limitations for more serious crimes.

The first observation—that serious violations reflect deeper-rooted criminal identities—is best demonstrated by example. Contrast the misdemeanor of simple trespass, which includes “[e]ntering upon . . . property without the ex-

<sup>383</sup> MODEL PENAL CODE § 1.07, Tent. Draft No. 5, *supra* note 308, at cmt. 16 (stating that rehabilitation “diminish[es] *pro tanto* the necessity for imposition of the criminal sanction”); Kitai-Sangero, *supra* note 278, at 433 (“One aspect of the fresh start argument emphasizes the incentive that statutes of limitations grant to reform and rehabilitate oneself.”).

<sup>384</sup> See, e.g., Ray Paternoster & Shawn Bushway, *Criminology: Desistance and the “Feared Self”: Toward an Identity Theory of Criminal Desistance*, 99 J. CRIM. L. & CRIMINOLOGY 1103, 1155 (2009) (arguing that “desistance from crime is an intentional act of self-change”).

<sup>385</sup> Adlestein, *supra* note 301, at 265 (“The argument based on the offender’s reformation over time disregards both the general deterrence and retributive purposes of criminal punishment . . .”).

<sup>386</sup> See *supra* notes 286–360 and accompanying text.

<sup>387</sup> See *supra* notes 356–360 and accompanying text.

<sup>388</sup> See, e.g., Joel J. Kupperman, *Virtue in Virtue Ethics*, 13 J. ETHICS 243, 244 n.1 (2009) (noting serious moral violations are more likely to stem from constant principles of character).

press permission of the owner . . . to . . . fish,” with the felony of burglary in the first degree, which includes “having the intent to commit a [listed felony] . . . [and] break[ing] an occupied structure” while “ha[ving] possession of a dangerous weapon.”<sup>389</sup> The former is punishable by up to thirty days in jail, a fine up to \$625, or both; the latter by up to twenty-five years in prison.<sup>390</sup> Though both crimes involve entering on someone else’s property, the significant difference in punishment reflects the fact that burglary is a more serious crime. This makes sense because the potential for personal injury during a burglary is much higher.<sup>391</sup> Additionally, the interests of the victim that a burglar violates—to be secure in body and home—are greater than the interests that simple trespass violates—to exclude others from land and stream.<sup>392</sup>

The higher stakes involved in burglary also show why burglary must generally reflect a criminal’s deeper criminal disposition. The network of interconnecting commitments, values, and personality traits that allow burglars to set aside victims’ salient claims to security and integrity must be psychologically more encompassing. They must also be more deeply ingrained for the burglar to be willing to risk the considerably greater punishment to carry out the criminal enterprise. Although many people could imagine a relative who is passionate about fishing engaging in casual trespass, there is nothing casual about first-degree burglary. Psychologists have recognized that burglars have distinctive motivations, behaviors, and decision-making.<sup>393</sup> There is no research program into the psychology of simple trespass.

The second observation—that deeper-rooted traits take longer to change—follows from the fact that personal identities change gradually and incrementally. Abrupt identity changes are possible if brought about by brain damage or radical conversion experiences.<sup>394</sup> The ordinary and general case,

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<sup>389</sup> IOWA CODE §§ 713.1, 713.3.1.b, 716.7.2.a(1) (2019).

<sup>390</sup> IOWA CODE §§ 902.9.1.b, 903.1.a (2019).

<sup>391</sup> *People v. Patton*, 46 Cal. Rptr. 2d 702, 712 (Cal. Ct. App. 1995) (explaining that burglary qualifies for the three strikes rule because “residential burglaries . . . are serious prior felony convictions having tremendous potential for injury or death”).

<sup>392</sup> *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999) (“[Burglary] was not designed to protect property or ownership, rather the notion that people should be able to feel secure in their homes.”).

<sup>393</sup> See, e.g., Bryanna Hahn Fox & David P. Farrington, *Behavioral Consistency Among Serial Burglars: Evaluating Offense Style and Specialization Using Three Analytical Approaches*, 62 CRIME & DELINQUENCY 1123, 1124 (2014) (studying the behavioral consistency among convicted burglars); Claire Nee, *Residential Burglary: Methodological and Theoretical Underpinnings*, in CAMBRIDGE HANDBOOK OF FORENSIC PSYCHOLOGY 467, 470 (Jennifer M. Brown & Elizabeth A. Campbell eds., 2010) (summarizing different studies of convicted burglars and their motivations); *Through the Eyes of a Burglar: Study Provides Insights on Habits and Motivations, Importance of Security*, SCIENCE-DAILY (May 16, 2013), [www.sciencedaily.com/releases/2013/05/130516160916.htm](http://www.sciencedaily.com/releases/2013/05/130516160916.htm) [<https://perma.cc/XB6G-C4MJ>] (stating the various reasons burglars gave for why they committed their burglaries).

<sup>394</sup> See, e.g., Harlow, *supra* note 182, at 7, 14 (describing Gage’s head trauma and how he changed afterwards). See generally V. BAILEY GILLESPIE, RELIGIOUS CONVERSION AND PERSONAL

however, happens subtly over time.<sup>395</sup> People rarely wake up feeling as though they underwent a dramatic break in identity from the person they were yesterday. This feeling, when it occurs repeatedly, may be symptomatic of a mental condition called “depersonalization/derealization disorder.”<sup>396</sup> It is probably for this reason that the psychologists studying healthy identity change consider periods spanning years.<sup>397</sup> If normal identity change is gradual, it must proceed by way of accumulated changes to more surface level psychological traits. Changes to deep traits requiring more pervasive shifts of attitude and behavior can be the eventual result—but it takes time. Therefore, to the extent that more serious crimes reflect deeper rooted criminal character traits and dispositions, the criminal identities of those who commit serious crimes should generally take longer to change.

#### D. Objections

The identity limiting account can explain the two basic features of statutes of limitations. Because criminal identity naturally changes over time, statutes of limitations bar prosecution that would risk conviction of a now-changed individual. Also, because more serious crimes reflect more deeply rooted criminal identities that are slower to change, longer limitations periods are appropriate.

Beyond these two basic features, statutes of limitations in the United States have other features that may initially strike some readers as inconsistent with the identity limiting account. Indeed, the features discussed below strike many commentators as inconsistent with *any* possible account of statutes of

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IDENTITY: HOW AND WHY PEOPLE CHANGE 51–57 (1979) (discussing the various ways people change after religious conversions); MASSIMO LEONE, RELIGIOUS CONVERSION AND IDENTITY: THE SEMIOTIC ANALYSIS OF TEXTS 79 (2004) (explaining how conversion can cause a loss of personal identity); Robert M. Carrothers, *Identity Consequences of Religious Changing: Effects of Motivation for Change on Identity Outcomes*, 43 SOCIOLOGICAL FOCUS 150, 150–51 (2010) (describing various people who found religion or converted to a new religion); Gary A. Tobin, *Conversion Requires Identity Transformation*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/conversion-requires-identity-transformation/> [<https://perma.cc/8PTS-J6FH>] (“The need for a new language to discuss the process and act of becoming a Jew is compelling. We shall discuss conversion as transformation. An individual does not convert from one state to another; identity transforms through both experience and understanding.”).

<sup>395</sup> See PARFIT, *supra* note 129, at 326 (creating an example of a very old man who is now a Nobel Peace Prize winner but once assaulted a man in his young adulthood, which indicates gradual change).

<sup>396</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 302 (5th ed. 2013) (“Episodes of depersonalization are characterized by a feeling of unreality or detachment from, or unfamiliarity with, one’s whole self or from aspects of the self . . . .”).

<sup>397</sup> See, e.g., Quoidbach et al., *supra* note 6, at 96 (studying identity changes over decades).

limitations. The identity limiting account can instead explain and embrace them.

For example, as one commentator has opined, the “problem with statutes of limitations . . . [is] that they paint with the broad brush of an inflexible general rule.”<sup>398</sup> The rule-like nature of limitations periods may seem to conflict with the identity limiting account. Identity shifts gradually and organically. There is usually no single moment when it can be said that a person’s criminal identity has changed. Identity can also change at different rates for different people and at different rates during different phases of the same person’s life.<sup>399</sup>

Judges are also suspicious of statutes of limitations’ rule-like nature. As Judge Posner explained, “how can you *reason* to 3 years over 2,300 days over 240, 20 years over 15? You cannot . . .”<sup>400</sup> His question applies equally to questions of identity as it would to spoliation of evidence or the right of repose. Bright-line rules are necessarily “overinclusive and underinclusive if assessed by reference to their purposes.”<sup>401</sup> As the Supreme Court has observed, statutes of limitations “are by definition arbitrary.”<sup>402</sup> In an ideal world, statutes of limitations are effectively implemented and flexibly keyed to their purpose. Some commentators have proposed multi-factor balancing tests to replace determinate limitations periods.<sup>403</sup> A more provocative proposal would abandon limitations periods altogether, and instead adjust punishments to reflect the shifting balance between society’s and the defendant’s interests.<sup>404</sup>

The identity limiting account sympathizes with these criticisms of the rigidity of statutes of limitations. The account does not rule out the use of multi-factor standards or innovations in punishment as possible solutions. The identity limiting account would, however, call for extreme caution before moving away from a rule-based regime. The proponents of more flexible standards tend to assume that these would lead to more accurate results. They seem to trust that judges or prosecutors would dispassionately weigh various factors

<sup>398</sup> Adlestein, *supra* note 301, at 266.

<sup>399</sup> See *infra* notes 421–579 and accompanying text.

<sup>400</sup> *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1394 (7th Cir. 1990) (Posner, J., concurring).

<sup>401</sup> Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 990 (1995).

<sup>402</sup> *Chase Sec. Corp.*, 325 U.S. at 314.

<sup>403</sup> Druga M. Bharam, Comment, *Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule*, 80 J. CRIM. L. & CRIMINOLOGY 842, 864–65 (1989) (proposing a balancing test to determine whether to apply discovery rule for tolling limitations period on child sexual abuse).

<sup>404</sup> See PARFIT, *supra* note 129, at 326 (“When some convict is now less closely connected to himself at the time of his crime, he deserves less punishment.”); Diamantis, *supra* note 102, at 40–43.

and determine precisely when they tip one way or the other.<sup>405</sup> Yet even those who advocate for these approaches concede “[t]here is no science for calculating the precise duration that most fairly balances the relevantly competing interests for each crime, nor is it even clear that such a duration exists.”<sup>406</sup>

If personal identity were readily observable, case-by-case determinations of identity between present-day defendants and past criminals might enhance accuracy. A person’s identity, however, arises from unobservable psychological traits that must be inferred, if at all, using circumstantial evidence.<sup>407</sup> Even when these traits can be inferred accurately, the vague boundaries between one identity and the next make line drawing impossible.<sup>408</sup> In such circumstances, it is an open question whether a rule or a standard would generate more consistent and appropriate results.<sup>409</sup> An open-ended standard would risk providing cover for judges and prosecutors to make idiosyncratic, or even biased, determinations about when a criminal has changed enough.<sup>410</sup> Having legislatures promulgate bright-line rules premised on general observations about hu-

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<sup>405</sup> Powell, *supra* note 54, at 149–50 (proposing a statutory multi-factor balancing test for limitation periods); Robin & Anson, *supra* note 254, at 16–19 (offering factors prosecutors should consider in deciding whether to time bar a case).

<sup>406</sup> Powell, *supra* note 54, at 117–18.

<sup>407</sup> See Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 125 (1998) (“What a person knows or intends is rarely susceptible of proof by direct evidence. If the actor has not disclosed his state of mind, there is no direct way for others to scrutinize it. But what a person thinks or *knows* can be established indirectly through inferences based on circumstantial evidence . . . .” (footnotes omitted)); Teneille Brown & Emily Murphy, *Through A Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States*, 62 STAN. L. REV. 1119, 1183–87 (2010) (discussing the unreliability of brain scanning in inferring mental states).

<sup>408</sup> The fourth century B.C.E. philosopher Eubulides first drew attention to this feature of vague predicates. Dominic Hyde & Diana Raffman, *Sorites Paradox*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 77, §§ 1–2, <https://plato.stanford.edu/entries/sorites-paradox/#SoriHist> [<https://perma.cc/PG8K-LLUT>]. Eubulides was talking about heaps rather than identities, but the structure of the problem is the same.

<sup>409</sup> Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 971 (“[Where the relevant criterion is highly subjective,] even a more uniform, rigorous standard of review is unlikely to eliminate nonmeritorious cases entirely. Of course, that is true of any standard. The real question is whether the complex of rules [would perform better].”).

<sup>410</sup> Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 529 (2016) (“[C]ognitive biases by judges, notwithstanding good intentions, have already proven to be inevitable.”). See F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 186 (2013) (“As the Court acknowledged, allowing each sentencing judge to impose sentences based on her application of the . . . factors reintroduces judicial discretion that will inevitably result in less uniformity.”).



man psychological development likely produces greater overall accuracy and fairness.<sup>411</sup>

This leads to a second objection to the identity limiting account. Legislatures have created bright-line limitations periods, but they have often opted for quite short time frames. For misdemeanors, statutes of limitations generally range from one to three years.<sup>412</sup> Short periods may seem to strain the credibility of the proposal that statutes of limitations are premised on identity change.<sup>413</sup> Can someone really change their criminal identity in so little time?

It is important to recall the relatively restricted notion of identity that is at the heart of the identity limiting account. The account does not justify statutes of limitations by providing that a person's identity can change over a year's time in some holistic, all-encompassing sense. Not only is that undoubtedly false, it is questionable whether any holistic concept of identity even makes sense.<sup>414</sup> Rather, as argued above, it is preferable to speak of people's *identities*, where each is characterized by reference to a relative network of interests.<sup>415</sup> The identity limiting account does not impute to criminal law the absurd view that people's identities routinely change *tout court* every one to three years. Rather, it is people's identities relative to the interests of criminal law, i.e. their *criminal identities*, that change. This notion of identity is determined by whatever psychological traits disposed a person to commit the crime in question.<sup>416</sup> For misdemeanors, it is more plausible that people can lose and acquire these dispositions over relatively short periods of time. To the extent they cannot, limitations periods should be longer.

A final common objection to statutes of limitations is that it makes little sense to bar prosecution of someone who committed a crime if that person is not contrite.<sup>417</sup> Scholars who make this objection tend to view statutes of limi-

<sup>411</sup> See Antonin Scalia, *Remarks by the Honorable Antonin Scalia for the 25th Anniversary of Chevron v. NRDC*, 66 ADMIN L. REV. 243, 250–51 (2014) (arguing that rules are preferable to standards when there is no straightforward answer to discern). Elizabeth S. Scott and Laurence Steinberg advance similar arguments for categorically exempting juvenile criminals from the adult justice system. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 836–37 (2003) (“Litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than immaturity.”).

<sup>412</sup> LAFAVE ET AL., *supra* note 269, § 18.5(a).

<sup>413</sup> Kitai-Sangero, *supra* note 278, at 438 (“Personality change, however, is definitely not the reason for applying statutes of limitations in most offenses. Many statutes provide short periods for prosecution.”).

<sup>414</sup> See *supra* notes 133–173 and accompanying text.

<sup>415</sup> See *supra* notes 133–173 and accompanying text.

<sup>416</sup> See *supra* notes 202–220 and accompanying text.

<sup>417</sup> Kitai-Sangero, *supra* note 278, at 442 (“Without repentance and without changing one's perception regarding the offense, the events that occur during one's life—whether studies, a change of occupation, marriage, parenthood, and more—do not constitute moral factors in support of the view

tations as a forgiveness that the state extends to criminals.<sup>418</sup> If a criminal's perception of the criminal act and its victims does not change, forgiveness and absolution do not seem appropriate.

Although the identity limiting account may seem subject to the same objection, it has a ready response. It does not require (as the law does not) contrition. The reason is straightforward: “[g]enuine repentance, as well as such states as contrition, remorse, the feeling of guilt, and the desire for atonement, all require some sense of continuity with the past and self-identity with an earlier wrongdoer.”<sup>419</sup> If, as the identity limiting account proposes, criminal identity changes in relevant respects over the limitations period, a person may lack the continuity of self required for forgiveness. A person whose identity has changed may feel regret for past wrongs. Perhaps society should demand that. Regret is the appropriate response to any harm that befalls an innocent person, regardless of who brought the harm about. But it is a conceptual mistake to demand that a person feel guilt or contrition when that person is not (i.e. is no longer) identifiable as the wrongdoer.<sup>420</sup>

### III. PRESCRIPTIONS FOR LIMITING IDENTITY IN CRIMINAL LAW

This Article has argued that criminal law should care about diachronic criminal identity. Only then could the law assure that the present-day people it targets are those who deserve punishment for past criminal acts. If the account of statutes of limitations in the previous Part is correct, then criminal law already has some commitments to something like the theory of diachronic criminal identity offered in Part I. Criminal law, however, has failed to embrace the broader implications of personal identity. The justice system routinely over-prosecutes and over-punishes by holding people accountable for crimes that their non-identical past selves committed. This Part draws attention to several core areas of criminal law where this happens and proposes concrete reforms that better align the requirements of the identity principle with the limits of personal identity.

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that punishment is inappropriate to the moral situation in which the potential defendant is currently ensconced.”).

<sup>418</sup> *Id.* at 443 (“But should the law forgive, through statutes of limitations, a wrongdoer who did not beg for forgiveness and did not express repentance? . . . The passage of time by itself does not convey the same message that repentance does.”).

<sup>419</sup> FEINBERG, *supra* note 208, at 85; see also Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 739 (1992) (“Individual responsibility supports two fundamental bases of morality: the continuing identity of the person and the individual’s power of self-determination.”).

<sup>420</sup> See Dufner, *supra* note 62, at 147 (“Without recollections, someone can only regret that the crime occurred, just as every other person could regret that the crime occurred. A genuine subjective appreciation of the fact that it was *oneself* who committed the crime would not be possible.”).

### A. *Limiting Prosecution*

Indicting anyone for a crime committed one hundred and twenty years ago would be inappropriate. It would of necessity involve indicting the wrong person because the natural lifespan of a human being is less than one hundred and twenty years. Under the same logic, if people's identities naturally change over time, prosecution for crimes that occurred before the period within which identities ordinarily change should also be inappropriate. Part II argued that statutes of limitations are one way the law recognizes this. But statutes of limitations do the job imperfectly. As one obvious example, some of the most serious crimes in every jurisdiction, most notably murder, have no statute of limitations.<sup>421</sup> If identities can change, this policy violates the identity principle. Innocent people should not be at serious risk of indictment, even for, and perhaps especially for, the most serious offenses. The identity principle should require time limits on prosecuting any crime.

This Section considers other respects in which a psychologically and philosophically informed approach to personal identity would constrain prosecution for past crimes.

#### 1. Young Offenders

Prosecution policy should be keyed to the best psychological data about how identity changes. A growing body of research suggests that personal identity changes at different rates with age. If that is right, it holds implications both for statutes of limitations as applied to young offenders and for the juvenile justice system.

Human psychology changes very rapidly during the earlier stages of life. Some of this is due to the natural maturation of basic cognitive reasoning capacities. Psychologists once thought that these capacities reached near completion in mid-adolescence.<sup>422</sup> They now know that it takes many more years before these cognitive capacities reach adulthood.<sup>423</sup> Teens continue to be vulnerable to judgment-distorting influences like peer orientation, misperception of

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<sup>421</sup> Robin & Anson, *supra* note 254, at 2.

<sup>422</sup> JOHN H. FLAVELL ET AL., *COGNITIVE DEVELOPMENT* 132 (3d ed. 1993); Shawn L. Ward & Willis F. Overton, *Semantic Familiarity, Relevance, and the Development of Deductive Reasoning*, 26 *DEVELOPMENTAL PSYCHOL.* 488, 492 (1990).

<sup>423</sup> Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood?*, BBC NEWS (Sept. 23, 2013), <https://www.bbc.com/news/magazine-24173194> [<https://perma.cc/2NLD-NKY7>].

risk, and deficient self-management.<sup>424</sup> Current brain science shows significant signs of adolescence and development until well into the twenties.<sup>425</sup>

Additionally, young people have a relatively fluid relationship with personal identity. During the pre-teen years—“characterized by exploration, experimentation, and fluctuations in self-image”—it may be said that people do not have fully coherent personal identities at all.<sup>426</sup> Psychologists describe a predictable developmental sequence from “identity crisis” toward greater self-definition.<sup>427</sup> Both superficial identity elements—like dress and speech manner—and deeper elements—like personality and values—are in flux.<sup>428</sup> It is not until early adulthood that there is “coherent integration of the various retained elements of identity.”<sup>429</sup> In a very real sense, “[a]dolescents are not yet the persons they will become.”<sup>430</sup>

Identity development never ceases: the persons adolescents will become are not the persons they will remain.<sup>431</sup> The process of self-definition and re-definition lasts a lifetime. Youth, adulthood, and old age, however, mark points on a spectrum of the rate of change. As a person ages, her preferences, values, and personalities stabilize.<sup>432</sup> As a result, people in their middle years change identity faster than seniors, people in their twenties change identity faster still, and teenagers’ newly formed identities change fastest of all.<sup>433</sup>

This variance in the rate of identity change should inform how the law approaches statutes of limitations. On the identity limiting account, statutes of limitations serve as an implicit recognition that personal identity changes, and that it is improper to prosecute a person with a different identity than the criminal. Currently, fixed limitations periods apply across the board to all offenders regardless of age. In Iowa, for example, the statute of limitations for most felonies is three years; that period applies “[i]n all cases.”<sup>434</sup> A more defensible approach would key limitations periods to a person’s age at the time of offense—shorter periods for younger criminals, longer for older. This would help

<sup>424</sup> Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 222–23 (1995).

<sup>425</sup> Shannon Brownlee, *Inside the Teen Brain*, U.S. NEWS & WORLD REP., Aug. 9, 1999, at 44, 52–53; Wallis, *supra* note 423.

<sup>426</sup> Scott & Steinberg, *supra* note 411, at 812.

<sup>427</sup> ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 15–20 (1968).

<sup>428</sup> LAURENCE STEINBERG, *ADOLESCENCE* 209–34 (11th ed., 2017).

<sup>429</sup> Scott & Steinberg, *supra* note 411, at 820.

<sup>430</sup> *Id.* at 821.

<sup>431</sup> Quoidbach et al., *supra* note 6, at 97.

<sup>432</sup> *Id.* at 96.

<sup>433</sup> Brent W. Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies*, 132 PSYCHOL. BULL. 1, 2–3 (2006) (discussing a large body of research finding that personalities become more stable as people age).

<sup>434</sup> IOWA CODE § 802.3 (2019).

limitations periods keep pace with observable generalizations about how identity actually changes, rather than insisting that it changes at a fixed rate from birth to death.

The unique personal identity characteristics of young offenders should also inform how the juvenile justice system functions. The system is currently caught between two framing conceits.<sup>435</sup> In the 1940s, every state had independent juvenile court systems, with special child-protective rules of procedure and a focus on reform and reintegration.<sup>436</sup> “The juvenile court’s rehabilitative ideal rested on several assumptions about positive criminology, children’s malleability, and the availability of effective intervention strategies to act in the child’s ‘best interests.’”<sup>437</sup> During the 1980s and 1990s, however, rates of juvenile crime increased rapidly,<sup>438</sup> leading to a series of high-profile tragedies.<sup>439</sup> These developments motivated a more retributivist mentality toward juvenile crime. Laws created several exceptions under which juveniles who committed serious violent crimes could qualify for prosecution as adults.

Scholars who criticize the retributive shift in juvenile justice contend that “it is [always] inappropriate to hold adolescents to an adult standard of accountability.”<sup>440</sup> The Supreme Court has endorsed this view:

[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult, since inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the

<sup>435</sup> C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 660 (2005) (“[T]he bright line that used to exist between the adult criminal system and the juvenile justice system has become blurred, if not erased.”); Scott & Steinberg, *supra* note 411, at 802–11 (providing a brief history of the move from “the traditional juvenile justice model based on non-responsibility [to] a regime of full responsibility”).

<sup>436</sup> Barry C. Field, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 337 (1999) (“The juvenile court combined the new conception of children with the new strategies of social control to produce a judicial-welfare alternative to criminal justice, to remove children from the adult process, to enforce the newer conception of children’s dependency, and to substitute the state as *parens patriae*.”); Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 378; Adam D. Kamenstein, Note, *The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2109 (1997).

<sup>437</sup> Field, *supra* note 436, at 337.

<sup>438</sup> Hunter Hurst, III, *Crime Scene: Treating Juveniles as Adults*, TRIAL (July 1, 1997), <https://www.thefreelibrary.com/Crime+scene%3A+treating+juveniles+as+adults.-a019634470> [<https://perma.cc/RP6W-4V54>] (“Between 1982 and 1991, the arrest rate of juveniles for violent crimes grew 41 percent.”).

<sup>439</sup> See Clarke, *supra* note 435, at 674–75 (cataloguing several school shootings in the 1990s).

<sup>440</sup> *Id.* at 710; Scott & Steinberg, *supra* note 411, at 830 (“[Y]oung offenders are less culpable than adults because of their diminished capacity . . .”).

same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.<sup>441</sup>

This perspective—that juveniles are less developed and therefore less responsible—may justify reinvigorating the firm line separating the juvenile justice system. As its proponents point out, the factors that currently qualify a juvenile offender for treatment as an adult under the law have no bearing on whether children have crossed developmental hurdles necessary for true responsibility.<sup>442</sup> The perspective suffers, however, from two critical shortcomings. One is that it fails to acknowledge the politically powerful and widespread “assumption that young offenders . . . are fully responsible.”<sup>443</sup> This may limit its prospects for success. The second shortcoming is that it has unpalatable implications for the accountability of adult criminals. If impulsivity and susceptibility to peer pressure mitigate teen responsibility, why not for adults too?

Framing the justification for a separate juvenile criminal justice system in terms of personal identity can show the necessity of reform while also speaking to the insights of both the earlier (rehabilitative) and current (retributive) approaches.<sup>444</sup> Some scholars have dismissed personal identity as an available lens for theorizing juvenile criminal justice.<sup>445</sup> Bucking that trend, Elizabeth S. Scott and Laurence Steinberg have pioneered work on juvenile identity and criminal justice.<sup>446</sup> They are character theorists and view people as responsible for misconduct when their behavior manifests defective character.<sup>447</sup> Juveniles should have a separate justice system because, according to Scott and Steinberg, adolescent behavior “does not manifest ‘character’ at all.”<sup>448</sup> “Youthful involvement in crime is often a part of [exploration and experimentation] and, as such, it reflects the values and preferences of a transitory stage, rather than

<sup>441</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 816 (1988).

<sup>442</sup> Clarke, *supra* note 435, at 661 (“Drawing conclusions about the responsibility and accountability of young offenders predicated on the severity of the offense is illogical in light of the developmental and psycho-social realities that influence adolescent behavior.”).

<sup>443</sup> Scott & Steinberg, *supra* note 411, at 807.

<sup>444</sup> Related approaches include “blended sentencing,” according to which a juvenile criminal receives both juvenile detention and adult sentence, with the understanding that the latter will be suspended if the juvenile rehabilitates before attaining majority. Clarke, *supra* note 435, at 681–85.

<sup>445</sup> See, e.g., Flanders, *supra* note 16, at 465 (“If we except juveniles from [being condemned for the rest of their lives], as we do, it is because we are not really sure that the act of the child demonstrated a fully responsible act . . .”). Others mention it in passing without developing the theme. See, e.g., Clarke, *supra* note 435, at 698 (“The criminal law, however, is ordinarily not interested in whether an individual’s identity has changed since he committed the offense . . . [T]his refusal to consider the viability of the ‘later self’ is fundamentally flawed.”).

<sup>446</sup> Scott & Steinberg, *supra* note 411, at 834–35.

<sup>447</sup> *Id.* at 823–25.

<sup>448</sup> *Id.* at 834.

those of an individual with a settled identity.”<sup>449</sup> If a juvenile’s behavior has no connection to character, she cannot be accountable on a character theoretic approach to punishment. Although there is much to recommend from Scott’s and Steinberg’s work, it fails to acknowledge the strong feeling many people have (including juveniles themselves) that teenagers are capable of responsible action. Their work is also in tension with the general view that juveniles are independent loci of dignity.<sup>450</sup> A person’s capacity for responsible action is part and parcel with their status as beings worthy of respect.<sup>451</sup>

The proposition advanced here is that juveniles may be fully capable of having identities, but that juvenile identity changes much more quickly than it will later in life. This approach speaks to retributive sensibilities and respects the dignity that juveniles possess. Middle and late adolescents are people who have identities and may even be able act responsibly. But given how rapidly their identities change, it makes sense to have an adjudicatory and sentencing process tailored to them. Courts, judges, and prosecutors attuned to this fact can help limit the consequences of conviction so that its effects are less likely to outlast the transience of young identity.<sup>452</sup>

The approach to criminal identity offered here also suggests that the law may be drawing the wrong line between juveniles and adults. Depending on the jurisdiction, one becomes an adult for criminal law purposes at sixteen,<sup>453</sup> seventeen,<sup>454</sup> or eighteen.<sup>455</sup> A person’s criminal identity, as defined in Part I, is tied to characterological traits that dispose her to engage in criminal conduct. The most reliable way to track generalities of how criminal identity develops over the human life cycle is to look at statistics relating age and rates of mis-

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<sup>449</sup> *Id.* at 801; see Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 291, 293 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that juvenile crime reflects a transitory developmental stage rather than individual preferences).

<sup>450</sup> See, e.g., Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 *COLUM. J. GENDER & L.* 409, 450–53 (2009) (discussing the importance of recognizing the dignity of minors while addressing laws that limit the ability of minors to make decisions such as ending a pregnancy); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (recognizing ability of minors to exercise First Amendment rights).

<sup>451</sup> See Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 476 (1968) (explaining that humans have a right to be punished because this stems from the “fundamental right to be treated as a person” and denying that right equates to denying a person’s moral duties).

<sup>452</sup> David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 *TEX. L. REV.* 1555, 1563 (2004) (“[T]he adult forum makes juveniles liable for longer sentences in harsher environments and makes their convictions a matter of permanent public record.”).

<sup>453</sup> N.Y. PENAL LAW § 10.00 (McKinney 2009 & Supp. 2019); MODEL PENAL CODE I § 4.10.

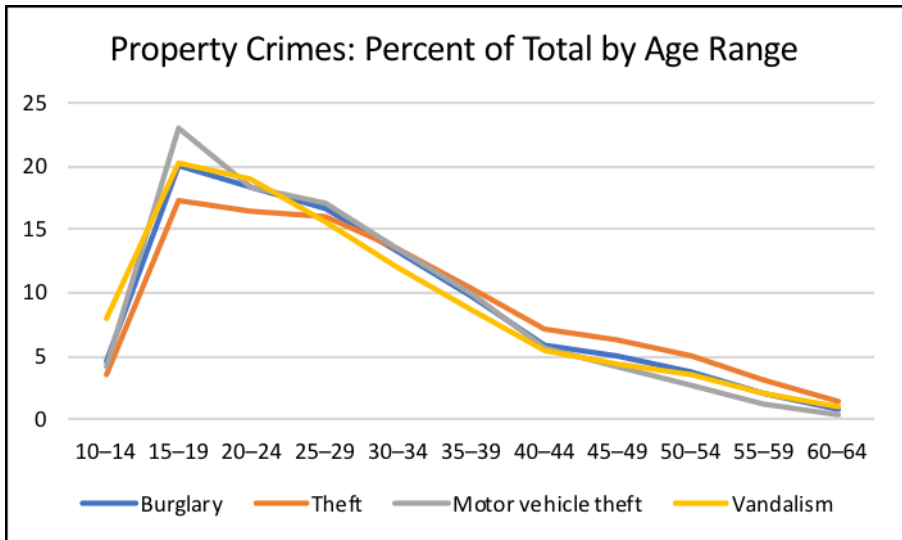
<sup>454</sup> TEX. PENAL CODE ANN. § 8.07(b) (West 2011 & Supp. 2018).

<sup>455</sup> *Juvenile*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Someone who has not reached the age [usu[ally] 18] at which one should be treated as an adult by the criminal-justice system.”).

conduct. These can show when criminal dispositions are most likely to develop, and, as importantly, when people who have acquired those dispositions are most likely to lose them.

“It is now a truism that age is one of the strongest factors associated with criminal behavior.”<sup>456</sup> The Federal Bureau of Investigation (FBI) keeps statistics on arrest rates for different age groups across all major crime categories.<sup>457</sup> An almost law-like relationship emerges from the most recent data. It suggests that current juvenile justice policy of treating juveniles who commit more serious crimes as adults is *exactly backwards*.

For property crimes, as illustrated in the graph below, eighteen seems to be the right approximate age of majority so far as criminal identity is concerned.<sup>458</sup>



The inflection point between fifteen and nineteen shows that this range of ages is where criminal disposition is most likely to develop and after which it is most likely to be lost.<sup>459</sup> On the theory of diachronic criminal identity developed in Part I, this means that the criminal justice system should anticipate a

<sup>456</sup> Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 377, 378 (Kevin M. Beaver et al. eds., 2015).

<sup>457</sup> *2016 Crime in the United States: Arrests by Age*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-20/table-20.xls#overview> [<https://perma.cc/56XS-8PM6>] [hereinafter FBI].

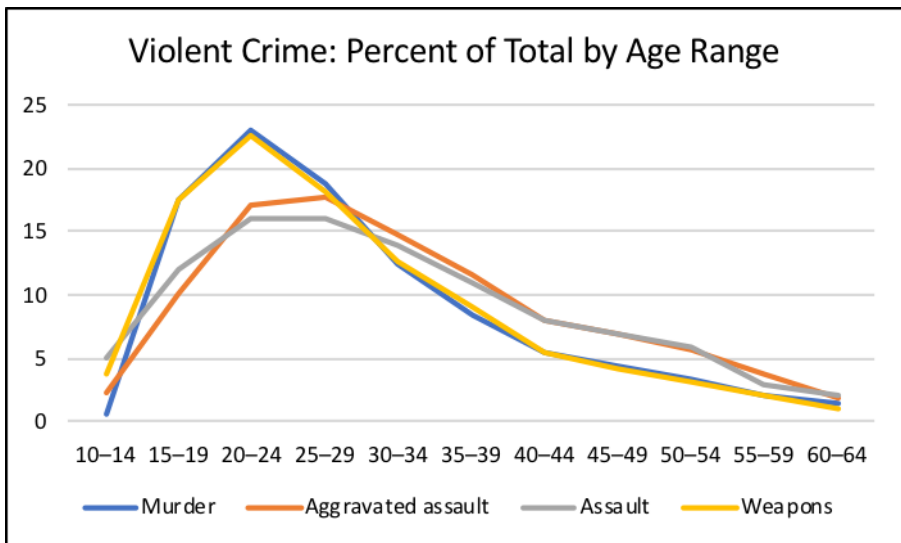
<sup>458</sup> *Id.* The above graph was created using the arrest data available in the FBI’s 2016 arrest by age report.

<sup>459</sup> *Id.*



rapid change in criminal identity after the late teen years so far as property crimes are concerned.

It is different, however, for more serious crimes like murder and aggravated assault.<sup>460</sup> Judges and prosecutors often have the discretion to treat juveniles who commit serious crimes as adults.<sup>461</sup> Presumably, the thought is that juveniles who commit such crimes must, despite their youth, already be “hardened criminals.”<sup>462</sup> Statistics on the incidence of these serious crimes, as illustrated in the graph below, suggest that the age of adulthood, so far as criminal identity is concerned, is *later* rather than earlier.<sup>463</sup>



<sup>460</sup> JOHN T. WHITEHEAD & STEVEN P. LAB, *JUVENILE JUSTICE: AN INTRODUCTION* 231 (4th ed. 2004); *From Juvenile Delinquency to Young Adult Offending*, NAT’L INST. OF JUST., (Mar. 10, 2014) <https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx> [<https://perma.cc/22ZE-SHXV>] (“The curve for violence tends to peak later than that for property crimes.”).

<sup>461</sup> Brink, *supra* note 452, at 1557 (“The national trend to try juveniles accused of serious crimes as adults is unmistakable.”); *id.* at 1563–65; *see, e.g.*, N.Y. PENAL LAW § 10.00 (defining “juvenile offender” to exclude those who commit listed serious crimes).

<sup>462</sup> Juan Alberto Arteaga, *Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1051–53 (2002) (“Federal lawmakers—describing America’s children as ‘hardened criminals’ . . . have sought to enact legislation that would facilitate prosecuting juveniles in criminal court. Cloaking their efforts with ‘poll tested’ phrases such as ‘[y]ou do the adult crime, you do the adult time, these reformers argue that juveniles must be held accountable for their actions . . .’ (footnotes omitted)).

<sup>463</sup> One serious crime of violence that is conspicuously absent is rape. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis 2012 & Supp. 2018) (defining rape as a “crime of violence”). The incidence of arrest for rape offenses peaks between fifteen and nineteen. FBI, *supra* note 457. This suggests that laws that treat some otherwise juvenile offenders accused of rape as adults, *e.g.*, N.Y. PENAL LAW § 10.00(18)(2), may be more appropriate than such laws as they relate to other violent offenses.

The inflexion point for these violent crimes occurs after twenty.<sup>464</sup> This suggests that the more appropriate age of majority, bearing in mind the rates at which criminal identity changes, is closer to the mid-twenties than to eighteen. For violent crimes and any others that share similar age-of-commission characteristics, the presumptive age of adulthood should be several years later than it currently is.

Such “age-crime curves” would strike most criminologists as quaint.<sup>465</sup> For centuries, they have known that criminal involvement peaks around early adulthood and then declines with age.<sup>466</sup> Though generalized statistics fail to capture individual variations, the curve is a predictable reverse-U.<sup>467</sup> Scholars working on life-course criminology point to different variables that might explain the decline in criminal activity after early adulthood.<sup>468</sup> These include both biological changes, like brain developments relating to emotional maturity<sup>469</sup> and physical decline,<sup>470</sup> and social changes like finding legitimate employment<sup>471</sup> and marriage.<sup>472</sup> Whatever variables are at play, when they produce a shift in criminal identity at predictable age markers, the law should take notice.

<sup>464</sup> FBI, *supra* note 457. The above graph was created using the arrest data available in the FBI’s 2016 arrest by age report.

<sup>465</sup> See David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189, 189 (1986) (“The relation[ship] between age and crime . . . is well-known.”).

<sup>466</sup> See, e.g., ADOLPHE QUETELET, RESEARCH ON THE PROPENSITY FOR CRIME AT DIFFERENT AGES 55 (Sawyer F. Sylvester trans., Anderson Pub. Co. 1984) (“The propensity for crime . . . must be at its *maximum* at the age where the strength and passions have attained their *maximum*, and where reason has not acquired sufficient command to dominate their combined influence.”).

<sup>467</sup> See Marc Le Blanc, *Twenty-Five Years of Developmental Criminology: What We Know, What We Need to Know*, in THE FUTURE OF CRIMINOLOGY 124, 126 (Rolf Loeber & Brandon C. Welsh eds., 2012).

<sup>468</sup> See generally Glen H. Elder, Jr., *The Life Course Paradigm: Social Change and Individual Development*, in EXAMINING LIVES IN CONTEXT: PERSPECTIVES ON THE ECOLOGY OF HUMAN DEVELOPMENT 101, 104–05 (Phyllis Moen et al. eds., 1995) (describing life-course theory).

<sup>469</sup> David P. Farrington et al., *Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing*, 11 CRIMINOLOGY & PUB. POL’Y 729, 733 (2012).

<sup>470</sup> Ulmer & Steffensmeier, *supra* note 456, at 391–92; see Darrell J. Steffensmeier, *Organization Properties and Sex-Segregation in the Underworld: Building a Sociological Theory of Sex Differences in Crime*, 61 SOC. FORCES 1010, 1014–15 (1983) (discussing the physical abilities that can be necessary in committing crime).

<sup>471</sup> JOHN H. LAUB & ROBERT J. SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70, at 17 (2003) (“The limited literature focusing directly on desistance from crime indicates that there are multiple pathways, including attachment to a conventional person such as a spouse, stable employment, transformation in personal identity, and the aging process.”).

<sup>472</sup> Delphine Theobald & David P. Farrington, *Effects of Getting Married on Offending: Results from a Prospective Longitudinal Survey of Males*, 6 EUR. J. CRIMINOLOGY 496, 512 (2009) (“[W]e found that, for men who got married, there were significant reductions in the number of convictions after marriage.”).

## 2. Statutes of Repose

Statutes of limitations are subject to an increasing number of exceptions, called tolling provisions, which allow prosecutors to bring charges that the limitations period would otherwise bar. As discussed in Part II with respect to continuing offenses, some tolling provisions are consistent with recognizing that people's identities change.<sup>473</sup> Considerations of personal identity, however, should prompt a reevaluation of other tolling provisions to ensure they do not violate the identity principle. As a general rule, statutes of limitations should evolve to look more like statutes of repose, which are not subject to most forms of tolling.<sup>474</sup> "Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability. . . . [I]t in part embodies the idea that at some point a defendant should be able to put past events behind him."<sup>475</sup>

Tolling provisions that extend limitations periods without any reference to intervening activity are immediately suspect. For example, some states apply a discovery rule to certain crimes, like fraud, according to which the limitations period only begins to run once the offense is discovered.<sup>476</sup> Several states also retroactively toll statutes of limitations until any point in time that inculcating DNA evidence is discovered.<sup>477</sup> The motivations behind these exceptions are laudatory. Fraud, by its nature, is easily concealed.<sup>478</sup> This means that limitations periods ordinarily used for crimes of similar seriousness will often run out before fraud comes to light. DNA evidence, unlike witness memories or

<sup>473</sup> See *supra* notes 364–377 accompanying text.

<sup>474</sup> 4 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1056 (4th ed. 2015) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling.").

<sup>475</sup> *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014).

<sup>476</sup> See, e.g., CAL. PENAL CODE § 803(c) (West 2008 & Supp. 2019); *Traer v. Clews*, 115 U.S. 528, 538 (1885) ("[T]he statute [of limitations] does not begin to run until the fraud is discovered."); J.E. Keefe, Annotation, *Pleading Avoidance of Delay in Discovery of Fraud in Order to Toll Statute of Limitations*, 172 A.L.R. 265, § 1 (originally published in 1948) ("By the weight of judicial authority, and by statutory provisions existing in numerous states, in actions for relief on the ground of fraud, the bar of the applicable statute of limitations commences to run only from discovery or from when, with reasonable diligence, there ought to have been a discovery of the facts constituting the fraud.").

<sup>477</sup> See, e.g., FLA. STAT. § 775.15 (2017) ("[A] prosecution for any of [several listed] offenses may be commenced at any time after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence."); UTAH CODE ANN. § 76-1-302 (LexisNexis 2017 & Supp. 2019) ("[P]rosecution for the offenses listed in [sections listing dozens of offenses] may be commenced at any time if the identity of the person who committed the crime is unknown but DNA evidence is collected that would identify the person at a later date.").

<sup>478</sup> ROBINSON, *supra* note 35, § 202(c) ("Because the offenses of fraud, breach of fiduciary obligation, and misconduct in office by public officers and employees are easily concealed, many jurisdictions have special rules governing the period of limitation in those cases.").

paper documents, does not spoil with time and remains solid proof of physical contact,<sup>479</sup> even decades later.<sup>480</sup>

These rationales, however, are irreconcilable with any rationale that focuses on fairness to the defendant or social welfare.<sup>481</sup> They are even harder to justify on the identity limiting account. Discovery of the offense or DNA evidence can have no bearing on whether the offender or the owner of the genome remains the same person.

For a very limited class of crimes, tolling until discovery, or even abolishing statutes of limitations entirely, might make sense. These are crimes whose very commission shows that the offender has a durable criminal identity that is unlikely to change with the passage of time. Although, as a general rule, criminal identities change with time, the best psychological understanding of some criminal dispositions is that they last a lifetime. The disposition to commit sexual offenses against minors is one such example.<sup>482</sup> Most states have effectively removed statutes of limitations for such offenses.<sup>483</sup> One common justification is that the effects of sexual abuse on victims never go away.<sup>484</sup> Additionally, child victims often repress memories of their abuse only to find that the limitations period has passed by the time the memories resurface.<sup>485</sup> Leading commentators have argued that extending statutes of limitations for child sex abuse “are particularly difficult to square with the rule’s fairness- and efficiency-promoting purposes.”<sup>486</sup> On the identity limiting account, however, it may make a lot of sense. Psychologists now understand that pedophilia is a

<sup>479</sup> Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 WASH. L. REV. 413, 473 (2001) (“DNA evidence can be conclusive only as to one factual issue—whether the DNA in the trace evidence somehow originated from the defendant.”).

<sup>480</sup> *Id.* at 472 n.309 (“DNA evidence does not grow stale with the passage of time.”).

<sup>481</sup> DiFonzo, *supra* note 344, at 1231 (discussing “the logical incoherence of allowing DNA indictments to satisfy limitations statutes”); Andrew C. Bernasconi, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants’ Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 999 (2001) (“DNA indictments disregard the very purpose for which statutes of limitations were enacted.”); Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 GEO. L.J. 1009, 1041 (2002) (“[A] DNA warrant may present issues of staleness.”).

<sup>482</sup> See *Pessimism About Pedophilia*, HARV. HEALTH PUB. (July 2010), [https://www.health.harvard.edu/newsletter\\_article/pessimism-about-pedophilia](https://www.health.harvard.edu/newsletter_article/pessimism-about-pedophilia) [<https://perma.cc/K267-XTY4>] (stating that it is impossible to change someone from being a pedophile).

<sup>483</sup> Symone Shinton, *Pedophiles Don’t Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*, 92 CHI.-KENT L. REV. 317, 317–19 (2017).

<sup>484</sup> DiFonzo, *supra* note 344, at 1225–26.

<sup>485</sup> See generally Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie—Words of Caution About Tolling Statutes of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 130–32 (1993) (discussing the connection between memory repression and the removal of statutes of limitations for sexual offenses against minors); Leibowitz, *supra* note 262, at 916–24 (same).

<sup>486</sup> Powell, *supra* note 54, at 132.

“sexual orientation[] . . . unlikely to change.”<sup>487</sup> Even pedophiles who seek help for their condition will find that there is no effective treatment.<sup>488</sup> As such, sexual abuse of a child manifests a criminal disposition—a criminal identity—that is likely to outlast any limitations period.<sup>489</sup> In such cases, imposing any limitations period would conflict with current science establishing the *un*-changeability of pedophilic criminal identity.

### B. Limiting Punishment

The stigma and burden of prosecution is not the only effect that the criminal justice system can have on defendants long after a crime occurred.<sup>490</sup> If criminal law is to take seriously the possibility that personal identity can change over time, then it must consider that other prolonged effects may impact the wrong people. These include long-term prison sentences and enduring collateral consequences of conviction.

#### 1. Prison Terms

There are more than 160,000 people presently serving life sentences in the United States.<sup>491</sup> An additional 44,000 are serving “virtual life sentences” of fifty years or more.<sup>492</sup> The number of life sentences has been growing rapid-

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<sup>487</sup> *Pessimism About Pedophilia*, *supra* note 482.

<sup>488</sup> Alice Dreger, *What Can Be Done About Pedophilia?*, THE ATLANTIC (Aug. 26, 2013), <https://www.theatlantic.com/health/archive/2013/08/what-can-be-done-about-pedophilia/279024/> [<https://perma.cc/HYS3-BCNR>] (“We have not yet found a way to convert pedophiles into non-pedophiles that [is] any more effective than the many failed attempts to convert gay men and lesbians into heterosexuals.”); *Pessimism About Pedophilia*, *supra* note 482 (“There is no cure [for pedophilia].”); *Pedophilia*, PSYCHOL. TODAY, <https://www.psychologytoday.com/us/conditions/pedophilia> [<https://perma.cc/Y4HS-CW3N>] (“[For pedophiles,] longstanding sexual fantasies about children can be difficult to change. . . . Dynamic psychotherapy, behavioral techniques, chemical approaches, and surgical interventions deliver mixed results. Lifelong maintenance may be the most pragmatic and realistic approach.”).

<sup>489</sup> LIN SONG & ROXANNE LIEB, ADULT SEX OFFENDER RECIDIVISM: A REVIEW OF STUDIES 12 (1994), [http://www.wsipp.wa.gov/ReportFile/1161/Wsipp\\_Adult-Sex-Offender-Recidivism-A-Review-of-Studies\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1161/Wsipp_Adult-Sex-Offender-Recidivism-A-Review-of-Studies_Full-Report.pdf) [<https://perma.cc/6B4M-A4YM>] (“Some sex offenders, such as child molesters, may reoffend many years after an initial sex offense. For these sex offenders, deviant sexual behavior may be a life-long pattern.”).

<sup>490</sup> *Arizona v. Washington*, 434 U.S. 497, 503–04 (1978) (“[Prosecution imposes] financial and emotional burden on the accused [and] prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing . . . .” (footnotes omitted)); LAFAVE ET AL., *supra* note 269, § 13.2(a)(3) (“[The decision not to prosecute can] relieve deserving defendants of even the stigma of prosecution.”).

<sup>491</sup> Nellis, *supra* note 31, at 5.

<sup>492</sup> *Id.*

ly and currently stands at four times what it was in 1984.<sup>493</sup> This is part of a broader trend across all states of imposing longer prison sentences, which have increased on average by five years since 2000.<sup>494</sup> Of inmates serving life sentences, nearly a third have no possibility of parole.<sup>495</sup> More than ten-thousand inmates serving life sentences were convicted while juveniles. Of these, a quarter serve without the possibility of parole.<sup>496</sup>

If personal identity ordinarily changes, judges should impose life sentences much more rarely. There is no reason to suppose that the natural processes by which personal identity changes cease behind bars. Life sentences unjustifiably risk eventually imprisoning people who are innocent, even if their earlier counterparts were guilty. Just as statutes of limitations limit prosecutions that bear too great a risk of targeting a person with a now-changed identity, formal limits on prison terms should be in place to limit the risk of incarcerating now-changed inmates. The risk is particularly high for individuals starting life sentences as juveniles, when identities change at a rapid pace. Just as statutes of limitations should be shorter the younger an offender is, caps on prison sentences should also be shorter for younger convicts.<sup>497</sup> Several countries already have across-the-board limits on prison terms.<sup>498</sup> Norway, for example, does not impose prison sentences longer than twenty-one years.<sup>499</sup> The country also has “some of the lowest crime and recidivism rates” in the world.<sup>500</sup>

Norway, of course, is not the United States. A more nuanced approach to limiting sentences may better accommodate both the concerns about identity change and the considerations that sometimes justify lengthy sentences here.

<sup>493</sup> Niall McCarthy, *Report: The Number of People Serving Life Sentences in the U.S. Is Surging*, FORBES (May 5, 2017), <https://www.forbes.com/sites/niallmccarthy/2017/05/05/report-the-number-of-people-serving-life-sentences-in-the-u-s-is-surg-ing-infographic/#1e624f85691d> [<https://perma.cc/AS4Y-R6NR>].

<sup>494</sup> *The Hidden History of Rising Time Served*, URB. INST. (July 2017), <http://apps.urban.org/features/long-prison-terms/trends.html> [<https://perma.cc/A9FN-DQFB>].

<sup>495</sup> Nellis, *supra* note 31, at 16.

<sup>496</sup> ASHLEY NELLIS, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA*, 1 (2012), [http://sentencingproject.org/doc/publications/inc\\_Life%20Goes%20On%202013.pdf](http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf) [<https://perma.cc/K646-8GE6>].

<sup>497</sup> See *supra* notes 422–472 and accompanying text.

<sup>498</sup> *Maximum Length of Sentence*, NATION MASTER (2019), <https://www.nationmaster.com/country-info/stats/Crime/Punishment/Maximum-length-of-sentence> [<https://perma.cc/9SA2-4VPC>].

<sup>499</sup> Bryan Lufkin, *The Myth Behind Long Prison Sentences*, BBC (May 15, 2018), <http://www.bbc.com/future/story/20180514-do-long-prison-sentences-deter-crime> [<https://perma.cc/D2LE-X2LB>]. Norway is not alone. William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT’L L. 461, 480 (1997) (“[O]ther European States such as Norway, Spain, and Portugal, in the interest of enlightened penal policy, have also done away with life imprisonment and established maximum prison terms of twenty to twenty-five years.”).

<sup>500</sup> Emily Labutta, Note, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 EMORY INT’L L. REV. 329, 329 (2017).

These considerations should not be ignored. In the 1970s and 1980s, both violent and property crime rates skyrocketed in the United States.<sup>501</sup> During that time, average prison sentences tripled,<sup>502</sup> in large part because courts and legislators wanted to get “tough on crime.”<sup>503</sup> This coincided with a broad shift in penal philosophy from the goal of rehabilitation to an emphasis on retribution.<sup>504</sup> Today “9 in 10 people serving the longest prison terms were convicted of a violent offense.”<sup>505</sup> Though life sentences may have little deterrent value, releasing violent inmates convicted of violent crimes risks shortchanging the interests of retributive justice and exposing society to still-dangerous individuals.<sup>506</sup>

A more moderate approach to sentencing reform is to keep life sentences but require the possibility of parole in every instance. Retaining the possibility of parole would require routine review of whether inmates’ criminal identities have changed at periodic intervals.<sup>507</sup> Of course, as with any parole decision, there is the risk of an error that returns a dangerous person back to the streets.<sup>508</sup> This risk can be mitigated with more demanding standards of review by parole boards<sup>509</sup> and tighter parole conditions to restrict and monitor parol-

<sup>501</sup> A. Michael DeBolt, Note, *The Punishing Father v. the Nurturing Mother: How Societal Views Towards Criminal Punishment Have Impacted Crime in the United States and Finland*, 12 U. ST. THOMAS L.J. 540, 541–42 (2016).

<sup>502</sup> ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 11 (2013).

<sup>503</sup> Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1138 (2012) (“Since the 1970s, when a perceived spike in the crime rate prompted politicians to pursue tough-on-crime policies, the American prison population has grown exponentially.” (footnote omitted)).

<sup>504</sup> Alschuler, *supra* note 57, at 9 (“The sentencing reform movement of the 1970s and 1980s prompted America’s reconsideration of its penal goals.”); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1294 (2006) (tracing the “thirty-year trend of increasingly severe sentences” to a shift to retributive penal philosophy).

<sup>505</sup> *Reform: Charting a New Path*, URB. INST. (July 2017), <http://apps.urban.org/features/long-prison-terms/reform.html> [<https://perma.cc/48Q9-L6LT>].

<sup>506</sup> NAT’L RES. COUNCIL OF THE NAT’L ACAD., *supra* note 50, at 83; David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 41 (2011).

<sup>507</sup> Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 16, 16 (2007) (stating that “institutional behavior, crime severity, criminal history, incarceration length, mental illness, and victim input” are the primary factors affecting parole release decisions).

<sup>508</sup> See, e.g., D. Michael Fisher, *Changing Pennsylvania’s Sentencing Philosophy Through the Elimination of Parole for Violent Offenders*, 5 WIDENER J. PUB. L. 269, 284–88 (1996) (discussing cases of parole release decisions that resulted in further violent crimes).

<sup>509</sup> See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1037 (1991) (discussing reforms to Wisconsin’s parole assessment factors that resulted in less reported crime); see also Edward R. Hammock & James F. Seelandt, *New York’s Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards’ Discretion*, 13 ST. JOHN’S J. LEGAL COMMENT. 527, 563 (1999) (“[R]eformation of the Board of Parole would effectively codify and improve parole procedures—which, in turn, would improve the safety of the public.”).

ees.<sup>510</sup> The rest of the world uses life-without-parole sentences far less often and seems none the worse for it.<sup>511</sup>

The Supreme Court has already shown some sympathy to this proposal when it comes to juvenile sentencing. In 2012, the Court ruled that statutes mandating sentences of life without parole violate the Eighth Amendment when applied to juveniles.<sup>512</sup> The Court then extended the ruling by proscribing life without parole for all juveniles except those “whose crimes reflect irreparable corruption.”<sup>513</sup> Although application of that standard may not live up to its promise, it suggests that only juveniles whose criminal identities will never change should be irredeemably locked away for life. Given what psychologists now know about the rapid pace of identity change during the juvenile years, the “irreparably corrupt” juvenile should be very rare.

One unavoidable consequence of reducing prison sentences (whether by imposing sentencing caps or requiring the possibility of parole) is that victims will sometimes feel that justice has not been done.<sup>514</sup> Unlike other sentencing reform proposals that couch justifications in broader policy rationales, an account focused on personal identity has a principled response.<sup>515</sup> At times, circumstances arise that necessarily frustrate victims’ interests in retribution—for example, the criminal may die in an accident before apprehension.<sup>516</sup> Although this may be a loss for victims hoping for justice, nabbing a lookalike scapegoat

<sup>510</sup> *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW CHARITABLE TR. 2 (Sept. 2018), [https://www.pewtrusts.org/-/media/assets/2018/09/probation\\_and\\_parole\\_systems\\_marked\\_by\\_high\\_stakes\\_missed\\_opportunities\\_pew.pdf](https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf) [<https://perma.cc/2EW8-HCXE>] (providing statistical evidence showing that “[i]mprovements in supervision offer opportunities to enhance public safety, decrease drug misuse, and reduce incarceration”).

<sup>511</sup> William W. Berry III, *More Different Than Life, Less Different Than Death*, 71 OHIO ST. L.J. 1109, 1130 (2010); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1731–32 (2006) (commenting on European countries and their limited use of life without parole sentences). On the other hand, there seems to be some disagreement about whether the United States is, overall, more punitive when it comes to violent crimes. Compare Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 690 (1997) (expressing the view that it is not), with *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, JUST. POL’Y INST. 1–2 (2011), <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf> [<https://perma.cc/U3KT-KH32>] (finding that it is).

<sup>512</sup> *Miller v. Alabama*, 567 U.S. 460, 470 (2012).

<sup>513</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

<sup>514</sup> See, e.g., Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1692 (1992) (arguing that part of the role of justice and punishment is to restore the victim’s sense of value).

<sup>515</sup> See, e.g., Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 318–20 (2009) (proposing policy reforms including abolishing mandatory sentences for drug crimes and limiting prisoners’ “length of stay”).

<sup>516</sup> Flanders, *supra* note 16, at 436 (“But the unique thing about the person who deserves to die is that he deserves to die in a certain way: at the hands of the state—that is, at the hands of us.”).



to satisfy their psychological needs is unquestionably off the table. Analogously, if inmates' personal identities really can change, then continuing to punish someone who has changed is no different from punishing an innocent look-alike. "It is better that ten guilty persons escape than that one innocent suffer."<sup>517</sup> In an ideal world, everyone's moral interests would be satisfied. But where natural changes bring the identity principle and victims' psychic satisfaction into conflict, the identity principle must prevail.

## 2. Collateral Consequences

Formal punishment is not the only state-imposed burden of criminal conviction. The various collateral consequences that accompany many convictions endure long past the payment of any fine or release from prison. "There are approximately 48,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits based on criminal convictions."<sup>518</sup> These include<sup>519</sup> ineligibility for welfare benefits,<sup>520</sup> public housing,<sup>521</sup> or jury service,<sup>522</sup> exclusion from professional licensing and other work opportunities,<sup>523</sup> and disenfranchisement.<sup>524</sup> The scope and effect of collateral consequences expanded dramatically during the 1980s and 1990s as part of the tough-on-crime movement.<sup>525</sup> At present, "U.S. policies on collateral consequences are harsher and

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<sup>517</sup> BLACKSTONE, *supra* note 29, at \*276.

<sup>518</sup> Brief of the Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15-1194), 2016 WL 7422735, at \*6.

<sup>519</sup> Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 258 (2004) ("In addition, society has created a vast network of collateral consequences that severely inhibit an ex-offender's ability to reconnect to the social and economic structures that would lead to full participation in society. These structural disabilities often include bars to obtaining government benefits, voting disenfranchisement, disqualification from educational grants, exclusion from certain business and professional licenses, and exclusion from public housing." (footnotes omitted)).

<sup>520</sup> *See, e.g.*, 21 U.S.C. § 862(a) (2012) (listing the length of ineligibility for federal benefits for people convicted of a federal drug trafficking crime).

<sup>521</sup> Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 37, 39 (M. Mauer & M. Chesney-Lind eds., 2002).

<sup>522</sup> Kalt, *supra* note 32, at 67.

<sup>523</sup> Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 23 (2005); Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2269 (2018).

<sup>524</sup> *Hunter v. Underwood*, 471 U.S. 222, 223 (1985); Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1045.

<sup>525</sup> Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROB. 10, 14–15 (1996).

more permanent than those in other countries.”<sup>526</sup> The law does not classify these collateral consequences as “punishment,”<sup>527</sup> but they often have similar effects. In practice, collateral consequences thwart criminal justice goals by serving as barriers to felons’ social reintegration and by promoting recidivism.<sup>528</sup>

Collateral consequences can be long lasting. Eleven states disenfranchise felons even after they have completed their sentences.<sup>529</sup> As a result, around 6.1 million people are presently disenfranchised in the United States, including one in thirteen African Americans nationwide.<sup>530</sup> In four states among those that allow post-sentence-completion disenfranchisement—Florida (until recently), Kentucky, Tennessee, and Virginia—one in five African Americans cannot vote.<sup>531</sup> Equally worrisome are the professional consequences of having a felony record.<sup>532</sup> Few states have mechanisms for expunging or sealing adult convictions, and those mechanisms that are available are “generally inaccessible and unreliable.”<sup>533</sup> Absent a presidential pardon, a federal criminal conviction will haunt a former felon to her grave.<sup>534</sup>

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<sup>526</sup> Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 462 (2010).

<sup>527</sup> See *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (holding that a state’s mandatory sex offender registry is not “punishment”).

<sup>528</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTION AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 10 (3d ed. 2004) (“[A] regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.”); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999) (“Ultimately, exclusions from the political, economic and social spheres of life undermine the notion that offenders can ever be successfully rehabilitated.”).

<sup>529</sup> JEAN CHUNG, FELONY DISENFRANCHISEMENT: A PRIMER, 2 (2019), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf> [<https://perma.cc/LT8E-THP2>].

<sup>530</sup> CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (Oct. 2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> [<https://perma.cc/DS4K-9T42>].

<sup>531</sup> *Id.*

<sup>532</sup> See Nora V. Demleitner, “*Collateral Damage*”: *No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1037–39 (2002) (citing suspension of drivers’ licenses, revocation of passports, bans on firearm possession, denial of state employment licenses, and restrictions from public employment as obstacles to employment for individuals with a felony conviction).

<sup>533</sup> MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE, at x–xi (2006).

<sup>534</sup> See Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEMPHIS L. REV. 1, 2 (2008) (“Millions of Americans suffer a life-long handicap as a result of a one-time lapse in judgment.”).

While other scholars have advanced dignity and race-based criticisms of collateral consequences,<sup>535</sup> these effects of conviction are also highly suspect from a personal identity perspective. If criminal law is to take seriously the possibility that personal identity changes with time, it can have no justification for automatically burdening people because of crimes long ago. Unlike the decision about whether to parole an inmate who is serving a life sentence, many of the felons at issue here have already served their sentences and been released to society. With few exceptions, when a former felon's criminal identity has changed, enduring collateral consequences can serve no legitimate criminal justice interest.

The most straightforward approach for reform would be to place hard expiration dates on collateral consequences. Applicable timeframes could differ by crime and collateral consequence. Floridians, for example, recently passed Amendment 4, which will return voting rights to felons immediately upon completion of their sentence.<sup>536</sup> Similar measures should be adopted for other collateral consequences that are not "closely related to the offense conduct involved"<sup>537</sup> nor designed to protect the public therefrom.<sup>538</sup>

Just as statutes of limitations serve as a time horizon after which a person (presumed to have a changed identity) cannot be prosecuted for a past crime, similar limitations periods should apply automatically to expunge past crimes from people's records. England's Rehabilitation of Offenders Act erases criminal records after a set period without reoffense.<sup>539</sup> According to that Act, after expungement, offenders "shall be treated for all purposes in law as a person who has not committed . . . the [subject] offence."<sup>540</sup> The United States should adopt a similar stance.

As discussed above, there are some criminal identities—like those that lead to sexual offenses against children—that are unlikely ever to change.<sup>541</sup> In

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<sup>535</sup> See, e.g., Pinard, *supra* note 526, at 511–23 (arguing that collateral consequences in the United States encroach on people's self-worth and disproportionately affect people of color).

<sup>536</sup> Frances Robles, *1.4 Million Floridians with Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html> [<https://perma.cc/K8KF-23CW>] ("Florida voters approved a measure to restore the voting rights of those with felony convictions who have served their sentences, as long as the crime committed was not murder or sexual abuse.").

<sup>537</sup> ABA, *supra* note 528, at 24.

<sup>538</sup> *Id.* at 23–24.

<sup>539</sup> Rehabilitation of Offenders Act, 1974 c. 53 (Eng.). Though the Act only applies to crimes whose sentence is less than thirty months, it could serve as a template for a more expansive expungement scheme.

<sup>540</sup> *Id.*

<sup>541</sup> See Timothy J. McCarvill & James M. Steinberg, *Have We Gone Far Enough? Children Who Are Sexually Abused and the Judicial and Legislative Means of Prosecuting the Abuser*, 8 ST. JOHN'S

these cases, “the focus is on protecting children.”<sup>542</sup> Tailor-made collateral consequences—like sex offender registration<sup>543</sup> and prohibitions on working at childcare facilities<sup>544</sup>—should have no time horizon for those convicted of sexual offenses against children. For highly durable criminal identities, there is no concern that such provisions violate the identity principle.

### C. Limiting Death Row

According to the latest available statistics, there are over 2,814 inmates currently on death row.<sup>545</sup> In 2013, the last year the Bureau of Justice Statistics compiled data about how long these inmates spend on death row, the average wait was fifteen and a half years.<sup>546</sup> Forty percent of all death row inmates have been there more than twenty years.<sup>547</sup> If, as suggested above, the age of adulthood for violent criminals is closer to twenty-five than eighteen, most inmates on death row have spent their entire adult lives there.<sup>548</sup> Many of the rest are much older and stand a better chance of dying in prison from natural causes than being executed.<sup>549</sup> The long wait across different life stages forcefully raises the concern that there are many inmates awaiting death whose criminal identities have changed.

This is far from the first Article to criticize excessive delays on death row. Nearly a quarter century ago, Justice John Paul Stevens wrote his famous *Lackey* memo on the issue.<sup>550</sup> The dominant concern among courts and schol-

J. LEGAL COMMENT. 339, 366 (1992) (“[T]he reality of child sex abuse indicates that the abuser does not reform but continues to abuse children.” (footnote omitted)); *supra* notes 482–489.

<sup>542</sup> *Pessimism About Pedophilia*, *supra* note 482 (emphasis removed).

<sup>543</sup> *See, e.g.*, 34 U.S.C. § 20913(c) (2006) (requiring sex offenders to register in the jurisdiction they live in).

<sup>544</sup> *See, e.g.*, 42 U.S.C. § 13041(c) (2012) (providing that employment in a federal or federally funded childcare facility may be denied based on “an offense involving a child victim”).

<sup>545</sup> ELIZABETH DAVIS & TRACY L. SNELL, DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2016, at 2 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cp16sb.pdf> [<https://perma.cc/E3AC-J52B>].

<sup>546</sup> TRACY L. SNELL, DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES, 2 (Dec. 2014), <https://deathpenaltyinfo.org/files/pdf/cp13st.pdf> [<https://perma.cc/JT9F-CT2F>].

<sup>547</sup> Rebecca McCray, *40 Years Awaiting Execution*, SLATE (Mar. 7, 2017), <https://slate.com/news-and-politics/2017/03/for-many-death-row-inmates-the-long-process-leading-to-capital-punishment-is-cruel.html> [<https://perma.cc/9SPR-CABX>].

<sup>548</sup> Davis & Snell, *supra* note 545, at 7 (noting that the average age on death row is forty-nine, meaning the average person enters death row at around age forty). In 2003, the average age of arrest for a death row inmate was twenty-eight. THOMAS P. BONCZAR & TRACY L. SNELL, DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2003, at 7 (Nov. 2004), <https://www.bjs.gov/content/pub/pdf/cp03.pdf> [<https://perma.cc/92TD-3484>].

<sup>549</sup> *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1054 (C.D. Cal. 2014) (“[T]he most common way out of California’s Death Row is not death by State execution, but death by other means.”).

<sup>550</sup> *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting the denial of certiorari).

ars has been whether such delays are cruel and unusual. One thread has focused on whether the delay is itself a form of unacceptable punishment.<sup>551</sup> As the Supreme Court wrote more than a century ago: “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.”<sup>552</sup> Justice Breyer has repeatedly shown his sympathy with this argument, including most recently in Vernon Madison’s case.<sup>553</sup> A second critical thread observes that long delays bring old age, and old age brings mental decline that, similar to some mental disorders, can undermine the penological goals of execution.<sup>554</sup> This is the argument Madison is now pursuing.<sup>555</sup>

The only legal argument that Madison and any similarly situated death row inmate can presently make is that their execution would offend “evolving standards of decency that mark the progress of a maturing society.”<sup>556</sup> This Eighth Amendment argument necessarily tethers itself to the present expectations of society about whether executing someone like Madison would serve “the objective of community vindication.”<sup>557</sup> To gauge that, the courts look to “objective indicia that reflect the public attitude,”<sup>558</sup> such as “legislation enacted by the country’s legislatures.”<sup>559</sup> These sources, however, do not support Madison’s case if he can otherwise understand that the state now wants to pun-

<sup>551</sup> *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from denial of certiorari) (emphasizing that death row is “dehumanizing”).

<sup>552</sup> *In re Medley*, 134 U.S. 160, 172 (1890); see *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (“The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.” (footnote omitted)).

<sup>553</sup> *Dunn v. Madison*, 138 S. Ct. 9, 13 (2017) (Breyer, J., concurring) (“[W]e may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale.”); see *Glossip v. Gross*, 135 S. Ct. 2726, 2764–70 (2015) (Breyer, J., dissenting) (discussing how the excessive lengths of time on death row raise constitutional concerns).

<sup>554</sup> *Ford v. Wainwright*, 477 U.S. 399, 399–400 (1986) (“[E]xecution [of an insane inmate] has questionable retributive value, presents no example to others and thus has no deterrence value, and simply offends humanity.”); see Dufner, *supra* note 62, at 137–38 (questioning whether demented inmates who cannot recall their crimes should even be imprisoned, let alone executed).

<sup>555</sup> *Madison v. Alabama (Madison I)*, 139 S. Ct. 718, 731 (2019) (“[W]e must return this case to the state court for renewed consideration of Madison’s competency [due to his dementia].”); Brief of Petitioner, *supra* note 13, at 17.

<sup>556</sup> *Ford*, 477 U.S. at 406 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)) (internal quotation marks omitted).

<sup>557</sup> *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

<sup>558</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>559</sup> *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

ish him for a past crime they say he committed.<sup>560</sup> Under the Court's present approach, a death row inmate must show that he is "incompetent"<sup>561</sup> and cannot "rationally comprehend the concepts of crime and punishment as applied in his case."<sup>562</sup>

Inmates who, like Madison, have undergone a break in personal identity are a poor fit for the Court's analytic framework. They have a third-personal understanding of the concepts of crime and punishment. They can see themselves from the outside as players in a state narrative in which they find themselves in the role of criminal, convict, and condemned.<sup>563</sup> But that narrative does not make sense to them when reconstructed first-personally. Because there has been a break in identity, it must seem as though a different man committed the crime. Madison may understand the parable of crime and punishment and that the state now asks him to fill the actor's shoes so the story may draw to a close. Even though he finds that the shoes do not fit, that is not enough for Eighth Amendment purposes.

A different argument, the one proposed here, draws on the identity principle as a core commitment of criminal justice and due process.<sup>564</sup> Justice Breyer recently remarked that an offender who has been on death row a long time may eventually "[f]ind himself a changed human being."<sup>565</sup> It is unclear how literally the Justice intended this isolated remark, but it is advanced quite literally here. If the general thrust of this Article holds, then inmates' criminal identities likely do change as they sit for decades on death row, especially if they started in their youth. Other scholars have focused on the influence of disorders like insanity<sup>566</sup> and late-stage dementia.<sup>567</sup> For demented individuals like Vernon Madison, the impression of a change in identity is so tragically palpable because there are striking physical causes and observable neurological manifesta-

<sup>560</sup> *Madison I*, 139 S. Ct. at 731 ("The sole question on which Madison's competency depends is whether he can reach a 'rational understanding' of why the State wants to execute him."); Brief of Respondent, *supra* note 7, at 32–34 ("But not one State has proscribed the use of capital punishment against prisoners with dementia-induced memory loss.").

<sup>561</sup> *Panetti*, 551 U.S. at 934.

<sup>562</sup> *Dunn*, 138 S. Ct. at 12.

<sup>563</sup> *Id.* ("Madison understands both that he was tried and imprisoned for murder and that Alabama will put him to death as punishment for that crime.").

<sup>564</sup> Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171, 209 (2014) (describing "the emerging modern consensus that . . . the Due Process Clause of the Fourteenth Amendment requires judicial review of compelling claims of innocence, irrespective of how long after conviction new evidence is discovered").

<sup>565</sup> *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting).

<sup>566</sup> Flanders, *supra* note 16, at 465 (raising and setting aside a role for insanity in the law's understanding of personal identity).

<sup>567</sup> See Dufner, *supra* note 62, at 149–50 (arguing that a person with dementia may have had such an identity change that continual punishment of that individual is no longer justified).

tions—parts of his brain tissue are literally dying.<sup>568</sup> But normal processes of psychological development and identity (re)formation can also bring about breaks in identity that brain scans looking for disease will not reveal. After this happens, whether by nature or disease, execution would violate the identity principle.

There are a range of mechanisms that could address the concern about identity change for long-term death row inmates.<sup>569</sup> The most inmate-protective approach would be to institute a limitations period at the expiration of which the state must release death-row inmates (at least to the general prison population). The length of the limitations period could be based off data about general rates of psychological change and development among inmate populations. Automatic release, however, would probably not be ideal. As with any rule, there will be an error rate, and the consequences of an error—releasing an inmate who has committed and is still disposed to commit crime qualifying for the death penalty<sup>570</sup>—could be high. A better approach would be to apply a presumption that an inmate's identity changes after a set period, and then offer the government a hearing to rebut the presumption. This allows the government to identify individual cases where release would be inappropriate and, therefore, endanger the population into which the inmate would be released.

A third approach, the least protective of inmates, would put the burden on inmates and allow them to argue that their identities have changed after a period. One significant advantage of this route is that it draws on existing habeas mechanisms.<sup>571</sup> The structure of an inmate's claim would be that evidence of a

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<sup>568</sup> Brief of Petitioner, *supra* note 13, at 8.

<sup>569</sup> One mechanism not considered, but which would address the concerns about identity, would be to narrow the time between conviction and execution. See *Coleman v. Balkcom*, 451 U.S. 949, 959–60 (1981) (Rehnquist, J., dissenting from denial of certiorari) (arguing that executions should happen more quickly to achieve goals of punishment); Patrick Tomlin, *Time and Retribution*, 33 *LAW & PHIL.* 655, 663–64 (2014) (explaining that minimizing the time between punishment and execution of punishment better serves retributivist goals). This would better ensure that the inmate's identity would not change in the interim. I do not consider this approach here because of the multitude of other concerns it would raise, namely shortchanging procedural protections that are required for the constitutional application of the death penalty. See Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho's Flawed Process*, 2 *J. APP. PRAC. & PROCESS* 85, 120–21 (2000) (“Expedited review undoubtedly jeopardizes the quality of decisions by requiring inadequate preparation time by post-conviction counsel and by constraining deliberation by appellate courts. Innocent persons may be executed who might otherwise be saved by reasonable delay in execution through newly-discovered evidence.”).

<sup>570</sup> Only serious crimes can qualify someone for the death penalty. See *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (“As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.”).

<sup>571</sup> Rule 33 of the Federal Rules of Criminal Procedure allows courts to entertain motions for new trials “in the interest of justice” if the defendant discovers new evidence. *FED. R. CRIM. P.* 33(a). Such

change in identity amounts to newly discovered evidence of innocence—that he, the person sitting on death row, is not (is no longer) the person who committed the crime.<sup>572</sup> Forty-nine states have habeas procedures in place for post-conviction claims of innocence and impose no time limits on when such claims can be made.<sup>573</sup> Under federal law, a habeas petitioner may have his “constitutional claim considered on the merits if he makes a proper showing of actual innocence.”<sup>574</sup>

The habeas claims envisioned here would not always fit easily into presently available legal categories. “A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man.”<sup>575</sup> As such, bare claims of innocence are not always sufficient to guarantee habeas review.<sup>576</sup> Habeas claims sometimes must allege some further defect—procedural, evidentiary, or otherwise—in the original conviction.<sup>577</sup> A death row inmate claiming that his identity has changed might even concede that the original conviction and sentencing were proper. Because of the long delay, the argument would go, it is no longer *he* who went to trial.

One concern with releasing death row inmates whose identities have changed in less extreme cases than Vernon Madison’s—where there is neurological evidence of his mental decline—is that inmates could feign and malin-

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motions, however, must be made within three years of conviction, which is too short a period for present purposes. *Id.* 33(b)(1).

<sup>572</sup> Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 134 (1996) (“In a broad sense, the desire for substantive justice means simply that we should strive for substantively correct guilt and innocence determinations. Specifically, it encompasses the notion that the appellate process should identify and correct instances in which innocent people have been convicted. Substantive justice is most implicated in a capital case, in which a prisoner’s execution is irreversible.” (footnote omitted)).

<sup>573</sup> Kaneb, *supra* note 564, at 203–08; *see, e.g.*, ALASKA STAT. §§ 12.72.020(b)(2), 12.72.010(4) (2018) (providing for “vacation of [their] conviction or sentence in the interest of justice” for inmates who can “establish[] by clear and convincing evidence that [they are] innocent” using “newly discovered evidence”).

<sup>574</sup> *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

<sup>575</sup> *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009).

<sup>576</sup> *House v. Bell*, 547 U.S. 518, 536 (2006) (“As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error.”).

<sup>577</sup> *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (“We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.”); *House*, 547 U.S. at 536. If a state offered no procedure for post-conviction review, then a claim of innocence would be enough to get into federal court. *See* Note, *Herrera v. Collins: The Right of Innocence: An Unrecognized Constitutional Privilege*, 20 J. CONTEMP. L. 258, 271 (1993) (“The [*Herrera*] Court, however, determined for the sake of argument that *Herrera* could bring a federal habeas petition of actual innocence if there were no state procedures through which he could present a claim.”).



ger.<sup>578</sup> “[T]he potential for false claims . . . in this context is obviously enormous.”<sup>579</sup> Psychological evaluation could aid judges who are asked whether an inmate’s identity has changed; however, these would necessarily rely largely on information provided by the inmate himself. This obviously complicates the fact-finding process. Even so, if, as this Article argues, people’s identities can change over time, the criminal justice system must engage in precisely this complicated factfinding rather than risk executing another innocent person.

### CONCLUSION

Criminal law sometimes seems to think it exists outside of time. Adulthood and death mark the beginning and the end of its domain, but criminal law often flattens the decades between so that old crimes may still be prosecuted and old sentences still carried out. But, we, the people subject to criminal law, must exist in time. Between adulthood and death, time changes us. This Article has argued that criminal justice must take heed. As we change, so should criminal law’s interest in us. Old crimes that criminal law currently attributes to us may, in a very real sense, no longer be ours.

This Article has laid out the philosophy and psychology behind the challenge that personal identity poses to current criminal justice doctrines, policies, and institutions. Personal identity is sustained by psychological connections between past, present, and future versions of ourselves. Natural processes of growth and development attenuate these connections—the more time that elapses, the fewer psychological connections will remain between any two selves. At some point, there are so few connections that criminal law should recognize that a person’s identity has changed. After that point, a person should be free from prosecution or punishment for crimes committed by a different, past self.

To tailor these general philosophical and psychological observations to criminal law, this Article offered its own account of “criminal identity.” According to this account, a criminal’s identity is tied to whatever characterological traits disposed her to commit her crime. If, at some future point, she outgrows enough of these traits, her criminal identity changes. This account can show why criminal law should have no further interest in people like Vernon Madison, who have undergone severe and tragic changes in criminal identity. It can also show why the criminal law should, more generally, be prosecuting

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<sup>578</sup> See Brief of Respondent, *supra* note 7, at 45 (“[A] rule prohibiting the execution of those who cannot remember committing their crime would create new opportunities for malingering and evasion.”).

<sup>579</sup> *Ford*, 477 U.S. at 429 (O’Connor, J., concurring in part and dissenting in part).

fewer people and punishing them less harshly. Everyone changes through natural psychological processes; we will all eventually become different people.

One remaining question is whether, stepping back from philosophy and psychology, this account of criminal identity is appealing. For those interested in criminal justice reform, this account leads to several attractive proposals, including a rejuvenated system of juvenile justice, fewer inmates awaiting capital punishment, and shorter prison sentences. But this account is also more than a means to an appealing end. At each step of the way, it has grounded itself in ordinary intuitions and recent psychological data about identity and responsibility across time. Though society may sometimes forget in the heat of the moment, it recognizes that people are always changing. After enough time passes, people know that harping on the old slight becomes inappropriate and petty. This is not because the slight stings any less when recalled. Rather, it is because the person behind the slight is probably not around anymore; that person has changed and become someone new. To hold her to account feels incongruous because, to her, that moment from long ago likely feels remote and foreign—like the act of a different person. A criminal justice system that incorporates these insights would feel more familiar, not less. It would resonate with our understanding of ourselves, and the limits on our selves.

