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DNA EVIDENCE EXPOSES STATUTES OF LIMITATION AS OUTMODED

You are raped. You give a description to police but they cannot find your attacker. You have nightmares about the attack on and off for several years. Then it happens. A little more than three years after your attack, you come face to face with the man on your commuter train. Badly shaken, you call the police. DNA testing confirms he is indeed your attacker. But, "sorry," you are told, "the statute of limitation has run." Every time you ride the train to work you wonder whether you will see him again.

Another bad dream? No, an all too real story in American courts. Statutes of limitation bar prosecution even when reliable evidence of guilt, such as DNA analysis, is readily available. How can this be?

The primary rationale for statutes of limitation is a deserved suspicion of old evidence. With time, memories fade, witnesses die, and physical evidence disappears. In 1623, when a statute of limitation was first enacted in England, these formidable problems for both prosecution and defense were avoided simply by barring prosecution after a fixed period. But time and circumstances have changed.

Trial procedures now give defendants full opportunity to highlight the weakness of old evidence. It is the prosecution that must prove the offense beyond a reasonable doubt, thus it is the prosecution that suffers most from the deterioration of evidence over time. A prosecution case weakened by time can be easily exposed at today's trials in a way it could not have been in 1623.

Long after the introduction of trial safeguards made statutes of limitation unnecessary, such statutes remained in force because there was little motivation to repeal them. The weakness of old evidence gave prosecutors little interest in prosecuting older cases, thus, statutes of limitation rarely had practical effect.

But that situation has changed dramatically with a host of forensic science advances, of which DNA testing is only one. Prosecutors increasingly have

reliable evidence in cases older than the limitation period, and future technological advances promise to increase the number.

Another rationale offered for limitation periods suggests that "if the actor long refrains from further criminal activity, the likelihood increases that he has reformed." But that argument is simply one for appropriate sentencing. A sentencing judge might conclude (or might not) that a rapist of seven years ago is less dangerous than one of two years ago. Further, it hardly follows that an offender who escapes capture for an earlier rape has not committed another one since. He may well have raped again, and been sentenced as if he were a first-time offender!

Still another rationale for statutes of limitation suggests that after a protracted period the community's retributive impulse may have passed. But the best test of whether it has or not in any given case may be whether a prosecutor with a docket of newer cases wishes to spend time and energy on the older case. Again, if the passage of time has indeed turned the desire for justice to compassionate forgiveness, then the shift in emotion can express itself in an appropriate sentence.

While the justification for statutes of limitation no longer exists, the cost of retaining such nonexculpatory offenses is high and increasing. Most obviously, they shield guilty offenders from the punishment they deserve. They also advertise the criminal justice system as condoning a failure of justice, thereby exacerbating the system's unfortunate reputation for treating criminal justice as a game.

The criminal justice system needs moral credibility if it is to gain public cooperation and respect. That credibility can only suffer when the system lets apparently guilty offenders go free, without even putting them to trial, because "they weren't caught in time."

Nearly every state exempts murder from its statute of limitation. At very least, that exemption should be extended to serious felonies.

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