Journal of Criminal Law and Criminology

Volume 101 | Issue 2 Article 9

Spring 2011

Contemporary Prosecutions of Civil Rights Era Crimes: An Argument Against Retroactive Application of Statute of Limitations Amendments

Michael Rowe

0091-4169/11/10102-0699
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 101, No. 2

CONTEMPORARY PROSECUTIONS OF CIVIL RIGHTS ERA CRIMES: AN ARGUMENT AGAINST RETROACTIVE APPLICATION OF STATUTE OF LIMITATIONS AMENDMENTS

Michael Rowe*

I. INTRODUCTION

Racial tensions in the South and especially those in Mississippi boiled over in the summer of 1964, partly as a result of the convergence of the Freedom Summer volunteers on the state and the imminent passage of the Civil Rights Act of 1964.[1] One newspaper account described Mississippi as a "besieged fortress" where "[c]rosses were burned in 64 of the state's 82 counties the night of April 24."[2] Pervasive racism also infiltrated many levels of state government, which included both non-violent, silent support and violent, public support of racial segregation in public schools and public accommodations.[3] Partially as a response to the perceived equalization of the races, the Ku Klux Klan received significant support not just from ordinary citizens, but also from sympathizers entrenched within certain state and local law enforcement agencies. These embedded Klan sympathizers "provided both protection against prosecution and the appearance that Klan activities—to some extent—were conducted under color of state law."[4]

In the six months prior to May 26, 1964, five African Americans were reported as murdered in a five-county radius in the southern corner of

* J.D. Candidate, Northwestern University School of Law, 2011; B.S. Indiana University, 2003.

[1] *Racial Crisis*, N.Y. TIMES, June 28, 1964, at E1. The Freedom Summer was an organized effort by several Civil Rights groups "in which 1,000 volunteers, white and Negro, were to move into the state to promote Negro voter-registration, education and community work." *Id.*

[2] Claude Sitton, *Mississippi Is Gripped by Fear of Violence in Civil Rights Drive*, N.Y. TIMES, May 30, 1964, at 1.

[3] Killen v. State, 958 So. 2d 172, 174 (Miss. 2007).

[4] *Id.* at 175.

Mississippi.[5] Less than one month later, three Freedom Summer volunteers—Michael Schwerner, Andrew Goodman, and James E. Cheney—were reported missing in what was to become perhaps the most famous of the Civil Rights Era murders, the "Mississippi Burning" case.[6] Among the racially motivated murders that summer were the May 2, 1964 murders of Charles Moore and Henry Hezekiah Dee, a college student and local laborer, respectively.[7] On the day of their murders, Moore and Dee were hitchhiking when a Volkswagen driven by James Ford Seale stopped to pick up the two boys. A truck carrying three co-conspirators followed the Volkswagen to the national forest, where Seale and Charles Marcus Edwards, among others, tied Moore and Dee to trees and "beat them with 'bean poles,' while [a co-conspirator] interrogated them . . . ."[8] Moore and Dee eventually were tied to an engine block and dropped into the river, all while they were still alive.[9]

Six months later, Seale and Edwards were arrested and charged with killing Moore and Dee.[10] While in custody, Edwards confessed to taking Moore and Dee into the forest and whipping them, but nothing else, while Seale stated that he had done it but the police would have to "prove it."[11] District Attorney Lenox Forman signaled his intention to bring the case before a grand jury.[12] Forman's actions all but ended the investigation, as a grand jury composed entirely of white residents of Mississippi would never bring an indictment against Edwards and Seale.[13] In fact, the charges were dismissed on January 11, 1965, only two months after the original arrest.[14]

Even if the defendants were indicted and brought before a jury, it was unlikely that Seale and Edwards would have been convicted, given the racial divisiveness of the time.[15] In fact, almost nothing about the murders

---

[5] Sitton, *supra* note 2, at 1.

[6] Claude Sitton, *3 in Rights Drive Reported Missing*, N.Y. TIMES, June 23, 1964, at 1; *see* Shaila Dewan, *Pushing to Resolve Killings from the Civil Rights Era*, N.Y. TIMES, Feb. 3, 2007, at A11.

[7] *2 Whites Seized in Negro Slayings*, N.Y. TIMES, Nov. 7, 1964, at 56.

[8] HARRY N. MACLEAN, THE PAST IS NEVER DEAD: THE TRIAL OF JAMES FORD SEALE AND MISSISSIPPI'S STRUGGLE FOR REDEMPTION 66–67 (2009).

[9] *Id.* at 67.

[10] *2 Whites Seized in Negro Slayings*, *supra* note 7.

[11] MACLEAN, *supra* note 8, at 38–39; *see also* Donna Ladd, *James Ford Seale: A Trail of Documents Tells the Story*, JACKSON FREE PRESS (Miss.), (Jan. 31, 2007), http://www.jacksonfreepress.com/index.php/site/comments/james_ford_seale_a_trail_of_documents_tells_the_story.

[12] MACLEAN, *supra* note 8, at 39.

[13] *Id.*

[14] *Whites Freed in Slayings*, N.Y. TIMES, Jan. 12, 1965, at 18; *see also* Ladd, *supra* note 11.

[15] MACLEAN, *supra* note 8, at 37–38.

was mentioned for the next forty years, until a number of other Civil Rights Era crimes were brought to the public's attention by a variety of local and national media.[16] As a result of the renewed interest in prosecuting Civil Rights Era crimes, James Ford Seale was charged again in 2007 for the role he played in the deaths of Moore and Dee. Charles Marcus Edwards, his co-conspirator, was given immunity by federal prosecutors in exchange for his testimony against Seale.[17] The federal government indicted Seale under 18 U.S.C. § 1201(a) and (c) for two counts of kidnapping and one count of conspiracy to commit kidnapping.[18] Seale ultimately was found guilty on all charges and sentenced to life in prison.[19]

The charges and conviction were predicated on the 1964 version of the statute, which identified kidnapping as a capital punishment eligible offense "if the kidnap[p]ed person has not been liberated unharmed, and if the verdict of the jury shall so recommend."[20] In conjunction with the capital nature of the kidnapping statutes, 18 U.S.C. § 3281 provided an unlimited statute of limitations for all federal indictments of capital offenses.[21] However, in the intervening period of time between the crime and the 2007 indictment, the Supreme Court ruled that the death penalty for § 1201 charges was unconstitutional.[22] As a result of that ruling, Congress amended § 1201 to eliminate the death penalty as a potential punishment for a § 1201 conviction.[23]

The critical legal question to come from Seale's 2007 conviction is whether Civil Rights Era kidnapping prosecutions should proceed under the unlimited statute of limitations offered by the 1964 version of § 1201 or under the 1972 amendment to § 1201. This Comment addresses this issue beginning in Part II, which provides a more complete introduction to the procedural history of Seale's conviction, including the Fifth Circuit's

---

[16] Following the 1994 conviction of Byron De La Beckwith, the local and national media, including ABC's program *20/20*, sought to expose additional unsolved Civil Rights Era murders. MACLEAN, *supra* note 8, at 50–51. A sampling of cases that received the most attention include Ernest Avants's conviction for his role in the death of Ben Chester White, Edgar Ray Killen's conviction for his role in the death of three civil rights workers in 1964, and Bobby Frank Cherry's conviction for his role in the deaths of four young girls killed in a Birmingham Church bombing. *Id.* at 57–60.

[17] MACLEAN, *supra* note 8, at 102–03.

[18] United States v. Seale, 542 F.3d 1033, 1034 (5th Cir. 2008).

[19] United States v. Seale, 577 F.3d 566, 568 (5th Cir. 2009).

[20] 18 U.S.C. § 1201 (1964).

[21] *Id*. at § 3281.

[22] United States v. Jackson, 390 U.S. 570, 572 (1968) (holding "the death penalty provision of the Federal Kidnap[p]ing Act imposes an impermissible burden upon the exercise of a constitutional right").

[23] Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, sec. 201, § 1201, 86 Stat. 1070, 1072 (1972).

appellate review of Seale's conviction and the Supreme Court's refusal to address the Fifth Circuit's certified question. Part II also provides a description of the changes to § 1201 since it was originally introduced in 1932. Part III is divided into three subparts: subpart A addresses the various tools a court may use to interpret the 1972 amendment to § 1201 including the general rule regarding statutory retroactivity; subpart B addresses the potential for due process violations associated with the forty-three year delay between the commission of the crime and the indictment; and subpart C addresses normative considerations for not applying the 1972 amendment retroactively. Finally, Part IV argues that the statute of limitations for Civil Rights Era kidnappings under § 1201 should be unlimited.

II. BACKGROUND

A full understanding of the background of Seale's offense requires, first, an appreciation of the procedural complexity of the case, and second, a primer on how § 1201 has evolved in the last forty years. This Part will address both of these issues individually.

A. PROCEDURAL POSTURE

Procedurally, *United States v. Seale* took a circuitous path through the federal courts, notwithstanding the fact that it took forty-three years to bring Seale to trial in the first place.[24] As mentioned, Seale was initially convicted in the Southern District of Mississippi for two counts of kidnapping and one count of conspiracy to commit kidnapping.[25] In an oral opinion on a defense motion to drop the charges based on an expired statute of limitations, the district court focused almost exclusively on *United States v. Jackson* in ruling that § 1201 was a capital crime for purposes of Seale's criminal offense and, as such, the unlimited statute of limitations should apply.[26] Seale's attorneys appealed to the Fifth Circuit on seven different issues, including an assertion that the district court erred in denying the defense's statute of limitations motion. Seale's motion asserted that as a result of the intervening 1972 amendment to § 1201, a five-year statute of limitations was applicable and had since expired.[27] A three-judge panel on the Fifth Circuit only considered Seale's statute of limitations argument and unanimously voted to vacate the conviction by ruling "that the five-year limitations period made applicable to the federal kidnap[p]ing statute by the

[24] United States v. Seale, 542 F.3d 1033, 1034 (5th Cir. 2008).

[25] *Id.*

[26] *Id.* at 1036.

[27] *See id.* at 1034.

1972 amendment applies to this case, where the alleged offense occurred in 1964 and the indictment was issued in 2007."[28]

In November 2008, a majority of the Fifth Circuit judges voted to rehear the case en banc over a vigorous dissent by Judge Smith.[29] The following June, the en banc Fifth Circuit split nine-to-nine on whether to affirm the conviction.[30] In July, the Fifth Circuit sent a certified question to the Supreme Court, asking: "What statute of limitations applies to a prosecution under 18 U.S.C. § 1201 for a kidnap[p]ing offense that occurred in 1964 but was not indicted until 2007?"[31] In November 2009, the Supreme Court refused to answer the certified question over vigorous disagreement from both Justice Stevens and Justice Scalia. Justice Stevens—writing for himself and Justice Scalia—recognized the importance of the certified question and reasoned that "[a] prompt answer from this Court [would] expedite the termination of this litigation and determine whether other similar cases may be prosecuted."[32] Justice Stevens also characterized the certified question as "narrow, debatable, and important."[33] By refusing to answer the certified question, the Supreme Court effectively affirmed the district court's decision to deny Seale's statute of limitations motion. Thus, the district court's initial conviction of Seale and imposition of a life sentence were affirmed.

B. BRIEF HISTORY OF 18 U.S.C. § 1201

Equally as important as understanding the procedural complexity of *Seale* is an understanding of the various changes 18 U.S.C. § 1201 has undergone since its adoption. The statute was first enacted in 1932 as part of the Federal Kidnapping Act, which followed the outrage generated from the kidnapping of the Charles Lindbergh baby.[34] Prior to that high-profile

---

[28] *Id.* at 1045.

[29] United States v. Seale, 550 F.3d 377 (5th Cir. 2008). In dissent, Judge Smith argued that "the government has not shown that the panel erred or that this case [merits] en banc consideration." He further placed the blame on the Department of Justice for the abrogation of justice. *Id.* at 377.

[30] United States v. Seale, 570 F.3d 650, 650–51 (5th Cir. 2009).

[31] United States v. Seale, 577 F.3d 566, 567 (5th Cir. 2009).

[32] 130 S. Ct. 12, 13 (2009) (Stevens, J., dissenting from denial of certiorari).

[33] *Id.*

[34] The twenty-month-old son of Charles Lindbergh was kidnapped on March 1, 1932. *Child Stolen in Evening*, N.Y. TIMES, Mar. 2, 1932, at 1. What is today 18 U.S.C. § 1201 was for a period of time known simply as the Lindbergh Law. *See generally New Lindbergh Law is Invoked in Threat*, N.Y. TIMES, Aug. 6, 1932, at 15.

case, kidnapping was only punishable under state law.[35] Thus, § 1201 created a new federal offense for kidnapping that crossed state lines.[36]

The first major change to § 1201 was made in 1972 as a response to both *United States v. Jackson*[37] and *Furman v. Georgia*.[38] *Jackson* invalidated and severed from § 1201 the potential for the imposition of the death penalty for kidnapping offenses.[39] More specifically, the Court held that "[t]he statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to [a] jury trial or upon one who pleads guilty,"[40] and the "inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."[41] The Court in *Furman*, on the other hand, cast doubt on the imposition of the death penalty for all crimes. The *Furman* Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[42] Congress responded to the Court in 1972 by passing the Act for the Protection of Foreign Officials and Official Guests of the United States, which in part amended § 1201 to eliminate the possibility of a death sentence.[43]

The most recent and major change to § 1201 occurred in 1994, when Congress enacted a spate of tough-on-crime legislation, including the Violent Crime Control and Law Enforcement Act.[44] This Act amended § 1201 once again; it now provides that "if the death of any person results [from the kidnapping], [the perpetrator] shall be punished by death or life imprisonment."[45] The 1972 amendment taken together with the 1994 amendment to § 1201 means the federal kidnapping offense was a non-capital punishment eligible crime only from 1972 to 1994. At all other points since the statute was created in 1932, a § 1201 conviction was a death-penalty eligible offense.

---

[35] United States v. McInnis, 601 F.2d 1319, 1323–24 (5th Cir. 1979).

[36] 18 U.S.C. § 1201(a)(1) (2006).

[37] 390 U.S. 570 (1968).

[38] 408 U.S. 238 (1972).

[39] 390 U.S. at 572.

[40] *Id.* at 571.

[41] *Id.* at 581 (citation omitted).

[42] *Furman*, 408 U.S. at 239–40. Four years later, in *Gregg v. Georgia*, the Supreme Court reopened the door for capital punishment in certain circumstances. 428 U.S. 153 (1976).

[43] Pub. L. No. 92-539, sec. 201, § 1201, 86 Stat. 1070, 1072 (1972).

[44] Pub. L. No. 103-322, sec. 60003(a)(6), § 1201, 108 Stat. 1796, 1969 (1994).

[45] *Id.*

Section 1201 has never expressly contained its own statute of limitations period. Instead, 18 U.S.C. § 3281, Capital Offenses,[46] has always applied to § 1201, for determination of the appropriate statute of limitations for a kidnapping prosecution and other capital punishment eligible offenses. Section 3281 provides that "[a]n indictment for any offense punishable by death may be found at any time without limitation."[47] Thus, as long as § 1201 remained a capital punishment eligible offense, the combination of § 1201 and § 3281 provided an unlimited statute of limitations period. Non-capital federal offenses are governed by § 3282, which provides, that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years. . . ."[48] As a result, kidnapping crimes committed between 1972 and 1994 were subject only to a five-year statute of limitations period because the underlying offense was not eligible for the death penalty.

III. DISCUSSION

The curious byproduct of *Seale*'s unique procedural history is that the only opinion of any length is Judge DeMoss's original Fifth Circuit opinion that vacated Seale's conviction.[49] In fact, the per curiam en banc opinion of the Fifth Circuit affirming the district court's denial of the statute of limitations motion is only two sentences.[50] Accordingly, subpart A of this Part begins by following the structure of the original Fifth Circuit opinion that vacated the conviction with an evaluation of whether the 1972 amendment to § 1201 should be applied retroactively. Subpart B departs from the original Fifth Circuit opinion to identify whether due process considerations should nullify a forty-three year delay in prosecution. Finally, subpart C considers the traditional justifications for enforcing a statute of limitations period and whether those justifications are relevant to the prosecution of a Civil Rights Era offender.

A. RETROACTIVITY OF THE 1972 AMENDMENT TO § 1201

As previously mentioned, Congress passed the Act for the Protection of Foreign Officials and Official Guests of the United States in 1972, largely in response to the Court's decisions in *Jackson* and *Furman*.[51] The

---

[46] 18 U.S.C. § 3281 (2006). Section 3281 has not changed significantly since 1964.

[47] *Id.*

[48] *Id*. at § 3282.

[49] United States v. Seale, 542 F.3d 1033 (5th Cir. 2008).

[50] United States v. Seale, 570 F.3d 650, 650 (5th Cir. 2009).

[51] Pub. L. No. 92-539, sec. 201, § 1201, 86 Stat. 1070, 1072 (1972).

original Fifth Circuit opinion started its analysis with a determination of whether the 1972 amendment to § 1201 should be applied retroactively to crimes committed prior to 1972,[52] and this Comment will begin with that same determination. The importance of determining whether the 1972 amendment should be applied retroactively cannot be overstated since such an application could render Seale's conviction and all subsequent Civil Rights Era convictions predicated upon § 1201 void. Thus, this first subpart analyzes the various legislative interpretation tools a court might use to determine whether the 1972 amendment should apply retroactively, including (1) congressional intent in changing the capital nature of the kidnapping statute in 1972 and (2) the general policy against retroactivity. In the following analysis, it becomes clear that the amendment should not apply to crimes committed prior to 1972.

1. Legislative Intent

The first interpretation tool a court might use in assessing the retroactivity of the 1972 amendment to § 1201 is legislative intent.[53] In other words, the question is whether it was Congress's intent to expressly change the statute of limitations period by eliminating the capital nature of § 1201 offenses or was Congress simply concerned with complying with the Supreme Court's recent pronouncements in *Furman* and *Jackson*. Only the former interpretation would permit the 1972 amendment to operate retroactively.

It is first instructive to recall the original Fifth Circuit panel's construction of the legislative intent of the 1972 amendment. The original Fifth Circuit panel reviewed the House debate in the Congressional Record and noted that Representative Richard Poff, the author of the 1972 amendment, stated that the death penalty provision was removed from the

---

[52] *Seale*, 542 F.3d at 1036 ("[T]o determine whether an amendment to a statute should be given retroactive effect, we first look to the intent of Congress.").

[53] There have been a significant number of criticisms leveled at the use of legislative intent as a statutory interpretation tool. Justice Scalia has been the most vocal advocate for its elimination, as he favors a brand of new textualism that attempts to determine the original meaning of a statute. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting). However, other Justices, including Justice Stevens and Justice Breyer, have continued to use legislative intent as an interpretation tool. *See, e.g.*, *Chisom*, 501 U.S. at 395–96; Green v. Bock Laundry Mach. Co., 490 U.S. 504, 516–21 (1989). While it appears that Justice Scalia's brand of new textualism was popular among his colleagues from his appointment in 1986 to 1995, "it remains important to research and brief the legislative history thoroughly." WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 795 (4th ed. 2007).

bill as a response to *Furman*.[54] Based on that statement, the court presumed that Congress was aware of the statute of limitations and thus, expressly finding that there was no legislative history to the contrary, the court inferred that Congress intended to change the limitations period.[55] The panel, however, ignored Representative Poff's more salient discussion regarding the elimination of the death penalty as a potential punishment. Representative Poff stated that the 1972 amendment should be construed as "nothing but a stopgap handling of the death penalty question," and "[a] more lasting determination of how, and whether, the death penalty might be prescribed . . . is an important and complex matter in itself, and passage of this otherwise relatively noncontroversial measure should not await a permanent resolution of that issue."[56] Contrary to the Fifth Circuit's assertion, Representative Poff appeared willing to amend the death penalty component of § 1201 only as a means of maintaining the constitutionality of the entire statute.

It is undeniable that the change in the potential punishment for kidnappings in no way reflects a congressional desire to change the statute of limitations period. Nothing in the Congressional Record suggests that it became easier to solve kidnappings or that the crime was any less deserving of an unlimited limitations period. This is a very different type of legislative intent from what was suggested by the original *Seale* panel, and certainly different than a willful change to the statute of limitations. The Fifth Circuit's inference with respect to the limitations period is simply unsupported by the Congressional Record. Alternatively, Representative Poff's statement that the elimination of the death penalty as a stopgap measure more strongly supports an inference that Congress only intended to change the punishment to maintain the constitutionality of § 1201 offenses post-*Furman*.

Another, albeit much less persuasive, piece of evidence from the Congressional Record evidencing congressional intent is the title of the bill—the Act for the Protection of Foreign Officials and Official Guests of the United States.[57] The bill's title reflects the impetus for the bill, and the Congressional Record notes there has been a "disturbing increase of

---

[54] United States v. Seale, 542 F.3d 1033, 1036 n.5 (5th Cir. 2008) (citing 118 CONG. REC. 27116 (1972)).

[55] *Id.* at 1036–39.

[56] 118 CONG. REC. 27116 (1972).

[57] In determining legislative intent, the title of a particular bill is probative at best and irrelevant at worst. Nevertheless, it is noteworthy that the Supreme Court has reviewed the title of a bill in certain limited circumstances. *See, e.g.*, Porter v. Nussle, 534 U.S. 516, 527–28 (2002); Holy Trinity Church v. United States, 143 U.S. 457, 462 (1892).

violence directed against [foreign] diplomats."[58] Additionally, Representative Poff indicates that the "purpose of this legislation is to promote the conduct of the foreign affairs of the United States by protecting the property and the personnel of foreign governments while they are present in this country."[59] The text of the bill itself is equally illustrative. For example, Section 2 states that "this legislation is intended to afford the United States jurisdiction . . . to proceed against those who . . . interfere with its conduct of foreign affairs."[60]

While the title of a bill or its general purpose is by no means definitive evidence of congressional intent, it is at least helpful for our purposes to illustrate that Congress likely did not consider or intend the corresponding change to the statute of limitations period. Even conceding that the Congressional Record is not a dispositive statutory interpretation tool, it is undeniable that the record does not permit an inference that Congress specifically intended to change the statute of limitations period.

2. General Policy Against Retroactivity

The second interpretation tool at a court's disposal is the general policy against retroactivity, which has been described as "deeply rooted in [the Supreme Court's] jurisprudence"[61] and "a legal doctrine centuries older than our Republic."[62] One principal justification for the general anti-retroactivity doctrine is the Court's desire to create "a rule of law that gives people confidence about the legal consequences of their actions."[63] Retroactive legislation unfairly upsets the ability of private actors to plan their behavior in accordance with federal law.[64]

While a general presumption against statutory retroactivity exists, the Court in *Bowen v. Georgetown University Hospital* provided a legislative escape hatch when it held that "[r]etroactivity is not favored in the law," and as a result, "congressional enactments and administrative rules will not be construed to have retroactive effect *unless* their language requires this result."[65] As the preceding analysis on legislative intent indicated, there was no support in the legislative history to the 1972 amendment to § 1201 for the idea that Congress intended to have the change in punishment and

---

[58] 118 CONG. REC. 27113 (1972).

[59] *Id.* at 27116.

[60] Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, 86 Stat. 1070, 1071 (1972).

[61] Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

[62] *Id.*

[63] *Id.* at 266.

[64] *Id.*

[65] 488 U.S. 204, 208 (1988) (emphasis added).

subsequent change in the statute of limitations apply retroactively.[66] Thus, the *Bowen* escape hatch does not apply to § 1201 prosecutions similar to Seale's.

Despite what now appears to be the current policy against legislative retroactivity, some commentators depict the Supreme Court's retroactivity jurisprudence as having vacillated "between a flexible discretionary approach and a bright-line rule" for a period of time, especially as it grappled with its substantive due process jurisprudence at the turn of the century.[67] In writing for the majority in *Landgraf v. USI Film Products*,[68] Justice Stevens sought to reconcile the doctrinal confusion. Justice Stevens noted the disfavor with which the Court viewed legislative retroactivity[69] and created the following three scenarios (in addition to the clear intent rule discussed in *Bowen*) that would permit retroactive application of a new statute: (1) "the intervening statute authorizes or affects the propriety of prospective relief[,]"[70] (2) the intervening statute changes a court's jurisdiction,[71] or (3) the intervening statute changes the procedural rules.[72] Justice Stevens defended the exclusion of procedural changes from the retroactivity doctrine because private actors have "diminished reliance interests in matters of procedure," and "rules of procedure regulate secondary rather than primary conduct."[73]

The Fifth Circuit panel availed itself of the third *Landgraf* exception and construed the change in the statute of limitations period for kidnapping offenses as procedural in nature.[74] As a result, that Court held that Congress intended the 1972 amendment to apply retroactively.[75] In so ruling, the panel provided a less-than-helpful definition of a procedural change: "statutes of limitations are procedural in nature because they do not disturb substantive rights."[76] A Florida district court provided a more helpful definition: "[a] substantive law creates, defines, and regulates rights

---

[66] Pub. L. No. 92-539, sec. 201, § 1201, 86 Stat. 1070, 1072 (1972).

[67] Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1063 (1997).

[68] 511 U.S. 244 (1994).

[69] *Id.* at 268.

[70] *Id.* at 273.

[71] *Id.* at 274.

[72] *Id.* at 275.

[73] *Id.*

[74] United States v. Seale, 542 F.3d 1033, 1036 (5th Cir. 2008).

[75] *Id.* at 1036–37.

[76] *Id.* at 1037.

as opposed to procedural or remedial law which prescribes a method of enforcing the rights or obtaining redress for their invasion."[77]

In citing *Landgraf*, the original Fifth Circuit *Seale* panel ignored an important qualification espoused in *Landgraf* for applying procedural changes retroactively. Justice Stevens wrote that "the mere fact that a new rule is procedural does not mean that it applies to every pending case."[78] For example, Justice Stevens cited a 1990 amendment to the Federal Rules of Criminal Procedure for the proposition that "amendments [are] applicable to pending cases insofar as they are 'just and practicable.'"[79] Thus, identification of a legislative change as procedural creates a presumption that can be overcome by a showing of some manifest injustice or impracticability. A showing of injustice by the prosecution in a case such as Seale's would overcome the procedural/substantive distinction even if the change in statute of limitations period was construed as strictly procedural.

Given the legislative retroactivity doctrine adopted by *Landgraf*, two related questions remain with respect to *Seale* and other similarly situated Civil Rights Era prosecutions under § 1201. The first question is whether a change in the applicable statute of limitations should be construed as procedural or substantive. Second, if the statute of limitations is identified as procedural, it must be determined whether applying the 1972 amendment retroactively is just.

a. Is a Change in the Statute of Limitations Period Procedural or Substantive in Nature?

In *Seale*, the original Fifth Circuit panel ruled that the change in the statute of limitations period was procedural in nature.[80] In reaching that conclusion, the court noted that "[c]riminal statutes of limitation merely limit the time in which the government can initiate a criminal charge and do not burden substantive rights."[81] The Fifth Circuit also relied in part on *State v. Skakel*, which held that an extension to a limitations period can be applied retroactively as long as the initial limitations period had not expired.[82] The *Skakel* court is not alone in holding that the limitations period is a procedural component of a statute. In fact, the *Skakel* court cites

---

[77] Richardson v. Honda Motor Co., 686 F. Supp. 303, 304 (M.D. Fla. 1988) (citation omitted).

[78] *Landgraf*, 511 U.S. at 275 n.29.

[79] *Id.* (quoting Order Amending Federal Rules of Criminal Procedure, 495 U.S. 969 (1990)).

[80] *Seale*, 542 F.3d at 1036–37.

[81] *Id.* at 1037.

[82] *Id.* at 1038 (quoting State v. Skakel, 888 A.2d 985, 1022 (Conn. 2006)).

a total of twenty-one state law cases suggesting that a change in the limitations period should apply retroactively, while citing five cases that held such a change should be applied only prospectively.[83] Nevertheless, the original Fifth Circuit panel erred by construing the 1972 amendment as procedural, and thus retroactive, since its ruling (1) is not consistent with *Landgraf*, (2) ignores the effect of a reduced statute of limitations as described in the *Vernon v. Cassadaga Valley Central School District*[84] concurring opinion, and (3) ignores the more basic distinctions between substantive and procedural changes.

First, the 1972 amendment to § 1201 appears to be similar to the congressional action that the Supreme Court confronted in *Landgraf*. The issue presented in *Landgraf* was whether Title VII of the Civil Rights Act of 1991 should be applied retroactively to a plaintiff that was demanding a jury trial.[85] Prior to the 1991 Act, the Civil Rights Act only provided for equitable remedies.[86] One principal change in the 1991 Act was the provision providing that a plaintiff seeking compensatory or punitive damages could demand a jury trial.[87] The plaintiff in *Landgraf* experienced workplace discrimination prior to the enactment of the 1991 Act.[88] Because of the change in available remedies, the plaintiff sought to avail herself of the new provisions with respect to a jury trial.[89] The *Landgraf* Court, however, held that the statute could not be applied retroactively because the statute was substantive in nature.[90]

The statutory change in damages available in *Landgraf* appears remarkably similar to the statutory change in the punishment available to prosecutors for a § 1201 conviction. Both statutory amendments changed the available remedies, which had a secondary effect on a substantive right. If *Landgraf* is our guide for determining whether a statutory change is procedural or substantive, then the 1972 amendment falls on the substantive side of the discussion.

A second concern with the Fifth Circuit's view that the statute of limitations change affected simple procedural rights was its failure to take account of a principal difference between *Skakel* and *Seale*. The twenty-one cases that *Skakel* cites to support its holding are predicated on statutory

---

[83] *Skakel*, 888 A.2d at 1024–25.

[84] 49 F.3d 886, 891–92 (2d Cir. 1995).

[85] Landgraf v. USI Film Prods., 511 U.S. 244, 247 (1994).

[86] *Id.* at 252.

[87] *Id.*

[88] *Id.* at 887–88.

[89] *Id.* at 249.

[90] *Id.* at 281 (finding "a jury trial [is] available only '[i]f a complaining party seeks compensatory or punitive damages'").

amendments that extended the statute of limitations period while the initial limitations period was still valid.[91] Those cases do not account for what should happen when the limitations period is shortened. This is exactly the scenario that the concurring opinion worried about in *Vernon v. Cassadaga Valley Central School District*, a case cited by the Fifth Circuit in *Seale*.[92] The issue presented to the court in *Vernon* was how to apply a 1991 amendment that changed the statute of limitations period for civil suits brought under the Age Discrimination in Employment Act (ADEA).[93] After noting a split among other circuit courts as to the retroactivity of the 1991 amendment, a two-judge majority ruled that a statutory change to the statute of limitations for ADEA civil actions should be applied retroactively.[94]

Judge Cabranes's concurrence in *Vernon* is most relevant to this Comment. Judge Cabranes suggested that there is an inherent difficulty in defining a statute of limitations change as procedural or substantive, noting that such a change "lie[s] on the cusp of the procedural/substantive distinction."[95] More importantly, Judge Cabranes presciently worried about statutory changes that shorten the statute of limitations period, which is precisely the type of statutory change affecting § 1201 prosecutions.[96] Judge Cabranes stated that in a civil context, "absent a clear statement from Congress, the new, shorter period should not be applied to plaintiffs who never had a chance to comply with the new rule."[97] Ultimately, the concurrence found little use in labeling a change in the statute of limitations as procedural or substantive given the amorphous nature of such a distinction.[98] To illustrate his point, Judge Cabranes noted that the limitations period was "treated as 'procedural' for choice-of-law purposes in context of [the] Full Faith and Credit Clause,"[99] while at the same time it was treated as substantive "for *Erie* doctrine purposes."[100] Instead, Judge Cabranes favored reviewing the statutory change in the context of the larger

---

[91] State v. Skakel, 888 A.2d 985, 1024–25 (Conn. 2006).

[92] United States v. Seale, 542 F.3d 1033, 1037 n.6 (5th Cir. 2008) (citing Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 889 (2d Cir. 1995)).

[93] *Vernon*, 49 F.3d at 889.

[94] *Id.*

[95] *Id.* at 892 (Cabranes, J., concurring); *see also* United States v. Blue Sea Line, 553 F.2d 445, 448 (5th Cir. 1977) (noting that "the distinction between procedure and substance tends to confuse more than clarify"). Notably, the original Fifth Circuit *Seale* opinion cited this exact language. *Seale*, 542 F.3d 1033, 1037 (5th Cir. 2008).

[96] *Vernon*, 49 F.3d at 891 (Cabranes., J., concurring).

[97] *Id.*

[98] *Id.*

[99] *Id.* at 892.

[100] *Id.* (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 722–29 (1988)).

legislative scheme.[101] Thus, while the Fifth Circuit is accurate in highlighting cases that conclude a change in a limitations period is procedural, it is simply incorrect to ignore the effects of lengthening versus shortening the limitations period.

Finally, the Fifth Circuit's analysis oversimplified the distinction between procedural and substantive statutory changes, as the court was mistaken in asserting that a change in the statute of limitations does not affect substantive rights. To the contrary, a statute of limitations change affects at least three parties' substantive rights. First, a change to the limitations period can determine whether or not a defendant faces criminal charges. It seems obvious that compelling an individual to stand trial and face the potential for a state-imposed punishment clearly changes that person's substantive rights—jail time is a prima facie example of a reduction in liberty, which is a substantive right. Additionally, an offender who faced an initial limitations period of two years at the time of the offense and subsequently faced a five-year limitations period as a result of a legislative change has clearly had his substantive rights affected. The fact that Seale faced a reduced limitations period after the 1972 amendment does not mean his substantive rights were any less affected.

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 substantive interest in ensuring justice in incarcerating criminals to prevent them from committing subsequent offenses. Additionally, the family members of the victims have substantive interests in seeing justice come to bear on those responsible for the deaths of their relatives.[102] Given the potential effect on the substantive rights of these three parties, it is disingenuous to suggest that a change in the limitations period is nothing more than procedural.

b. Is a Retroactive Application of the 1972 Amendment Just?

Recall Judge Cabranes's desire to review statutory changes in the context of the broader legislative scheme[103] and Justice Stevens's desire to review the statutory change for injustice.[104] Both reviews eschew the strictures of a bright-line retroactivity rule in favor of a rule that ensures injustice does not result from a retroactive application of a statute. The preceding distinction between procedural and substantive rights is therefore irrelevant if the statutory change in question would create injustice for one

---

[101] *Id.* (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 557–58 (1974)).

[102] *See infra* text accompanying note 107.

[103] *Vernon*, 49 F.3d at 892 (Cabranes, J., concurring).

[104] Landgraf v. USI Film Prods., 511 U.S. 244, 275 n.29 (1994).

or more of the parties. This subsection evaluates whether a retroactive application of § 1201 is just.

Most justifications for the retroactivity doctrine begin with the assertion that the law should give fair notice to private actors so they may be able to order their primary behavior.[105] However, this concern for fair notice and private planning is not present in Seale's case. Seale had the opportunity to inform himself of the intricacies of the 1964 version of § 1201 to the extent he was interested, and he had his opportunity to order his affairs in conformance with the 1964 law. Instead, Seale and his co-conspirators willfully chose to violate the kidnapping provisions as enacted at the time of the murder. There is simply no evidence that Seale faced injustice during his 2007 prosecution since he had adequate notice via the 1964 version of § 1201 that provided for an unlimited statute of limitations for kidnappings that resulted in harm to the victim.[106] There is no reason to give him the benefit of a subsequent statutory change based on the belief that he was unable to properly order his affairs.

On the other hand, the victims' families and the government might argue that they independently had a reasonable interest in the 1964 version of § 1201. Victims and their family members have a significant stake in the outcome of a criminal trial, and it would be foolish to ignore their collective interest in justice. For example, Chief Justice Rehnquist wrote in *Payne v. Tennessee* that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law . . . ."[107] As a result, if any party had a reliance interest in the kidnapping law, it was the prosecution and the victims' families. Ultimately, the absence of injustice against Seale and the manifest injustice the victims' families would dictate that the 1972 amendment to § 1201 should only be applied prospectively.

In the end, it is clear that statutory interpretation tools do not support a retroactive application of the 1972 amendment to § 1201. First, a review of the legislative history of the 1972 bill reveals a complete absence of intent to change the limitations period as opposed to simply changing the punishment. Similarly, Congress's textual silence as to the amendment's general retroactivity prevents the retroactivity doctrine's escape hatch from being employed. Next, notwithstanding Congress's silence, a change to the

---

[105] *Id.* at 265.

[106] 18 U.S.C. § 1201 (1964) (amended 2006).

[107] 501 U.S. 808, 819 (1991). *Payne* expressly permitted the use of victim impact statements in certain circumstances and in the process overruled both *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987). The propriety of *Payne* is well beyond the confines of this Comment. It is cited herein simply to suggest that courts can and do consider victims' interests.

statute of limitations period should be construed as a change to a substantive right, which limits a court's ability to apply the limitations period retroactively. Finally, a court should not apply the amendment retroactively due to the potential of injustice to the prosecution and the victims' families. Because a retroactive application of the 1972 amendment is improper, prosecution against Seale and other § 1201 defendants should proceed under the pre-1972 version of the statute.

B. DUE PROCESS CONSIDERATIONS

To the extent that the 1972 amendment to § 1201 is not applied retroactively, the next question to consider with respect to *Seale* and similarly situated Civil Rights Era prosecutions based on § 1201 is whether a significant (forty-three years for Seale) delay in bringing charges against a potential defendant violates the due process rights of that defendant. The Supreme Court in *United States v. Lovasco* held that "the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment."[108] Furthermore, the Court held that "[j]udges are not free . . . to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'"[109] In response to this due process consideration, this subpart will review other recent Civil Rights Era prosecutions to determine whether such a pre-indictment delay abridges the procedural due process rights of the defendant.

Seale is not the first Civil Rights Era prosecution that has faced an appreciable amount of time between the alleged crime and the indictment. To name just a few others, Ernest Avants was convicted for his role in the death of Ben Chester White; Edgar Ray Killen was convicted for his role in the death of three civil rights workers in 1964; and Bobby Frank Cherry was convicted for his role in the deaths of four young girls killed in a Birmingham church bombing.[110] While no *Seale* opinion addressed the due process question, another recent Civil Rights Era prosecution, *Killen v. State*, did.[111] In reviewing due process considerations associated with the delay in prosecution, the court in *Killen* applied a two-prong test developed by the Supreme Court in *United States v. Marion*.[112] The *Marion* test asks

---

[108] United States v. Lovasco, 431 U.S. 783, 790 (1977).

[109] *Id.*

[110] *See supra* text accompanying note 16.

[111] 958 So. 2d 172, 189–91 (Miss. 2007). While *Killen* is a state prosecution and *Seale* is a federal prosecution, similar procedural due process issues existed given the prosecutorial delay present in both cases.

[112] *Id.* at 189.

the following two questions in determining whether a pre-indictment delay violated the defendant's due process rights: (1) did the pre-indictment delay cause actual prejudice, and (2) was the pretrial delay used intentionally by the prosecution to gain a tactical advantage?[113] Although the *Marion* test allows a defendant to make a due process argument with respect to pre-indictment delays, the argument is rarely successful because the defendant bears a heavy burden in proving that the delay offended due process.[114] Nevertheless, the following analysis will evaluate the components of the *Marion* test individually as it relates to § 1201 prosecutions.

1. Actual Prejudice

The Mississippi Supreme Court recently applied the *Marion* test in *Killen v. State*.[115] Edgar Ray Killen was originally acquitted in 1967 of federal charges that alleged he "conspire[d] to violate the civil rights" of three Mississippi Freedom Summer civil rights workers that were killed in 1964.[116] Forty-one years after the murders, Killen was charged and convicted in state court on three counts of manslaughter.[117] In affirming Killen's conviction, the Mississippi Supreme Court applied the two-prong *Marion* test to determine whether the delay in charges resulted in a violation of Killen's procedural due process rights.[118] In doing so, the Court first held that the defendant's old age, his failing health, and the inability of a court to find a jury of his peers (Killen argued that a jury of his peers was not available since "they had long passed away or were too old to serve on juries") did not constitute actual prejudice.[119] Killen also argued that faded memories and the potential lack of cross-examination of key witnesses also created actual prejudice.[120] In ruling against Killen's faded memories argument, the *Killen* court relied on *De La Beckwith v. State*, in which the Mississippi Supreme Court held that "[v]ague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish a due process violation from preindictment delay."[121] Thus,

---

[113] United States v. Marion, 404 U.S. 307, 324 (1971).

[114] *See* Stoner v. Graddick, 751 F.2d 1535, 1540 (11th Cir. 1985) (finding that "the Constitution places a very heavy burden on a defendant to show that [the] pre-indictment delay has offended due process"); *see also Killen*, 958 So. 2d at 191.

[115] *Killen*, 958 So. 2d at 188–91.

[116] *Id.* at 173.

[117] *Id.* at 173–74.

[118] *Id.* at 189.

[119] *Id.*

[120] *Id.* at 190.

[121] De La Beckwith v. State, 707 So. 2d 547, 570 (Miss. 1997) (citing United States v. Ballard, 779 F.2d 287, 294 (5th Cir. 1986)).

Seale or another § 1201 defendant will likely be unsuccessful in making general assertions about lost witnesses and evidence, in addition to being unsuccessful with respect to a claim about the defendant's health, age, or the lack of a jury of his peers.

One question the *Killen* and *De La Beckwith* Courts left open is whether a previous trial is necessary to obviate the due process inquiry. For example, the *Killen* and *De La Beckwith* courts allowed both the prosecution and defense to use testimony and evidence from the original proceedings to the extent that a witness had died prior to the most recent trial. In fact, six of the state's fourteen witnesses in *Killen* were called by transcript from the previous trial.[122]

As mentioned, no *Seale* opinion addressed whether the forty-three year indictment delay for Seale resulted in an abridgement of his procedural due process rights. We are left to rely on other courts' rulings to determine whether Seale or any other similarly situated § 1201 defendant faced an abridgment of their due process rights. To begin, *Killen* seems to stand for the proposition that age, health, and juries consisting of "non-peers" are non-starters, and that type of argument clearly would not help Seale prove a violation of his due process rights.

A key difference between Seale on the one hand and Killen and De La Beckwith on the other, however, is that Seale never faced trial at some earlier point in time. The absence of an original trial might allow Seale to construct a stronger argument that his due process rights were violated since he cannot avail himself of evidence from a 1960s trial. However, Seale and his co-conspirator Charles Marcus Edwards had both allegedly confessed to certain aspects of the murders after their initial arrest in November 1964[123] and presumably faced certain pretrial procedures before their charges were dropped. Such procedures might lessen the actual bias against Seale. Furthermore, Seale has the potential to discover documents detailing why his charges were originally dropped; reliable (albeit old) evidence is still available to both the prosecution and Seale.[124] Neither the prosecution nor the defense has to rely entirely on the potential for failed memories since both sides can use evidence that had been previously memorialized in one form or another. Thus, while a transcript from trial was not available for Seale's prosecution, other documents including his confession and other pretrial procedures were available to both sides, which drastically lessens any potential actual prejudice.

---

[122] *Killen*, 958 So. 2d at 190.

[123] MACLEAN, *supra* note 8, at 38–39; *see also* Ladd, *supra* note 11.

[124] Dewan, *supra* note 6, at A11.

Ultimately, and to the extent that Seale and other similarly situated § 1201 defendants attempt to argue that their lack of an initial trial presents actual bias, *Killen* suggests that their arguments must be more than simple "[v]ague assertions" of actual prejudice, which might include the death of a key witness or some other specific assertion regarding the spoliation of key evidence.[125] Failing any specific allegation of bias, it is unlikely that Seale or any other § 1201 defendant will be able to prove the existence of actual prejudice, especially since their original statements to investigators in 1964 and other pretrial procedural evidence could be used during the contemporary trial.

2. Intentional Delay

Even to the extent that Seale or some other § 1201 defendant is able to prove actual prejudice, that defendant is also required to prove that there was an intentional delay on the part of the prosecution to gain some tactical advantage during trial.[126] One court interpreted the second prong of the *Marion* test to mean that pre-indictment delay could not be used to harass the defendant.[127] Yet another court has interpreted *Marion's* second prong to mean that the prosecution must actually intend to gain a tactical advantage via the pre-indictment delay and that simple negligence will not suffice.[128]

In *Killen*, the court was not forced to address the merits of an intentional delay claim since actual prejudice did not exist.[129] Nevertheless, it acknowledged the existence of Killen's tactical advantage argument before quickly dismissing it. Killen argued that the state gained a tactical advantage because the nature of jury duty and the type of jurors selected for jury duty materially changed from the 1960s to his prosecution in 2005.[130] Killen's brief stated, "It would be foolish to argue that the attitude of the general public has not changed from the sixties all to the advantage of the State and to actual prejudice against [Killen]."[131] The Mississippi Supreme Court noted that Killen's assertion was probably accurate, but there was no legal precedent for such an assertion and the claim simply lacked merit.[132] One might expect for Seale and other § 1201 defendants to make similar

---

[125] *Killen*, 958 So. 2d at 190.
[126] United States v. Marion, 404 U.S. 307, 324 (1971).
[127] United States v. McMullin, 511 F. Supp. 2d 970, 978 (N.D. Iowa 2007).
[128] Clark v. State, 774 A.2d 1136, 1152–53 (Md. 2001).
[129] *Killen*, 958 So. 2d at 190–91.
[130] *Id.* at 191.
[131] *Id.*
[132] *Id.*

arguments, but *Killen* appears to foreclose the possibility that such an assertion might succeed.

A second type of intentional delay argument was foreclosed in *United States v. Eisbart*.[133] The court in *Eisbart* held that an allegation "that evidence sufficient to indict was available to the Government well in advance" of the indictment is not adequate to support an allegation of prosecutorial misconduct.[134] This ruling appears to be consistent with a Maryland Court of Appeals ruling that stated that simple negligence is not enough to prove the prosecution gained a tactical advantage.[135]

Ultimately, Seale is unlikely to prove that the pre-indictment delay caused him any actual prejudice. Even if Seale is able to prove some modicum of actual prejudice, he must also satisfy the second prong of *Marion*, which requires a showing that the prosecution was more than simply negligent in failing to bring charges in the intervening time period.[136] As a result, any argument Seale makes with respect to his due process rights is likely to fail given the steep burden imposed on defendants in proving a due process violation.

C. NORMATIVE JUSTIFICATIONS FOR NOT APPLYING THE 1972 AMENDMENT RETROACTIVELY

The final question to consider in analyzing Seale's conviction and similar § 1201 prosecutions is whether an application of the 1972 amendment to § 1201 is normatively fair to both the prosecution and the defendant. This subpart will begin by discussing the traditional justifications associated with statute of limitations provisions and the contemporary changes Congress has made to those traditional notions and assumptions. This subpart will then address the balance between not applying the 1972 amendment and the traditional rationales offered in support of limitations periods. Ultimately, this subpart will conclude from a normative point of view that the 1972 amendment should not apply retroactively to § 1201 prosecutions for Civil Rights Era offenses.

1. Traditional Justifications and Contemporary Changes to Statute of Limitations Periods

The first step in assessing whether Seale's prosecution is normatively fair is to briefly recall the generally recited benefits and justifications of a

---

[133] No. 83 Cr. 806–CSH, 1984 U.S. Dist. LEXIS 17498, at *4–5 (S.D.N.Y. Apr. 18, 1984).

[134] *Id.*

[135] Clark v. State, 774 A.2d 1136, 1152–53 (Md. 2001).

[136] United States v. Marion, 404 U.S. 307, 324 (1971).

well-defined statute of limitations period.[137] The first and perhaps most obvious justification is that "after a certain time, no quantum of evidence is sufficient to convict" a defendant.[138] Witnesses' memories fade and "[f]or this reason, it will be more difficult . . . to defend . . . against charges relating to 10-year-old events than 1-week-old events."[139] A second identified justification for a statute of limitations period is Congress's long-held policy favoring repose.[140] The Supreme Court has held that "statutes of limitation are to be liberally interpreted in favor of repose."[141] A policy favoring repose is one that promotes putting an old crime to rest for the benefit of the accused and for the benefit of society.[142] The accused and the prosecution can feel a sense of relief knowing that they no longer must be concerned with an offense committed many years ago. The third traditional justification for statute of limitations periods asserts that such a period may encourage "law enforcement officials [to] promptly investigate suspected criminal activity,"[143] which in effect promotes adjudicatory efficiency benefiting both the criminal justice system and the accused.[144] Finally, statutes of limitations "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."[145] Similar to the third justification, the predictability justification is often asserted by those in favor of judicial efficiency.[146] Taken together and bearing in mind the Court's longstanding deference to repose, strict and perhaps traditional enforcement of statutory limitations periods might favor non-prosecution in matters similar to Seale's.

Despite what appears to be the criminal justice system's general policy towards strictly construing statute of limitations periods, state legislatures and Congress have been moving to lengthen statute of limitations periods for many types of criminal offenses. In fact, there have been at least twelve new exceptions carved out for the federal limitations period in the last

---

[137] *See, e.g.*, Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 129–31 (2008) (identifying the traditional rationales for statute of limitations periods).

[138] Stogner v. California, 539 U.S. 607, 615 (2003).

[139] DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL, AND MORAL CONCERNS 61 (2000).

[140] *Marion*, 404 U.S. at 322; *see also* Bridges v. United States, 346 U.S. 209, 215–16 (1953).

[141] *Marion*, 404 U.S. at 322 n.14.

[142] *Id.*

[143] Toussie v. United States, 397 U.S. 112, 115 (1970).

[144] Powell, *supra* note 137, at 130–31.

[145] *Marion*, 404 U.S. at 322.

[146] Powell, *supra* note 137, at 131.

twenty years.[147] For example, Congress abolished the statute of limitations for "terrorist offense[s] that 'resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.'"[148] Likewise, the savings and loan crisis of the 1980s prompted Congress to lengthen the limitations period from five years to seven years for a "criminal offense of major procurement fraud committed against the United States."[149] There have also been limitations extensions for criminal offenses against children, trafficking offenses, and certain sexual offenses.[150] Finally, and in addition to the extension of limitations periods for particular types of criminal activity, Congress has also extended the limitations periods for highly complex crimes and crimes that may require significant discovery.[151]

Given the numerous changes to limitations periods, the traditional justifications for a statute of limitations are less persuasive. At least one commentator noted that "Congress had done very little to justify recent changes to the [limitations] rule[s] in relation to new circumstances or understandings, and a closer look at the exceptions' likely effect suggests that they will undermine the interests and objectives that they have long been thought to protect."[152] Thus, erosion of the traditional limitations periods for certain types of offenses also serves the purpose of eroding the traditional rationales offered for limitations periods in the first place. Given these changes, strict construction of a limitations period against Seale and other similar defendants may no longer be warranted. Given the conflicting signals pertaining to the justifications given for a statute of limitations period, it is perhaps best settled by an analysis of the normative considerations for not applying the 1972 amendment retroactively.

2. Normative Balance Between the 1972 Amendment and the Traditional Justifications for Statutes of Limitations

Having introduced the justifications and recent legislative history of limitations periods, it is next important to determine whether those traditional justifications for a statute of limitations period (notwithstanding the contemporary changes nullifying many of those justifications) can be balanced with the norms of fairness and justice. In fact, the first normative rebuttal to the traditional justification examines the general assumptions

---

[147] *Id.* at 124.

[148] Act of Oct. 26, 2001, Pub. L. No. 107-56, Title VII, § 809(a), 115 Stat. 379 (codified as amended at 18 U.S.C. § 3286 (2006); Powell, *supra* note 137, at 124.

[149] Powell, *supra* note 137, at 124; *see* Major Fraud Act of 1988, 18 U.S.C. § 1031(f) (2006).

[150] Powell, *supra* note 137, at 125 & nn.66–70.

[151] 18 U.S.C. § 3294 (2006); Powell, *supra* note 137, at 125–26.

[152] Powell, *supra* note 137, at 131–32.

about evidence in applying a limitations period in the first place. As was previously asserted, "evidence is, by its nature, fragile and susceptible to destruction over time, as memories fade and witnesses die or become otherwise unavailable,"[153] and there is evidence to suggest that even the most heinous and thus, most memorable, offenses are subject to the same deteriorating memories as other offenses.[154] It is important to note, however, that evidence spoliation typically has a disproportionate effect on the prosecution rather than the defense since the state is charged with meeting the reasonable doubt standard.[155] In fact, "[d]efense lawyers have often used delay [during the initial proceedings] to their [clients'] advantage."[156]

In addition to the questionable assumption regarding the evidentiary burden defendants carry in old prosecutions, there is also a question about the quality of evidence brought to bear in an old prosecution. As just noted, prosecutions of old crimes create the potential for failed memories and lost documents. However, at least one court was satisfied with the ability of witnesses to recall specific events that occurred forty-one years earlier.[157] Furthermore, a brief psychological analysis of memory suggests that memories of old crimes can still accurately reproduce details of the offense in certain circumstances.[158]

DNA analysis and other scientific advances in the collection of evidence may also bridge the divide between failed memories and contemporary prosecutions. Some commentators suggest that "[g]iven these advances, the need for limitation periods has diminished."[159] On the other hand, the imposition of scientific methods such as DNA testing seems to at least anecdotally create a presumption of guilt against the defendant.[160] While the purported accuracy rates of DNA evidence remain high, it is worth noting that forensic scientists are also "fallible and sometimes blind

---

[153] Thigpen v. Smith, 792 F.2d 1507, 1514 (11th Cir. 1986).

[154] SHUMAN & SMITH, *supra* note 139, at 88–91.

[155] *Id.* at 88 (arguing that "because the state bears the burden of proving the elements of the crime charged . . . the unavailability of evidence ordinarily has a disproportionate impact on the prosecution").

[156] *Id.*

[157] Killen v. State, 958 So. 2d 172, 190 (Miss. 2007) (finding "Killen's other witnesses similarly had no problems recalling the events that took place in 1964").

[158] SHUMAN & SMITH, *supra* note 139, at 97 ("[Reliance] on inherently perishable proof in the prosecution of [old] crimes does not mean that justice cannot be done. Instead, it means that we must proceed with great care.").

[159] PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 58 (2006).

[160] Powell, *supra* note 137, at 133.

to their own shortcomings."[161] While there was no suggestion with respect to the existence of DNA evidence that linked Seale to the deaths of Moore and Dee in any *Seale* opinion, the fact that these scientific methods exist pokes a hole in the infallibility of the statute of limitations justification regarding evidence spoliation.

The second normative rebuttal to the traditional justifications examines the benefits of repose. Repose has long been identified as a justification based on the theory that "[t]he passage of time may . . . lead to profound changes in . . . identity."[162] Additionally, more recent arguments for repose have focused on society's interest in forgiving the wrongs of the past.[163] Nevertheless, the latter argument in a case such as Seale's would create injustice to the family members of the two murder victims.[164] For example, anecdotal evidence from victims' families suggests the existence of a therapeutic value associated with a conviction.[165] More specifically, some commentators suggest that the victims' confrontation of the past wrong "may reasonably achieve the objective of helping the victim understand where he or she stands in relation to the offense."[166] It may also "relieve the victim of feelings of guilt," and free the victim from continued fear.[167] While this normative rebuttal to the traditional justifications is psychological, there is no reason to dismiss it as unimportant. In fact, many courts seem to appreciate the value associated with victims' feelings as they permit victim impact statements to be read during the sentencing phase of a trial [168]

Finally, the third normative rebuttal to the traditional statute of limitations justifications examines the existence of often blatant prosecutorial misconduct in many Civil Rights Era crimes that resulted in unprosecuted crimes such as those committed by Seale and De La Beckwith. This prosecutorial misconduct is in complete contrast to the

---

[161] Scott Bales, *Turning the Microscope Back on Forensic Scientists*, 26 NO. 2 LITIG. 51, 58 (2000).

[162] Powell, s*upra* note 137, at 130 (quoting SHUMAN & SMITH, *supra* note 139, at 19).

[163] SHUMAN & SMITH, *supra* note 139, at 12.

[164] It is at least noteworthy that the repose justification is ignored for crimes that Congress has deemed sufficiently heinous to warrant an unlimited statute of limitations. *See supra* text at notes 147–48 (discussing the unlimited statute of limitations for some terrorism offenses).

[165] SHUMAN & SMITH, *supra* note 139, at 112.

[166] *Id.*

[167] *Id.*

[168] Payne v. Tennessee, 501 U.S. 808, 819 (1991). *But see, e.g.*, Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000) (arguing that courts should prohibit sentencing opinions in capital trials because they are prejudicial).

traditional justification that argues that limitations periods promote prompt investigations. As was previously noted, the perfunctory investigation of Seale and Edwards in late 1964 and the speed with which the charges were dropped suggest that neither man would have ever been convicted in a 1960s courtroom, even with overwhelming evidence proving their guilt.[169] Furthermore, one news account recounting the 1964 dismissal suggested that Seale and Edwards began spreading rumors that they were mistreated by the police during and after their arrest.[170] The prosecutor acknowledged that the evidence against Seale and Edwards was strong, but ultimately dismissed the case since he was sure a grand jury would not bring an indictment if there was even a slight intimation that the men were beaten by the police.[171] Applying the 1972 amendment retroactively would therefore allow for the perverse result of almost condoning the actions of state-sponsored racism by local and federal prosecutors, contravening the investigatory efficiency justification for a limitations period. Therefore, the final normative rebuttal for not applying the 1972 amendment to § 1201 is to limit the protections that were given to wrongdoers by a corrupt and racist criminal justice system.

Ultimately, the normative justifications for refusing to apply the 1972 amendment to § 1201 are strong and include the diminishing presumption that evidence is easily spoiled, a reluctance to create injustice towards the victims' families, and a reluctance to perpetuate the prosecutorial misconduct of the era. While these justifications certainly apply to § 1201 prosecutions, some commentators advocate an even more sweeping change.[172] Robinson and Cahill suggest that "statutes of limitation no longer serve a legitimate purpose, at least for serious offenses, but they continue to cause failures of justice and should therefore be abolished or greatly curtailed."[173] While this last assertion concerning the continued viability of limitations periods is outside the scope of this Comment, it is at a minimum suggestive that the traditional justifications for a limitations period seem to be less relevant for purposes of Civil Rights Era offenses such as James Ford Seale's.

---

[169] *See* MACLEAN, *supra* note 8, at 37–38. Additionally, Byron De La Beckwith was tried twice in 1964 and was twice acquitted by an all white jury before eventually being convicted in 1994, which lends credence to the assertion that Seale and other similar defendants would never have been convicted of their crimes during the Civil Rights era. Claudia Dreifus, *The Widow Gets Her Verdict*, N.Y. TIMES MAG., Nov. 27, 1994, at SM69.

[170] Ladd, *supra* note 11.

[171] *Id.*

[172] ROBINSON & CAHILL, *supra* note 159, at 60.

[173] *Id.*

IV. THE FUTURE OF CIVIL RIGHTS ERA PROSECUTIONS

The effects of the Civil Rights Era still reverberate throughout the South. Those effects include the question of how to proceed and whether to prosecute heinous, racially motivated crimes that were committed over forty years ago. In fact, the FBI has identified approximately ninety-five "unsolved hate crimes from the Civil Rights Era" that are under active investigation.[174] Furthermore, in 2008, Congress passed and President Bush signed the "Emmett Till Unsolved Civil Rights Crime Act,"[175] which allocated $135 million to the Department of Justice and the assignment of permanent Department of Justice personnel to the continuing investigation of open civil rights crimes committed before 1969.[176] While the amount of money allocated to solving old crimes is modest, this bill illustrates the government's and perhaps the country's continued desire to prosecute these crimes. Therefore, determining whether the 1972 amendment to 18 U.S.C. § 1201 should apply retroactively has important ramifications for these future Civil Rights Era and perhaps even future organized crime prosecutions.

In assessing whether the 1972 amendment should apply retroactively, this Comment began by analyzing two tools of statutory interpretation. Most importantly, the general rule against retroactivity suggests that the 1972 amendment should not apply retroactively to crimes committed prior to 1972. Moreover, even to the extent that a court would construe a change to the statute of limitations as procedural, a court could not ignore the potential injustice created in not prosecuting a crime such as Seale's. Additionally, and notwithstanding the unlimited statute of limitations period, a potential for due process abuse towards the defendant exists. However, the burden placed on the defendant in proving such a violation includes both actual prejudice and intent on behalf of the government to obtain a tactical advantage. Again, to the extent Seale or a similarly situated defendant could prove actual prejudice, there is little hope in that defendant proving actual intent on the part of the government to gain a tactical advantage. Finally, the normative rebuttals to the traditional justifications for not applying the 1972 amendment retroactively are a compelling reason to proceed with a prosecution.

Civil Rights Era crimes have the potential to remain a part of the fabric of this country as long as there are open cases that have gone unprosecuted.

---

[174] Press Release, Fed. Bureau of Investigation, Combating Hate Crimes (Nov. 7, 2008), *available at* http://www.fbi.gov/news/podcasts/inside/combating-hate-crimes/view.

[175] Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, 122 Stat. 3934 (2008).

[176] *Id.*

To the extent that these crimes implicate 18 U.S.C. § 1201, courts have the tools to confront these crimes head-on. Ultimately, the Department of Justice should continue prosecuting these crimes in an effort to bring closure to a sad chapter in this country's history.