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Blurring the Statute of Limitations

By Joel Cohen

No question about it: If you murder someone, you better be prepared to live with it for the rest of your life, maybe even afterwards. As well you should be.

You should likewise be prepared to face criminal prosecution for the murder for the rest of your life -- that is to say, until whenever the authorities catch up with you. This is due to what amounts to a policy decision that Society made long ago, and it is a decision that applies nationwide. Put simply, no one may ever escape prosecution for committing murder merely because too much time has elapsed since the killing. The rationale here is that murder so undermines the "social contract" that it shouldn't be dealt with in any other way.

This "social contract" has in fact been amended in recent years: New statutes now on the books address acts of terrorism that create a foreseeable risk of death or serious physical injury. These statutes of limitations allow prosecutions for acts of terrorism as long as the offenders remain alive, even where no deaths result from the terrorist act. In other words, there is no statutory time bar for prosecuting such offenses in states where such statutes exist. In our age of modern terrorism, it is difficult to quarrel with these laws.

It is for good reason, however, that we do not leave all crimes and offenses interminably open for redress. Lawmakers decided long ago that "the Law" should impose time limits after which neither the government, in the instance of both criminal and civil offenses against it, nor the private citizenry in the instance of civil offenses committed against its members (as victims), can pursue claims against those who have wronged them. Such periods of limitation are intended to benefit both the wrongdoers and the victims (including the government), and do so for a multitude of reasons.

Clearly, individual victims need to move on with their lives, and they are encouraged to do so through the enforcement of time limitations. Still, unsympathetic as it might sound, particularly to victims, wrongdoers also need to be allowed to get on with their lives. Times change, memories fade. More broadly, lawsuits and criminal actions no longer have the vitality that they may have had during the finite periods carved out by statutes of limitation. There is real societal value in everyone involved proceeding with a case within a finite period. And it seems fair -- as long as there is a sufficient

opportunity for the victims (*i.e.*, would-be plaintiffs) or the government to proceed with a civil claim or prosecution. After all, the value of "closure" is as applicable in the life of the law as it is as a human dynamic.

Notably, the U.S. Supreme Court has barred criminal prosecutions on "due process" grounds where the statute of limitations had not technically yet elapsed, but where a prosecutor had tactically chosen to defer prosecuting a case in the hopes that a potential exculpatory witness would die.

Still, the overwhelming trend in recent years is otherwise: Because of new tolling provisions, more statutory exceptions and case law now exempt civil plaintiffs and even prosecutors from the hitherto strict confines of statutory time limits.

True, tolling provisions are not unprecedented. Traditionally, if a criminal defendant, even an innocent one, left the jurisdiction or went into hiding, he could potentially be prosecuted as late as five years -- the standard limitations period -- after he returned or was discovered. Theoretically, in such cases, a defendant could be prosecuted as long as 50 years -- or even more! -- after the offense; in legal terminology, the statute was "tolled" during his absence. Likewise, where a victim was a minor when an assault was committed against her, the criminal statute of limitations remains "tolled" and typically will not incept until she reaches the age of majority. (Exceptions apply, such as if the incident is reported to the authorities before the victim reaches majority.) The law presumes that a minor won't have the presence of mind (really, the legal capacity) required to report the attack to the authorities. The policy decisions that allow for such tolling surely make sense, although an argument could be made that tolling is taken too far, especially in the case of the absent defendant, because prosecutors have the capacity to institute a prosecution even while a defendant is ostensibly running from the law.

However, other examples of tolling don't make nearly as much sense. For example, prosecutors sometimes push the envelope, particularly in the instance of conspiracy charges, which they file indictments for long after the expiration of the five-year statute of limitations for the underlying, substantive criminal event. So, for example, if a theft by two co-defendants occurred on January 2, 2008, a prosecutor might claim that the five-year statute of limitations remained open after January 2, 2013, by arguing that long after the 2008 event occurred, one of the co-conspirators acted in a manner designed to cover up the crime.

Prosecutors have, sometimes successfully, relied on case law that suggests that a co-conspirator must affirmatively withdraw from the conspiracy in order for the statute to start running for him. And how exactly would one do that? Does the co-conspirator have to email his fellow crook, saying: "I no longer want to be involved in the theft we committed on January 2, 2008"? Certainly that would be a sufficient affirmative act to end his role in the conspiracy, but should the law expect such an unrealistic act on the part of a wrongdoer to finally end his role in a conspiracy? But talk about blurring the statute of limitations!

This "blurring," if you will, has strayed into the civil arena as well. Of course, the "infancy" of a would-be plaintiff should properly toll the relevant statute -- which is usually three years for a tort -- until the plaintiff reaches majority. If a tortious event hypothetically occurred on July 4, 2000, when the would-be plaintiff was 8 years old, the statute would be tolled until 10 years later. Once the would-be plaintiff achieves majority in 2010, he may proceed with an allegation of liability against a corporation for

the conduct of its employee under the doctrine of respondeat superior, and in fact he has three years starting July 4, 2010 to do so.

But let's tweak the hypothetical and say that the would-be plaintiff was already an adult in the eyes of the law on July 4, 2000, when the tortious event occurred. Let's say that he did nothing regarding the tort, perhaps because he did not realize the corporation's role in it. Instead, 12 years later, representatives of the corporation come forward, stating that they have just become aware of the misconduct of one of the corporation's employees -- and misleadingly so, because the corporation was actually aware, or at least should have been aware, of the wrongdoing long before. In this scenario, 12 years have elapsed since the offending act in question. And, because the plaintiff was an adult when the tortious event occurred, the statute would likely "run" at the conclusion of the three-year limitations period, which would be July 4, 2003. Does this seem fair? Assuming these facts, how long (if at all) will the statute be tolled? In other words, for how long will the defendant corporation remain "equitably estopped" from asserting the running of the statute of limitations?

On the one hand, we empathize with the potential plaintiff, particularly where deplorable facts deny "legal sympathy" for an accused. On the other hand, isn't there a point in time (or, more importantly, shouldn't there be one?) when the law would say that "it's just not fair to expose a wrongdoer to the potential of a lawsuit for something that happened too long ago"?

Justice Oliver Wendell Holmes Jr. once said that hard cases make bad law. Sometimes, however, hard cases don't have the chance to make bad law because they settle out before the Law is required to act. Here's just one example to illustrate the point: Horrendous though the conduct of the Swiss banks was in appropriating Holocaust-era deposits (and even putting the question of jurisdiction of the American courts to entertain such lawsuits aside), the applicability of the relevant statutes of limitation and the legitimacy of a "tolling" for more than 40 years until the class action lawsuits were initiated were never decided. Instead, the offending banks settled and paid out extraordinary sums. Had the merits of the time-bars been litigated, the cases may well have been decided in favor of the banks.

Politically incorrect as it might be to say so, the courts' occasional willingness to find tolling exceptions sometimes encourages class action plaintiffs to threaten, or even file, lawsuits way outside the standard statute of limitations period in hopes of cajoling settlements from defendants who actually have the "legal" ability to assert valid time-bars to lawsuits. Is there always a benefit in tolling the statutes of limitation for seemingly long periods of time? The answer to that is often a blur.

Finally, we would be remiss if we did not note, approvingly, the U.S. Supreme Court's hot-off-the-presses decision on February 27 in *Gabelli v. Securities and Exchange Commission*, in which the court unanimously decided that in an enforcement action for fraud **the SEC was required to initiate proceedings within five years of the action's "accrual," not the likely later date of its discovery**. Clearly, the right result -- but, in so deciding, the court sharply distinguished a government enforcement action from a private lawsuit where the plaintiff might not be in the same position, or of a same mind, to promptly initiate a claim.

However, it may well be, in this litigious age, that the courts should seriously reconsider that distinction and its vitality going forward, given the important societal value of repose.

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