INVISIBLE VICTIMS

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The criminal courtroom is closed to invisible victims. They did nothing to forfeit their claims to justice. However heinous the wrongs they suffered, however certain their evidence, however eager the prosecutors on their cases, no criminal tribunal will ever see them.

Invisible victims exist because of doctrines that immunize certain people from any criminal inquiry and punishment. These people include suspects whose alleged misdeeds occurred long ago, diplomats, legislators, pardon recipients, and the deceased, among many others. Shielding such individuals from criminal sanction often makes sound policy sense, but criminal law has yet to reckon with the moral cost of deferring unconditionally to their interests.

This Article offers a more balanced approach by disentangling the possibility of trial from the availability of punishment. In other words, criminal law should permit courts to hold trials of suspects who are otherwise immune from punishment. Even if sentencing will not follow, trials give victims a voice and juries an opportunity to recognize and condemn wrongdoing. Familiar procedural safeguards can protect unpunishable criminals' weightiest interests, even as invisible victims receive the recognition they deserve.

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We know crimes were committed on a large and almost unprecedented scale. The question is who can be held accountable today . . . . In my opinion, there are no criminal charges possible now . . . .

—Former Tulsa County Presiding District Judge William Kellough[1]

I. A BLINDSPOT IN CRIMINAL JUSTICE

One century ago, on the morning of May 31, 1921, the Greenwood district of Tulsa, Oklahoma, was home to Black Wall Street, a self-built oasis of almost unparalleled African American prosperity.[2] Streets packed with stores, hotels, jewelers, nightclubs, professional offices, and a library were the envy of neighboring communities.[3]

Eighteen hours later, Greenwood was a shambles. White rioters had burned more than thirty-five square blocks to the ground, leaving three hundred bodies and ten thousand homeless residents in their wake.[4] Local, state, and national histories largely omitted the Tulsa Race Massacre for

1. Tim Stanley, *1921 Tulsa Race Massacre: Criminal Charges Likely Impossible Today, Legal Expert Tells Mass Graves Committee*, TULSA WORLD (May 18, 2021), https://tulsaworld.com/news/local/racemassacre/1921-tulsa-race-massacre-criminal-charges-likely-impossible-today-legal-expert-tells-mass-graves-committee/article_ec55e940-b735-11eb-8cdc-efb7b6b26f78.html [https://perma.cc/D5YE-DNLY].

2. Amanda Aronczyk, Planet Money, *Black Wall Street*, NPR, at 00:48–01:10, 01:26–01:40 (June 2, 2021, 4:25 PM), https://www.npr.org/2021/06/02/1002538572/black-wall-street [https://perma.cc/S9MT-XDDD].

3. Yuliya Parshina-Kottas, Anjali Singhvi, Audra D.S. Burch, Troy Griggs, Mika Gröndahl, Lingdong Huang, Tim Wallace, Jeremy White & Josh Williams, *What the Tulsa Race Massacre Destroyed*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html [https://perma.cc/ZE8L-PNAK].

4. *Id.*

seventy years.[5] Many descendants of victims, still living in Greenwood and still suffering the aftereffects of that day of devastation, knew nothing of the Massacre until recently.[6]

If criminal justice has any role to play, it is here. Yet now that the story of the Tulsa Race Massacre has come to modern light, legal doctrines block the criminal justice system from taking any action. Since the rioters are all deceased, the criminal law will not inquire into their misdeeds.[7] Government entities that participated in the Massacre exist today, but applicable statutes of limitations periods expired long ago.[8] The victims (three of whom survive today)[9] and their descendants must seek what justice they can by pleading for political solutions in the fickle halls of the state legislature.[10] Alternatively, they hope for civil damages by arguing that the Massacre satisfies the legal definition of a public "nuisance."[11] This dynamic demeans them. The criminal justice system is our most solemn platform for recognizing victims and the wrongs they suffer. But, so far as the criminal record will ever be concerned, there was no murder or arson in Greenwood a century ago.

This Article introduces what it calls "invisible victims."[12] The criminal justice system underserves many populations. Invisible victims

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5. Daniella Silva, *Once Overlooked in Classrooms, Tulsa Race Massacre Now Seen as 'Important' Lesson in Oklahoma Schools*, NBC NEWS (May 28, 2021, 1:30 PM), https://www.nbcnews.com/news/us-news/once-overlooked-classrooms-tulsa-race-massacre-now-seen-important-lesson-n1268684 [https://perma.cc/6H2H-4YNE]; Doug Stanglin, *Fact Check: Devastating 1921 Tulsa Race Massacre Wasn't Worst U.S. Riot, Isn't Ignored in Books*, USA TODAY (Sept. 22, 2020, 8:07 PM), https://www.usatoday.com/story/news/factcheck/2020/06/17/fact-check-tulsa-race-massacre-worst-u-s-riot-isnt-ignored-history-books/5341812002/ [https://perma.cc/5GKH-JZYH].

6. Aronczyk, *supra* note 2; Meagan Jordan, *How Three Survivors of the Tulsa Race Massacre Continue to Fight for Reparations 100 Years Later*, THE UNDEFEATED (May 31, 2021), https://theundefeated.com/features/how-three-survivors-of-the-tulsa-race-massacre-continue-to-fight-for-reparations-100-years-later/ [https://perma.cc/S6KZ-5N3Q].

7. Jordan, *supra* note 6.

8. *Id.*

9. *Id.*

10. Keisha N. Blain, Opinion, *Tulsa Race Massacre Survivors Are Fighting for Reparations, 100 Years Later*, MSNBC (May 31, 2021, 8:16 AM), https://www.msnbc.com/opinion/tulsa-race-massacre-survivors-are-fighting-reparations-100-years-later-n1268891 [https://perma.cc/B8TE-RBJP].

11. Elizabeth Olson, *Tulsa Race Massacre Victims See 'Nuisance' Suit as Justice Route*, BLOOMBERG L. (June 2, 2021, 3:17 PM), https://news.bloomberglaw.com/business-and-practice/tulsa-race-massacre-victims-see-nuisance-suit-as-justice-route [https://perma.cc/537H-C4TF].

12. "Invisible alleged victim" would be more accurate throughout this Article. *See* Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1451 (2021). Without a completed criminal adjudication, the wrong the victims are alleged to have suffered has not been formally established. I omit "alleged" throughout both for ease of locution and

are distinct from the marginalized victims whose interests biased police and prosecutors often refuse to acknowledge.[13] Invisible victims face an even more formidable obstacle than executive discretion—non-negotiable legal doctrines that block any access to criminal justice, however certain the evidence may be. The victims of the Tulsa Race Massacre are invisible in this sense because the rule of abatement and statutes of limitations bar any validating action in criminal law. They are not alone. Many other doctrines—including diplomatic immunity and executive pardon—produce structurally similar injustices for countless other victims.[14]

No victim should be invisible. No doctrine should automatically constrain criminal law's ability to acknowledge those who have a legitimate claim to its recognition. Invisible victims exist because criminal law sometimes overzealously guards against any infringement of certain types of suspects, often people in positions of privilege and power. Though there are sometimes very good policy reasons for protecting these suspects, their interests should not automatically trump victims' claims to recognition.

This Article argues that criminal justice should never automatically blind itself to wrongdoing just because of the wrongdoer's identity. Trial advances victims' dignity interests by memorializing their narratives and allowing impartial juries to weigh their allegations. Conviction, even without punishment, can validate victims by formally conveying society's judgment that what they endured was a criminal wrong deserving condemnation. The proposal advanced below strikes a balance between offering victims the recognition they deserve and preserving the most important interests of those suspects whom the law seeks to protect.

Invisible victims are the logical counterpart of what this Article calls "unpunishable criminals" (or, depending on context, "unpunishable suspects")—a person who (is alleged to have) committed criminal wrong but whom legal doctrine shields from sanction. A taxonomy of unpunishable criminals showcases the range of policy reasons that are supposed to justify this dynamic (Part III). Despite the broad variety of unpunishable criminals, there is one feature that unites them: they are all, so far as current law is concerned, immune from trial as well as sanction

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because the modifier "alleged" exacerbates the injustice I describe below. I believe all the invisible victims I describe truly suffered wrongs, even if who wronged them has not been established.

13. William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155, 156, 199 (2020). Michal Buchhandler-Raphael describes and documents this phenomenon, particularly when it relates to sexual assault, as "underprosecution." Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. RICH. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814068. It, too, can render many victims functionally invisible.

14. *See infra* Sections III.A.1–2.

(Part IV). The criminal justice system ensures that it will never punish—and also that it will never know.

The law should decouple immunity from punishment and immunity from trial (Part V). While theorists tend to talk of the criminal justice process as an undifferentiated whole with the same general purpose from start to finish—punishing wrong—there is room for a more dynamic approach. There are criminal justice values that trial, and trial alone, can accomplish. Dissociating conviction from the necessity of sanction would unlock presently overlooked criminal justice value for victims and simultaneously protect the weightiest concerns of unpunishable suspects.

This theoretical foundation sets the stage for a detailed policy intervention: criminal law should—when circumstances warrant—permit prosecutors to indict, and courts to try, unpunishable suspects (Part VI). Though unpunishable suspects have, by definition, much less to fear from the possibility of conviction, extra care is still necessary to ensure the integrity of the criminal justice process. Three complicating factors are most salient: whether the suspect could participate in trial, whether the suspect voluntarily rendered themselves unpunishable, and whether the suspect's status as unpunishable is permanent or temporary. Each factor bears on the relative risks of proceeding to trial against an unpunishable suspect and points to additional procedural protections that should be in place.

II. WHY INVISIBLE VICTIMS EXIST

Invisible victims and unpunishable criminals are logical counterparts. The survivors of the Tulsa Race Massacre are invisible because those who injured them are beyond the reach of the criminal law. As a consequence, the criminal justice system has no mechanism for acknowledging and validating the Massacre's survivors. They represent just one poignant pairing of invisible victims and unpunishable suspects. Unfortunately, there are many, many more. This Part introduces and begins to analyze some illustrative case studies.

Authorities allege that, from 2002 until 2019, Jeffrey Epstein raped or sexually abused dozens of underage women, some as young as fourteen.[15] He also procured, through a "vast enterprise" of co-

15. Ali Watkins, Benjamin Weiser & Amy Julia Harris, *Jeffrey Epstein's Victims, Denied a Trial, Vent Their Fury: 'He Is a Coward*,*'* N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/27/nyregion/jeffrey-epstein-hearing-victims.html [https://perma.cc/LC3S-T26S].

conspirators,[16] underage girls to have sex with elite clientele.[17] Authorities apprehended Epstein, and the evidence against him was compelling. After so many years of abuse and evasion, it seemed that authorities were on the verge of delivering justice for his victims. However, mere days before trial, prison officials discovered Epstein dead in his holding cell, apparently by suicide.[18]

More than forty women allege that Bill Cosby raped or sexually assaulted them between the 1960s and early 2000s.[19] Many of Cosby's accusers report that he drugged them with hypnotic Quaaludes[20] before forcing them to engage in sex acts they would not or could not describe.[21] Because the vast majority of Cosby's crimes occurred long ago, he is largely immune from sanction.[22] He assaulted many of his victims decades before #MeToo brought to light rampant sexual abuse in the entertainment industry.[23] In California, New York, and Nevada, where Cosby was most

16. Brenda Pierson, *Three More Women Sue Epstein's Estate over Alleged Abuse*, REUTERS (Aug. 20, 2019, 7:54 AM), https://www.reuters.com/article/us-people-jeffrey-epstein-lawsuits/three-more-women-sue-epsteins-estate-over-alleged-abuse-idUSKCN1VA1B4 [https://perma.cc/7UQY-M4Q4] ("All [accusers] said Epstein used a 'vast enterprise' of associates to recruit them, subject them to unwanted sex acts and keep them under his control.").

17. Taylor Nicole Rogers, *Here Are All the Famous People Jeffrey Epstein Was Connected To*, BUS. INSIDER (Oct. 14, 2020, 3:53 PM), https://www.businessinsider.com/famous-people-jeffery-epstein-money-manager-sexual-trafficking-connected-2019-7/ [https://perma.cc/2ECN-9JEP].

18. Gabriela Saldivia, *Jeffrey Epstein Dead by Apparent Suicide at Manhattan Jail*, NPR (Aug. 10, 2019, 10:00 AM), https://www.npr.org/2019/08/10/750113214/jeffrey-epstein-found-dead-early-saturday-morning [https://perma.cc/GVM9-VXUL].

19. *Timeline: Bill Cosby: A 50-Year Chronicle of Accusations and Accomplishments*, L.A. TIMES (Sept. 25, 2018, 11:34 AM), https://www.latimes.com/entertainment/la-et-bill-cosby-timeline-htmlstory.html [https://perma.cc/S65X-ACBM].

20. Graham Bowley & Ravi Somaiya, *Bill Cosby Admission About Quaaludes Offers Accusers Vindication*, N.Y. TIMES (July 7, 2015), https://www.nytimes.com/2015/07/08/business/bill-cosby-said-in-2005-he-obtained-drugs-to-give-to-women.html [https://perma.cc/7LYD-VMKB].

21. Patrick Ryan, Maria Puente & Carly Mallenbaum, *A Complete List of the 60 Bill Cosby Accusers and Their Reactions to His Prison Sentence*, USA TODAY (July 6, 2021, 10:33 AM), https://www.usatoday.com/story/life/people/2018/04/27/bill-cosby-full-list-accusers/555144002 [https://perma.cc/AJB8-QLCQ].

22. Shannon Valladolid, *Rape Survivor Says Statutes of Limitations Should Be Ended After Cosby Case*, 10 TAMPA BAY NEWS (Apr. 27, 2018, 7:48 PM), https://www.wtsp.com/article/news/local/rape-survivor-says-statutes-of-limitations-should-be-ended-after-bill-cosby-case/67-546703245 [https://perma.cc/75BM-38A8].

23. *#MeToo: A Timeline of Events*, CHI. TRIB. (Feb. 4, 2014, 1:52 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [https://perma.cc/JS5Z-99TK] (dating the first use of the #MeToo to 2006 and the start of the movement to 2017).

active,[24] the statutes of limitations for sexual assault were ten,[25] five,[26] and four years,[27] respectively. In Pennsylvania, which had a longer limitations period, a jury found Cosby guilty of just one incident. A court subsequently vacated even that lone conviction as inconsistent with a witness immunity agreement prosecutors had offered Cosby many years earlier.[28]

In August 2019, a U.S. diplomat's spouse, Anne Sacoolas, was driving in the wrong lane when she struck and killed U.K. teenager Harry Dunn.[29] Sacoolas concedes she was driving negligently,[30] but she fled the country soon after. Even had she stayed, diplomatic immunity would have protected her from punishment.[31] In the United States alone, there are over 100,000 people with similar diplomatic immunity.[32]

By most accounts, criminal law's central and culminating purpose is to give wrongdoers the punishment they deserve and the punishment that will deter. As the above cases illustrate, unpunishable suspects often occupy positions of power and privilege. Many invisible victims come from disempowered communities that are least able to fend for themselves.

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24. Filipa Ioannou, Ben Mathis-Lilley, Elliot Hannon & Lena Wilson, *A Complete List of the Women Who Have Accused Bill Cosby of Sexual Assault*, SLATE (Apr. 26, 2018, 5:50 PM), https://slate.com/culture/2018/04/bill-cosby-accusers-list-sexual-assault-rape-drugs-feature-in-women-s-stories.html [https://perma.cc/U4AC-QWP5].

25. S.B. 813, 2015–16 (Cal. 2016) (enacted) (amending previously "[e]xisting law generally requir[ing] that the prosecution of a felony sex offense be commenced within 10 years after the commission of the offense"); Matt Ford, *After Cosby, California Changes Its Rape Laws*, ATLANTIC (Sept. 29, 2016), https://www.theatlantic.com/news/archive/2016/09/california-statute-of-limitations/502307 [https://perma.cc/82PV-SPUB] (discussing how California's ten-year statute of limitations prevented prosecutors from being able to charge Cosby).

26. N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2019), *amended by* 2019 N.Y. Laws 37, 1209.

27. NEV. REV. STAT. § 171.085 (2013), *amended by* 2015 Nev. Stat. 583.

28. This was pursuant to an immunity agreement Cosby signed with prosecutors more than a decade ago. Merritt Kennedy & Joe Hernandez, *Bill Cosby Is Released from Prison After Court Overturns Sexual Assault Conviction*, NPR (June 30, 2021, 5:36 PM), https://www.npr.org/2021/06/30/1011799764/bill-cosbys-conviction-for-sexual-assault-is-overturned-by-a-pennsylvania-court [https://perma.cc/3DDK-FN6J].

29. Matthew S. Schwartz, *U.S., U.K. Change Diplomatic Immunity Rules After British Man Was Killed*, NPR (July 22, 2020, 4:31 PM), https://www.npr.org/2020/07/22/894204666/u-s-u-k-change-diplomatic-immunity-rules-after-british-man-was-killed [https://perma.cc/XEB2-BVW9].

30. Jonny Hallam, *Prosecutors Can Seek 'Virtual Trial' of US Diplomat's Wife Accused of Killing a British Teenager, UK Says*, CNN (June 12, 2021, 4:26 PM), https://edition.cnn.com/2021/06/12/uk/sacoolas-virtual-trial-raab-gbr-intl/index.html [https://perma.cc/7LCY-EDB7].

31. *Id.*; Schwartz, *supra* note 29.

32. OFF. OF FOREIGN MISSIONS, U.S. DEP'T OF STATE, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 3 (2018), https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf [https://perma.cc/CB5G-UGRC].

Criminal law's inability to pursue suspects like Epstein, Cosby, and Sacoolas introduces a gap in justice. Such gaps are often unavoidable. With respect to deceased suspects like Epstein, the law has no option but to forgo punishment because punishment is physically impossible. Every modern criminal code recognizes that statutes of limitations, like those that protect Cosby, are essential safeguards.[33] And the diplomatic immunity that Sacoolas enjoys is necessary "to ensure the efficient performance of the functions of diplomatic missions."[34] For present purposes, I assume that the law is correct whenever it determines that the balance of interests favors granting a class of suspects immunity from punishment.

Even where immunity from punishment is the best policy, it is still worth asking what the criminal law can do to mitigate the justice gap for victims. Far from making things better for victims, the law presently adds discretionary insult to necessary injury. Consider, once again, Epstein's case. Shortly after authorities found him dead, prosecutors called on the court to dismiss the case.[35] The judge capitulated: "Mr. Epstein's death obviously means that a trial in which he is a defendant cannot take place."[36] The rule of abatement mandates that a defendant who dies must have his indictment wiped clean.[37] Cosby, too, will never see charges for most of his offenses because the right of repose guaranteed by statutes of limitations legally includes repose from trial. Similarly, under ordinary rules, Sacoolas could not be tried for vehicular homicide because diplomatic immunity also confers immunity from suit.[38]

Though the rationale differs in each case, a legal pattern starts to emerge: unpunishable suspects are also unprosecutable suspects. And with that pattern, the criminal law renders large classes of victims invisible to its entire apparatus. In effect, the law seems to assume that when there is no possibility of punishing a suspect—even were a conviction secured—it must wash its hands of the matter entirely. It is as if the whole game is not worth the candle when a suspect is beyond sanction.[39] Unpunishable

33. Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 60 B.C. L. REV. 2011, 2052, 2066–71 (2019).

34. Vienna Convention on Diplomatic Relations prmbl., Apr. 18, 1961, 500 U.N.T.S. 95.

35. Colin Dwyer, *Jeffrey Epstein's Criminal Case Closed After His Death Derailed Prosecution*, NPR (Aug. 29, 2019, 4:30 PM), https://www.npr.org/2019/08/29/755528777/jeffrey-epsteins-criminal-case-closed-after-his-death-derailed-prosecution [https://perma.cc/XGC5-8ABA].

36. Watkins, Weiser & Harris, *supra* note 15.

37. *See People v. Mount*, 280 Cal. Rptr. 3d 891, 895 (Cal. Ct. App. 2021).

38. In a stunning development, U.K. officials seem poised to conduct a first-ever "virtual trial" of Sacoolas, who will remain in the United States, likely not participate, and face no punishment. *See* Hallam, *supra* note 30.

39. William Laufer and Robert Hughes are critical of the law's complacency in the face of the fact that it fails to punish *most* crime that occurs. Laufer & Hughes, *supra* note 13. Though they, too, are concerned with victims, they emphasize what *punishment*

defendants become unprosecutable defendants. Neither legal theory nor sound policy forces this conclusion, but with it, the law forfeits several benefits it could offer to victims and society. The implicit rule that unpunishable suspects cannot be subject to trial imposes an unappealingly reductive vision of the criminal justice system's organizing ambition: to impose suffering on wrongdoers. But justice encompasses more than punishment, and so should the criminal law. Importantly, justice demands that we recognize victims and the wrongs they suffer.

The criminal justice system tends to fixate on what it can do *to* criminals.[40] This anemic self-conception distracts criminal law from what it can do *for* victims and society. Trial and sentencing have many overlapping and intertwined goals. Identifying the guilty, measuring fault, and administering deserved sanctions are certainly among them. However, trial also has independent values. For example, trial provides victims with a platform for shaping their own narratives.[41] Since prosecution can serve some justice values irrespective of impending punishment, conditioning pursuit of the former on the possibility of the latter reduces the good that criminal law can deliver. The Victims' Rights Movement of the 1970s,[42] the federal Crime Victim's Rights Act of 2004,[43] and more recent victim-focused state Marsy's laws[44] all recognize various rights of victims to

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of defendants can do for victims. *Id.* at 174–75. While their work is an admirable step in the right direction, it overlooks the antecedent (and, I believe, potentially more significant) benefits of trial for victims.

40. Discussions of the "purposes of criminal law" quickly become discussions of the purposes of punishment. *See, e.g.*, James B. White, *Making Sense of the Criminal Law*, 50 U. COLO. L. REV. 1, 3–4 (1978) ("Much contemporary writing about criminal law asks whether, and how far, each of these purposes serves as a justification either of the practice of punishment in general or of its infliction in a particular case or class of cases."); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2570 n.141 (1991) (quoting JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 9 (1954)) ("The purposes of the criminal law are rather to punish the wrongdoer for his offense against the mores of society and to deter others from acting likewise."); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 273, 373 (1996).

41. *See* Jaime Malamud Goti, *Equality, Punishment, and Self-Respect*, 5 BUFF. CRIM. L. REV. 497, 500, 504, 506 (2002); Tatjana Hörnle, *Distribution of Punishment: The Role of a Victim's Perspective*, 3 BUFF. CRIM. L. REV. 175, 176–77, 182–83 (1999); Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 534–38 (2005); *see also* Tyrone Kirchengast, *Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial*, 16 NEW CRIM. L. REV. 568, 569, 592–93 (2013) (arguing for victim legal representation in defendants' criminal trials in order to ensure victim participation and representation in the trial process).

42. *History of Victims' Rights*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ [https://perma.cc/4FMY-BST4] (last visited Feb. 20, 2022).

43. 18 U.S.C. § 3771.

44. *See generally* MARSY'S L., https://www.marsyslaw.us [https://perma.cc/8N9P-G8ZC] (last visited Feb. 20, 2022); CAL. CONST. art. I, § 28(b). To

participate in trial when they believe they have been wronged. The presumption behind most victims' rights initiatives is that trial is an option. Under current law, that presumption proves false for invisible victims.

As I argue below, criminal law can do better. This Article's modest thesis is that the value of trial and verdict—for invisible victims and society—will sometimes outweigh an unpunishable suspect's interest in being left totally alone. Consequently, the law should be open to allowing prosecutors to charge, and courts to try, unpunishable suspects just as they would ordinary suspects. Linking prosecution to the possibility of punishment makes criminal justice an all-or-nothing affair. It denies victims and society the expressive and restorative benefits of reckoning with the past just because circumstance, law, or the suspect's own hand rendered them ineligible for punishment. By decoupling prosecution and punishment, the criminal law could restore the role of victims and society in judging what happened, even where policy considerations favor suspects' immunity from sanction.

None of this is to deny that there are costs to trying unpunishable suspects. Some of the costs are material. Trials are not free; they take up judicial and prosecutorial resources that are already in short supply.[45] All else being equal, these limited resources are better allocated to situations where the course of criminal justice can come to its punitive conclusion. Other costs are moral. While some victims may want to tell their stories publicly, others may prefer to leave the trauma of the past behind them.[46] Trials of unpunishable suspects also carry a higher risk of unfairness. Defendants who do not face punishment may lack the incentive, or sometimes even the ability, to fully defend themselves in person. I will reckon with all these costs in due course. Various procedural safeguards can mitigate some of them.[47] In circumstances where the risks of trial outweigh the value of truth, prosecutors should decline to proceed.

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date, twelve states have approved Marsy's laws. *See Marsy's Law for All*, BALLOTPEDIA, https://ballotpedia.org/Marsy%27s_Law_for_All [https://perma.cc/5NKZ-DGLK] (last visited Feb. 20, 2022).

45. *Davila v. Davis*, 137 S. Ct. 2058, 2069 (2017) ("We cannot 'assume that these costs would be negligible,' and we are loath to further 'burden . . . scarce federal judicial resources' . . . .") (citations omitted) (first quoting *Murray v. Carrier*, 477 U.S. 478, 487 (1986); then quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("Judges and prosecutors conserve vital and scarce resources.").

46. KATIE FEIFER, CHRISTIAN BRANDT-YOUNG, CHAI SHENOY & FIRUZEH SHOKOOH VALLE, COUNTERQUO, YOUR VOICE, YOUR CHOICE: A SURVIVOR MEDIA GUIDE (2015), https://www.ncedsv.org/wp-content/uploads/2020/01/Your-Voice-Your-Choice-CQ-Survivor-Media-Guide2.pdf [https://perma.cc/J2AA-VT8U] (noting possible negative factors that may discourage victims from telling their stories publicly); *see also* LINDA A. FAIRSTEIN, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE 121 (1993).

47. *See infra* Part VI.

III. A TAXONOMY OF UNPUNISHABLE CRIMINALS

Various legal and situational factors can immunize criminals and render their victims invisible. To demonstrate the full scope of this criminal justice deficit, this Part offers a taxonomy of unpunishable criminals. In so doing, this Part follows existing legal doctrines and concepts, which tend to focus on wrongdoers rather than victims. That focus is the partial source of the law's pathology. As Part V demonstrates, the cure is to bring victims back into view.

The taxonomy below proposes three primary categories of factors that can immunize unpunishable criminals: statuses at the time of the crime, conditions that develop after crime, and developments that render criminals physically unavailable.

A. Status at Time of Crime

The law grants some individuals immunity from punishment because of a status they possessed at the time of their crimes. The thought is that criminal sanction would interfere with an important function that people with that status are supposed to fulfill. In the law's judgment, those functions are indispensable and take precedence over exacting justice.

1. DIPLOMATIC IMMUNITY

Foreign officials are immune from punishment by host countries.[48] This protection includes foreign diplomats, consular officers, employees of international organizations, and their close affiliates (e.g., family members).[49] Diplomatic immunity is almost as old as international law itself. While its codification is a relatively recent development,[50] the legal custom has existed around the world for millennia.[51] Ancient civilizations in China, India, and Egypt all recognized the inviolability of foreign

48. *See* Marsha L. Frey & Linda Frey, *Diplomatic Immunity*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/diplomatic-immunity [https://perma.cc/DA6D-TH2E] (last visited Feb. 20, 2022); Anna Raphael, Note, *Retroactive Diplomatic Immunity*, 69 DUKE L.J. 1425, 1429 (2020).

49. *See generally* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL33147, IMMUNITIES ACCORDED TO FOREIGN DIPLOMATS, CONSULAR OFFICERS, AND EMPLOYEES OF INTERNATIONAL ORGANIZATIONS UNDER U.S. LAW 4 (2005).

50. *Id.*

51. Vienna Convention on Diplomatic Relations, *supra* note 34 ("[A]ll nations from ancient times have recognized the status of diplomatic agents . . . ."); James E. Hickey, Jr. & Annette Fisch, *The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States*, 41 HASTINGS L.J. 351, 363 (1990).

diplomats within their borders.[52] Ancient Greece and early Rome also issued a special status for envoys to prevent interference with their official purposes.[53] By the Middle Ages, diplomatic immunity was a nearly ubiquitous legal phenomenon.[54]

Today, both U.S. and international law provide for diplomatic immunity.[55] The 1961 Vienna Convention on Diplomatic Immunity protects diplomats and their household family members and staff.[56] Under the Convention, a host country that suspects a diplomat of a crime has three options: (1) nonaction, (2) declaring the offending diplomat a *persona non grata* (i.e., kicking them out of the country), or (3) requesting a waiver of immunity from the diplomat's home country.[57] Such waivers are rare.[58] The United States ratified the Vienna Convention in 1972,[59] and Congress implemented it six years later through the Diplomatic Relations Act.[60] The Act is essentially indistinguishable from the Convention[61] except that the Act extends diplomatic protections to foreign officials "regardless of whether the sending State is a party to the Convention."[62]

The purpose of diplomatic immunity "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions."[63] The threat of criminal sanction can interfere with diplomats' efforts to facilitate peaceful and prosperous international relations. This so-called "functional" understanding of diplomatic immunity has largely superseded older justifications founded on personal representation (according to which "the diplomat is the personification of [the sending State] and should, therefore, receive the same privileges as the sovereign") and extraterritoriality (according to which the diplomat legally remains within the sending State even when they are temporally in the receiving State).[64]

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52. MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RS21672, DIPLOMATIC IMMUNITY: HISTORY AND OVERVIEW 1 (2003).

53. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 654 (3d ed. 1999).

54. GARCIA, *supra* note 52, at 2.

55. William G. Morris, Note, *Constitutional Solutions to the Problem of Diplomatic Crime and Immunity*, 36 HOFSTRA L. REV. 601, 603 (2007).

56. *See* Vienna Convention on Diplomatic Relations, *supra* note 34, arts. 29, 37.

57. *See* Morris, *supra* note 55, at 606–07.

58. Steven Lee Myers, *Georgia Prepared to Waive Immunity of a Top Diplomat*, N.Y. TIMES (Jan. 11, 1997), https://www.nytimes.com/1997/01/11/us/georgia-prepared-to-waive-immunity-of-a-top-diplomat.html [https://perma.cc/RFV9-W7K8].

59. *See* GARCIA, *supra* note 49, at 4.

60. 22 U.S.C. § 254c.

61. *See* Raphael, *supra* note 48, at 1433.

62. *See* GARCIA, *supra* note 49, at 4.

63. Vienna Convention on Diplomatic Relations, *supra* note 34.

64. Michael B. McDonough, Note, *Privileged Outlaws: Diplomats, Crime, and Immunity*, 20 SUFFOLK TRANSNAT'L L. REV. 475, 485–86 (1997).

2. PRESIDENTIAL IMMUNITY

Though diplomats (and their affiliates) form the largest class of people who are unpunishable by virtue of their status, they are not alone. Of recent concern for the U.S. polity, sitting presidents likely are immune from criminal punishment. According to historic convention, presidential immunity endures even after leaving office.[65] The Supreme Court has yet to weigh in on the issue, but the constitutional case for sitting presidents is strong. Criminal punishment would interfere with the president's ability to carry out constitutionally delegated executive functions.[66] The president's "duties as chief magistrate demand his whole time."[67] That does not leave much time for moonlighting in prison.[68]

In recent memory, President Donald Trump was alleged to have committed criminal violations of federal election laws.[69] Many believe he directed secret hush payments to Stormy Daniels, an extra-marital love interest whose story could have disrupted his presidential bid.[70] Trump's alleged violations of campaign finance laws may have shaped the course of history, giving him an advantage over 2016 Democratic contender

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65. Paul Rosenzweig, *Trump Has Justified Breaking One of America's Most Sacred Norms*, ATLANTIC (Oct. 27, 2020), https://www.theatlantic.com/ideas/archive/2020/10/case-criminally-investigating-ex-president/616804/ [https://perma.cc/UDA9-WVJG] ("In the 240 years since America's founding, no former president has been indicted for criminal conduct.").

66. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563 (1833) ("The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office . . . ."); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 (1997) ("Sitting Presidents cannot be prosecuted.").

67. *United States v. Burr*, 25 F. Cas. 30, 33–34 (C.C.D. Va. 1807) (N. 14,692d).

68. The threat of states punishing a sitting president would also raise federalism concerns. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435–36 (1819) ("The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole . . . ."); *United States v. Nixon*, 418 U.S. 683, 713 (1974) ("[A president's] generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.").

69. Ben Protess, William K. Rashbaum & Benjamin Weiser, *Investigation into Trump Campaign Finance Violations Is Over, Judge Says*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/nyregion/michael-cohen-trump-investigation.html [https://perma.cc/LV8L-JYGF]. The same payments may also have violated state business laws. *See* Corinne Ramey & Rebecca Ballhaus, *New York Prosecutors Subpoena Eight Years of Trump Tax Returns*, WALL ST. J. (Sept. 16, 2019, 5:21 PM), https://www.wsj.com/articles/new-york-prosecutors-subpoena-eight-years-of-trump-tax-returns-11568668898 [https://perma.cc/K3PZ-GHGZ].

70. Ryan Lucas, *New Documents Reveal How Trump, Cohen, Aides Worked to Seal Hush Money Deals*, NPR (July 18, 2019, 1:49 PM), https://www.npr.org/2019/07/18/743112028/trump-spoke-with-cohen-as-they-aides-sealed-hush-money-deals-in-2016 [https://perma.cc/FL5D-YCSP].

Hillary Clinton.[71] In partial deference to presidential immunity, the Department of Justice declined to press any charges.[72]

3. LEGISLATIVE IMMUNITY

A more limited form of immunity protects legislators. The Speech or Debate Clause of the Constitution provides that "Senators and Representatives . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place."[73] The Supreme Court has held that "the Clause provides protection against . . . criminal actions"[74] for "legislative acts."[75] "A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it."[76] The Clause exists to "protect the integrity of the legislative process."[77]

Controversial examples of legislative immunity are easy to come by. On February 12, 2020, Senator Richard Burr (R-N.C.) sold many shares of large companies, including holdings in hotel chains; the timing was suspicious because the sales followed Senate committee briefings with top government health officials and preceded the market's plunge in response to COVID-19.[78] Burr's sales netted between $628,000 to $1,700,000.[79] Authorities investigated Burr for possible insider trading.[80] FBI agents even obtained a search warrant for Burr's cellphone and his cloud storage.[81] However, the Speech or Debate Clause presented the same

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71. Beth Reinhard, Frances Stead Sellers & Emma Brown, *Days Before the Election, Stormy Daniels Threatened to Cancel Deal to Keep Alleged Affair with Trump Secret*, WASH. POST (Mar. 2, 2018), https://www.washingtonpost.com/investigations/days-before-the-election-stormy-daniels-threatened-to-cancel-deal-to-keep-alleged-affair-with-trump-secret/2018/03/02/770a446a-1d9b-11e8-8a2c-1a6665f59e95_story.html [https://perma.cc/2597-7KVN].

72. Jim Mustan, *Why No Hush-Money Charges Against Trump? Feds Are Silent*, AP NEWS (July 19, 2019), https://apnews.com/article/0543a381b39a42d09c27567274477983; A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 258–60 (2000).

73. U.S. CONST. art. I, § 6, cl. 1.

74. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–03 (1975).

75. TODD GARVEY, CONG. RSCH. SERV., R45043, UNDERSTANDING THE SPEECH OR DEBATE CLAUSE 1 (2017).

76. *United States v. Brewster*, 408 U.S. 501, 512 (1972).

77. *Id.* at 507.

78. Eric Lipton, Nicholas Fandos, Sharon LaFraniere & Julian E. Barnes, *Stock Sales by Senator Richard Burr Ignite Political Uproar*, N.Y. TIMES (Mar. 21, 2020), https://www.nytimes.com/2020/03/20/us/politics/coronavirus-richard-burr-insider-trading.html [https://perma.cc/P3MN-BJF2].

79. *Id.*

80. *Id.*

81. Devlin Barrett, Seung Min Kim, Spencer S. Hsu & Katie Shepherd, *Sen. Richard Burr Stepping Aside as Intelligence Committee Chair Amid FBI Investigation of Senators' Stock Sales*, WASH. POST (May 14, 2020),

obstacle[82] that it has for past efforts to charge senators with insider trading.[83] Part of the case against Burr would have involved public speeches he made in his legislative capacity expressing confidence in the U.S. economy's resilience.[84] The DOJ dropped its investigation of Burr less than one year after his sell-off.[85]

B. Circumstance Arising After Crime

Criminals may become unpunishable because of circumstances that arise after commission of a crime. In the time between the crime and the onset of the circumstance, a court could sentence them if they were apprehended and convicted. However, once the circumstance sets in, punishment is no longer a legal option. This Section discusses several examples.

1. RUNNING OF LIMITATIONS PERIOD

Many criminals can become unpunishable if they are patient enough. The vast majority of criminals are never caught.[86] Once the statute of limitations runs, they become immune from punishment.[87] Limitations periods vary widely by jurisdiction,[88] but three to six years is typical for felonies (a few of the most serious crimes, such as murder, have no statute of limitations).[89] Bill Cosby, discussed above, is one salient example of

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https://www.washingtonpost.com/nation/2020/05/14/fbi-richard-burr-warrant/ [https://perma.cc/37F4-ZBUU].

82. Tim Mak, *Justice Department Looking into Senator's Stock Sell-Off*, NPR (Mar. 31, 2020, 9:31 PM), https://www.npr.org/2020/03/31/824958381/justice-department-looking-into-senators-stock-selloff [https://perma.cc/7HJ8-5T95].

83. Robert Anello, *How Senators May Have Avoided Insider Trading Charges*, FORBES (May 25, 2020, 9:28 PM), https://www.forbes.com/sites/insider/2020/05/26/how-senators-may-have-avoided-insider-trading-charges/#fe9eaf227ba6 [https://perma.cc/V6L2-24B2].

84. Mak, *supra* note 82.

85. Vanesa Romo, *DOJ Drops Insider Trading Investigation into Sen. Richard Burr*, NPR (Jan. 19, 2021, 9:12 PM), https://www.npr.org/2021/01/19/958622574/doj-drops-insider-trading-investigation-into-sen-richard-burr [https://perma.cc/Z4M7-BHRY].

86. *See* Laufer & Hughes, *supra* note 13, at 157.

87. Legal Info. Inst., *Statute of Limitations*, CORNELL L. SCH., https://www.law.cornell.edu/wex/statute_of_limitations [https://perma.cc/R8CR-J6DK] (last visited Feb. 20, 2022).

88. 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) ("[T]here is considerable variation in statutes of limitations for identical crimes across jurisdictions within the United States.").

89. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 18.5(a) (5th ed. 2018).

someone protected by the limitations period. Dozens of women alleged he raped or sexually assaulted them, but Cosby only faced trial on account of one. The other allegations are time-barred.

From the perspective of punishment theory, statutes of limitations are odd. As Oliver Wendell Holmes asked, "[W]hy is peace more desirable after twenty years than before?"[90] The mere passage of time is irrelevant to the traditional interests of criminal justice, such as retribution, deterrence, and rehabilitation.[91] The age of a crime has no direct bearing on whether it deserves punishment[92]—a rape that occurred ten years ago is just as reprehensible today. Deterring rape by punishing its incidence is just as important now as in the past.[93] Society has just as much interest in rehabilitating a sex offender whose criminal disposition arose yesterday as one whose disposition arose yesteryear.[94]

Nonetheless, statutes of limitations remain near-universal features of modern criminal law.[95] In other work, I have argued that they serve implicitly to recognize that people's psychological identities change over time; a person today may not be the same as the suspect from twenty years ago with the same DNA.[96] More mainstream justifications for statutes of limitations fall into two categories: those according to which prosecuting old crimes is "unproductive for society" and those according to which it is "unfair to the perpetrator."[97] Under the first category are those justifications that see statutes of limitations as facilitating accuracy at trial by "requiring that prosecutions be based upon reasonably fresh

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90. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

91. *See* 18 U.S.C. § 3553(a)(2).

92. 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).

93. 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).

94. ROGER PRZYBYLSKI, U.S. DEP'T OF JUST., RECIDIVISM OF ADULT SEXUAL OFFENDERS 2 (2015), https://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf [https://perma.cc/34AC-HWPP] (stating that recidivism reduction must be a critical aspect of criminal justice and finding that while sexual recidivism rates are lower than recidivism for general crimes, certain types of sex offenders have different rates of recidivism, and some may increase as time since conviction goes on).

95. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 202(a) (1984) ("Nearly every American jurisdiction has some form of time limitation within which a criminal prosecution must be instituted . . . .").

96. *See* Diamantis, *supra* note 33.

97. Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 200 (1995); *see* Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1186 (1950).

evidence."[98] Under the second category, statutes of limitations are thought to protect suspects' right of repose.[99]

2. INCOMPETENCY

A suspect who becomes incompetent may be immune from some forms of punishment, or even from any punishment at all. Consider Alvin Bernard Ford, who in 1974 was sentenced to death in Florida for shooting a helpless, wounded police officer in the back of the head at close range.[100] Though competent at the time of his crime and trial, during his many years awaiting execution, Ford began to experience severe delusions.[101] For example, he thought prison guards were stashing dead bodies in prison beds and holding his family hostage.[102] Though Florida's governor signed Ford's death warrant, the U.S. Supreme Court determined that the Eighth Amendment forbids authorities from executing insane individuals.[103] Killing an inmate who cannot understand why he is facing punishment would be a cruel and unusual spectacle because it could not possibly advance any of criminal law's retributive or deterrent interests.[104]

The immunity afforded by incompetency arising after an alleged crime lasts only as long as the incompetency itself.[105] While controversial, authorities may forcibly medicate an individual accused of a serious crime if such medication is necessary to restore their competency and is consistent with best medical practice.[106] Courts are split on the extent to which the state may medicate capital convicts in order to restore competency for execution.[107]

3. PARDONS, WITNESS IMMUNITY, AND AMNESTY

Some officials have the power to make criminals unpunishable on an ad hoc basis.[108] The Constitution gives the president the "unlimited"

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98. MODEL PENAL CODE § 1.07 (current version at § 1.06) cmt. 16 (AM. L. INST., Tentative Draft No. 5., 1956).

99. *Toussie v. United States*, 397 U.S. 112, 115 (1970).

100. *Ford v. Wainwright*, 752 F.2d 526 (11th Cir. 1985).

101. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

102. *Id.*

103. *Id.* at 404, 410.

104. *Panetti v. Quarterman*, 551 U.S. 930, 956–60 (2007).

105. *See, e.g.*, *Booth v. Superior Ct.*, 66 Cal. Rptr. 2d 758, 763 (Cal. Ct. App. 1997); *State v. Perry*, 610 So. 2d 746, 749 (La. 1992).

106. *Sell v. United States*, 539 U.S. 166, 180–82 (2003).

107. *Compare Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (permitting forcible restoration of competency for execution), *with Perry*, 610 So. 2d at 747 (prohibiting forcible restoration of competency for execution).

108. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 570, 580 (2001).

power[109] to pardon and commute individual criminal sentences for any and all federal crimes.[110] President Trump drew criticism for seeming to use the pardon power selectively on behalf of "friends whose cases resonate[d] with him personally."[111] For example, in 2020, Trump commuted the sentence of his "longtime friend," Roger Stone, who had been convicted and sentenced to forty months' imprisonment for lying to Congress about election interference.[112] Earlier, in 2017, Trump pardoned Arizona Sheriff Joe Arpaio (self-proclaimed to be "America's toughest sheriff"), whom a court convicted of contempt for ignoring its order not to apprehend Latinos for discriminatory reasons.[113] Trump, however, was not alone in his generous use of the pardon power. His predecessor, Barack Obama, pardoned or granted clemency to more than ten times as many people.[114]

Pardons are most concerning when presidents use them preemptively. The ordinary presumption behind a pardon is that the recipient committed the crime at issue.[115] Indeed, pardons typically come after trial and conviction.[116] However, a preemptive pardon comes before the criminal justice process even gets started.[117] Preemptive pardons have a long history.[118] Most famously, President Ford preemptively pardoned

109. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

110. U.S. CONST. art. II, § 2, cl. 1.

111. Peter Baker, *In Commuting Roger Stone's Sentence, Trump Goes Where Nixon Was Not Willing*, THE MORNING CALL (July 11, 2020), https://www.mcall.com/news/nation-world/ct-nw-nyt-trump-roger-stone-nixon-20200711-i5rk77rlbrhkphnebayy3ikjw4-story.html.

112. Ryan Lucas, *Trump Commutes Sentence of Longtime Friend and Advisor Roger Sone*, NPR (July 10, 2020, 7:57 PM), https://www.npr.org/2020/07/10/887721441/trump-commutes-sentence-of-longtime-friend-and-adviser-roger-stone [https://perma.cc/J7GZ-WVPY].

113. Michelle Mark, *How Former Arizona Sheriff Joe Arpaio Became the Most Hated Lawman in America*, BUS. INSIDER (Jan. 10. 2018, 4:24 PM), https://www.businessinsider.com/maricopa-county-sheriff-joe-arpaio-pardoned-by-trump-2017-8 [https://perma.cc/6FVZ-8C3X].

114. Off. of the Pardon Att'y, *Clemency Statistics*, U.S. DEP'T OF JUST. (Feb. 2, 2022) https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/ED8M-CTMV].

115. *Burdick v. United States*, 236 U.S. 79, 86 (1915).

116. *See* Off. of the Pardon Att'y, *Pardons Granted by President Donald J. Trump (2017–2021)*, U.S. DEP'T OF JUST. (Apr. 28, 2021), https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021 [https://perma.cc/N9RP-LFLX].

117. *See Ex parte Garland*, 71 U.S. (4 Wall.) 333, 334, 380 (1866); Cass R. Sunstein, *Not Convicted or Indicted? Trump Can Pardon You Anyway*, BLOOMBERG (Jan. 19, 2021, 7:19 AM), https://www.bloomberg.com/opinion/articles/2021-01-11/trump-preemptive-pardons-would-be-legal-with-a-caveat.

118. Indeed, past presidents have extended preemptive pardons. Among more recent administrations, George H. W. Bush preemptively pardoned five individuals, Off. of the Pardon Att'y, *Pardons Granted by President George H. W. Bush (1989–1993)*, U.S. DEP'T OF JUST. (Apr. 28, 2021), [https://perma.cc/MU3E-CTV7]; Clinton six, Off. of the Pardon Att'y, *Pardons Granted by President William J. Clinton (1993–2001)*, U.S. DEP'T

President Nixon.[119] More recently, many feared on the eve of President Biden's inauguration that President Trump was preparing an extensive list of preemptive pardons for family members, close affiliates, and maybe even himself.[120] Though these fears never materialized, Trump did preemptively pardon five other suspects.[121]

Governors can exercise the pardon and clemency powers with respect to state crimes.[122] Supporters justify the powers as a tools for advancing public welfare when punishment would work a greater injustice than leniency.[123] Critics observe that they can foster corruption.[124]

Congress also has the power to render criminals unpunishable through acts of amnesty.[125] The distinction between pardon and amnesty is "one rather of philological interest than of legal importance."[126] Their effect is the same: "amnesty releases recipients not from guilt but from the penalty imposed by law."[127] Still, there are some general differences between amnesties and pardons. Amnesties tend to precede trial and

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OF JUST. (Apr. 28, 2021), https://www.justice.gov/pardon/pardons-granted-president-william-j-clinton-1993-2001 [https://perma.cc/96Z6-SSFM]; and Obama three, Molly Hennessy-Fiske, *Three Pardoned by U.S. in Deal with Iran Hope to Get Their Lives Back on Track*, L.A. TIMES (Jan. 20, 2016, 6:00 AM), https://www.latimes.com/nation/nationnow/la-na-iranian-freedom-20160119-story.html [https://perma.cc/4HYG-EVMN].

119. *See* Brian Naylor, *Talk of 'Preemptive' Pardons by Trump Raises Questions: What Can He Do?*, NPR (Dec. 2, 2020, 1:27 PM), https://www.npr.org/2020/12/02/941290291/talk-of-preemptive-pardons-by-trump-raises-questions-what-can-he-do [https://perma.cc/JAW9-TECH].

120. Jennifer Jacobs, Justin Sink & Josh Wingrove, *Trump Prepares Pardon List for Aides and Kin, and Maybe Himself*, BLOOMBERG L. (Jan. 8, 2021, 6:25 AM), https://www.bloomberg.com/news/articles/2021-01-07/trump-prepares-pardon-list-for-aides-and-kin-and-maybe-himself.

121. These include Matthew Golsteyn (premeditated murder), Stephen Bannon (wire fraud and money laundering connected to a "We Build the Wall" campaign), Kenneth Kurson (cyberstalking), Casey Urlacher (illegal gambling business), and Tommaso Buti (financial fraud connected to restaurant chain). *See* Yuliya Talmazan, Rachel Elbaum & Sara Mhaidli, *Full List of Trump's Last-Minute Pardons and Commuted Sentences*, NBC NEWS (Jan. 20, 2021, 8:21 AM), https://www.nbcnews.com/politics/donald-trump/full-list-trump-s-last-minute-pardons-commuted-sentences-n1254806 [https://perma.cc/CF25-8F5E]; Off. of the Pardon Att'y, *supra* note 116.

122. *Ex parte Wells*, 59 U.S. (18 How.) 307, 313, 318 (1855).

123. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) ("It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.").

124. Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 805 (1996) ("The law, then, is that the pardon power is intended to serve the 'public welfare,' not the corrupt whim of a self-serving executive.").

125. *Brown v. Walker*, 161 U.S. 591, 601 (1896).

126. *Knote v. United States*, 95 U.S. 149, 152–53 (1877).

127. JOHN C. ETRIDGE, 72-35F, AMNESTY: A BRIEF HISTORICAL OVERVIEW 3 (1972), *reprinted in* 118 CONG. REC. 7039 (1972).

conviction, while pardons more often follow.[128] Amnesties also tend to apply to larger classes of individuals who have committed crimes against the state.[129] For example, the Immigration and Reform Control Act of 1986[130] granted amnesty for immigration violations to millions of people who satisfied its criteria.[131] Many believe that Congress should pass a similar immigration amnesty provision today.[132]

Prosecutors possess a similar power in their authority to grant witness immunity.[133] The strongest form of witness immunity is "transactional immunity," which renders a suspect unpunishable for all crimes connected to their testimony.[134] For example, in 1986, James Cardinali testified in a racketeering trial against his boss, John Gotti, head of the Gambino crime family in New York.[135] In return, the government agreed that Cardinali "would not be prosecuted for any crimes he told about," including four homicides that he committed.[136] As discussed above, Bill Cosby also benefited from witness immunity, which a court relied on to vacate his lone sexual assault conviction.[137]

Prosecutors often grant witness immunity to induce a suspect to cooperate with the investigation of a higher-priority suspect.[138] Alternatively, they may also grant witness immunity to compel testimony from a suspect who has properly invoked their Fifth Amendment right against self-incrimination.[139] Though controversial,[140] witness immunity, and its capacity to force suspected criminals to testify against their own interests, is an essential tool for prosecutors. "[T]he fact of the matter is

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128. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 351 (1866).

129. *Burdick v. United States*, 236 U.S. 79, 94–95 (1915).

130. 8 U.S.C. § 1255a (Supp. IV 1986).

131. *Id.*; *see generally* Steve Harvey, Opinion, *Proposals to Bring the Outcasts Home Without Punishment*, L.A. TIMES, June 4, 1927, at G5, *reprinted* in 118 CONG. REC. 20589 (1972).

132. *E.g.*, Conor Friedersdorf, *The Nationalist Case for Amnesty*, ATLANTIC (Feb. 15, 2019), https://www.theatlantic.com/ideas/archive/2019/02/immigration-amnesty/582688/ [https://perma.cc/XJ4K-3354].

133. *See* 18 U.S.C. §§ 6001–6005.

134. *See generally* H. Lloyd King, Jr., *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155 (1999). A lesser form of witness immunity, "use immunity," merely obliges prosecutors not to use evidence derived from a witness's testimony against him. *Kastigar v. United States*, 406 U.S. 441, 443 (1972).

135. Leonard Butler, *Gotti Witness Received Immunity in Four Slayings*, N.Y. TIMES (Dec. 11, 1986), https://www.nytimes.com/1986/12/11/nyregion/gotti-witness-received-immunity-in-four-slayings.html [https://perma.cc/5SDS-ZKC5].

136. *Id.*

137. Kennedy & Hernandez, *supra* note 28.

138. *See* King, *supra* note 134, at 155.

139. *See id.* at 156.

140. *See* Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 813 (1987).

that police and prosecutors cannot do without [witnesses who are criminals]—period. . . . If a policy were adopted never to deal with criminals as prosecution witnesses, many important prosecutions—especially in the area of organized and conspiratorial crimes—could never make it to court."[141]

C. Physical Unavailability

Sometimes external circumstances, rather than legal decree, make a person unpunishable. There are two important classes of criminals whom the law has no option to punish because it cannot lay hold to them: fugitives and the deceased.

1. FUGITIVES

A fugitive is a "criminal suspect . . . who flees, evades, or escapes arrest, prosecution, imprisonment, service of process, or the giving of testimony."[142] Becoming a fugitive is itself a crime,[143] but it simultaneously renders the fugitive (at least temporarily) unpunishable. Regardless of how certain the state is about a suspect's identity, location, and the nature of alleged crimes, it cannot imprison a suspect it cannot apprehend. Of course, if a fugitive is (re)captured, the fugitive is subject to the full (or remaining) sentence plus any additional sanction for fleeing.[144]

2. THE DECEASED

"[T]he realm of the dead is not invaded, and punishment [is not] visited upon the dead."[145] When a suspect dies, he moves beyond the possibility and purpose of sanction. "[P]unishment . . . should be abated upon death for shuffling off the mortal coil completely forecloses punishment, incarceration, or rehabilitation, this side of the grave at any rate."[146] If a criminal fine is assessed and the defendant dies before paying

141. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1390 (1996).

142. *Fugitive*, BLACK'S LAW DICTIONARY (11th ed. 2019).

143. 18 U.S.C. § 1073.

144. *Theriault v. Peek*, 406 F.2d 117, 117 (5th Cir. 1968) ("Escape from prison interrupts service, and the time elapsing between escape and retaking contribute nothing to the service of the sentence.").

145. *Mervis v. Wolverton*, 211 So. 2d 847, 848 (Miss. 1968).

146. *United States v. Dudley*, 739 F.2d 175, 177 (4th Cir. 1984).

it, the obligation does not pass to his estate.[147] Even in civil law, causes of action for punitive damages tend to expire with the defendant from whom they are sought.[148]

IV. LAWS THAT IMMUNIZE UNPUNISHABLE CRIMINALS FROM TRIAL

The taxonomy of unpunishable criminals demonstrates that the class is large and varied.[149] Yet one regrettable feature unites them: they will never face trial.[150] Their victims will never have an opportunity to testify, nor will they have the satisfaction of a jury verdict. The next Parts explain why this is an unforced error and how the law could do better. This Part demonstrates that for each type of unpunishable suspect (with one minor exception noted below), the law separately provides immunity from prosecution.

Diplomats: Diplomats are shielded from prosecution because the distractions of trial could frustrate their diplomatic function in much the same way that punishment can.[151] Accordingly, federal law provides that "[a]ny action or proceeding brought against an individual who is entitled to immunity . . . under any . . . laws extending diplomatic privileges and immunities, shall be dismissed."[152]

Presidents: The Department of Justice has a standing policy of not indicting sitting presidents because trial and punishment would distract the president from executing his constitutionally delegated functions.[153] Instead, the Constitution prescribes an alternative federal procedure—impeachment—by which Congress can remove a president.[154]

Legislators: Courts have held that "[t]he history of legislative immunity demonstrates that it was devised to enable and encourage representatives to act on behalf of the public at large without fear of . . .

147. *Reed v. Cist*, 7 Serg. & Rawle 183, 184 (Pa. 1821) ("No evidence could have supported this action of debt for penalty incurred in the life time of the intestate. It died with him, and did not survive to his administrators.").

148. RESTATEMENT (SECOND) OF TORTS § 926(b) (AM. L. INST. 1979) ("[T]he death of the tortfeasor terminates liability for punitive damages.").

149. They may even outnumber punishable suspects. At any given time, suspects who are unpunishable because unapprehended exceed the number of punishable suspects. *See* German Lopez, *The Great Majority of Violent Crime in America Goes Unsolved*, VOX (May 1, 2017, 3:10 PM), https://www.vox.com/policy-and-politics/2017/3/1/14777612/trump-crime-certainty-severity.

150. *See supra* Part II.

151. *See* GARCIA, *supra* note 52, at 2–3.

152. 22 U.S.C. § 254d.

153. A Sitting President's Amenability to Indictment and Criminal Prosecution, *supra* note 72, at 260. Note, though, that the Supreme Court recently held that the president is not protected from state subpoenas for evidence. *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020).

154. U.S. CONST. art. I, § 2, cl. 5; *id.* art I, § 3, cls. 6–7; *id.* art. II, § 4.

criminal prosecution."[155] Charges premised on legislative acts are subject to dismissal.[156]

Time-Barred Crimes: "Federal courts disagree as to whether a statute of limitations is an affirmative defense or a jurisdictional bar to prosecution."[157] On either interpretation, the expiration of a statute of limitations blocks further prosecution. Under federal law, "no person shall be prosecuted [after the limitations period]."[158] State statutes are similarly explicit.[159]

Incompetent Criminals: "It is a principle of long standing that an insane man may not be tried for a crime."[160] The measure of incompetency is the extent to which an accused can participate in their own defense. Since conviction ordinarily puts a defendant's liberty at stake, due process "safeguards [their] fundamental right not to stand trial while incompetent."[161]

Pardoned Criminals and Amnesty Recipients: A suspect may be granted a pardon or amnesty before, during, or after trial.[162] Any further prosecution of the recipient for the targeted crimes is barred.[163] If received after conviction, the legal fact of trial and conviction remain; pardons and amnesty do not expunge records.[164] When received before conviction—as happens with preemptive pardons—pardons function differently from amnesty in terms of the legal record they create. A recipient must formally accept a pardon, and the Supreme Court has ruled that doing so is tantamount to admitting guilt for the underlying crime.[165] By contrast, amnesty usually requires no acceptance and implies no admission.[166]

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155. *Hanington v. City of Albany*, 57 Fair Empl. Prac. Cas. (BNA) 642, 643 (M.D. Ga. 1990).

156. *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 266 (1982).

157. Brigitte M. Duffy, *Jury Instruction on Time-Barred, Lesser Included Offense Constitutes Waiver of Statute of Limitations Defense*—State v. Lambrechts*, 585 A.2d 645 (R.I. 1991), Annual Survey of Rhode Island Law*, 26 SUFFOLK U. L. REV. 525, 526 (1992).

158. 18 U.S.C. § 3282 ("[N]o person shall be prosecuted, tried, or punished" after the limitations period expires.).

159. *See, e.g.*, CAL. PENAL CODE § 800 (West 2021) ("[P]rosecution for an offense punishable by imprisonment in the state prison for eight years or more . . . shall be commenced within six years after commission of the offense.").

160. *Thomas v. Cunningham*, 313 F.2d 934, 938 (4th Cir. 1963).

161. *Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996).

162. *See Burdick v. United States*, 236 U.S. 79, 94–95 (1915).

163. *See supra* Section III.A.3.

164. Off. of the Pardon Att'y, *Pardon Information and Instructions*, U.S. DEP'T OF JUST. (Nov. 23, 2018), https://www.justice.gov/pardon/pardon-information-and-instructions [https://perma.cc/RFA9-78ET].

165. *Burdick*, 236 U.S. at 94.

166. *Id.* at 94–95.

Fugitives: Federal Rule of Criminal Procedure 43 states that "a defendant must be present" at the initial appearance.[167] Every state, with the possible exception of Pennsylvania, imposes a similar requirement.[168] These rules protect a defendant's Sixth Amendment rights to "be informed of the nature and cause of the accusation" and "to be confronted with the witnesses against him."[169] The physical presence of the defendant, and not of his representative, is required: "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[170] Accordingly, most fugitives are not subject to prosecution. The one exception is for fugitives who are present for their initial appearances and subsequently flee. Such suspects are still unpunishable while unapprehended, but because they have been informed of their charges and the consequences of failing to appear, their voluntary absence does not bar prosecution.[171] I discuss such fugitives more extensively below.[172]

Dead Criminals: If a defendant dies before trial, no prosecution can commence because the Federal Rules of Criminal Procedure mandate a defendant's presence at the start of trial.[173] If the defendant dies during trial, the judge must dismiss the charges before entering judgment.[174] If the defendant dies while directly appealing their conviction, the case against them abates ab initio: the trial court must vacate the original conviction and dismiss the indictment.[175]

The pattern that emerges from considering the entire taxonomy of unpunishable criminals is that a criminal whom authorities cannot punish is one whom authorities cannot prosecute. The natural inference seems to be that trial has no point if punishment is prohibited. But that flawed logic

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167. *Crosby v. United States*, 506 U.S. 255, 255, 262 (1993) ("[Federal law] prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial.").

168. 234 PA. CODE § 602 (2021).

169. U.S. CONST. amend. VI.

170. *Carter v. Sowders*, 5 F.3d 975, 981–82 (6th Cir. 1993) (quoting *Faretta v. California*, 422 U.S. 806, 819 (1975)).

171. *See United States v. Tortora*, 464 F.2d 1202, 1209–10 (2d Cir. 1972); *United States v. Benabe*, 654 F.3d 753, 768–69 (7th Cir. 2011); *United States v. Bradford*, 237 F.3d 1306, 1312 (11th Cir. 2001); *United States v. Davis*, 61 F.3d 291, 302–03 (5th Cir. 1995); *Commonwealth v. Tizer*, 684 A.2d 597, 604–05 (Pa. Super. Ct. 1996) (providing the dialogue between the trial court and the defendant where the trial court explains the consequences of the defendant's absence).

172. *See infra* Part VI.

173. FED. R. CRIM. P. 43(a)(1).

174. *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983) ("We see no reason to treat a criminal defendant who dies before judgment is entered any differently from one who dies after a notice of appeal has been filed.").

175. *United States v. Green*, 507 U.S. 545 (1993) (per curiam); *United States v. Hudson*, 460 F.2d 321 (5th Cir. 1972). Some commentators favor this policy. *See, e.g.*, Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943 (2002). Only a handful of states reject it. *See, e.g.*, *State v. Raffone*, 285 A.2d 323, 325–26 (Conn. 1971).

overlooks the interests of the victims whom it renders invisible. It encodes a vision of criminal law that is exclusively oriented to punitive ends.

As argued in the next Part, this is a mistaken and anemic perspective on criminal justice. Criminal law offers many values, some of which trial can uniquely serve. It is worth asking whether the justice system could hold trials even when punishment is off the table. If, as will be argued below, the answer is "yes," then current law unnecessarily renders victims invisible when it determines that the people who allegedly harmed them are beyond sanction.

V. TRIAL IS NOT JUST A PRELUDE TO PUNISHMENT

Trials can contribute to just outcomes even when there is no possibility of punishment. Current legal doctrine conflates the goals of trial and sanction by routinely barring the former where the latter is unavailable. Expressive theorists of criminal law such as R. A. Duff[176] and Henry Hart[177] come close to disentangling the two phases of criminal justice by emphasizing the unique condemnatory force of conviction. As Duff notes, "[W]e should not let criminal punishment dominate our discussion of what criminal law is."[178]

However, even Duff does not acknowledge the full independent value of trial because he stops short of concluding that trial without the possibility of punishment could be a worthwhile endeavor.[179] Like most criminal law theorists, Duff's view of trial focuses on the defendant. He sees trial as a "calling to account" in which the defendant must be present to receive judgment.[180] This perspective, however, marginalizes many other interests of victims and society in trial.[181] Only John Gardner has hinted at a willingness to go further: "[E]ven if for some reason we abolish the whole apparatus of criminal sentence and civil remedies, we should

176. R. A. DUFF, TRIALS AND PUNISHMENTS (1986); R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001) [hereinafter DUFF, P.C.C.].

177. *See* Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

178. R. A. DUFF, THE REALM OF CRIMINAL LAW 15 (2018).

179. Duff believes "it is unclear whether punishment is a necessary dimension of criminal law." *Id.* at 36.

180. *Id.*

181. Victims are by definition the parties closest to a given wrong and "have standing to express the harshest [moral] criticism [and] demand answers with the greatest urgency." *See* Gabriel S. Mendlow, *The Moral Ambiguity of Public Prosecution*, 130 YALE L.J. 1146, 1158 (2021).

still think twice about abolishing the trials themselves."[182] Unfortunately, Gardner did not elaborate.

Victims' suffering must go unrequited when those who wrong them are beyond sanction. Epstein's alleged victims felt cheated by his "coward[ly]" suicide.[183] Cosby's accusers felt "devastat[ed]" when a Pennsylvania court vacated his only sentence.[184] Harry Dunn's parents longed for the closure of justice after Sacoolas fled the country: "[Y]our legs feel like lead, you're in pain morning until night that no painkillers can take away."[185]

However, many theorists overlook the fact that victims lose something further when the solemn forum of the courtroom is closed to them too. Courtney Wild, one of Epstein's victims, felt the law "robbed [her] and all the other victims of [their] day in court."[186] Cosby's accusers felt "cheated" that the statute of limitations barred most charges.[187] For Dunn's parents, the loss of their son was compounded by having no opportunity to confront his killer: "You're not able to cry, because we can't understand this whole situation as to why [Sacoolas] would have left us without wanting to meet us back then. She needs to get on the plane and get back to the UK, just do the right thing."[188]

This Part states the intuitive case for the independent value of trial for victims and society and then spells out in more detail what the sources of that value are.

A. The Intuition Behind Trial's Independent Value

After Jeffrey Epstein died, his victims and some officials tapped into the intuition that the criminal justice system still had something to offer.

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182. John Gardner, *The Mark of Responsibility*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 177, 190–91 (John Gardner ed., 2007).

183. Kevin McCoy & John Bacon, *'Robbed of Our Day in Court': Accusers Rip 'Coward' Jeffrey Epstein in Court Hearing Tuesday*, USA TODAY (Aug. 27, 2019, 5:22 PM), https://www.usatoday.com/story/news/2019/08/27/jeffrey-epstein-accusers-in-manhattan-courtroon/2123607001/ [https://perma.cc/U35B-WSUZ].

184. Elizabeth Blair, *Bill Cosby's Release Could Have a Silencing Effect on Victims, Advocates Say*, NPR (June 30, 2021, 7:00 PM), https://www.npr.org/2021/06/30/1011859393/bill-cosbys-release-could-have-a-silencing-effect-on-victims-advocates-say [https://perma.cc/B5KM-R4MT].

185. Frances Perraudin & Edward Helmore, *Harry Dunn's Parents Give Tearful Account of Finding Dying Son to US TV*, GUARDIAN (Oct. 14, 2019, 10:30 AM), https://www.theguardian.com/uk-news/2019/oct/14/harry-dunns-parents-say-they-will-only-meet-anne-sacoolas-if-she-returns-to-uk [https://perma.cc/LG55-UEL9].

186. McCoy & Bacon, *supra* note 183.

187. Rajini Vaidyanathan, *Bill Cosby: Why Is There a Time Limit on Bringing Sexual Assault Cases to US Courts?*, BBC (Sept. 9, 2016), https://www.bbc.com/news/world-us-canada-37311685 [https://perma.cc/D2W5-62SP].

188. Perraudin & Helmore, *supra* note 185.

Chauntae Davies, one of Epstein's accusers, struck a defiant tone: "I will not let him win in death."[189] Officials in France felt similarly on behalf of their citizen-victims and declared, "The death of Mr. Epstein must not deprive his victims of justice."[190]

Remarks like these are puzzling if one reduces criminal justice to punishing the guilty. On many standard views, what guilty defendants deserve is some measure of suffering proportionate to the seriousness of their crimes.[191] Yet when Davies said Epstein would not "win" and the French officials said his victims would still have "justice," they knew Epstein was beyond any possibility of material sanction.[192]

Events that unfolded in the weeks after Epstein's death give some sense of what his victims and French authorities could have had in mind. While acknowledging that the case against Epstein had to be dismissed, presiding Judge Berman took the unusual step of letting trial proceed for one single day. On that day, the criminal law opened its eyes and saw Epstein's accusers. Twenty of them took the stand to tell of the abuse they suffered; seven more participated through statements read by attorneys.[193] While scholars' views of letting the trial temporarily proceed were mixed, Judge Berman's creative decision comported with the law—he allowed victim testimony as part of the hearing on the prosecutor's motion to dismiss.[194] The judge remarked that he was doing it "both as a matter of

189. Brendan Pierson & Nathan Layne, *'Eats Away at My Soul': Epstein Accusers Testify Weeks After Suicide*, REUTERS (Aug. 27, 2019, 5:03 AM), https://www.reuters.com/article/us-people-jeffrey-epstein/i-will-not-let-him-win-epstein-victims-testify-weeks-after-his-death-idUSKCN1VH10X [https://perma.cc/32N4-TVGE].

190. Gregory Viscusi & Gaspard Sebag, *French Ministers Call for Their Own Epstein Investigation*, BLOOMBERG (Aug. 12, 2019, 9:51 AM), https://www.bloomberg.com/news/articles/2019-08-12/french-ministers-call-for-epstein-investigation-in-france.

191. ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) ("[A] retributivist claims that punishment is justified because people deserve it . . . .").

192. Epstein's estate did pay monetary sums to settle civil claims by victims. *See* James Hill, *Jeffrey Epstein Victims Program Shutting Down with $121 Million Paid to Abuse Survivors*, ABC NEWS (Aug. 9, 2021, 7:17 AM), https://abcnews.go.com/US/jeffrey-epstein-victims-program-shutting-121-million-paid/story?id=79344412 [https://perma.cc/F999-SCKG]. In Section V.D below, I discuss the inadequacy of civil remedies as substitutes for criminal trial.

193. Kat Tenbarge, *'I've Suffered and He Has Won': More than 20 of Jeffrey Epstein's Accusers Gave Emotional Testimonies in Court as Prosecutors Moved to Shut Down His Case*, BUS. INSIDER (Aug. 27, 2019, 2:11 PM), https://www.businessinsider.com/victims-jeffrey-epstein-testimony-dismiss-indictment-court-hearing-federal-prosecutors-2019-8 [https://perma.cc/8ML9-V7TR].

194. *Compare* Bruce Green & Rebecca Roiphe, *The Judge in Epstein's Case Should Not Turn the Dismissal into a Drama for the Victims*, N.Y. L.J. (Aug. 26, 2019, 11:00 AM), https://www.law.com/newyorklawjournal/2019/08/26/the-judge-in-epsteins-case-should-not-turn-the-dismissal-into-a-drama-for-the-victims/ [https://perma.cc/2E96-CXG5], *with* Paul G. Cassell & Bradley J. Edwards, *Hearing on Dismissing Epstein*

law and as a measure of respect for the victims."[195] "I believe it is the court's responsibility, and manifestly within its purview, to ensure that the victims in this case are treated fairly and with dignity."[196]

Epstein's accusers thanked Judge Berman for the opportunity and spoke about how empowering the experience was. As one accuser would remark, the power came in part from becoming visible and being able to seize control of a narrative that was unfolding around her. When Epstein was in control of the narrative, the story was one of dependency and degradation that he and his cohort had used to manipulate the young women.[197] Later, when Epstein's alleged crimes came to light, the media took hold of the narrative. In an effort to validate, the media portrayed the women as passive victims at the hands of cruel abusers.[198] But for the accusers themselves, that was not the story they wanted to be a part of either. As one of them would say, "I do not want the narrative to be, 'Those poor girls.'"[199] Testifying at trial gave the victims a forum in which they could seize control of their stories with their own voices as *survivors* rather than *victims*.[200]

The significance of Epstein's one-day trial illustrates an intuitive point about the value of trial vis-à-vis punishment. Epstein's accusers valued the trial even though it could, punitively speaking, go nowhere. By prohibiting cases against unpunishable suspects like Epstein, the law treats

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Charges Was Not 'Drama' but Proper Respect for Victims, N.Y. L.J. (Aug. 28, 2019, 9:27 AM), https://www.law.com/newyorklawjournal/2019/08/28/hearing-on-dismissing-epstein-charges-was-not-drama-but-proper-respect-for-victims/ [https://perma.cc/PC79-BTU4].

195. Tenbarge, *supra* note 193.

196. Watkins, Weiser & Harris, *supra* note 15.

197. Carter Sherman & Emma Ockerman, *'I'm Just Angry He's Not Alive': Jeffrey Epstein's Victims Are Enraged They Can't Face Him in Court*, VICE (Aug. 27, 2019, 2:22 PM), https://www.vice.com/en_us/article/gyzq5q/im-just-angry-hes-not-alive-jeffrey-epsteins-victims-are-enraged-they-cant-face-him-in-court [https://perma.cc/44U5-GFPR] ("I was nothing. I was his slave.").

198. *See, e.g.*, Luke Kenton, *'We Weren't Prostitutes or Whores – We Were Children': Three Jeffrey Epstein Victims Open Up About Coming to Terms with the Horrific Abuse They Endured at His Palm Beach Mansion After 'Blaming Themselves for Years*,*'* DAILY MAIL (Jan. 8, 2020, 2:41 PM), https://www.dailymail.co.uk/news/article-7865677/Jeffrey-Epstein-victims-open-abuse-endured-Palm-Beach-mansion.html [https://perma.cc/8SMB-QYVR]; James Hill, *Jeffrey Epstein Survivors on Coming to Terms with What Happened to Them in Palm Beach: 'I Had Blamed Myself for All These Years*,*'* ABC NEWS (Jan. 8, 2020, 4:53 AM), https://abcnews.go.com/US/jeffrey-epstein-survivors-coming-terms-happened-palm-beach/story?id=68099808 [https://perma.cc/2NZM-2FU3]; Erica Orden, *Jeffrey Epstein Operated a Vast Sex-Trafficking Network of Underage Girls Who Recruited Other Victims, Prosecutors Say*, CNN (July 8, 2019, 7:47 PM), https://www.cnn.com/2019/07/08/us/jeffrey-epstein-monday-court-appearance/index.html [https://perma.cc/2JPF-6PUP].

199. Sherman & Ockerman, *supra* note 197.

200. *Surviving Jeffrey Epstein* (Lifetime Channel 2020).

prosecution as having only derivative value, as having meaning only to the extent it can facilitate proper punishment.

How did the law get here? Everyone recognizes that trial and punishment have different functions. While trial sorts the guilty from the innocent, punishment gives the guilty the sanction they deserve. But when scholars collapse trial and punishment together under the moniker "criminal law," the values of punishment rise to salience and drown others out. This is perhaps because of the visceral grasp sanction has over us and of the weighty justificatory burden it bears. Consequently, we standardly speak of the "purposes of criminal law" but list only the four purposes of punishment: retribution, deterrence, rehabilitation, and incapacitation.[201]

Yet there is no requirement, as a matter of law, logic, or policy, for the same values to apply at all phases of the criminal justice process.[202] By focusing on trial in isolation from what it may contribute to eventual punishment, we may discover criminal justice goals that trial is uniquely situated to fulfill. We may better understand what value Judge Berman's one-day trial of Epstein unlocked for his accusers. We may also find that, for all the good Judge Berman did, full trials of unpunishable suspects and eventual verdicts could offer even more for both victims and society.[203]

B. Synergies Between Trial Values and Punishment Values

Trial is an effort to shine the light of present judgment on facts that would otherwise remain hidden in the shadows of the past. When carried to successful completion, trial identifies violations that occurred and recognizes them as such. By the time the gavel of conviction falls, stamping a declaration of guilt in the public record, the condemnatory, retributive, and deterrent projects of the criminal law—goals most often associated with punishment—have already begun.

Condemnation often stands out as a function that distinguishes criminal from other modes of legal accountability.[204] Theorists usually

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201. *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, 1 (2003) (listing "retribution, deterrence, incapacitation, and rehabilitation" as the "textbook purposes of criminal punishment").

202. Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 120 (1996) ("[T]he determination of guilt and innocence has a different purpose from the determination of punishment."). For example, I have argued that the purpose of punishing corporate criminals should be rehabilitation, Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 533–44 (2018), while the purpose of prosecuting them should be expressive condemnation, Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2063–64 (2016).

203. *State v. Devin*, 142 P.3d 599, 604 (Wash. 2006).

204. Greenawalt, *supra* note 191, at 351 ("Serious criminal punishment represents society's strong condemnation of what the offender has done.").

associate criminal law's condemnatory message with its capacity to "punish" rather than merely award damages—to lock people up rather than just force them to pay.[205] But as philosopher C.L. Ten has argued, "Condemnation can be expressed by a system of purely symbolic punishment. . . . [T]he verdict of the court already expresses condemnation."[206] Trial has the unique power to declare a suspect "guilty," to label him a "felon." This mark carries society's strongest condemnatory message.[207] To be sure, "tortfeasor" also has a negative ring to it.[208] It signifies, on prominent accounts, that the defendant failed to calculate and balance the costs of risk and prevention.[209] But only the most contemptible tortfeasors, those who injure with criminal culpability, also warrant the mark of conviction.[210]

The procedural aspects of criminal trial amplify the strength of its message. Conviction reflects the judgment of an entire community,[211] embodied by an (ideally) representative cross-section composed of six to twelve jurors.[212] At sentencing, by contrast, a single judge determines punishment in a process committed to their broad discretion.[213] While

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205. Hart, *supra* note 177, at 404–05 ("What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

206. C. L. Ten, *Positive Retributivism*, 7 SOC. PHIL. & POL'Y 194, 200 (1990); *see* DUFF, P.C.C., *supra* note 176, at 56–59; John Gardner, *The Functions and Justifications of Criminal Law and Punishment*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW, *supra* note 182, at 201, 205–07.

207. *Rubio v. Superior Ct.*, 593 P.2d 595, 598 (Cal. 1979) (noting that felons "have had the experience of being deprived of their personal liberty by the state and, upon their return to the community, of being stigmatized both publicly and privately because of their former status").

208. Peter Westen, *Reflections on Joshua Dressler's* Understanding Criminal Law, 15 OHIO ST. J. CRIM. L. 311, 313 (2018) ("Yet moral condemnation alone fails to distinguish criminal law from tort law, given that the use of punitive damages in torts also expresses moral condemnation.").

209. *United States v. Carroll Towing, Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (stating the Learned Hand formula).

210. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 195–96 (1991).

211. *Witherspoon v. Illinois*, 391 U.S. 510, 519–20 (1968) ("[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system . . . ."); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1179 (1931) ("[T]he jury's task is to reflect the social values of the community . . . .").

212. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation.").

213. *Beckles v. United States*, 137 S. Ct. 886, 893 (2017) ("Yet in the long history of discretionary sentencing, this Court has 'never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.'") (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005)).

judges do act with the authority of the state, there is no pretense that they are representative of the community in which they reside.[214] It would be disingenuous to pretend that all juries reflect the values of the communities from which they are selected,[215] but available statistics tell of a much wider representation gap where judges are concerned.[216] There are laws to address juries whose demographics are suspiciously skewed.[217] Those laws do not apply to the political processes of appointing and electing judges.

The concern for truth, as reflected in the different evidentiary rules and burdens at trial and sentencing, is another important procedural difference with expressive significance.[218] The standards of admissibility for evidence at trial are very high: hearsay,[219] character evidence,[220] evidence of past crime,[221] and the like do not pass muster. Sentencing is more of an evidentiary free-for-all;[222] many of the rules that ordinarily assure relevance and veracity do not apply. "[T]he use at sentencing of evidence generally inadmissible at trial, such as hearsay, . . . increase[es] the number of errors being borne by defendants."[223] The burdens of proof at trial (beyond a reasonable doubt)[224] and sentencing (mere

214. *Woodward v. Alabama*, 571 U.S. 1045, 1051 (2013) (Sotomayor, J., dissenting) ("By permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes.").

215. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 832 (2012) (discussing "the intractable problem of bias in juries and jury selection").

216. Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/ [https://perma.cc/9CJT-PN2X] ("Today, more than 73 percent of sitting federal judges are men and 80 percent are white. Only 27 percent of sitting judges are women, while Hispanic judges comprise just 6 percent of sitting judges on the courts. Judges who self-identify as LGBTQ make up fewer than 1 percent of sitting judges.") (footnotes omitted).

217. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) ("[R]acial discrimination in jury selection offends the Equal Protection Clause.").

218. *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1249 (11th Cir. 2017) ("The accuracy of jury trials depends on adversarial testing, and the broad prohibition on hearsay evidence reflects an understanding that hearsay statements are not amenable to many of the methods our adversarial system relies on to test the quality of evidence.").

219. FED. R. EVID. 802.

220. FED. R. EVID. 404(a).

221. FED. R. EVID. 404(b).

222. FED. R. EVID. 1101(d)(3) ("These [Federal Rules of Evidence] . . . do not apply to . . . sentencing.").

223. Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 302–03 (1994).

224. *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due

preponderance)[225] reflect a different level of concern for the truth. Under a preponderance standard, otherwise inconsequential facts can tip the balance of evidence in favor of one version of truth and against the other.[226] Tolerance for error is relatively high.[227] The greater care and more stringent rules of evidence at trial enhance the gravity of the message conviction sends.[228] A message that comes too easily, like "facts" and enhancements at sentencing,[229] carries correspondingly less gravitas.

C. Values Unique to Trial

There are also criminal justice values that trial can uniquely fulfill. Many discussions of criminal justice tend to center on what sort of justice the law can deliver *to* perpetrators; sidelined too often is the justice that criminal law can deliver *for* victims.[230] In the context of unpunishable criminals, scholars who discuss the rights of victims often emphasize restitution.[231] Yet, as the victims' rights movement of the 1990s recognized, criminal law's significance for victims goes far beyond

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Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

225. *United States v. O'Brien*, 560 U.S. 218, 224 (2010) ("Sentencing factors . . . can be proved . . . by a preponderance of the evidence.").

226. David Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34, 47–56 (1979) (defining the preponderance of evidence standard as fifty-percent-plus).

227. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 926 (3d Cir. 1985) ("Society's tolerance for risk of error in civil cases may have been subsumed in the decision to establish a lower burden of proof in civil cases . . . .").

228. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 856–57 (2000) ("[T]he burden [of proof beyond a reasonable doubt] reflects the unique significance of the proposition to be proved, as the law seeks to ensure that liability is warranted before moral condemnation is leveled upon an alleged wrongdoer.").

229. A judge can enhance a defendant's punishment at sentencing on the basis of facts that the prosecution was unable to prove at trial. *See United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015).

230. Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209, 209 (1990) ("[V]ictims often feel that their particular injuries are ignored while the system addresses itself to some abstract injury to the state or to the rule of law itself . . . ."); Luca Assirelli & Charlotte Keenan, *Crime Victims Can Find It Healing to Meet Offenders—but Too Few Know It*, GUARDIAN (Dec. 18, 2018, 9:00 AM), https://www.theguardian.com/law/2018/dec/18/victims-can-find-it-healing-to-meet-offenders-but-too-few-know-it [https://perma.cc/6N5Q-Z6YZ].

231. *See, e.g.*, Timothy A. Razel, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice—and What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2212 (2007); NAT'L CRIME VICTIM L. INST., ABATEMENT AB INITIO AND A CRIME VICTIM'S RIGHTS TO RESTITUTION (2006), https://law.lclark.edu/live/files/21760-abatement-ab-initio-and-a-crime-victims-right-to [https://perma.cc/3XTB-PXWJ].

money.[232] Epstein's case again is illustrative. His accusers say they suffered moral, dignity, physical, and psychological harms at his hands. Restitution at sentencing[233] (were it possible) and civil suit (some of which Epstein's estate settled)[234] could make them economically whole. While that is better than nothing, money cannot heal body, mind, or spirit; it cannot restore dignity if one feels one has lost it. Relying solely on cash judgments risks creating the impression that society is "pricing" crime rather than prohibiting and denouncing it.[235]

For many victims of serious crime, the path to true healing can begin only once they cease to be "victims."[236] The law can facilitate this transition by helping victims seize control of the narrative unfolding around them in tabloids and newscasts.[237] Rather than being passive objects of sympathy, victims have a platform at trial to become active narrators and agents of justice. As Charity O'Reilly, the counseling coordinator for the Network of Victim Assistance, said of the witnesses at Epstein's one-day trial, "No amount of jail time will make up for the time they suffered. But we cannot overestimate hearing their voices. As a community, we need to say, 'We hear you. We believe you.' That is incredibly healing and empowering."[238] Psychologists agree that testifying about the wrongs one has suffered can be therapeutic.[239] When an

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232. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 169–70 (2001).

233. *See* Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A.

234. *See* Jacob Shamsian, *Inside the Messy Effort to Compensate 225 Jeffrey Epstein Accusers*, INSIDER (Jan. 6, 2022, 6:00 AM), https://www.insider.com/inside-jeffrey-epstein-victims-compensation-program-fund-2022-1 [https://perma.cc/U5HS-UT9T].

235. Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 619 (1998).

236. *See* MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 14–17 (2009).

237. David Folkenflik, *A Dead Cat, a Lawyer's Call and a 5-Figure Donation: How Media Fell Short on Epstein*, NPR (Aug. 22, 2019, 6:06 PM), https://www.npr.org/2019/08/22/753390385/a-dead-cat-a-lawyers-call-and-a-5-figure-donation-how-media-fell-short-on-epstei [https://perma.cc/S8RN-WZDS] ("A coterie of intimidating lawyers. A deployment of charm. An aura of invincibility. A five-figure donation to a *New York Times* reporter's favored nonprofit. A bullet delivering a message. Even, it is alleged, a cat's severed head in the front yard of the editor-in-chief of *Vanity Fair*. Such were the tools the disgraced financier Jeffrey Epstein is said to have used to try to soften news coverage and at times stave off journalistic scrutiny altogether.").

238. Marion Callahan, *Justice Elusive in the World of Sex Trafficking*, U.S. NEWS (Aug. 31, 2019, 3:05 AM), https://www.usnews.com/news/best-states/pennsylvania/articles/2019-08-31/justice-elusive-in-world-of-sex-trafficking; *see also* Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 358–59 (1999) (describing importance of truth to victim healing).

239. *Developments in the Law—International Criminal Law: The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1970–71 (2001) (noting that victims

unpunishable defendant escapes prosecution, "it shows [an] offender again took control and silenced victims that could have been heard. For victims, it feels like another silencing. It's a microcosm of what happens to victims every day."[240] When the criminal justice system abdicates its truth-finding function, it withholds from victims the voice many of them need to heal. It leaves victims to vie for control of the truth in the public eye. That is a contest in which powerful people like Epstein tend to have the upper hand.[241] The fact that Epstein and Cosby managed to silence their victims for decades is testament enough to that dynamic.

When alleged criminals occupy positions of authority and influence, victims' and society's interest in truth is at its highest, but their ability to secure truth is at its lowest. Consider a president, who benefits not only from the usual social privileges conferred by wealth, status, and maleness—"[W]hen you're a star, they let you do it. You can do anything"[242]—but also from the awesome power of his office—"I have the right to do whatever I want as president."[243] If a president criminally abuses an individual,[244] his victim's relative powerlessness compounds the injury. The impeachment process could be another route for securing justice for presidential misconduct, but it is an unreliable substitute for criminal trial. As several senators reminded us in 2019, impeachment is about politics, not truth.[245]

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can benefit from a "safe forum to have their stories formally heard and acknowledged"); Laufer & Hughes, *supra* note 13, at 171 ("The inevitability of life-course pathologies resulting from violent sexual victimization come, at least in part, from the absence of acknowledgement or validation of the wrong and harm.").

240. Callahan, *supra* note 238; *see* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 907 (2009).

241. *See* Folkenflik, *supra* note 237; Laufer & Hughes, *supra* note 13, at 191 ("Poor, marginalized, and disaffiliated communities experience violence and victimization in relative silence and obscurity . . . .").

242. *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html [https://perma.cc/RED4-K6YC] (speaking prior to election).

243. Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'the Right to Do Whatever I Want*,*'* WASH. POST (July 23, 2019), https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/ [https://perma.cc/8QSU-N9QC] (speaking while president).

244. *See, e.g.*, Eliza Relman, *These Are the Sexual-Assault Allegations Against Bill Clinton*, BUS. INSIDER (June 4, 2018, 12:04 PM), https://www.businessinsider.com/these-are-the-sexual-assault-allegations-against-bill-clinton-2017-11#juanita-broaddrick-1 [https://perma.cc/D6DW-Q592].

245. Kelsey Snell, *McConnell: 'I'm Not Impartial' About Impeachment*, NPR (Dec. 17. 2019, 3:06 PM), https://www.npr.org/2019/12/17/788924966/mcconnell-i-m-not-impartial-about-impeachment [https://perma.cc/H33L-KRXA] ("Senate Majority Leader Mitch McConnell, R-Ky., dismissed the impeachment process against President Trump as a political proceeding rather than a judicial one.").

When it rejects its fact-finding mission, the justice system also risks becoming complicit in crime.[246] The truth about past misdeeds is uncomfortable for perpetrators who are forced to look their moral failings in the eye. It can also be deeply disconcerting for society as a whole, because, when an innocent is harmed, society is partly to blame for failing to protect.[247] By silencing the truths that trial could reveal, the law shields us all from having to reckon with our collective failings and from undertaking the effort of reform.[248] But this dynamic cements the social and legal structures that made past victims vulnerable and all but assures that the cycle of victimization will continue.[249] As Archbishop Desmond Tutu observed, "[Forgetting the past] result[s] in further victimization of victims by denying their awful experiences."[250]

Some theorists believe that forcing society to reckon with its own failings is one of criminal law's most important purposes.[251] Such

246. *See* Eric J. Miller, *The Moral Burdens of Police Wrongdoing*, 97 RES PHILOSOPHICA 219, 221–22 (2020).

247. *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 473 (1998) ("[T]he family and friends of the undervalued black victim will suffer emotional harm from believing that justice was not served. Most importantly, the greater societal tolerance for violence inflicted on blacks reinforces a cultural belief in the inferiority of blacks and generally contributes to the maintenance of white supremacy."); Lewis Field, *The Fear of the Vindictive Shrew: Using Alternative Forms of Punishment to Change Societal Sentiment About Rape Laws*, 17 J. GENDER RACE & JUST. 515, 516 (2014) ("[I]t is not only rape laws that have failed victims, but also society's failure to take seriously nonviolent date rape."); Emily C. Wilson, *Stop Re-Victimizing the Victims: A Call for Stronger State Laws Prohibiting Insurance Discrimination Against Victims of Domestic Violence*, 23 AM. U. J. GENDER SOC. POL'Y & L. 413, 428 (2015) ("That individuals become victims of domestic violence, therefore, means that . . . the community has failed to protect victims from domestic violence . . . ."); *see also* Laufer & Hughes, *supra* note 13, at 162 ("When serious criminal prohibitions go unenforced, the state fails in its duty to protect.").

248. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) ("[W]here the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."); *Huminski v. Corsones*, 396 F.3d 53, 81 (2d Cir. 2005); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 536–37 (2006).

249. Llewellyn & Howse, *supra* note 238, at 368 (noting how truth is essential for reform and preventing future violations).

250. ROSALIND SHAW, U.S. INST. OF PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE 6 (2005), https://www.usip.org/publications/2005/02/rethinking-truth-and-reconciliation-commissions-lessons-sierra-leone [https://perma.cc/9VPJ-JNCB].

251. R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 125, 139 (R.A. Duff & Stuart P. Green eds., 2011) (criminal law "concern[s] us all as citizens" because it targets "wrongdoing that violates the polity's defining values"). *But see* Eric J. Miller, *Breaking Windows as Corrective Justice: Impure Resistance in Urban Ghettos*, 53 TULSA L. REV. 313, 316–18 (2018) (book review).

reconstructive theories have seen a resurgence of interest in recent years.[252] According to those theories, there is a set of shared normative understandings that hold society together.[253] Criminal conduct is an assault on those understandings because it purports to prioritize the illegitimate interests of the criminal over the legitimate interests of the victim.[254] The criminal justice system helps to mend the damage done to the social fabric by re-establishing the social status of the victim and negating the invalid claim of superiority implicit in the criminal's conduct.[255]

Contemporary reconstructive theorists focus on the role of punishment,[256] but this approach overlooks the essential and arguably more important (so far as reconstruction is concerned) role of trial.[257] As international criminal lawyers are well aware, punishment can even be an impediment to reconstruction.[258] Truth and reconciliation commissions find their place in the aftermath of the world's worst atrocities, such as those that can occur during civil war or dictatorships.[259] While truth and

252. *See, e.g.*, Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1489–90 (2016); VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 5 (2019).

253. Kleinfeld, *supra* note 252, at 1490.

254. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) ("By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender's assessment of whose interests count is wrong.").

255. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 42 (1990) ("[Punishment] ensures that, once established, the moral order will not be destroyed by individual violations which rob others of their confidence in authority. Punishment is thus a way of limiting the 'demoralizing' effects of deviance and disobedience.").

256. *See, e.g.*, Kleinfeld, *supra* note 252, at 1491 ("But if the normative order of the classroom is something we treasure, something we want to uphold in the wake of cheating, condemnatory punishment in the community's name is the tool for the job.").

257. *See* Daniel S. McConkie, Jr., *Criminal Justice Citizenship*, 72 FLA. L. REV. 1023 (2020).

258. Emily B. Mawhinney, *Restoring Justice: Lessons from Truth and Reconciliation in South Africa and Rwanda*, 36 HAMLINE U'S. SCH. L'S. J. PUB. L. & POL'Y 21, 48 (2015) ("Yet, it is unlikely that an offender would experience healing if he or she enters into dialogue under threat of punishment. Victims and community members may have experienced some restorative healing thanks to the opportunity to participate in [truth and reconciliation commissions]. Because the Courts imposed serious legal punishments rather than forgiveness, they were not widely successful in achieving restorative outcomes . . . ."); Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies*, *in* LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 42 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000); John Braithwaite, *Narrative and "Compulsory Compassion,"* 31 LAW & SOC. INQUIRY 425, 430 (2006) ("The core insight of the South African Commission . . . was that impunity might not be replaced primarily with punishment, but with truth and reconciliation based on empowerment of victims through testimony and storytelling that might reconfigure national memory.").

259. Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 676–77 (2004)

reconciliation commissions vary widely, their common mandate is to investigate, recognize, and memorialize past wrongs.[260] Uncovering the truth may bring shame to wrongdoers,[261] but truth and reconciliation commissions are never equipped or authorized to punish.[262] Scholars who criticize truth and reconciliation commissions for allowing crimes to go unpunished overlook the fact that the prospect of punishment can undermine commissions' truth-seeking function.[263] Wrongdoers are crucial participants but are more likely to steer clear if their material interests are at stake.[264] In contrast to contemporary reconstructivists, the vision of justice that proponents of truth and reconciliation espouse is restorative rather than retributive.[265] Sometimes, large societal conflicts heal best when accusers can confront suspects by seeking apology and when suspects can recognize accusers by asking forgiveness.[266]

Proponents of truth and reconciliation need not deny that, in an ideal world, those who violate human rights in national conflicts would receive

("Throughout this time, many nations, including South Africa, Lebanon, and the nations of the former Yugoslavia, have tried to end internal civil wars and have looked to reconciliation as a means of healing and uniting a wounded and divided people.").

260. *See* Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMPAR. & INT'L L. 375, 379 (1997) ("National reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their story, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help them move beyond the pain of the past."); Elizabeth Stanley, *Evaluating the Truth and Reconciliation Commission*, 39 J. MOD. AFR. STUD. 525, 525–26 (2001).

261. Katie Kerr, *Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process*, 37 U. MIA. INTER-AM. L. REV. 53, 106 (2005) ("Additionally, truth may 1) benefit victims through public acknowledgment of the harm they have suffered; 2) punish injurers by shaming them; 3) facilitate social catharsis; and, most controversially, 4) promote reconciliation.").

262. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 10–14, 141 (2d ed. 2011).

263. *See, e.g.*, Matiangai V.S. Sirleaf, *Beyond Truth and Punishment in Transitional Justice*, 54 VA. J. INT'L L. 223, 284–87 (2014).

264. Mawhinney, *supra* note 258, at 26 ("Amnesty can also be an essential tool in getting offenders, as well as victims[,] to the table to begin the process of dialoguing.").

265. Lisa J. Laplante, *Just Repair*, 48 CORNELL INT'L L.J. 513, 550–51 (2015) ("Archbishop Desmond Tutu, commenting on the South African Truth and Reconciliation Commission, noted that the commission was far more restorative because it followed the spirit of the African understanding of justice as 'not so much to punish as to redress or restore a balance that has been knocked askew.'") (quoting MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 81 (1998)); Mawhinney, *supra* note 258, at 23 ("Restorative justice is an alternative to the retributive approach to justice . . . . Unlike retributive justice that emphasizes punishment as a means of righting wrongs, restorative justice empowers the parties themselves to restore justice by alternative means.").

266. *See* Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 293–95 (2007).

the punishment they deserve. But the perfect need not be the enemy of the good. Truth and reconciliation deliver value to victims and societies ravaged by conflict, despite the fact that the world in which truth and reconciliation commissions function is far from ideal. Similarly, the inability to punish should not preclude criminal law's capacity to uncover truth, affirm victims, and denounce wrongdoing.

D. No Ready Substitute for Criminal Trial

Truth and reconciliation commissions raise the question of whether they, or some other narrative-setting mechanism such as civil trial or popular media (like Lifetime's documentary *Surviving Jeffrey Epstein*), could validate criminal law's invisible victims. While these forums can advance important expressive and truth-finding functions, they cannot reproduce the rigor and expressive weight of criminal trial.

Because civil trial and popular media lack the arduous procedural demands of criminal law, they can expose wrongdoing more expeditiously.[267] However, the weaker evidentiary standards in civil law and most popular media mean that these fora cannot render conclusions with the level of certainty possible in criminal law. A civil judgment for one party or the other merely signifies a greater-than-fifty-percent likelihood. Random factors of circumstance and otherwise insignificant evidence can easily tip the balance. By contrast, when the criminal justice system speaks, it does so with a certainty that excludes reasonable doubt.

Online media are particularly susceptible to distorting truth. Their obvious appeal is their democratic reach; even otherwise disempowered individuals can create content. However, the dominant narratives in online media tend to reflect the social influence of the speakers or the technical sophistication of their bots, not connection to truth. Studies show that lies get traction online much more quickly than truth: "It takes the truth about six times as long as falsehood to reach 1500 people . . . ."[268] Criminal law, by contrast, has a much better chance of delivering a more objective public verdict with the level of confidence that accusers, suspects, and society deserve.

Civil law and popular media also lack the expressive weight of criminal conviction. Of course, civil law does make determinations of fault (e.g., that the defendant unjustifiably injured the plaintiff), and there is no shortage of expressive vitriol online. However, the messages in these fora cannot carry the same gravitas. The various other non-condemnatory

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267. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1523 (1996) ("[S]ending the [condemnatory] message . . . costs society more than sending the message through civil liability . . . .").

268. Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1148 (2018).

functions of civil law and popular media dilute the seriousness with which they can convey a community's moral outrage. Private people speak online only in individual capacities and often with as much fervor when critiquing the last season of *Game of Thrones* as when deploring criminal transgression. Furthermore, "[c]ivil and criminal liability have distinct social meanings . . . . [T]he finding of [criminal] liability must recognize that . . . the victim . . . is beyond price."[269] By contrast, the entire purpose of civil law is often precisely to find out how to "price" a violation.[270] Placed among the mix of generic contract and unintentional tort awards, the expressive import of civil judgment falls far short of conviction.[271] Because civil judgment and popular media have more ambiguous relationships to truth, the fact that their expressive potential is more muted is probably for the best.

Truth and reconciliation commissions are a much more plausible substitute for criminal trials of unpunishable suspects. Properly structured, commissions can instill deeper confidence in both the truth and normative weight of their conclusions. Indeed, the United States already has some limited experience with truth and reconciliation commissions, such as the Maine Wabanaki-State Child Welfare Commission (which investigated state removal of Native children from their homes),[272] the Greensboro Commission (which investigated a brutal attack on social and economic justice protesters),[273] and the 1921 Tulsa Race Massacre Centennial Commission.[274]

However, truth and reconciliation commissions still do not have the same robust evidentiary standards of criminal trial, and their conclusions lack the normative and condemnatory force of criminal conviction. This is by design. Perpetrators often receive amnesty in exchange for participation.[275] Some commissions explicitly state that their mission is to

269. Friedman, *supra* note 228, at 854–55.

270. Kahan, *supra* note 235, at 619 ("[L]ike fines, civil damages seem to connote that society is 'pricing' corporate crime.").

271. *See* Hart, *supra* note 177, at 404 ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

272. Esther Altvater Attean, Penthea Burns, Martha Proulx, Jamie Bissonette-Lewey, Jill Williams & Kathy Deserly, *Truth, Healing, and Systems Change: The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Process*, 91 CHILD WELFARE 15, 19, 25 (2012).

273. Jill E. Williams, *Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission*, 72 LAW & CONTEMP. PROBS. 143, 144–45 (2009).

274. TULSA RACE MASSACRE CENTENNIAL COMM'N, https://www.tulsa2021.org [https://perma.cc/P2AW-3RUA] (last visited Feb. 21, 2022).

275. Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, DIACRITICS, Fall–Winter 2002, at 33 (2002).

establish "an *impartial* historical record."[276] Truth and reconciliation commissions are less about pointing the finger of communal blame and more about laying a framework for moving past conflict. Victims desire and deserve not just a sterilized accounting of facts, but a moral judgment on their case.[277]

Perhaps the most significant shortcoming of truth and reconciliation commissions is that they have a poor track record of providing satisfactory results for victims. The Tulsa experience is illustrative. The Oklahoma legislature created the first commission to investigate the Tulsa Race Massacre in 1997.[278] Four years later, the commission issued recommendations that, now twenty years on, have yet to be implemented.[279] The current commission, the 1921 Tulsa Race Massacre Centennial Commission, is faring far worse. All surviving members of the Tulsa Race Massacre have sued the commission and the city of Tulsa, one of whom sought a cease-and-desist order.[280] The survivors feel excluded from the Centennial Commission's work and believe that their stories are being "appropriated" for tourism and economic opportunities.[281] The Tulsa experience with truth and reconciliation commissions is part of a general trend. Sixty percent of victims who testified at the South African Truth and Reconciliation Commission also reported feeling worse afterwards.[282]

Fortunately, there is no need to rely on civil law, popular media, or truth and reconciliation commissions to give invisible victims the recognition they deserve. As the next Part discusses, criminal courts and procedure are suited to the task, with some modest reforms.

VI. SEEING THE INVISIBLE WHILE PROTECTING THE UNPUNISHABLE

Invisible victims and unpunishable suspects have conflicting, legitimate interests. The ideal world—where all criminals receive the punishment they deserve and all victims receive their due recognition—is

276. 1 SIERRA LEONE TRUTH & RECONCILIATION COMM'N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 10 (2004) (emphasis added).

277. 3 ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL & VICTOR TADROS, THE TRIAL ON TRIAL: TOWARDS NORMATIVE THEORY OF THE CRIMINAL TRIAL 80–81 (2007) ("[P]eople seem to care about trials and verdicts even when punishment is not, or is no longer, at issue.").

278. *US: Failed Justice 100 Years After Tulsa Race Massacre*, HUM. RTS. WATCH (May 21, 2021, 2:00 AM), https://www.hrw.org/news/2021/05/21/us-failed-justice-100-years-after-tulsa-race-massacre [https://perma.cc/6U7Q-XRV6].

279. *Id.*

280. *Id.*

281. *Id.*

282. *See* SHAW, *supra* note 250, at 7.

unavailable. Any path forward is fraught with difficulty. This Part's modest claim is that any bright-line rule against courts trying unpunishable suspects will necessarily strike the wrong balance some of the time. The Sections that follow introduce three variables for gauging unpunishable suspects' interests in avoiding trial and weighing them against invisible victims' claims to recognition: (1) whether the suspect is permanently or temporarily unpunishable, (2) whether the suspect voluntarily took steps to render themselves unpunishable, and (3) whether the suspect could, if they so desired, defend themselves in court.

As the charts below illustrate, the three variables cut across the taxonomy of unpunishable suspects introduced in Part III.

	Could Participate in Trial	Could Not Participate in Trial
Voluntarily Became Unpunishable	• Running of Limitations Period • Pardoned Suspects • Immune Witnesses • Fugitives (if apprehension unlikely)	• Suspects who Committed Suicide
Took No Steps for Purpose of Becoming Unpunishable	• Diplomats[283] • Legislators • Amnesty Recipients[284]	• Deceased Suspects (not by suicide) • Permanently Incompetent

Figure 1. Permanently Unpunishable Suspects

	Could Participate in Trial	Could Not Participate in Trial
Voluntarily Became Unpunishable	• Fugitives (if apprehension likely)	• Temporarily Incompetent (if medication declined)
Took No Steps for Purpose of Becoming Unpunishable	• Presidents	• Temporarily Incompetent (if untreatable)

Figure 2. Temporarily Unpunishable Suspects

Raising these three variables naturally prompts the question of who should weigh them in deciding whether to proceed to trial against an unpunishable suspect. One natural option is to rely on prosecutors, who are already the gateway from investigation to trial. For ordinary punishable suspects, prosecutors must balance many factors in deciding whether to indict.[285] The strength of the evidence is one salient factor, but so, too, are the criminal justice value of the case, the costs of pursuing the case, and the collateral effects (both positive and negative) of a potential conviction.[286] Prosecutors decline some cases even where the evidence

283. I include diplomats, legislators, and presidents as involuntarily unpunishable because they ordinarily do not seek their government positions in order to become unpunishable.

284. Where people must apply for amnesty, they would count as voluntarily unpunishable.

285. *See* U.S. Dep't of Just., Just. Manual § 9-27.220 (2020).

286. *See generally id.* §§ 9-27.000, 9-28.000.

would likely lead to an easy conviction, because the balance of considerations tells against trial.[287] Reckoning these values and uncertainties is no easy task, but it is the sort of decision that prosecutors must make all the time.[288] Extending prosecutorial discretion to include decisions about whether to proceed to trial against an unpunishable suspect would introduce some additional variables but would amount to nothing different in kind.

In terms of the three variables discussed below, prosecutors should feel freest to indict where suspects are permanently unpunishable, voluntarily unpunishable, or could participate in trial. Where a suspect is permanently unpunishable, there is no chance that delay would open the possibility of a preferable course: an ordinary trial followed by any due punishment. If a suspect voluntarily did something to make themselves unpunishable or could assist in their own defense, any potential unfairness of proceeding to trial is mitigated because it would be a consequence of the suspect's free choice.[289] By contrast, prosecutors should hesitate where a suspect is only temporarily unpunishable, did nothing to make themselves unpunishable, or has no way to participate in their defense.

Since the stakes of trial and conviction are by definition lower for unpunishable suspects, there is a risk that prosecutors, jurors, and judges will let their guards down. If victims are present, their pain may be very palpable. If the defendant is absent, the stakes of conviction may seem inconsequential. That dangerous impression must be avoided at all costs. The value of trying unpunishable suspects crucially depends on maintaining the integrity and high standards of the criminal justice process. Additional procedural protections should be in place. A criminal process that weakens its standards has little value for society's obligation to come to terms with its actual shortcomings. Victims deserve not just a show trial over some convenient defendant, but true empowerment over the narrative that unites them and those who actually wronged them. A criminal process that is hasty, inattentive, inaccurate, or unfair loses the solemn authority and expressive force that form a large part of the value

287. *See id.* § 9-27.2200 cmt. ("[T]he attorney for the government's belief that a person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction is not sufficient standing by itself to commence or recommend prosecution.").

288. James M. Cole, *Remarks at Criminal Litigation Ethics Conference: University of California, Hastings College of Law, August 2, 2013*, 65 HASTINGS L.J. 1148, 1151 (2014) ("[P]rior to charging, an ethical prosecutor takes on an almost judicial role, trying to balance many difficult factors and make wise decisions that are in the best interest of the community, almost becoming his own adversary."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

289. *See Diaz v. United States*, 223 U.S. 442, 455 (1912).

of prosecuting unpunishable suspects. Even worse, such a process could bleed over and undermine the perceived integrity of ordinary criminal trials.[290]

The following three Sections discuss supplemental procedural protections for trials against unpunishable suspects. Each of the three variables is a possible juncture calling for special process to ensure that recognizing invisible victims does not unduly burden the legitimate interests of unpunishable suspects. The procedural enhancements that follow are familiar solutions that courts already use to handle structurally similar challenges.

A. Permanently Versus Temporarily Unpunishable

Some criminals are permanently unpunishable. For example, deceased criminals and those with diplomatic immunity may never face sanction. By contrast, executive immunity technically protects presidents only while they are in office.[291] Though President Trump has not yet faced any criminal charges, President Biden stated publicly that he would not stand in the way if the DOJ chose to proceed.[292] Fugitives are in a grey area of uncertainty depending on the likelihood of apprehension. If apprehended, they become punishable. Some fugitives, such as those who have fled to a foreign jurisdiction that has no extradition agreement with the United States, are, for all practical purposes, permanently unpunishable.[293]

Because of the higher criminal justice value of trying suspects who, if found guilty, can be punished, there should be an elevated threshold for

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290. *See* PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 534 (2013) (arguing that criminal law is an integrated whole and that shortcomings in one part can undermine perceptions of the rest).

291. DOJ policy against prosecuting sitting presidents does not extend to ex-presidents. Veronica Rocha, Meg Wagner & Amanda Wills, *Robert Mueller Testifies*, CNN (July 25, 2019, 11:29 AM), https://www.cnn.com/politics/live-news/robert-mueller-congress-testimony/h_e6c45aa7db90385350a47b46c55bdafb [https://perma.cc/52CP-APA8].

292. Barbara Sprunt, *Biden Says He Would Not Stand in the Way of a Trump Prosecution*, NPR (Aug. 6, 2020, 9:00 AM), https://www.npr.org/2020/08/06/899375561/biden-says-he-wouldnt-stand-in-the-way-of-a-trump-prosecution [https://perma.cc/X3LK-UFSU]; Camila DeChalus & Jacob Shamsian, *Trump Is Facing Criminal Investigations into His Conduct. Court Buildings Are Bracing for Violence and Chaos.*, BUS. INSIDER (Feb. 3, 2022, 4:04 PM), https://www.businessinsider.com/trump-protests-investigation-courts-nyc-dc-atlanta-criminal-2022-2 [https://perma.cc/3KPB-283Z].

293. *See generally* Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625 (2016); *cf., e.g.*, *Trials: The Unpunishable Crime*, TIME (Aug. 25, 1952), http://content.time.com/time/subscriber/article/0,33009,816771,00.html [https://perma.cc/C3N4-MU4X].

indicting suspects who are only temporarily unpunishable. The preferable course ordinarily would be to wait for authorities to apprehend fugitives and for presidential suspects to lose the protections of their office. There could be circumstances involving a temporarily unpunishable suspect, though, where time is of the essence. Some impending future event—such as the death of a victim—could significantly reduce the value of delay.

If prosecutors choose to indict a temporarily unpunishable suspect, a hard legal protection should be in place: if convicted while unpunishable, the suspect must have the option of a retrial should they subsequently become punishable. This would ensure that a defendant who was convicted in absentia or while the stakes were very different is not unfairly prejudiced once circumstances change. Other countries that allow their courts to try international fugitives in absentia mandate a similar protection.[294]

Given the victim-oriented concerns of this Article, one of the most significant costs of retrial is that victims may be called upon to testify a second time. While testifying can be empowering for victims, it also can reopen old wounds. Prosecutors should consult victims when deciding whether to indict a temporarily unpunishable suspect and give heavy weight to their preferences. Where victims prefer to leave the past behind them, the strong presumption should be against indictment. Where victims wish to proceed against a suspect who is only temporarily unpunishable, prosecutors should first advise victims about the relative likelihood of retrial.

B. Voluntarily Versus Involuntarily Unpunishable

Some criminals take purposeful steps to make themselves unpunishable. This category includes criminals who accept pardons or who take their own lives to avoid trial (as Epstein seems to have done). Fugitives also count as voluntarily unpunishable because they could always turn themselves over to authorities. Other criminals—such as those who die of natural causes or who receive amnesty—have no say in the circumstances that make them unpunishable.

Authorities should feel freer to indict suspects who are voluntarily unpunishable. The law already recognizes that suspects' voluntary choices

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294. *See, e.g.*, Stan Starygin & Johanna Selth, *Cambodia and the Right to Be Present: Trials* in Absentia *in the* Draft Criminal Procedure Code, 2005 SING. J. LEGAL STUD. 170, 174 (listing several countries with safeguards for fugitives convicted *in absentia*); *see* Alan Greenblatt, *Knox or Not: Plenty of Cases Are Tried Without a Defendant*, NPR (Mar. 26, 2013, 4:04 PM), https://www.npr.org/2013/03/26/175374848/knox-faces-a-new-trial-even-if-she-s-not-there [https://perma.cc/466Z-8PTN] ("In the vast majority of cases, you'd have to retry the person, if and when you find them.") (quoting Southern Methodist University Law Professor Christopher Jenks).

can adversely affect the procedural protections they are due. For example, although a criminal defendant has a constitutional right to be present at every stage of their trial, if the defendant is "voluntarily absent after trial has begun" (e.g., because they have fled the jurisdiction), the trial may proceed without them.[295] That principle of voluntary relinquishment, presently limited in law to fugitives who flee during trial, should extend to other voluntarily unpunishable suspects.

When a suspect does something to make themselves unpunishable, they create a potential justice deficit because they block any sanction that may be due. When the law also bars any trial of that suspect, it further rewards the suspect's decision by shielding them from the moral reckoning of trial. This potentially allows wrongdoers to injure their victims a second time by silencing victims' opportunities to demand recognition.[296] Protection from punishment does not necessitate, and should not entail, the right to hide the past and to bar society's moral judgment. As one federal court remarked of suspects who commit suicide to avoid prosecution, "It seems contrary to our system of justice to allow . . . [the suspect] to be absolved of all criminal liability because he intentionally took his own life."[297]

The balance of normative considerations is more nuanced for suspects who, like amnesty recipients and legislators, generally do nothing to make themselves unpunishable. Since the suspect's choice is not involved, the law does not risk creating unsavory incentives. Authorities should ask, for each case, whether the purpose behind the law that makes the suspect unpunishable is consistent with exposing them to prosecution. In many cases, the answer is likely "no." For example, the purpose of awarding amnesty to undocumented immigrants in the Immigration and Reform Control Act of 1986 was to decriminalize and provide a path to citizenship for over two million people.[298] Prosecution would frustrate both goals. Similarly, legislative immunity exists "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[299] Exposing

295. FED. R. CRIM. P. 43(c)(1) ("A defendant who was initially present at trial . . . waives the right to be present . . . when the defendant is voluntarily absent after the trial has begun . . . ."); *Smith v. United States*, 94 U.S. 97, 97–98 (1876) (noting prison escapee could appear at retrial if he so chose).

296. Laufer & Hughes, *supra* note 13, at 173–74 (expressing concern that "offenders control not only their victims, but survivors and, in a very real way, the state's response to violent victimization").

297. *United States v. Chin*, 633 F. Supp. 624, 627 (E.D. Va. 1986). *But see United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983).

298. *See* 8 U.S.C. § 1255a n.4 (1986); *see also* Richard A. Johnson, Note, *Twenty Years of IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 245 n.26 (2007).

299. *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

legislators to the inconvenience of prosecution for official acts would often undermine the value of protecting them from punishment. However, even when prosecution would undermine the purpose for which a suspect is unpunishable, there should be no absolute bar to trial. Rather, authorities should proceed more cautiously before deciding to indict and pursue only high-criminal-justice-value cases, like those that involve particularly heinous crimes or many victims.

C. Could Versus Could Not Participate in Defense

Perhaps the most important variable affecting the decision whether to try an unpunishable suspect is whether the suspect could meaningfully participate in their defense. Nothing prevents fugitives and suspects protected by statutes of limitations from appearing in court to defend themselves. Deceased and incompetent suspects do not have that option. Different procedural safeguards should be in place depending on whether the accused could meaningfully participate.

Even where prosecutors decide to proceed against an unpunishable suspect, judges should hold a hearing to determine the suspect's ability to participate in trial.[300] In some cases, as when the defendant is dead or otherwise physically incapacitated, an inquiry into morgue, hospital, and jail records would easily establish the suspect's unavailability.[301] In other cases, the issue could be far more complex. For suspects whose mental incompetency would compromise their participation, courts should engage in the sort of fact-intensive competency hearing they presently use to determine competency to stand trial.[302] For suspects who have executive, legislative, or diplomatic immunity, judges should ask whether trial would significantly impair the governmental functions that immunity from punishment was designed to protect. While immunity will often win out, this will not always be the case, especially where trial is expected to be relatively short or uncomplicated. Trial is much less onerous than punishment, as is trial's level of potential interference with official

300. *See* 18 U.S.C. § 4241(a) (prescribing hearings about competency to stand trial).

301. *See Commonwealth v. Kelly*, 78 A.3d 1136, 1143 (Pa. Super. Ct. 2013) (requiring the prosecution to demonstrate via a hearing that the defendant is absent without cause); *People v. Molina*, 462 N.Y.S.2d 338, 343 (N.Y. App. Div. 1983) (requiring the prosecution, in order to decide on the issue of voluntary absence, to check hospitals, morgues, and jails for the defendant and articulating that a defendant will not be tried in absentia "unless he cannot be found after reasonable efforts to locate him, coupled with the lack of evidence that he is dead or ill," which implicitly suggests that the defendant must be alive for the trial to continue).

302. *Drope v. Missouri*, 420 U.S. 162, 180 (1975); 40 AM. JUR. 2D *Proof of Facts* § 6 (1984) ("A competency hearing is required only where evidence from any source, including the trial judge's own doubts about the defendant's competence, raises a 'bona fide doubt' as to the defendant's competency.").

duties.[303] Presidents and legislators are not immune from civil suit[304] and have participated as defendants in civil trials without derailing their duties.[305] After the court determines whether the defendant could participate in trial, it should implement the procedural protections discussed below.

1. NOT ABLE TO PARTICIPATE

One of the most fundamental protections in the criminal justice system is the right to mount an effective defense and participate in one's own trial. The Sixth Amendment provides in pertinent part that the defendant has the right to "be informed of the nature and cause of the accusation" and "to be confronted with the witnesses against him."[306] With regard to notice, the defendant can insist that the indictment sufficiently apprise them of the charge in order to prepare a defense.[307] The Confrontation Clause guarantees defendants the opportunity to test the memories and consciences of witnesses and allows defendants to face the jury.[308] Federal law and many state laws go further, clarifying the defendant's right to be physically present at trial.[309] For example, "[t]he [Utah] legislature has deemed it essential to the protection of one *whose life or liberty is involved* in a prosecution for felony, that he shall be personally present at the trial."[310]

Clearly, a suspect who cannot participate in their trial because they are dead or incompetent cannot exercise their rights to be informed of the charges against them, to confront witnesses, or to be meaningfully present. However, the drafters of the constitutional provisions and statutes guaranteeing a right to physical presence likely did not have unpunishable suspects in mind. As observed above, American lawmakers often conflate immunity from punishment with immunity from trial. With these two concepts distinguished, however, it becomes apparent that the rights to participate in trial apply with less force where neither "life [n]or liberty is involved."[311] This is not to say the rights become nullities. A suspect who

303. Amar & Kalt, *supra* note 66, at 12 ("When the President is substantially distracted from his job, he is half absent and his job goes half-undone.").

304. *Clinton v. Jones*, 520 U.S. 681, 694 (1997) (finding "no support for [Presidential] immunity for *unofficial* conduct").

305. *Id.* at 692 (finding that, before 1997, "three sitting Presidents have been defendants in civil litigation involving their actions prior to taking office").

306. U.S. CONST. amend. VI.

307. *Bartell v. United States*, 227 U.S. 427, 431 (1913); *United States v. Simmons*, 96 U.S. 360, 362 (1877); *United States v. Cruikshank*, 92 U.S. 542, 557–59 (1875).

308. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

309. *See, e.g.*, FED. R. CRIM. P. 43; 725 ILL. COMP. STAT. 5/115-3(a) (2021).

310. *Hopt v. Utah*, 110 U.S. 574, 579 (1884) (emphasis added).

311. *Id.*

wishes to participate must not be prevented from doing so. Yet, where the stakes of conviction are lower, as they by definition are for unpunishable suspects, victims' claims to recognition through trial loom larger.

For dead suspects, the stakes of possible conviction are as low as they get.[312] Even the psychic value of having a name untarnished by criminal conviction can be of no comfort in the grave.[313] A dead suspect's clear name does have some social value—that is why presidents and governors will sometimes issue posthumous pardons[314]—but its value is to the integrity of the criminal justice system, not to the individual.[315] That integrity is best assured at trial. The benefits of trial—to victims and society—remain because, contrary to the language of one court a century ago, the injuries resulting from crime are not "buried with the offender."[316]

Even if the stakes for unpunishable suspects are lower, the integrity of the criminal justice process still demands attention to stringent procedures. The adversarial approach to uncovering truth in U.S. courtrooms depends on highly motivated, competing parties who bring to

312. Jeffrey E. Feinstein, *Abatement and Criminal Appeals: The Case of the Dead Defendant*, N.Y. ST. BAR J., Nov. 1987, at 41, 431 ("[W]hile a defendant's death certainly renders moot any interest the deceased defendant had in the outcome of a particular appeal, the judgment of conviction, as well as any rules of law established by the defendant's case, can have a profound impact on survivors."). The consequences to his estate could be more substantial where victim restitution or criminal fines are ordered. *People v. Peters*, 537 N.W.2d 160, 161–62 (Mich. 1995) (permitting order of restitution to stand when defendant died after trial); *United States v. Pomeroy*, 152 F. 279, 280, 283 (C.C.S.D.N.Y. 1907) (abating criminal fine). Where a defendant was alive during trial, the assets used to pay restitution more properly belong with the victims than with heirs. *See United States v. Dudley*, 739 F.2d 175, 178 (4th Cir. 1984). Where the defendant died before trial, as for fugitives, the trial court should not enter the sentencing phase after a guilty verdict, so no restitution would be ordered.

313. While "the surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation," *State v. Morris*, 328 So. 2d 65, 67 (La. 1976), victims have a greater interest in truth.

314. *See Policy on Posthumous Pardon Applications*, U.S. DEP'T OF JUST. (Dec. 23, 2020), https://www.justice.gov/pardon/policies [https://perma.cc/Z7NC-MGXX]; *see, e.g.*, The Associated Press, *126 Years After the 'Separate but Equal' Ruling, Homer Plessy Is Pardoned*, NPR (Jan. 5, 2022, 1:36 PM), https://www.npr.org/2022/01/05/1070593964/homer-plessy-posthumous-pardon-plessy-v-ferguson-separate-but-equal [https://perma.cc/VXC3-WJPU].

315. *But see generally* DON HERZOG, DEFAMING THE DEAD (2017) (arguing that defaming recently deceased people injures them). The defendant's good name may also have value to the defendant's family. In such cases, it would be good to follow Hawaii's example by letting family members assist in the defense of a deceased defendant. *See, e.g.*, *State v. Makaila*, 897 P.2d 967, 972 (Haw. 1995).

316. *United States v. Dunne*, 173 F. 254, 258 (1908) (quoting *United States v. Daniel*, 47 U.S. (6 How.) 11, 14 (1848)); *see* Emmanuel Melissaris, *Posthumous 'Punishment': What May Be Done About Criminal Wrongs After the Wrongdoer's Death?*, 11 CRIM. L. & PHIL. 313 (2017).

light the most important facts and advance the best arguments.[317] Though studies show people are capable of objectively assessing evidence even when suspects are not physically present, there is surely a higher risk of error when suspects do not participate in preparing their own defense. The risk of error could undermine the fairness of any conviction and the procedural integrity that is critical to criminal law's expressive force.

This is a common problem in criminal procedure, and courts already have mechanisms in place to help. Ordinary punishable suspects have varying levels of interest and competency to participate in their defense. Some refuse to participate entirely. Whenever a suspect does not participate, whether by choice or necessity, the compromise to the adversarial quest for truth is the same.[318] Yet the law does not always let this stand as a barrier to trial. If it did, a suspect's lack of interest, below-average competency, or refusal to participate would serve as a shield to all criminal liability. Rather, the law relies, as needed, on the zealous advocacy of public defenders to make the best case on their client's behalf.[319]

Trials in absentia of unpunishable suspects are not unheard of in other countries, and U.S. courts could turn to foreign jurisdictions for some best practices. According to Kurt Volker, the former U.S ambassador to NATO, "It's common practice, not only in Europe. . . . It's done when the defendant is not physically at hand, yet the legal outcome can be pursued."[320] In 2020, for example, Turkey tried twenty Saudis who were accused of killing and dismembering journalist Jamal Khashoggi.[321] The murder took place on Turkish soil, but Saudi Arabia refused to extradite the suspects.[322] In 2009, Italy tried U.S. citizen Amanda Knox for murdering a student and separately tried twenty-six other Americans (including a former CIA station chief) for kidnapping an Egyptian

317. Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 110 (2017) ("An adversarial justice system is one in which the judicial process relies on attorneys to investigate the facts and law, present the issues to the court, and engage in zealous advocacy on behalf of their clients.").

318. *See, e.g.*, *United States v. Perkins*, 787 F.3d 1329, 1340 (11th Cir. 2015) ("The record reflects that Mr. Perkins was not unable to assist his attorney with his defense; Mr. Perkins simply chose not to participate in his defense.").

319. *See Polk County v. Dodson*, 454 U.S. 312, 321–22 (1981).

320. *See* Greenblatt, *supra* note 294.

321. *See* Matthew S. Schwartz, *Khashoggi Murder Trial Begins in Turkey*, NPR (July 3, 2020, 4:38 PM), https://www.npr.org/2020/07/03/887116557/khashoggi-murder-trial-begins-in-turkey [https://perma.cc/XX4E-8MYC].

322. Ben Hubbard & David D. Kirkpatrick, *Saudi Arabia Rejects Turkey's Extradition Request in Khashoggi Killing*, N.Y. TIMES (Oct. 27, 2018), https://www.nytimes.com/2018/10/27/world/middleeast/saudi-arabia-khashoggi-turkey.html [https://perma.cc/WK2R-25MV].

cleric.[323] In 2021, British courts made a first-time decision to proceed with a trial in absentia of Anne Sacoolas (whose case is discussed above).[324] "Prosecutors may be worried that delays could mean witnesses might die . . . or that evidence would be lost."[325] Foreign courts administer extra procedural protections in such trials, including retrying the suspect if they are ever apprehended.[326]

The United Kingdom has procedures for trying suspects who are considered unfit to plead because they lack "sufficient intellect to comprehend the course of the proceedings so as to make a proper defence."[327] Such suspects are functionally absent from trial. Under English law, they also are immune from punishment.[328] Still, English law requires judges to hold a "trial of facts" to determine whether the suspect "did the act or made the omission charged against him."[329] The jury has two options: acquit the suspect or find the suspect did indeed perform the criminal act or omission.[330] Because the suspect is unfit to mount their own defense, special procedural protections apply. For example, the court must appoint a representative "to put the case for the defense."[331] Even the U.K. Law Commission, which issued a report critical of trials of facts, found that the "procedure, whereby counsel or a solicitor is appointed by the court to represent the accused and to present his or her case, works well in terms of assisting an unfit accused."[332] Because of the significant similarities between U.K. and U.S. law, trials of fact are a helpful template for conceptualizing how prosecution of unpunishable suspects might look here.

When trying an unpunishable suspect who will not participate in their own defense, courts should always appoint a public defender. Judges

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323. Greenblatt, *supra* note 294; Peter Wilkinson, *Meredith Kercher: Remembering the Victim*, CNN (Mar. 26, 2015, 10:49 AM), https://www.cnn.com/2011/09/29/world/europe/kercher-profile/index.html [https://perma.cc/2V3K-UNGS]; *Trial over 'CIA-Led' Kidnapping of Egyptian Cleric to Continue, Italian Judge Rules*, GUARDIAN (May 20, 2009, 10:24 AM), https://www.theguardian.com/world/2009/may/20/italy-cia-trial-cleric-kidnapping [https://perma.cc/ZWF7-WQ95].

324. Hallam, *supra* note 30.

325. Greenblatt, *supra* note 294.

326. *Id.*

327. *Rex v. Pritchard* [1836] 7 LJKB 303 (UK). I am grateful to Andrew Cornford and Antony Duff for drawing my attention to this feature of British law.

328. Criminal Procedure (Insanity and Unfitness to Plead) Act, (1991) § 4A(2)(b) (UK).

329. *Id*. § 4A(3).

330. *Id.* § 4A(3)–(4).

331. *Id.* § 4A(2)(b).

332. THE L. COMM'N, CONSULTATION PAPER NO. 197: UNFITNESS TO PLEAD 106 (2015), http://www.lawcom.gov.uk/app/uploads/2015/06/cp197_Unfitness_to_Plead_web.pdf [https://perma.cc/G2DM-TCWP].

should also admonish the jury that its task is no less serious and that the standards for conviction are no less rigorous just because the defendant is absent from trial.[333] No adverse inference should be drawn.[334] A judge could even, as R. A. Duff has suggested, "warn[] the jury to consider whether the defendant's inability to give evidence creates a reasonable doubt about his guilt."[335]

Admittedly, these precautions cannot fully reproduce the adversarial benefits of having a suspect who is competent, fully motivated, and available for trial in person. Courts have held, however, that such additional procedures are sufficient to protect the integrity of trial when a defendant refuses to participate. Where unpunishable suspects are concerned, the case for proceeding to trial with these protections is even stronger. The consequences of conviction are, by definition, significantly diminished, but victims' right to be recognized is no weaker.

2. ABLE TO PARTICIPATE

Some unpunishable suspects, like those who are unpunishable only because the limitations period has passed, could participate in their own defense. In the ideal circumstance, they would choose to do so. Their presence would best ensure the integrity of the trial process. Where victims hope to confront their wrongdoers, in-person participation from both parties is essential. Furthermore, society's expressive interests in conviction and acquittal are best satisfied when the suspect is present to receive the jury's judgment. The normative landscape becomes more complicated when defendants could participate but refuse to do so.

Given the higher criminal justice value of trying an unpunishable suspect who actually participates in their defense, the law should do what it can, short of compelling the suspect's presence,[336] to secure that result. Most crucially, prosecutors and courts should ensure to the extent possible that unpunishable suspects have notice of the charges against them, the impending trial, and the consequences of failing to appear. Though all jurisdictions already require such notice before trial of ordinary suspects,

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333. 75A AM. JUR. 2D *Trial* § 1071 (2021); *see also* James G. Starkey, *Trial in Absentia*, 53 ST. JOHN'S L. REV. 721, 738 (1979).

334. 75A AM. JUR. 2D *Trials* § 1071 (2021) ("While the jury in a state criminal trial may be apprised of the absence of the defendant from the proceedings and the reason therefor when the trial is continued in the defendant's absence, the jury should not be allowed to draw an inference of guilt from the absence."); *see Taylor v. United States*, 414 U.S. 17, 18 (1973) (per curiam) (upholding trial of absent defendant and noting that, "[t]hroughout the remainder of trial, the [trial] court admonished the jury that no inference of guilt could be drawn from [defendant]'s absence").

335. DUFF, *supra* note 178, at 33.

336. Attempting to compel an unpunishable defendant to attend trial risks converting him into a punishable defendant. As assumed here, any defendants who are presently unpunishable are properly so.

most have a very limited conception of the form such notice can take. Most require, as federal law does, that the notice occur in the courtroom in the physical presence of the defendant.[337] This means that if a defendant is not physically available or refuses to attend the initial stages of trial, they are immune to all prosecution. However, as the Supreme Court has remarked, it is not "consonant with the dictates of common sense that an accused person . . . should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial."[338]

What the Sixth Amendment rightly guarantees is notice,[339] not some specific form of notice.[340] Notice must be sufficient to permit voluntary waiver, whether that waiver occurs out of the courtroom (by failing to appear)[341] or in the courtroom (by creating a disturbance requiring removal).[342] Pennsylvania is one of the only U.S. jurisdictions to recognize that pretrial notice need not require the defendant to set foot in a courtroom; its courts are more dismissive of the distinction between a defendant who voluntarily never appears and one who initially appears and thereafter refuses to return. "To distinguish [one trial from another because the first] trial began with [the defendant] in attendance whereas [the defendant in the second] never appeared for trial is to rely on an almost meaningless distinction . . . ."[343] Pennsylvania's Rule 602(a) provides that a "defendant's absence without cause at the time scheduled for the start of trial or during trial shall not preclude proceeding with the trial."[344] A defendant can count as "absent without cause" if they have been made aware of the charges against them.[345] Where prosecutors provide adequate notice, "failure to appear initially for trial is sufficient [in Pennsylvania] to hold the trial *in absentia*."[346]

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337. FED. R. CRIM. P. 43; *Crosby v. United States*, 506 U.S. 255, 260 (1993); *see, e.g.*, FLA. R. CRIM. P. 3.180; DEL. SUPER. CT. CRIM. R. P. 43; COLO. R. CRIM. P. 43; CAL. PENAL CODE § 1043 (West 2020); ARK. CODE ANN. § 16-89-103 (2019); ARIZ. SUPER. CT. R. APP. P. CRIM. 9.1; ALASKA R. CRIM. P. 38.

338. *Crosby*, 506 U.S. at 260.

339. *United States v. Martinez*, 923 F. Supp. 861, 868 (E.D. Va. 1996) ("[N]otice to the defendant . . . [was a] linchpin[] of . . . constitutional waiver of the Sixth Amendment right . . . .").

340. *See Diaz v. United States*, 223 U.S. 442, 455, 458–59 (1912).

341. *Taylor v. United States*, 414 U.S. 17, 19–20 (1973) (per curiam).

342. *See Illinois v. Allen*, 397 U.S. 337 (1970); *see also* IOWA R. CRIM. P. 2.27(2)(b) (permitting the defendant to be excluded based on conduct); COLO. R. CRIM. P. 43(b)(2) (stating that, after being warned by the court, defendant will be removed for continued disruptive behavior); MASS. R. CRIM. P. 45(a) (permitting defendant to be removed for disruptive behavior).

343. *Commonwealth v. Sullens*, 619 A.2d 1349, 1352 (Pa. 1992).

344. 234 PA. CODE § 602(A) (2022).

345. *Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. Ct. 1997).

346. COMMONWEALTH OF PA. RULES COMM., TRIALS *IN ABSENTIA* FINAL REPORT 3 (2013), https://www.pacourts.us/assets/opinions/Supreme/out/430crim-rpt.pdf [https://perma.cc/RV62-WNTW].

There are two types of out-of-court notice that jurisdictions could deem sufficient. The more demanding route, which Pennsylvania opted for, is to require actual notice. Accordingly, a prosecutor who would like to proceed to trial with an absent defendant must show by a preponderance of the evidence that the defendant actually received sufficient notice of the charges, trial, and consequences of failing to appear.[347] As Pennsylvania's Rules Committee noted, though, this is a very difficult bar for prosecutors to meet when a defendant is not present at the start of trial.[348] For many unpunishable suspects, especially fugitives, the burden of proving actual notice likely would prove insurmountable. Jurisdictions that want the option of prosecuting unpunishable suspects could adopt the second type of out-of-court notice—constructive notice. Courts may find that communicating to a legal representative (if one exists), a last-known mailing address,[349] or news outlets,[350] etc.,[351] may suffice in those circumstances when a suspect's location proves elusive.

CONCLUSION

"[W]hen we automatically close the courthouse door . . . we implicitly express a value judgment on the comparative importance of classes of legally protected interests."[352] The courthouse door closed on Lessie Blenningfeld, Viola Fletcher, and Hughes Van Ellis, the three living survivors of the Tulsa Race Massacre.[353] No public criminal record will ever memorialize the brutality they experienced a century ago; no criminal jury will ever condemn the wrong they suffered.

The living Tulsa Race Massacre survivors are just three members of the broad class of invisible victims that this Article uncovers. For reasons that have nothing to do with strength or seriousness of their cases, various doctrines internal to criminal law bar the justice system from acknowledging them. Standing opposite every invisible victim is an

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347. *See* 234 PA. CODE § 602 cmt. (2022); *Commonwealth v. Scarborough*, 421 A.2d 147, 153 (1980).

348. COMMONWEALTH OF PA. RULES COMM., *supra* note 346, at 5 ("The Committee noted that it is unlikely that most judicial districts will be able to provide information by the summons or at the preliminary arraignment that would constitute sufficient notice of all further proceedings after the preliminary hearing, including the date of the trial.").

349. *See, e.g.*, ALA. R. CRIM. P. 3.4.

350. *See, e.g.*, LA. CODE CIV. P. 803.

351. 62B AM. JUR. 2D *Process* § 139 (2022) ("Constructive service is only allowable in certain limited cases, and statutes governing constructive or substitute service of process must be strictly complied with, and such provisions are to be strictly construed.").

352. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

353. *See* Jordan, *supra* note 6.

unpunishable criminal—someone whom the law immunizes. There are often good reasons for protecting these criminals from punishment. But the law goes too far when it also automatically prohibits courts from inquiring into their misconduct. This is unfair to invisible victims because it denies them access to our most solemn public forum. By utilizing the procedures discussed above, the law could take a more balanced approach. It could protect the most important interests of unpunishable criminals while acknowledging invisible victims' claims to moral recognition. In brief, the law should allow trials of unpunishable defendants whom invisible victims accuse of wronging them. Those trials should proceed cautiously to judgment but stop short of sentencing.

Without trial and its final judgment of guilt or innocence, the qualification "alleged" will forever punctuate any wrong an invisible victim suffers. Invisible victims must fight for narrative space in newspapers, tabloids, and civil courts, where they are up against unpunishable defendants who often wield significant social, economic, or political clout. The loudest, the most popular, and the most powerful voices become, for all intents and purposes, the truth. And invisible victims remain hidden from view.

Invisible victims deserve more. People like Judge Berman, who oversaw Epstein's one-day trial, know this. With some modest reforms, the criminal justice system could leverage pre-existing procedures to ensure that invisible victims have their day in court. While these invisible victims may never know the satisfaction of justice being done to those who wronged them, they will at least have the recognition they are due.

Over and above tangible benefits, the possibility of prosecuting unpunishable criminals also has appealing theoretical implications for a broad range of perspectives on the nature of criminal law. It casts doubt on reductive accounts that equate criminal justice with proper punishment because it draws attention to the independent value of trial. This should be a welcome result for dyed-in-the-wool retributivists who favor robust criminal justice responses—prosecuting criminals who are unpunishable allows for some movement toward justice in cases where currently there can be none. At the opposite end of the criminal theory spectrum are abolitionists who are skeptical of criminal law's punitive orientation. For them, this Article may offer a vision of criminal justice that does not necessitate punishment—trial in the absence of sanction.