REBALANCING CURRENT LIMITATIONS PERIODS TO REFLECT A SOCIETY THAT VALUES ITS MEMBERS AS MUCH AS THEIR MONEY

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> *To expose the limitations of doctrine—to reveal the poverty of legal discourse, its dependence on only a few types of feint and parry, eminently graspable—is one of the major goals of this piece.*[1]
>
> —*Clare Dalton*

> *[E]very case—like every other instance of legal discourse, is a tiny enterprise of world creation. Not an isolated enterprise, it fits in with millions of similar instances to create the fields of consciousness through which we interpret, and thus continually produce and reproduce, familiar social realities.*[2]
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> —Robert W. Gordon

I. INTRODUCTION

Statutes of limitations provide outside limits beyond which people may not seek the assistance of the state to remedy a

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1. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1009 (1985).

2. Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 216 (1987).

wrong.[3] They are among the most straightforward and uncompromising of statutory provisions. They are lists of actions that must be commenced within a given period of time,[4] and—as tempered by tolling provisions and special accrual rules which may extend the date on which the time period is said to start—they are gatekeepers to the legal system.[5] A right to seek redress of a wrong, therefore, depends on whether counsel can cognize the wrong as being within a cause of action carrying a limitations period long enough to include the date on which the claim accrued. If an action is not commenced within that time period, the state will not entertain the claim.[6]

Statutes of limitations protect parties against the unfairness of having to defend against stale claims and provide an outside limit after which claims may not be brought for the purposes of finality.[7] That is, after a certain period of time, courts explain that it is unfair to force a party to defend a claim because memories fade, documents disappear, and witnesses die.[8] Limitations amount to a balancing act between rights to seek redress from wrongs and expediency, and at some point, the state concludes that "'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'"[9] That said, as the Supreme Court of the United States has long recognized, statutes of limita-

3. WILLIAM BALLANTINE, A TREATISE ON THE STATUTE OF LIMITATIONS 188 (1812).

4. *See, e.g.*, N.Y. C.P.L.R. § 214 (2014) ("The following actions must be commenced within three years . . . .").

5. *E.g.*, Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 355–59 (1991) (highlighting a special tolling rule for victims of childhood sexual abuse).

6. This Article is limited to an analysis of the statutes of limitations state legislatures enact concerning private civil claims, with the exception of a discussion of the filing requirements of Title VII of the Civil Rights Act of 1964. The statutes of limitations applicable to private claims against government entities and federal, state, and local criminal actions are beyond the scope of this work.

With respect to some federal claims, state statutes of limitations matter. For example, where a federal statute does not provide a statute of limitations period (and 28 U.S.C. § 1658 is inapplicable, and no court has resolved the issue), federal courts frequently look to (i.e., borrow) the limitations period associated with the state law they deem most similar to the federal law at issue and use that period to determine whether the federal claim is timely. Kimberly Jade Norwood, *28 U.S.C. § 1658: A Limitation Period with Real Limitations*, 69 IND. L.J. 477, 511 (1994).

7. United States v. Kubrick, 444 U.S. 111, 117 (1979).

8. *Id.*

9. *Id.* (quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944)).

tions have a darker side; they are based on considerations of expediency, not "logic,"[10] and impose fundamentally arbitrary limits on what may be "otherwise perfectly valid claims."[11]

Part of that darkness arises from the fact that limitations statutes provide different time periods for the assertion of different causes of action, such that those with certain claims have more time to bring them than the holders of other claims. In that way, legislative choices concerning limitations periods have profound effects on society.[12] I maintain that it is improper to provide different limitations periods for different causes of action based on the fiction that different periods are required by the nature of the action or considerations of justice. That is so because the above policy reasons courts identify as justifying limitations periods apply equally across the various causes of action[13] and do not support having a shorter limitations period for intentional torts than for those sounding in negligence, or a longer limitations period for contract claims.

I further maintain that these differences in time matter, because they constitute state action reinforcing the societal positions of those who hold power over those who lack it and provide less protection to some of the most vulnerable and to those suffering intentional wrongs than to those injured as a result of contract breaches.[14] Statutes of limitations thereby rep-

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10. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

11. *Kubrick*, 444 U.S. at 125 ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims."). As the Court explained in another context:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.

Chase Sec. Corp., 325 U.S. at 314 (citing *Order of R.R. Telegraphers*, 321 U.S. at 349).

12. *See* Gordon, *supra* note 2, at 214 ("The issue is always: what kind of property, what kind of contracting regimes, should a legal system put its force behind?").

13. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 74 (2010).

14. Gordon rhetorically points out that in contract actions where the court

> makes a policy decision conferring great social power upon the party who controls the form, then equates the power regime it has just created with natural liberty—the "intentions of the parties"—and finally proclaims its reluctance except in extreme cases to displace the form on the ground that to do so would substitute the *law's* judgment for the voluntary acts of the parties!

resent social, political, and economic decisions that have the effect of favoring one form of relief over another and the interests of certain individuals over others by determining who will have the use of the power of the state to enforce their rights and who will not.[15] If legislatures are going to provide different limitations periods for different claims, and it is certainly within their power to do so, they cannot justifiably claim that the rules they enact are values-free. To the extent that the rules have the effect of reinforcing the remedies available to those who have power over those who do not, they are unjust and should be modified to be consistent with the legitimate purposes of limitations statutes.

The question is: How may that be done? I propose a single limitations period for most private common law and statutory claims and the reconceptualization of limitation periods—based on the "jurisprudence of rules"[16]—from absolute bars to standards. Those standards would permit parties to assert claims after the expiration of limitations periods—subject to certain procedural and substantive safeguards—thereby serving the legitimate purposes of limitations statutes and creating a more appropriate balance between justice and finality than strict limitations periods currently provide.

Gordon, *supra* note 2, at 214.

15. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457–62 (1897).

> People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves . . . . [A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.

Id. at 457–58. Stated somewhat more dramatically:

> Of course a party who relies on legal enforcement is not engaging in a private transaction . . . . If things go wrong, he hopes to have the option of having his interpretation of the deal backed up by state force—up to and including the 101st Airborne Division or National Guard if defendant resists enforcement. If defendant does not pay up, they will take her furniture, they will take her house, and sell it to satisfy the [judgment]. That is coercive. The problem is, what are the conditions under which state force is to be deployed? Or as one of the early Legal Realists, Arthur Corbin, put it, "[w]hat acts are those which will cause society to come forward with its strong arm?"

Gordon, *supra* note 2, at 213 (quoting Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 170 (1917)).

16. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687 (1976) ("[The jurisprudence of rules] is premised on the notion that the choice between standards and rules of different degrees of generality is significant . . . .").

II. "THE JURISPRUDENCE OF RULES"[17]

An analysis of the rules or standards to be applied to limitations periods is a work within "[t]he jurisprudence of rules[, which] is the body of legal thought that deals explicitly with the question of legal form."[18] Duncan Kennedy described the legal form based on three criteria—"formal realizability," "[f]ormalities vs. [r]ules [d]esigned to [d]eter [w]rongful [b]ehavior," and "generality vs. particularity"—each defining separate continua.[19] At base, the solution I propose and my analysis concern where statutes of limitations fall along the foregoing continua of legal forms and what that means for how we should deal with the questions of when, whether, and under what circumstances a state should impose limits on the amount of time people have to sue.[20] The analysis, therefore, must begin with a discussion of those forms.

A. Statutes of Limitations as Extreme Examples of Formal Realizability

As Kennedy explains, "formal realizability" concerns "the degree to which a legal directive has the quality of 'ruleness.'"[21] Statutes of limitations stand on the "extreme" end of the continuum of formal realizability.[22] That is so because a statute of limitations "is a directive to an official that requires him [or her] to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way."[23] For example, a rule that provides that the victim of an assault must sue within one year of the attack requires a court on January 28, 2014, to respond to the following hypothetical facts—on January 26, 2013, in a drunken rage, Jim beat and sexually assaulted his now ex-wife Jane—with an order

17. *Id.*
18. *Id.*
19. *Id.* at 1687–94.
20. *Id.* at 1685, 1687.
21. *Id.* at 1687.
22. *Id.* at 1687–88 (referring to the example of age as an indicator of capacity).
23. *Id.*

dismissing the civil claim.[24] There are generally no opportunities for the judge to consider the merits of the claim, whether there were reasons why Jane failed to file a civil action within the time provided in the rule, or whether Jim would suffer unreasonable prejudice in defending the claim on or after January 28, 2014.[25] Such a rule may be contrasted with "a standard or principle or policy"[26] that, depending upon its nature, exists toward the other end of the continuum of rule realizability.

> A standard refers directly to one of the substantive objectives of the legal order. Some examples are good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness. The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.[27]

As applied to the foregoing sexual assault case, the court might apply the standard that claims should be permitted unless the passage of time makes it unreasonable for the party to be required to defend the claim. Applying such a standard, the court might permit all claims prior to the expiration of the limitation period but thereafter conduct an analysis that considers, by way of example, explanations for the delay, including whether the woman suffered from trauma that made it psychologically difficult for her to press charges, whether she was working to reconcile with her former husband, whether she was attempting to complete divorce proceedings during the period,[28] and any influence her former husband may have exerted on her not to

24. The vast majority of states apply a one year statute of limitations to assaults and most other intentional torts. *See* VEDDER PRICE, STATUTES OF LIMITATIONS: A FIFTY-STATE SURVEY (2000), *available at* http://www.vedderprice.com/files/Publication/e1ad17ad3cc7-4c51-9d94-09145f4da91f/Presentation/PublicationAttachment/d6b692fb-94a047b4-979f-c7b3f0a2c950/c20de91d-c385-42d3-9865-7453c10832b6_document.pdf (providing a fifty-state survey of limitations periods).

25. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 112 (2005) (describing how statutes of limitations unfairly favor defendants' interests, rather than plaintiffs').

26. Kennedy, *supra* note 16, at 1688.

27. *Id.*

28. CHAMALLAS & WRIGGINS, *supra* note 13, at 74–75.

press charges.[29] The court might also consider the merits of the claim; whether the defendant admitted to the assault; whether the documentary record is strong, weak, complete, or incomplete; and whether the man would be likely to suffer unreasonable prejudice as a result of the woman's failure to bring suit within a year of the alleged attack.[30]

Kennedy points out that there are, of course, advantages to applying rules. They "are the restraint of official arbitrariness," and they provide more "certainty" than standards or principles.[31] The "official arbitrariness" to which Kennedy refers to is the risk that a judge may use a principle different than one that is intended by the directive. Kennedy argues that standards are more likely to be subject to risks ranging from "corruption to political bias" than strict rules and that the use of rules yields greater certainty, thereby helping people to plan and order their lives.[32]

He also notes, however, that there are disadvantages or "cost[s]" associated with applying rules as legal forms.[33] Applying rules in lieu of standards results in "the sacrifice of precision in the achievement of the objectives lying behind the rules."[34] For example, a rule applying a one year limitations period would likely serve to eliminate some stale claims, but it would also prohibit a great number of claimants from bringing meritorious claims that would otherwise be perfectly reasonable for the other party to defend. The enforcement of a rule applying such a short

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29. *Id.* at 73. The shorter limitations periods in domestic violence cases than in tort cases

> [have] been repeatedly cited as posing a significant obstacle for domestic violence victims because the pattern of coercion and control that characterizes domestic violence can make consideration of filing a tort claim near the time of the injury inconceivable for many victims. Consideration of a tort claim generally comes, if at all, only after the injured spouse has left the relationship and has established an independent existence for herself and her children, not infrequently years after serious incidents of battering have occurred.

Id.

30. *See* VEDDER PRICE, *supra* note 24 (surveying limitations statutes across the states).
31. Kennedy, *supra* note 16, at 1688–89.
32. *Id.*
33. *Id.* at 1689.
34. *Id.*

limitation period may, therefore, be "[vastly] over- and [potentially] underinclusive[ ]."[35]

Kennedy argues that if we are to adopt a rule over a standard, "it is because of a judgment that this kind of arbitrariness," its over- or underinclusiveness, "is less serious than the arbitrariness" that could result from corrupt or unwise judges "and uncertainty that would result from empowering the official to apply the standard[[36]] of 'free will' directly to the facts of each case."[37] I maintain, tracking Kennedy, that the risks of arbitrariness resulting from the application of limitations periods[38] are more "serious than the arbitrariness and uncertainty that would result from empowering" judges to properly balance the need to avoid prejudice to a party from the assertion of stale claims with the need to provide a forum for the adjudication of what may otherwise be meritorious claims based on the facts of each case.[39]

B. Limitations Are Formalities That Limit Rights

A second continuum of legal form Kennedy describes involves the extent to which the law deals with limiting negative behavior (e.g., rules against theft or murder) on one end and providing formalities for people to follow if they wish society to enforce agreements, for example, on the other. "[L]egal institutions aimed at wrongdoing attach sanctions to courses of conduct in order to discourage them."[40] That is to say, to discourage violence, the state imposes criminal penalties. In contrast, the state is generally thought to be—but it may not actually be—indifferent as to the effects of formalities;[41] nevertheless, these formalities may

35. *Id.*

36. *See supra* text accompanying notes 7–11 (In the context of statutes of limitations, the underlying standard would reflect the need to avoid unfair prejudice to parties from having to defend stale actions and the need to provide parties with a reasonable opportunity to seek redress of their claims.).

37. Kennedy, *supra* note 16, at 1689.

38. *Id.* at 1685 (read "rigid rules rigidly applied," particularly rules that apply different periods for difference causes of action).

39. *Id.* at 1689. As Gordon wrote, "I am . . . here arguing against . . . the kind of rule fetishism that supposes salvation comes through rules, rather than through the social practices that the rulemakers try to symbolize and crystallize, and that blinds one to the possibility of oppression through rules." Gordon, *supra* note 2, at 219–20.

40. Kennedy, *supra* note 16, at 1692.

41. *Id.* at 1693.

have disparate impacts on different groups of people. Kennedy uses the example of a requirement of a writing (a will) to permit a person to convey assets outside of her immediate family to highlight the intersection of formalities and rules.[42] He notes that the formality may be for the procedural purpose of preventing fraud, or it may be intended to influence conduct—here, to discourage people from making out-of-family transfers.[43]

With respect to statutes of limitations, it seems common to understand the lawmaker as being indifferent[44] to the conduct at issue, and that unlike with the rules of murder, the rules are mere formalities that people need to abide by or their claims will not be heard. However, the distinction between the purposes of rules of form and those of substance is not always clear. Rules of form may well be "designed to induce people to act in particular ways . . . that the lawmaker [may] not [be] indifferent as to whether the parties adopt them."[45] The principle that formalities can be actions of the state to discourage or encourage behavior is what I want to focus on here. If the state is said to pass laws against perjury to discourage lying, it has a preference as to whether people tell the truth or lie, and the law is designed to encourage truth telling. The lawmaker, then, is not indifferent to whether we tell the truth or lie under oath. It follows that rulemakers cannot properly be said to be indifferent to the substantive effects of the limitations period they enact (or fail to modify). A six year statute of limitations in a breach of contract action and a 180 day limitations period in a discrimination case (or a one year limitations period in a sexual assault case) are not mere procedural devices lacking any expression of state preference over the private ordering of things. At minimum, they represent a societal ordering in which lawmakers provide less time to bring such claims, making it less likely that the claims will be brought or that courts will be forced to adjudicate them. It is, therefore, not accurate or reasonable to understand limitations periods to be mere formalities resulting in conduct to which rule makers are

42. *Id.* at 1692.
43. *Id.*
44. *Id.* at 1691.
45. *Id.* at 1693. *See infra* Part IV(A) (discussing an example arising out of the "grand compromise" that resulted in the enactment of Title VII with a ninety day filing requirement).

indifferent.[46] The limits are similar to rules against perjury or murder in that they are designed to encourage and discourage behavior. By providing six years to bring a contract claim, the state is enabling holders of such claims (relative to claimants with causes of action bearing shorter limitations periods) to bring them. By providing one year or less to bring sexual assault, defamation, and employment discrimination claims, the state is disabling people from bringing those claims—and is expressing an implicit disinterest in dealing with them.

C. Generality vs. Particularity in Legal Forms

A third continuum Kennedy uses to analyze the legal form is the extent to which it is characterized by "generality vs. particularity."[47] By way of definition, a general rule applies in most or all cases, and a particular rule applies in few or to specific cases.[48]

> Generality means that the framer of the legal directive is attempting to kill many birds with one stone. The wide scope of the rule or standard is an attempt to deal with as many as possible of the different imaginable fact situations in which a substantive issue may arise.[49]

The "general rule will be more over- and underinclusive than a particular rule. Every rule involves a measure of imprecision vis-à-vis its purpose (this is definitional), but the wider the scope of the rule, the more serious the imprecision becomes."[50] So, the more general the rule, the greater the risk of arbitrary results—born of over- and underinclusiveness. Accordingly, if a statute of limitations were to bar *all* intentional tort claims unless they are brought within one year, it might eliminate some false claims, but it would risk being overinclusive to the extent that it would prevent the court from entertaining what would otherwise be legitimate claims.

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46. *Cf.* Kennedy, *supra* note 16, at 1691.
47. *Id.* at 1689.
48. *Id.* at 1689–90 (noting that standards can also be more general or specific).
49. *Id.* at 1689.
50. *Id.* at 1689–90.

That said, general rules do offer some advantages over particular ones. Applying *multiple* particular rules to govern a single standard risks "contradictions and uncertaint[ies] in borderline cases"[51] because, using Kennedy's example of rules providing "different age[s] of capacity for voting, drinking, driving, contracting, marrying[,] [military service,] and tortfeasing," one can see how the application of the particular rules could yield arbitrary and unjust results and understand the reasonableness of the charge that if I am old enough to be called to fight, I should be old enough to vote.[52] It follows that in the case of statutes of limitations, the use of different particular rules to govern the amount of time to bring suit for multiple different causes of action could give rise to arbitrary and unjust results.[53] A cure for such a problem would be to enact a more general rule that would apply to all causes of action.

However, as noted above, general rules risk over- and underinclusiveness. Accordingly, Kennedy points to the flexibility of standards in dealing with cases involving different facts, which may require different results. He provides the following quote to support this position:

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy modified and adapted to the circumstances of all the particular cases which fall within it.[54]

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51. *Id.* at 1690.

52. *Id.* Our society responded to such a practice with United States Constitution Amendment XXVI, Section 1 (providing that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age").

53. Kennedy, *supra* note 16, at 1690.

54. *Id.* at 1690–91 n.12 (quoting Norway Plains Co. v. Bos. & Me. R.R, 67 Mass. 263, 267 (1854)).

With respect to statutes of limitations periods, I therefore argue that we should have a general rule that applies to most private civil claims, but that rule should not operate as an absolute bar. The rule should be tempered by an understanding of the philosophy of forms and the legitimate purposes of limitations periods to give rise to a presumption of untimeliness. The presumption applicable to the limitations period may be overcome under appropriate circumstances (as set forth below) so as to reduce the over- and underinclusivness associated with its formal realizability, prevent formalities from being used to improperly or thoughtlessly control behavior, and avoid arbitrariness associated with the generality of the rule.

III. LIMITATIONS STATUTES: PROBLEMS

To this point, I have focused mostly on theory so as to present a framework for my argument that current limitations periods in the United States require modification. Through the discussion of a series of examples, I now argue that current rules—which provide that the amount of time a party has to bring a claim depend upon the nature of the cause of action—yield arbitrary, inconsistent, and unjust results. I address each of the foregoing contentions in turn.

A. Claims-Based Limitation Periods Produce Arbitrary Results

To demonstrate the point that current, claims-based limitations periods can yield arbitrary results, I begin with an example—more precisely, a story. In 1974, I lost my baseball cards to Jim Peterson.[55] Jim and I were eight years old. We both had collections of similar size and quality. One day, Jim said, "Why don't you come over and bring your baseball cards?" I loaded my cards into a big brown paper bag and brought them to his house. He said something to the effect of "let's put the cards together and see who we have." That seemed like a perfectly good idea. Before we were done sorting and comparing the names of the players to team lists, he had to go to dinner, or I had to go home. Based on the idea that we would continue at a later date, I left my cards at

55. Not his real name.

his house. He knew they were mine. I trusted that he would return them or that I would have a chance to take them back. We soon drifted apart, and I do not recall whether I asked him for my cards back. If I did, I did not press the matter. He never returned them. We reconnected at the age of seventeen or eighteen, and I asked him for the cards. He apologized and said that he would like to be friends but that he had given all the cards to his nephew years earlier and that he could not get them back.

My purpose in sharing this story is not to seek compassion or risk judgment for my naiveté, but rather to demonstrate the arbitrary nature of having different limitations periods for different causes of action. Assuming I were to have been inclined to sue Jim and the claims were timely and not tolled or somehow disallowed because of our ages, a lawyer drafting a complaint against Jim might allege unjust enrichment or breach of contract, fraud, conversion, and several counts of negligence (in keeping the baseball cards inadvertently, or in failing to return the cards, or in giving them to his nephew), and intentional and negligent infliction of emotional distress.[56] The claims carry different statute of limitations periods.[57] In New York, for example, unjust enrichment and contract claims must be brought in six years.[58] Conversion is governed by a three year statute of limitations.[59] Most claims sounding in negligence also carry three year statutes, but the intentional infliction of emotional distress claim must be brought in one year.[60] Thus, there are several potential statutes of limitations periods arising out of a single, rather straightforward set of facts.[61]

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56. FED. R. CIV. P. 8(d)(2) and the pleading rules of most states provide that parties may plead in the alternative. *E.g.*, Sioux Biochemical, Inc. v. Cargill, Inc., 410 F. Supp. 2d 785, 801 (N.D. Iowa 2005); G–I Holdings, Inc. v. Baron & Budd, 238 F. Supp. 2d 521, 535 (S.D.N.Y. 2002).

57. The claims accrue at different times and are subject to different rules for tolling. *E.g.*, *G–I Holdings, Inc.*, 238 F. Supp. 2d at 535.

58. N.Y. C.P.L.R. § 213(2) (2013). The six year period would also apply to breach of contract claims. In New York, the fraud claim must be brought within the "greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." *Id.* § 213(8).

59. *Id.* § 214(3).

60. *Id.* § 215(3); *see also* VEDDER PRICE, *supra* note 24 (identifying similar limitations periods in other states).

61. As one commentator observed:

I maintain that there is no basis for different limitations periods for different causes of action where accrual and tolling rules remain unchanged. That is so because once a claim accrues, the philosophical justifications for having time limits do not turn on the nature of the underlying cause of action.[62] The memories of witnesses do not fade faster in negligence cases than in contract cases. The rate at which documents become unavailable has nothing to do with whether actions relying upon them sound in tort or contract. And, at the risk of sounding flippant, the life expectancy of people with information about negligence or defamation cases is not generally shorter than those who have information about contractual matters. Just as having different ages of majority for various activities—like "voting, drinking, driving, contracting, [and] marrying"[63]—increases the likelihood that there will be "contradictions and uncertainty in borderline cases[,] . . . [a more] general rule [applicable to all private civil actions] . . . eliminates all [of] these [issues]."[64] In short, the different periods cannot be justified on the grounds of protecting the defendant from stale claims, and the need for closure does not justify *different* limitations periods. It follows that there is no justification for having different limitations periods for different causes of action.

> Cases . . . do not always fit neatly into one or another theory of liability, and litigants often strive to fit their claims within the theory which invokes the more favorable time period. Further, a given fact situation may give rise to more than one remedy, e.g., tort and contract, and after one remedy is barred, litigants often seek another which is still timely.

OSCAR G. CHASE AND ROBERT A. BARKER, CIVIL LITIGATION IN NEW YORK § 7.02, at 240 (2d ed. 1990).

62. CHAMALLAS & WRIGGINS, *supra* note 13, at 74.

63. Kennedy, *supra* note 16, at 1690.

64. *Id.* The fact that such a rule may be more "formally recognizable" is not an argument against the main argument set forth in this piece. My argument is not that standards are always better than rules. My argument is that the risk associated with arbitrary rules that entirely prevent people from presenting claims is too great without granting courts discretion to allow post-limitation period claims upon a showing of good cause.

B. Claims-Based Limitations Periods Risk Disparate Results in Similar Cases

The foregoing example is one of inconsistency, but in and of itself, it is not one of injustice because the limitations periods that I would be entitled to are the same as those other people holding similar claims would receive. The initial problem of injustice arises where two people suffer similar harms, but because the claims give rise to different causes of action, one of the people may seek judicial intervention, but the other may not. That is to say, people suffering similar harms should not have different time limits to petition the state for a remedy based on the manner in which the law characterizes their claims. To the extent the rules have that effect, they are likely to produce unjust results.

Consider the following hypothetical situation. In many states, defamation carries a one year statute of limitations.[65] In this example, Jane and Jim are in a long-term relationship, but they have a remarkably hostile break-up. Jim knowingly, falsely, and with intent to harm Jane publicly states that Jane, a private citizen, has a loathsome disease and that she was fired from her job because she used drugs at work.[66] She suffers $100,000 in damages as a result of Jim's public statements.[67]

Compare that case to the following one. In exchange for consideration, Sam promises Sally that he will not make the following false statement: "Sally has a loathsome disease and was fired because she used drugs at work." Sam breaches that promise, and Sally suffers $100,000 in damages. In that case, Sally would have a breach of contract claim for which she would—in most states—have at least six years to assert against Sam.[68] The shorter limitations period for defamation actions than

65. *See, e.g.*, N.Y. C.P.L.R. § 215(3); VEDDER PRICE, *supra* note 24 (including Arizona, Arkansas (slander), California, Colorado, Kentucky, Louisiana, Mississippi, Tennessee, Virginia, and West Virginia).

66. *See* Digital Media Law Project, *State Law: Defamation*, DMLP.ORG, http://www.dmlp.org/legal-guide/state-law-defamation (last updated Aug. 12, 2008) (containing a collection of examples).

67. Defamation actions are frequently subject to a one year statute of limitations period. *Id.*; VEDDER PRICE, *supra* note 24.

68. *See* VEDDER PRICE, *supra* note 24 (providing the statute of limitations for breach of contract in each state); Nolo Law for All, *Chart: Statutes of Limitation in All 50 States*, NOLO.COM, http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart

contract actions, therefore, risks the possibility that Jane will have less of an opportunity to seek redress of her claims in her defamation action than Sally would have in a contract action, even though the damages that Jane and Sally suffer and the statements of Sam and Jim are identical.

In response, one might argue that affirmatively promising not to do something creates greater duties[69] and, therefore, entitles a party to a longer period to sue than where obligations are created by the state. There is some appeal to the idea that affirmatively promising not to do something harmful and then doing it is somehow morally worse than simply doing the bad thing.[70] However, the harm to the victims in both instances is the same. Moreover, it seems fair to challenge the premise that what Sam did in the contract action was morally worse than Jim's actions in the defamation action. What did Jim intend and expect to happen in the defamation example when he made those statements against Jane? He knew that she would not want him to make them. He made them intentionally to harm her and knew that making them would cause her financial harm. He further understood that his statements were contrary to law—in that the law provides a civil remedy for slander. As members of a society, we are bound by its laws,[71] including civil laws that permit people to recover damages or receive equitable relief when others behave in uncivil ways. Where, as here, Jim intentionally harmed Jane as a result of a breach of those laws, the state should afford Jane the same amount of time to seek redress of her defamation claim as it affords Sally for her contract claim.[72]

The moral problems associated with providing more time to seek enforcement of contracts than remedy for torts on the basis

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-29941.html (last visited Feb. 17, 2015) (providing the statute of limitations for written and oral contracts in each state).

69. Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 512–13 (2008).

70. *See id.* at 519 (suggesting that soliciting someone's trust and then acting "inconsistent[ly] with such a solicitation seems doubly violent toward the values of trust").

71. H.L.A. HART, THE CONCEPT OF LAW, 211–12 (2d ed. 1994) (Even "morally iniquitous rules may still be law.").

72. One might also claim that in the contract example, Sam received consideration for his promise, but that is a matter that is more properly remedied by the law of damages than by restricting access to the courts to redress the wrong. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (explaining what constitutes consideration).

of the private (contract) versus public (tort) origin of the obligations arise from two main sources. First, like the value of contracting to human relationships,[73] norms of behavior created by society, whether they be reasonable care, strict liability, requirements of truth telling (defamation and perjury), fiduciary duties, grounds for marriage, civil union, or divorce, similarly, provide value to society and human relationships.[74] Indeed, these norms are deemed so important that the state provides them to everyone, not just those with the funds or will to contract for the services. As such, the argument that holders of contract claims deserve more time to press those claims based on the intrinsic value of norms created by consent over those created by law is not a persuasive one.[75]

Additionally, it is not clear that one can even properly argue that all contractual obligations truly arise from express private agreements so as to purport to distinguish these obligations from tort-based or statutory-based duties.[76] Indeed, despite law professors' best efforts to drill the message into the heads of students of law that promissory obligations arise out of the will of the parties—from a "meeting of the minds"[77]—the origin of contractual obligations is not as clear in law or in practice. In recognition that some may view the foregoing statement as a somewhat radical one, it seems fair to ask, "What is the source of contractual obligations, if not from the agreement of the parties?" There are, of course, times when there is an actual agreement to do certain things, but the law does not require an actual agreement for the state to enforce what it defines as a "promise."[78] Instead, the law requires a "manifestation of intention,"[79] which

73. *See* Shiffrin, *supra* note 69, at 507–08 ("[P]romises [do not] magically repel all vulnerabilities, repair all inequalities, and lock down the future. Rather, for moral agents acting in moral character, promises provide a unique and indispensable tool to manage and assuage vulnerabilities.").

74. *Id.* at 499 (addressing the value of promises and interpersonal relationships).

75. *Id.* at 500–01 (discussing obligations arising from consent).

76. Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1570–71 (2009) (Contract terms do not provide for every possible contingency, and may be viewed as incomplete to the extent that terms are not the result of an actual agreement.).

77. *See* Dalton, *supra* note 1, at 1040 (citing FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS: CASES AND MATERIALS 35–38 (2d ed. 1970)).

78. *See id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981)).

79. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 2(1)).

may be quite different than an actual agreement. Where there is merely a manifestation of assent, the source of the obligation is akin to an obligation sounding in tort because it is imposed by the state.[80] The obligation the law imposes is that people shall be bound by the manifestation of assent rather than their actual agreement.[81] Clare Dalton makes the point by tracking the definitions of "promise" and "manifestation of intention" in the Restatement (Second) of Contracts as follows:

> Take, for example, the *Restatement*'s formulation of "promise" as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Here the *Second Restatement* directs us to focus, not on all intentions, but only on manifested ones. The commentary elaborates on the significance of this distinction: "The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct . . . ."[82]

She then explains that binding parties based on what is deemed to be their manifestation of intention as opposed to their actual intention "leads to a choice between basing liability on an unreliable assertion of private intention [(i.e., the parties may not have actually intended to agree on the thing)], *or admitting and justifying the imposition of public law on the parties.*"[83] In instances where we cannot know with certainty the nature of the express promises of the private parties to one another so as to use actual promising as a moral basis for the generation of an obligation to assent, the obligation must be understood to be imposed by the state.[84] "Even the paradigmatically self-sufficient 'express' contract, in which 'the terms of the agreement are openly uttered and avowed at the time of the making,' is invaded by 'publicness' in its *interpretation* and *enforcement*."[85] If the obligation to per-

80. *Id.* at 1021 (citing RESTATEMENT (SECOND) OF CONTRACTS § 4).

81. *Id.* at 1040 (referencing RESTATEMENT (SECOND) OF CONTRACTS § 2(1)).

82. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 2(1) cmt. b) (footnote omitted).

83. *Id.* at 1041 (emphasis added).

84. Shavell, *supra* note 76, at 1570–71.

85. Dalton, *supra* note 1, at 1017 (quoting Hertzog v. Hertzog, 29 Pa. 465, 467 (1857)) (emphasis added).

form the promise—and, of course, the power to interpret and enforce it[86]—comes from the state, the assertion that there is something special or different about the formation of contracts that provides a morality-based basis for a longer period to assert contract claims over tort-based claims loses much of its initial appeal.[87]

Indeed, often disparities in power make it hard to properly point to the agreement of the purported promisor as the legal source of the parties' obligations.[88] For example, lessees and promisors to credit card and software licensing agreements rarely have the power to offer changes to the contracts they sign.[89] Internet users regularly click to accept the terms of software agreements and lack the means to negotiate the terms.[90] Yet, as noted above, the state generally enforces those agreements[91] based on the manifestation of intention and generally in the absence of a meeting of the minds.[92] It may be that the state wishes to hold people to the terms of the unilateral form, but no one should believe that the legal force of that arrangement came from the actual agreement of the parties to all the terms of the contract. Good or bad, the legal force came from the power of the state—making the source of the obligation substantively little

86. *Id.*

87. Indeed, there are specific terms that the state will impose where they are missing from a contract. For example, the Uniform Commercial Code implies the following terms, notwithstanding that the parties did not agree to them, the delivery location is presumed to be the seller's place of business, the time for shipment is presumed to be a reasonable time, and the time payment is due is upon receipt of goods. U.C.C. §§ 2-308–310 (2011). Furthermore, if society deemed the breach of contractual obligations to be somehow worse than the breach of those arising out of tort or other statute-based obligations, one would think that the damages available for breach of contract would be greater than those available for torts. But, of course, the opposite is the case.

88. *See, e.g.*, Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 909 (Fla. 2d Dist. Ct. App. 1968) (noting that courts will generally "leave the parties where they find themselves," if they are only dealing at arm's length).

89. *E.g.*, Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983–84 (9th Cir. 2007) (showing the unequal bargaining power of a promisor to a cell phone contract in terms of an arbitration clause).

90. *See, e.g.*, 5381 Partners LLC v. Shareasale.com, Inc., No. 12-CV-4263, 2013 U.S. Dist. LEXIS 136003, at *2, *24–25 (E.D.N.Y. Sept. 23, 2013) (finding manifestation of intent to be binding and enforcing internet agreements); Feldman v. Google, Inc., 513 F. Supp. 2d 229, 233 (E.D. Pa. 2007) (demonstrating an example of a situation where an individual agreed to the online terms and conditions without negotiating the contract).

91. *5381 Partners LLC*, 2013 U.S. Dist. LEXIS 136003, at *2, *19–24.

92. *Id.* at *19–24.

different than the source of the obligation in common law tort and statutory actions—and thereby eliminating the purported distinction that may be asserted as a reason to grant contract claims longer limitation periods.

Alternatively, one might argue that contract rights deserve more protection than those arising from statute-based claims or common law torts based on the assumption that contracts are more likely to be in existence longer than evidence generated as a result of a tort. Although there may be instances where that argument is true, it is not always accurate, and it is not the actual basis for the disparate treatment of the causes of action for several reasons. First, more than half of the states of the United States provide the same statute of limitations period for written contracts as for oral contracts, notwithstanding that there may be no documentary evidence of oral contracts.[93] Similarly, only one of the fifty states surveyed provides less time to bring a slander action than a libel action.[94] As with written contracts, a printed defamatory statement is more likely to leave a longer lasting evidentiary trail than that which may be left in a slander action,[95] yet the limitation periods most states apply are generally the same.[96] It follows that the actual cause for different limitations periods is not the relative permanence of the evidence of the obligation. Second, in a world where our actions are becoming more and more public, and our every move recorded, it is far from clear that a private contract will provide more or longer-lived evidence of its terms or breach than other obligations.[97] Accordingly,

93. VEDDER PRICE, *supra* note 24 (including Alabama, Alaska, Arkansas, Colorado, Delaware, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Wisconsin).

94. *Id.*

95. RESTATEMENT (SECOND) OF TORTS § 568 (1977).

96. VEDDER PRICE, *supra* note 24.

97. *E.g.*, Sam Gregory, *Cameras Everywhere: Ubiquitous Video Documentation of Human Rights, New Forms of Video Advocacy, and Considerations of Safety, Security, Dignity and Consent*, 2 J. Hum. Rts. Prac. 191, 191–207 (2010) (video surveillance used to document human rights violations); Neela Shabde & Alan W. Craft, *Covert Video Surveillance: An Important Investigative Tool or a Breach of Trust?* 81 ARCHIVES DISEASES CHILDHOOD 4, 291–94 (1999) (monitoring mothers and minors to provide evidence of abuse); Matthew Mickle Werdegar, *Lost? The Government Knows Where You Are: Cellular Telephone Call Location Technology and the Expectation of Privacy*, 10 STAN. L. & POL'Y REV. 103 (1998) (how the ability to locate one another creates evidence); Jeremy Scahill &

the argument that applying a longer statute of limitations in contract cases based on the nature of, basis of creation of, or evidentiary record generated in those actions is not a particularly strong one.

IV. CLAIMS-BASED LIMITATIONS PERIODS ENGENDER INJUSTICE

We should care about disparities in statutes of limitations periods—not just because, as shown above, they are arbitrary, produce inconsistent results, and are not based on reasoned distinctions between the causes of action—but also because those disparities may (1) interfere with the ability of people who have historically lacked social, political, and economic power to live well in our society and (2) privilege those with power.[98] In providing different limitations periods for different claims, legislatures value the interests of some claimholders over others by providing relatively longer periods of time for them to ask that the state enforce the claim at issue. As such, statutes of limitations are not mere procedural devices. They serve to foster or limit the ability of people to enforce their claims.[99]

A. Title VII Filing Requirements Evidence Societal Priorities and Injustice

Consider the potential for limitations-related injustice arising out of the filing requirements of Title VII of the Civil Rights Act of 1964.[100] By way of brief background, the Civil Rights Act provides a private employee with the right to bring a civil action seeking damages or an injunction against an employer who discriminates against the employee because of "race, color, reli-

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Glenn Greenwald, *The NSA's Secret Role in the U.S. Assassination Program*, FIRSTLOOK.ORG (Feb. 10, 2014, 12:30 AM EDT), https://firstlook.org/theintercept/article/2014/02/10/the-nsas-secret-role/ (government use of cellphone location information in assassination efforts); *Surveillance of Citizens by Government: Chronology of Coverage*, NYTIMES.COM, http://topics.nytimes.com/top/reference/timestopics/subjects/s/surveillance_of_citizens_by_government/ (last visited Feb. 17, 2015) (collecting articles about government surveillance).

98. Gordon, *supra* note 2, at 213–14.

99. Injustice need not be intentional to justify change.

100. 42 U.S.C. § 2000e–5 (2012).

gion, sex, or national origin."[101] In order to commence an action seeking redress under the statute, however, the claimant must first have filed a charge[102] with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days[103] of the "unlawful employment practice."[104] "[A]nd if the employee does not submit a timely EEOC charge, the employee may not challenge that practice in court."[105]

In *Ledbetter v. Goodyear Tire & Rubber Co.*,[106] for example, the Court held that Ledbetter's income discrimination claim was untimely because Ledbetter failed to file a charge with the EEOC within 180 days of the "unlawful employment practice."[107] By way of brief background, Goodyear employed Ledbetter as a supervisor beginning in 1979, and Ledbetter remained with the company in her supervisory position until she retired in 1998.[108] She claimed that her lower salary was based on discriminatory performance reviews and continued payments of smaller salary increases as adjusted from that lower level.[109] None of the discriminatory reviews occurred within 180 days of Ledbetter filing her charge with the EEOC, but Goodyear regularly remitted paychecks to her in amounts lower than what her male colleagues received within the charging period.[110]

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101. *Id.* § 2000e–5(g)(2)(A).

102. A notice or a response to an EEOC questionnaire. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 622 n.1 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111–2, 123 Stat. 5 (2009).

103. If the state has an agency that accepts such charges, the charge may be filed there and the 300 day period applies. *Ledbetter*, 550 U.S. at 645 n.1 (Ginsburg, Stevens, and Souter, JJ., dissenting) (citing § 2000e–5(e)(1)).

104. § 2000e–5(e)(1).

105. *Ledbetter*, 550 U.S. at 623–24 (citing § 2000e–5(f)(1)).

106. *Id.*

107. The statute provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." § 2000e–5(e)(1).

108. *Ledbetter*, 550 U.S. at 643 (Ginsburg, Stevens, and Souter, JJ., dissenting).

109. As Justice Ginsburg noted in her dissenting opinion:

> Over time . . . her pay slipped in comparison to the pay of male area managers with equal or less seniority. By the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her [fifteen] male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236.

Id.

110. *Id.* at 622 (majority opinion).

Ledbetter sued.[111] The jury accepted her position, finding "it 'more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex'" and awarding her back pay.[112] Goodyear appealed, claiming that Ledbetter had failed to allege or prove that an unlawful employment practice had occurred within 180 days of her filing with the EEOC.[113] The Court of Appeals agreed with Goodyear and reversed.[114] The Supreme Court affirmed. It held that Ledbetter's claim was untimely because Ledbetter failed to prove that a decision causing her to receive a disparately low salary occurred within the 180 day period.[115]

Although the primary issue in *Ledbetter* concerned a disagreement about what should constitute an unlawful employment practice under Title VII,[116] underlying that disagreement was a philosophical issue concerning how to best address the rights that Congress provided in the Civil Rights Act. The *Ledbetter* majority reasoned that a strict interpretation of the limitations period was needed to "'protect[ ] employers from the burden of defending claims arising from employment decisions that are long past.'"[117] In her dissent, Justice Ginsburg responded that Ledbetter's claims were "*not* long past"[118] because "Goodyear continued to treat Ledbetter differently because of sex each pay period,"[119] and that the manner in which the majority interpreted the filing deadline was inconsistent with the purposes of Title VII—to provide a remedy to members of protected classes who suffer discrimination at work.[120] Recognizing that she was not in the majority, Justice Ginsburg called on Congress to address the issue.[121] Congress responded with The Lilly Ledbetter Fair Pay Act of 2009, which provided that employees may recover for discriminatory wages so long as the effect of the discrimination—

111. *Id.* at 621–22.
112. *Id.* at 644 (Ginsburg, Stevens, and Souter, JJ., dissenting).
113. *Id.* at 622 (majority opinion).
114. *Id.* at 622–23.
115. *Id.* at 632.
116. *Id.* at 624–25.
117. *Id.* at 630 (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 256–57 (1980)).
118. *Id.* at 657 (Ginsburg, Stevens, and Souter, JJ., dissenting).
119. *Id.*
120. 42 U.S.C. § 2000e–2(a)(1) (2012).
121. *Ledbetter*, 550 U.S. at 661 (Ginsburg, Stevens, and Souter, JJ., dissenting).

not just the discriminatory decision—occurred within the 180 day period.[122]

Perhaps most significantly, however, Congress recognized that limiting the time period within which to bring claims—as in *Ledbetter*—was not just a procedural hurdle, *it undermined substantive rights*. Indeed, The Lilly Ledbetter Fair Pay Act of 2009 begins with the following congressional finding concerning the negative effects limitations periods can have on the implementation of legislation.

> The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision *undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices*, contrary to the intent of Congress.[123]

Congress thereby recognized that the manner in which the majority in *Ledbetter* interpreted the 180 day filing requirement undermined substantive rights.[124] It may well represent a good policy for people to bring claims as soon as possible after the claims accrue, but the same policy would hold true in breach of contract and negligence cases, which carry longer limitations periods.[125] Instead, it seems fair to understand legislation by the result of the application of its terms. A Title VII filing

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122. *See* § 2000e–5(e)(3)(A)–(B), 2000e–5 note.

123. § 2000e–5 note (emphasis added) (typeface altered).

124. *Id.* The Supreme Court explained in another context that

> [i]n 1972, Congress amended [Section] 706 by changing the general limitations period from 90 days to 180 days and correspondingly extended the maximum period for deferral States from 210 days to 300 days. The amendment did not make any change in the procedural scheme, however, although such a change was proposed and rejected.

Mohasco Corp. v. Silver, 447 U.S. 807, 822 (1980) (footnote omitted).

125. The Court in *Ledbetter* explained that Congress' choice of the "short [EEOC filing] deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Ledbetter*, 550 U.S. at 630–31. However, the 180 day deadline is not stayed pending negotiations between employees and employers, and it is hard to see how narrowing the window of opportunity to negotiate a private settlement increases the possibility of reaching an agreement. *Id.*

requirement that provided employees with more than 180 or 300 days to bring claims would allow of such claims more than the current one. That restriction appears to have been intentional. The legislative record reflects that the original limitations periods represented a compromise in Congress.[126] With more equanimity than I can muster, the Supreme Court described the compromise as follows:

> Since the Senate did not explain why it adopted a time limitation of only half that adopted by the House [which had provided a six month period], one can only speculate. But it seems clear that the ninety day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination. *To others it must have represented a necessary sacrifice of the rights of some victims of discrimination in order that a civil rights bill could be enacted.*[127]

While there may be truth to both statements, the language I emphasized seems to be the more logical explanation. Opponents of the bill apparently, and accurately, understood that they could undermine it by providing the shortest limitations period possible. The compromise had consequences that continue to be borne by the very people the legislation recognized as most in need of society's protection.

B. Short Limitations Periods for Intentional Torts Produce Injustice

In most states, the limitations period for intentional torts (e.g., assault, battery, false imprisonment, and intentional infliction of emotional distress) is one year.[128] Given the difference in "relative moral culpability"[129] between intentional acts and negli-

126. *Mohasco Corp.*, 447 U.S. at 819–21 (explaining the compromise that gave rise to Title VII and its limitations periods in detail).

127. *Id.* at 820 (emphasis added).

128. VEDDER PRICE, *supra* note 24.

129. CHAMALLAS & WRIGGINS, *supra* note 13, at 73; Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 174 (2001) (stating "[m]any statutes of limitations,

gent ones, it is peculiar that holders of negligence claims have more time to sue than victims of intentional torts. In addition to the difference in the nature of the underlying acts, victims of certain intentional torts are frequently less likely to be in a position to assert their claims within the limitations period provided.[130] Martha Chamallas and Jennifer Wriggins persuasively argue that short limitations periods particularly burden victims of domestic violence, given the power dynamics of abusive relationships, societal pressure, and normal human desire to keep families together.[131] They reason that the shorter limitations periods

> pos[e] a significant obstacle for domestic violence victims because the pattern of coercion and control that characterizes domestic violence can make consideration of filing a tort claim near the time of the injury inconceivable for many victims. Consideration of a tort claim generally comes, if at all, only after the injured spouse has left the relationship and has established an independent existence for herself and her children, not infrequently years after serious incidents of battering have occurred.[132]

The authors point out that state limitations statutes were originally modeled after English statutes, which formerly reflected this disparity (i.e., shorter limitations periods for intentional torts), but that English law has since changed to provide longer limitations periods for intentional torts than for negligence claims.[133] The current United States practice of providing less time for victims of domestic violence and sexual assaults to sue

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counterintuitively, let the more egregious wrongdoer rest easy well before the negligent wrongdoer can").

130. CHAMALLAS & WRIGGINS, *supra* note 13, at 74–76.

131. *Id.*

132. *Id.* at 73.

133. *Id.*; Wriggins, *supra* note 129, at 172–73 ("England and Wales . . . have a three year statute of limitations for negligence and a six year statute of limitations for intentional torts.") (citing In re Stubbings v. United Kingdom, No. 36-37/1995/542 -543/628-629, 1, 28–35 (Eur. Ct. H.R. 1996), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58079# (explaining that a six year statute of limitation applied in a civil claim seeking damages for rape, not three years, which applies in negligence cases).

than holders of negligence or contract claims is unjust and reflects the values and priorities of our society.

As to other intentional torts, they too involve intentional acts that one would think society would wish to discourage by offering longer limitations periods for victims to seek redress.[134] Statutes of limitations applicable to emotional distress claims highlight the absurdity of providing disparate limitations periods for negligent and intentional conduct. In New York, for example, a one year limitations period applies to intentional infliction of emotional distress claims, but if the tortfeasor acts negligently (as opposed to intentionally), a three year limitation period would apply.[135]

C. Contract Limitations Favor the Party in Power in Contractual Relationships

Frequently, agreements (particularly consumer agreements) are drafted by the entity with the greater economic power in the relationship and thereafter presented for execution to the inferior party.[136] If the promisor signs the form, then there is a contract—and an obligation that the state will enforce.[137] As noted above, contract terms are generally controlled by the party with greater economic power. Although there is generally a legal presumption that ambiguities are interpreted against the drafter,[138] the presumption arises only when the drafter has failed to accurately set forth what it wanted, and the very existence of the presumption is evidence of the recognized power differential.[139] By enacting and applying procedures that allow for the enforcement of contractual agreements for periods of time that are substantially longer than those provided in tort actions, the state favors the enforcement of those agreements and the ability of the holders of

134. CHAMALLAS & WRIGGINS, *supra* note 13, at 74–75; Wriggins, *supra* note 129, at 174.

135. N.Y. City Bar Ass'n, *New York City Personal Injury Lawyers*, NYCBAR.ORG, http://www.nycbar.org/get-legal-help/legal-referral-service/practice-areas/negligence-and-personal-injury-law/statutes-of-limitation (last visited Feb. 17, 2015).

136. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

137. *See* Dalton, *supra* note 1, at 1040 (quoting the RESTATEMENT (SECOND) OF CONTRACTS § 2(1)).

138. McCarthy v. Am. Int'l Grp., Inc., 283 F.3d 121, 124 (2d Cir. 2002).

139. RESTATEMENT (SECOND) OF CONTRACTS § 206.

economic power to enforce their contractual rights for longer periods of time than the victims of intentional torts or negligence. In doing so, the state uses its power to maintain the economic positions of the parties.

V. SEEKING A SOLUTION

Instead of blindly following rules adopted from England centuries ago, which even that country has now changed,[140] we should consider the legitimate policies underlying limitations periods and adopt a single period of time to bring most private civil claims. That time period, however, should not operate as an absolute bar. For the reasons set forth above, the statute of limitations should give rise to a presumption that after its passage, it is no longer fair to the party being charged to have to defend against a claim. A party seeking to commence a claim after the expiration of the applicable statute of limitations would be permitted to do so only by leave of court for good cause shown. To demonstrate such good cause and be granted leave to commence the post-limitations action, the claimant would file a motion for an order seeking permission to file a complaint.[141] The standard to be applied by a court facing such an application would require the plaintiff to prove that it filed the action in good faith and that it is likely to prevail on the merits. The claimant would also have to show a reasonable excuse for failing to file before the expiration of the limitations period and that any such delay would not be likely to subject the defendant to unfair prejudice.[142] Conveniently, courts have significant experience evaluating whether requests for extensions of time unreasonably prejudice the interests

140. Wriggins, *supra* note 129, at 172–73.

141. The procedure might be modeled in part upon the operation of the Ontario Securities Act, R.S.O. 1990 chap. S.5 § 138.8(1), which requires a plaintiff seeking to file a misrepresentation action to demonstrate that it filed the action in good faith and is likely to prevail on the merits. *See* FED. R. CIV. P. 15, 26 (authorizing the United States federal courts to extend certain time limits upon motion); David Di Paolo & Margot Finley, *Strategy for Defendants Facing a Leave Motion to Commence a Class Action Under the Securities Act*, 8 CAN. CLASS ACTION REV. 169, 170 (2013) (explaining that a court will only grant leave, if the action is brought in good faith and is likely to resolve in favor of the plaintiff).

142. In the event that such a system gave rise to too many claims, it might be amended to provide that the discretionary period contain an end date.

of parties.[143] Indeed, as Justice Ginsburg suggested in *Ledbetter*, if a defendant proved that a claimant unreasonably delayed bringing an action, and that delay caused the defendant to suffer unreasonable prejudice, the action could be dismissed based on the defense of laches.[144] Similar grounds would exist for courts to deny a motion for leave to file a post-limitations complaint.

Another possible solution would permit the claimant to file suit without leave of court but require the claimant to prove a post-limitations claim by clear and convincing evidence rather than by the preponderance of the evidence—the usual standard in civil actions.[145] Alternatively, the court might require the plaintiff to pay a higher filing fee to compensate society for the extra burden of entertaining additional actions, or such actions could be referred to mandatory arbitration. Damages post-expiration of limitations periods could also be limited to compensatory awards and rules might prohibit payments for pain and suffering or punitive damages. The point is, there are multiple alternatives to absolute bars that would avoid the practice of unjustly favoring the interests of people holding one type of claim over others and knowingly trading justice for finality.

VI. CONCLUSION

The rules we, as a society, select to govern the enforcement of our public and private relationships matter. Rules that favor one type of claim or person over another create a society where those who hold favored claims have greater protection than those who hold other claims, and barring people with legitimate claims based on time limits that fail to fully consider the reality of our economic and social relationships is a recipe for social unrest.[146]

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143. *See* FED. R. CIV. P. 8(c) (demonstrating that a statute of limitations can be an affirmative defense).

144. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 657 (2007) (Ginsburg, Stevens, and Souter, JJ., dissenting) (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002)).

145. Of course, that solution would not work in fraud actions, which are often subject to proof by clear and convincing evidence.

146. R. EDWARD FREEMAN, MANAGING FOR STAKEHOLDERS 8 (2007) (explaining that ethics involves "a conversation about how we can reason together and solve our differences, recognize where our interests are joined and need development, so that we can all flourish without resorting to coercion and violence").

Returning to and tracking Clare Dalton's argument, the story[147] most students of the law hear is that statutes of limitations are values-neutral; the rules are merely procedural devices. If we care to listen more closely, however, we will notice other parts of the story that our "culture [does not as easily] make available to us."[148] We will notice that current statutes of limitations are consistent with a society that values the enforcement of commercial contract claims over those of victims of assault and other intentional torts, discrimination, and negligence. The "languages and themes" of our culture[149] would have us believe that the shame and trauma that victims of sexual abuse suffer have no bearing on the amount of time within which the state should provide for consideration of their civil claims. We would see the provision of special courts for the litigation of commercial claims—where some of the most experienced judges apply expedited procedures to adjudicate business related cases[150]—while other claims vie for the remainder of the attention of the courts. It may be that part of the story our culture tells is that intentional torts are private matters to be dealt with privately[151]—but that would be an odd twist given that contractual obligations purportedly arise out of private relationships, and tort duties arise as a matter of common law. Such a story would also reveal that those who suffer from domestic violence, discrimination, or harm from a defective product are at least as likely to need the protection of the state as businesses seeking to enforce the terms of the contracts they draft.

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147. Clare Dalton wrote:

> Law, like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority.... When we tell one another stories, we use languages and themes that different pieces of the culture make available to us, and that limit the stories we can tell. Since our stories influence how we imagine, as well as how we describe, our relationships, our stories also limit who we can be.

Dalton, *supra* note 1, at 999.

148. *Id.*

149. *Id.*

150. *See, e.g.*, *New York State Supreme Court Commercial Division Rules*, N.Y. SUP. CT., https://www.nycourts.gov/courts/comdiv/ (last visited Feb. 17, 2015); The Philadelphia Courts, *Criteria for Assignment of Cases to Commerce Program*, PHILA. COMMERCE CT. R., http://www.courts.phila.gov/pdf/cpcvcomprg/criteria.pdf (last visited Feb. 17, 2015).

151. CHAMALLAS & WRIGGINS, *supra* note 13, at 75 (criticizing descriptions of domestic violence as a "family matter").

Although limitations periods do foster appropriate policy considerations,[152] the story I tell is not the one reflected in current rules. The proper application of the "jurisprudence of rules"[153] requires that the absolute nature of statutes of limitations be modified. To avoid arbitrary, inconsistent, and unjust results, legislatures should adopt a single limitation period for all private contract, tort, and statutory claims. Then, based on the legitimate policies of statutes of limitations, a presumption that a claim is untimely should arise, which may be overcome upon a showing of good cause.

152. *See supra* Part I. *But see* Rodney C. Roberts, *The Morality of a Moral Statute of Limitations on Injustice*, 7 J. ETHICS 115, 116–17 (2003) (arguing that no statute of limitation should apply to claims based on societal injustice).

153. *See* Kennedy, *supra* note 16, at 1687 (explaining that "[t]he jurisprudence of rules is the body of legal thought that deals explicitly with the question of legal form").