Very Important Cases ("VICs"): *United States v. Briggs* and the Status of Cases Involving Sexual Violence and Statutes of Limitations

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Introduction

UNITED STATES V. BRIGGS IS A CASE ABOUT RAPE.[1] DK, the survivor, was raped in 2005 by then-captain Michael Briggs, an officer in the United States Armed Forces.[2] She sought to prosecute the case eight years later.[3] Her efforts were denied by the Court of Appeals for the Armed Forces ("CAAF") in *United States v. Briggs* ("*Briggs I*").[4] The court, invoking the presumption against retroactivity, concluded that her time was up.[5] Her case was barred by the statute of limitations.[6]

The Supreme Court's December 2020 decision ("*Briggs II*") reversing the CAAF began with the simple phrase "the question before us is important . . . ."[7] The Court concluded that the prosecution of Briggs could proceed because, at least in the context before it, there was no statute of limitations attached to rape.[8] The Court did not in-

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1. United States v. Briggs (*Briggs I*), 78 M.J. 289, 290 (C.A.A.F. 2019), *rev'd*, 141 S. Ct. 467 (2020).

2. *Briggs I*, 78 M.J. at 290.

3. *Id.* at 291.

4. *Id.* at 294–95.

5. *Id.* at 295.

6. *Id.*

7. United States v. Briggs (*Briggs II*), 141 S. Ct. 467, 469 (2020).

8. *Id.*

voke the presumption against retroactivity.[9] However, prior to this decision, courts had invoked the presumption in similar contexts.[10]

The presumption against retroactivity is a commonly invoked canon of construction applied in cases involving previously stale claims or charges of sexual violence that are ostensibly revived by a newly amended statute of limitation.[11] The presumption dictates that statutes should not be interpreted to have a retroactive effect or to extend to conduct that predates the legislation.[12]

The absence of a presumption against retroactivity analysis in the Supreme Court's opinion in *Briggs II* may be meaningful.[13] As many have argued, court opinions implicitly determine hierarchy and rank among social groups and corresponding values.[14] Court decisions may effectually confer status to groups and individuals, thus removing status from others.[15] By determining how individual cases are decided, courts are also engaged in the process of collective value-setting.[16]

Using a framework that examines how the Court engages in the process of value-setting, this Article discusses lower court decisions and argues that, in comparison, *Briggs II* demonstrates a readiness to balance the value and status of affected groups. The Court's decision in *Briggs II* suggests a recalibration of the weight given to the relative interests, and in doing so, reconfigures the status conferred to parties in cases involving sexual violence and statutes of limitations. *Briggs II* marks a small step away from judicial conservatism in these cases and instead supports consideration of the larger set of actors that are affected, including the survivor. This suggests that the law may finally catch up with what some legislatures and advocates have recognized for years—the need to revisit and update statutes of limitations for cases involving sexual violence.

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9. *Id.*

10. *See infra* Part III.

11. *See infra* Part II.

12. *See* Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). *Landgraf* is often cited as a seminal case in modern retroactivity analysis.

13. *See infra* Part I.

14. *See* Jerome E. Carlin, Jan Howard & Sheldon L. Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9, 29 (1966) (explaining that the law influences the treatment of certain individuals and that "when laws are biased against the interests of a particular group or class of people their deprived status is given official sanction").

15. *See id.*

16. *See id.* By value-setting, this Article means the act of determining what groups or ideas ought to be favored and why.

This Article proceeds in four parts. Part I outlines the relevance of the presumption against retroactivity in cases involving sexual violence and discusses the idea of courts as value-setters and determiners of status and rank. Part II analyzes the CAAF decision as well as other recent decisions that invoke the presumption against retroactivity. Part III shows how the decision in *Briggs II* might suggest a recalibration of values in this context. Part IV concludes with suggestions on the broader impact of this decision in light of public policy.

I. Statutes of Limitations in Cases of Sexual Violence, the Anti-Retroactivity Canon, and Jurisprudence as Value-Setting

It has been said that "[c]hange is the law of life."[17] For our laws to function, they must adapt to the changing attitudes and theories of the times—dead letters replaced by something revived and new. One such example is the area of statutes of limitations pertaining to cases of sexual violence.

Statutes of limitations regarding civil and criminal sexual offenses have become more flexible over time. Some states have moved away from prescribing a fixed time for the statute of limitations and instead prescribe time limits that turn on when the plaintiff knew or should have known of the act,[18] when the plaintiff discovered that the injury was caused by the act,[19] within seven years after the plaintiff reaches the age of majority,[20] or when the plaintiff "leaves the dependency of the abuser."[21] Similarly, federal law does not impose a statute of limitations for designated sexual offenses.[22]

The reasons behind these changes are multi-faceted. One reason relates to changed perceptions about what is reasonable to expect of those who have survived sexual violence.[23] Specifically, there is grow-

17. John F. Kenney, Address in the Assembly Hall at the Paulskirche in Frankfurt (June 26, 1963).

18. *See, e.g.*, D.C. Code § 12-301(a)(11) (2001).

19. Wash. Rev. Code § 4.16.340(1)(b) (2020).

20. Fla. Stat. § 95.11(7) (2021).

21. *Id.*

22. Senior Specialist in American Public Law, Cong. Res. Serv., Statute of Limitations in Federal Cases: An Overview 2 (2017).

23. *See* Rob Frehse & Lauren del Valle, *New State Law Extends the Statute of Limitations for Rape in New York*, CNN (Sept. 18, 2019, 9:50 PM), https://www.cnn.com/2019/09/18/us/new-york-law-rape-statute-of-limitations-extended/index.html [https://perma.cc/2PWJ-RKM6] (lawmaker noting the need to give survivors more time to come forward); Dan Petrella, *Illinois Eliminates Statute of Limitations for Major Sex Crimes*, Chi. Tribune (June 26, 2019, 6:11 PM), https://www.chicagotribune.com/politics/ct-sexual-assault-statute-of-limi-

ing recognition that many victims of sexual violence may not readily remember the details of what happened[24] or may take time to collect the faculties and resources needed to take action.[25]

As the public absorbed these ideas into social consciousness, many laws were changed to align with this new way of thinking.[26] Implicit in this shift was the idea that it may be unsound policy to expect someone who experienced sexual violence as a minor, for example, to legally confront the alleged perpetrator a mere two years later or lose their ability to do so forever. Though, to be clear, many states still adhere to the traditional view and have not changed their laws.[27] On the other end of the spectrum, some advocates have pushed for completely abolishing statutes of limitations in certain cases involving sexual violence,[28] and several states have moved to that effect.[29]

In a sense, statutes of limitations in this context are unique as they perhaps frustrate their purpose. Statutes of limitations create clarity and finality.[30] Tying a statute of limitations to contextual fact-based analysis creates tension between purpose and application. This

tations-20190726-pe7hwzphovf2vnvtfoddhmhlby-story.html [https://perma.cc/92BL-2LTJ] (legislator remarking that inspiration for new law came from a survivor's experience).

24. James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, TIME (Dec. 9, 2014, 1:33 PM), https://time.com/3625414/rape-trauma-brain-memory/ [https://perma.cc/K5JQ-YFZB].

25. *See* Vito Zepinic, *Disintegration of the Self-Structure Caused by Traumatic Memories*, 5 PSYCH. & BEHAV. SCIS. 83, 83–84 (2016) (describing one impact of trauma as "difficulties in self-regulation, self-esteem maintenance, lower tolerance levels, and the sense of self-discontinuity and personal agency," and likening severe trauma to "a high-velocity bullet piercing through the body, tearing apart internal organs which are critical for survival").

26. The various laws discussed in this Article involve both criminal and civil statute of limitations. As this Article speaks more to the general assumptions underlying the statute of limitations, both civil and criminal laws are discussed interchangeably as those general assumptions can be applied to both contexts.

27. *See, e.g.*, ALA. CODE § 6-2-38 (2020); MICH. COMP. LAWS § 600.5805 (2020); N.C. GEN. STAT. § 14-32.3 (2021).

28. Symone Shinton, *Pedophiles Don't Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*, 92 CHI.-KENT L. REV. 317, 318 (2017).

29. *See, e.g.*, Alyssa Dandrea, *N.H. Considers Eliminating Statute of Limitations in Criminal Cases Involving Sexual Assault*, CONCORD MONITOR (Nov. 8, 2020, 11:13 AM), https://www.concordmonitor.com/Criminal-statute-of-limitations-sexual-assault-NH-33102726 [https://perma.cc/NL64-YN8S]; Ivey DeJesus, *Pa. House Passes Measure to Allow Voters to Create a Window for Child Sex Abuse Victims to Go to Court*, PA. REAL TIME NEWS (Jan. 27, 2021, 3:50 PM), https://www.pennlive.com/news/2021/01/pa-house-passes-measure-to-allow-voters-to-create-a-window-for-child-sex-abuse-victims-to-go-to-court.html [https://perma.cc/5NQL-C68A].

30. *Briggs II*, 141 S. Ct. 467, 471 (2020) (". . . one principal benefit of statutes of limitations is that typically they provide clarity . . . ."); s*ee also* Plaut v. Spendthrift Farm, 514 U.S. 211, 227–28 (1995) (discussing statute of limitations and the rule of finality).

is because though plain parameters still exist (satisfying clarity), those parameters may change based on the specific application (disturbing clarity). Some legislatures, however, have decided that this is a necessary tension, and the laws amending the statute of limitations remain.[31] Ultimately, courts are left to deal with the tension.

Within this tense scene arrives the presumption against retroactivity. This presumption cautions courts against interpreting statutes to apply retroactively unless the legislature specifically intended it.[32] Under this construction, the court must determine whether legislatures intended or expressly prescribed that the statute be read to have a retroactive effect.[33] If not, the presumption kicks in, and the new law is not applied.[34] The presumption places high value on the interests of the defendant and the court.[35] The former has an interest in knowing when he or she will be hauled into court or prosecuted. The latter implicates an interest in adhering to long-standing precedent and judicial economy.

Thus, sexual violence litigation is an area where these competing factors are stark, such as when a law is changed, allowing a victim to bring a claim of sexual assault when previously they could not. For example, a law is changed so a claim can be brought until a plaintiff turns twenty-five, while previously the claim was limited to a certain number of years, e.g., six. A plaintiff, now aged twenty-two, brings a claim more than six years after the alleged assault. While the claim is barred under the prior law, the claim would not be barred under the amendment because the plaintiff is under twenty-five. The presumption against retroactivity could be invoked because the statute would reach conduct that took place prior to the amendment of the statute.

31. Christine Stuart, *CT Keeping Statute of Limitations for Sex Assaults 'Devastating' for Survivors*, CT POST (Feb. 21, 2020, 11:01 AM), https://www.ctpost.com/local/article/CT-keeping-statute-of-limitations-for-sex-15073617.php [https://perma.cc/3QXG-VKQ8].

32. Landgraf v. USI Film Products, 511 U.S. 244, 273 (1994).

33. *Id.* at 280.

34. *Id.* But there are caveats to this general principle. *See id.* at 266 ("The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration."); *id.* at 267–68 (not every matter that affects conduct that predated the statute is retroactive); *id.* at 268 (there may be reason "simply to give comprehensive effect to a new law Congress considers salutary"); *see also* Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006) (conceptualizing the presumption's relevance when a law has a "retroactive consequence in the disfavored sense"); *id.* at 40 (explaining that the presumption against retroactivity is not "a tool for interpreting the statute" in the first instance).

35. *Landgraf*, 511 U.S. at 265–66, 268.

The challenges underlying this factual context may be clear. On one hand, the plaintiff may have been prevented from bringing the suit earlier because of difficulty remembering the event or because they were a minor when the assault happened. And although they have the new law on their side, the defendant and the court have finality and long-standing precedent on theirs. The protections are in opposition.

Many courts, including the lower court in *Briggs I*, have resolved this tension in favor of the presumption against retroactivity and denied the claims.[36] In doing so, courts are making a value-based judgment about who the court and the law ought to protect.

Many argue that this is precisely what courts do.[37] Certain traditions maintain that the law functions not as a "neutral instrument, but rather that it is oriented in favor of those groups or classes in society having the power to bend the legal order to their advantage."[38] This results in the law "frequently favor[ing] certain parties or roles in a relationship . . . ."[39] Through the lens of instrumentalism, sociologist Pierre Bordieu posited that jurisprudence simply reifies "direct reflections of existing social power relations, in which . . . the interests of dominant groups are expressed . . . as an instrument of domination"[40] that "legitimizes victories over the dominated," which then become accepted as true.[41] Critical race theorist Mari Matsuda makes the point that critical legal studies offer a "central descriptive message—that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power . . . ."[42]

To put it simply, the "law is an idea structured by values."[43] This view suggests that courts are engaged in value-setting, but it fails to contemplate the practical application or effect of the process. Others

36. *Briggs I*, 78 M.J. 289, 295–96 (C.A.A.F. 2019).

37. Carlin, *supra* note 14, at 29.

38. *Id.* at 12.

39. *Id.*

40. Pierre Bordieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 814 (1987) (emphasis omitted).

41. *Id.* at 817. Bordieu points to an example of labor unions stating:

> [A]s their power increased, the legal status of American labor unions has evolved: although at the beginning of the nineteenth century the collective action of workers was condemned as 'criminal conspiracy' in the name of protecting the free market, little by little unions achieved the full recognition of the law.

Id.

42. Mari Mastuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 327 (1987).

43. Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present* 29 (Wash. Univ. St. Louis Sch. L. Legal Study Rsch. Papers, Working Paper, Paper No. 19-03-01, 2019), https:/

have attempted to use a value setting lens to resolve "concrete legal and social problems in a way that 'cuts ice,'—striving to solve problems and engage value questions to enhance the development of the legal order."[44] Under this framework, law—and its "normative nature"—stems from its societal role in determining values, which may be informed by "the particular culture in which it exists."[45]

This Article's lens is derived from these concepts. Courts set values, and in that process assign favor, status, and rank to certain groups and classes—a sort of laying of the chessboard, deciding the pawns, rooks, and kings.[46] In other words, jurists help determine who or what in the eyes of the law is important. A court's decision to invoke certain legal doctrines is guided by implicit value setting. The structure and timing of those invocations can offer clues as to how the court is engaging in this value-setting process.

Part II discusses the court's decision in *Briggs I* and suggests that by invoking the presumption against retroactivity to dispose of the case, the court also made a normative-based value judgment about who the law ought to protect when there are two dichotomous interests at stake.

II. *Briggs I* and Similar Jurisprudence Invoking the Anti-Retroactivity Canon

The sexual assault at issue in *Briggs I* occurred in 2005.[47] Both parties—DK (the survivor) and Michael Briggs (the accused)—were in the United States Armed Forces.[48] Briggs was a higher-ranking

/papers.ssrn.com/sol3/papers.cfm?abstract_id=3350467 (citations omitted) (discussing major concepts of sociological jurisprudence).

44. *Id.* at 23.

45. *Id.* at 37.

46. The anti-subordination principle, advanced by critical feminist legal scholarship to enhance equal-protection analysis, makes this a point relevant doctrinally as well as theoretically. "The anti-subordination principle is a group-based perspective grounded in an understanding of the way certain groups have been historically treated unequally." Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59, 64 (1987). "[T]he principle of anti-subordination is premised on the assumption that society is a racial patriarchy. The problem with this hierarchy is that the people at the bottom, e.g., women and blacks, do not have sufficient power to control or value their own lives." *Id.* "The evil is denying women and blacks fullness as human beings by seeing them as objects to be acted upon rather than subjects entitled to control of their own lives." *Id.*

47. *Briggs I*, 78 M.J. 289, 290 (C.A.A.F. 2019).

48. *Id.*

member, and DK was a subordinate.[49] The assault was reported to law enforcement in 2014.[50]

Previously, the court had concluded that the offense of rape had no statute of limitations.[51] This is because Article 43(a) of the Uniform Code of Military Justice ("UCMJ") "provided that 'any offense punishable by death, may be tried and punished at any time without limitation.'"[52] At the time these prior cases were decided, Article 120(a) of the UCMJ "provided that rape may 'be punished by death or such other punishment as a court-martial may direct.'"[53] Therefore, under this approach, there would be no bar to DK's suit even though it was filed eight years after the rape occurred.

However, *Briggs I* deviated from this view.[54] The court concluded that Article 43(a) does not apply to the offense of rape because under Supreme Court precedent it is unconstitutional to be punished by death for raping an adult woman.[55] Therefore, the *Briggs I* court found that rape was instead subject to the five-year statute of limitations applied to offenses under the same code.[56]

In 2006, Congress amended Article 43(a) to provide that the offense of rape "may be tried and punished at any time without limitation."[57] The amendment apparently sought to clarify that the Article's dictates were not affected by constitutional changes concerning the death penalty.[58]

Despite this clarification, because the rape at issue occurred in 2005—predating the 2006 amendment—the court addressed the question of whether this change should apply retroactively to DK's case.[59] The amendment suggests that the Legislature intended no statute of limitations for rape, nevertheless, the court ultimately found that the amendment could not be applied retroactively, thus the case could not go forward.[60]

49. *Id.*
50. *Id.* at 290–91.
51. *Id.* at 291–92.
52. *Id.* at 292 (citing 10 U.S.C. § 843(a) (1994)).
53. *Id.* (citing 10 U.S.C. § 920(a) (1994) (amended 2006)).
54. *Id.* at 291–92.
55. *Id.* at 292 (referencing Coker v. Georgia, 433 U.S. 584, 592 (1977)).
56. *See id.*
57. 10 U.S.C. § 843 (2018) (Article 43(a) amended in 2006 to include rape).
58. *See Briggs II*, 141 S. Ct. 467, 472 (2020) (discussing the 2006 Amendment to Article 43(a)).
59. *Briggs I*, 78 M.J. at 293.
60. *Id.*

The court's reasoning reveals its process of value-setting. Underlying court opinions is the influence of a narrative—a story that guides the decision in the case.[61] Narratives paint a picture of what the court deems important from the slew of facts underlying a particular case and why.[62] And ultimately, it can offer clues as to what values and theories are underpinning the process of decision making.

The court's rendition of the facts shines a light on this inquiry. First, the court pointed out that the assault occurred after a night of "heavy drinking."[63] The court referenced that DK did not "immediately" report the incident to law enforcement, and that both parties "remained in the military after the 2005 *encounter*."[64] The opinion also stated that DK recorded a telephone conversation "without [Briggs'] knowledge,"[65] and in that conversation Briggs stated, "I will always be sorry for raping you."[66] Further, the court emphasized that the judicial proceedings were brought "more than eight years after the rape occurred."[67]

These details are important. Underlying them, perhaps, are long-held beliefs, suspicions, and skepticism about the veracity or importance of complaints by victims of sexual violence.[68] The court's narrative (that the assault occurred many years ago, that heavy drinking was involved, that DK continued to interact with Briggs, the use of the word "encounter" to describe rape, and the inclusion of the fact that Briggs repented) may implicitly place a value judgment on the incident and guide how the court balances competing interests.

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61. Meaning the invocation and placement of ideas, facts, and events which might suggest an orientation toward the parties, the laws, and the values at stake. *See, e.g.*, Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348 (1994) (describing the stories underlying Supreme Court cases during the Reconstruction era); Peggy Cooper Davis, Anderson Francois & Colin Starger, *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 303 (2017) (describing and analyzing the Confederate narrative or the "story in which the states' reunion after the Civil War was a modest reform by which state-sanctioned slavery was ended, but states' rights were unaffected").

62. *See* Davis, *supra* note 61; Davis, Francois & Starger, *supra* note 61.

63. *Briggs I*, 78 M.J. at 290.

64. *Id.* (emphasis added).

65. *Id.*

66. *Id.*

67. *Id.* at 291.

68. For social and political commentary on this matter see Jia Tolentino, *After the Kavanaugh Allegations, Republicans Offer a Shocking Defense: Sexual Assault Isn't a Big Deal*, THE NEW YORKER (Sept. 20, 2018), https://www.newyorker.com/news/our-columnists/after-the-kavanaugh-allegations-republicans-offer-a-shocking-defense-sexual-assault-isnt-a-big-deal [https://perma.cc/5J4R-7S9T]. Of course, this orientation toward sexual assault victims speaking out is not limited to a political party, nor is it limited to what occurred during the confirmation hearings mentioned in Tolentino's article.

This narrative is not incidental. Arguably, this rendering of the factual narrative sets up a legal narrative that might be understood as preemptively defendant-centric. Taken further, it may suggest a determination of culpability (i.e., a substantive concern) is guiding the court's inquiry into whether the claim is expired (i.e., arguably, a procedural concern). Normatively speaking, it may be unideal to blend these two together. This is because procedural rules exist to ensure even administration of the law, regardless of a party's culpability or liability.

This rendering of the facts also supports the legal narrative that it is unsound to disturb entrenched legal concepts for conduct that occurred years ago and had a minimal effect (as evidenced by DK's delay in reporting and remaining in the military) or was at least mitigated by subsequent actions (as evidenced by Briggs' apology).

Against this backdrop, the court ultimately invoked the presumption against retroactivity to dispose of the case.[69] The court's rather brief analysis on the issue simply posited that the presumption against retroactive legislation applied because there was "nothing in the text of the 2006 amendment that indicates that the amendment should have a retroactive effect."[70] The court acknowledged the fact that in enacting the 2006 amendment Congress could have simply been codifying existing law with respect to the statute of limitations for rape.[71] The court conceived this as more support against retroactive application because "if Congress did not actually decide to make the statute apply retroactively, then the presumption of non-retroactivity should control."[72]

Thus, the CAAF first rejected DK's claim based on the idea that constitutional precepts denied construing the statute in a way that removed the statute of limitations for rape.[73] Then, the court denied DK's claim, reasoning that the presumption against retroactivity was controlling.[74] Interestingly, little discussion or analysis of any of the statutes at issue took place, nor of the larger context in which those statutes were enacted. The court's analysis rested entirely on extra-statutory sources, which, in a matter that involves interpreting a statute, might leave something to be desired.

69. *Briggs I*, 78 M.J. at 294–95.
70. *Id.* at 293.
71. *Id.* at 294.
72. *Id.*
73. *Id.* at 293.
74. *Id.*

The court's rendering or understanding of the facts of the case made these outcomes inevitable. The factual narrative of ambivalence as to the veracity of DK's complaint determined what value to give to her case, and perhaps, all cases like it. Because this narrative sets up an inference that the value might be relatively low, the competing value of the interests of the court and defendant become stronger. Thus, the presumption against retroactivity becomes necessary because it supports the hierarchy of values the court has determined.

Another way of viewing it is that the factual narrative—suggesting DK's complaint may be of low value—blended with the valued legal principle of stare decisis led to the court's conclusion. Thus, the court's process of value-setting, which relies on the court's view of the facts and salience of sexual violence cases, necessarily leads to an invocation of the presumption against retroactivity.

In a different jurisdiction but somewhat similar context, the Utah Supreme Court recently reached a similar conclusion in *Mitchell v. Roberts*.[75] There, the plaintiff alleged she was sexually abused at the age of sixteen by an adult defendant in 1981.[76] She brought a civil suit against the defendant after the Utah Legislature amended the statute of limitations in 2016 such that claims could be brought by minors "within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection (7), whichever is longer."[77]

In denying the claim, the court declared it unconstitutional for the Utah Legislature to enact any legislation that retroactively extends the statute of limitations.[78] Thus, the court took the analysis one step further away from what one might consider a survivor-interested view—making it so the Legislature could not enact legislation with a retroactive reach.[79] Legislation that seeks to retroactively amend the statute of limitations in cases involving sexual violence would simply be unrecognized by the law.

The court arrived at this conclusion in two extra-statutory ways. First, it concluded through analysis of the original meaning of the Utah Constitution that a statute of limitations defense is a vested right

75. Mitchell v. Roberts, 469 P.3d 901 (Utah 2020).

76. *Id.* at 902.

77. *Id.* at 902–03.

78. *Id.* at 903.

79. *Id.* (The court deviated from *Landgraf's* directive that a retroactive effect of a statute may be permitted if the statute expressly allows it). The court stressed that under its precedent, "when we were confronted with a case in which the legislature did in fact express its intent to retroactively divest vested rights head on, we held that it lacked the power to do so." *Id.* at 908.

that the Legislature cannot take away without disturbing due process.[80] And second, it held that any legislation that seeks to retroactively change the statute of limitations implicates this due process concern because the vested right attaches at the end of a statute of limitations period.[81] From a values perspective, this analysis focuses almost entirely on the interest of the defendant and the court.

While this may make sense in the context of statute of limitations, it could also be the case that other interests and rights are at stake when a legislature enacts legislation that extends a statute of limitations and applies it retroactively. Here, as in the decision in *Briggs I*, there was little focus paid to the particulars of the statute at issue.[82] By focusing on the constitutionality of the Legislature's action, the court avoided the need to discuss the intent, purpose, or particulars of the statute.[83]

When a court invokes the presumption against retroactivity without any other analysis or source guiding its decision, it suggests that all cases brought under this context will be barred, chilling the possibility of redress for victims of sexual violence that occurred prior to the changed law. For these individuals, the letter of this law is all but dead. The resolution of these issues on this ground is dissatisfying. The value-based judgment the court makes is problematic; it weakens the notion of fairness and the potential for changed laws to have any real efficacy. And, from a value-setting lens, the court could be sending an

80. *Id.* at 912 ("'[A] vested right . . . is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.' A ripened limitations defense seems to fit within this definition, since it is at least arguably 'a legal exemption from a demand.'" (quoting THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 415 (3d ed. 1874)).

81. *See id.* at 906 ("Accordingly, after a cause of action has become barred by the statute of limitations the defendant *has a vested right to rely on that statute as a defense* . . . which cannot be taken away by legislation . . . or by affirmative act, such as lengthening of the limitation period.") (alteration in original) (quoting Roark v. Crabtree 893 P.2d 1058, 1062 (Utah 1995)).

82. *See id.* (Indeed, the bulk of the court's opinion was dedicated to its analysis of the original meaning of a "vested right," a defendant-centric frame of reference.).

83. The statute at issue offered broad protection for plaintiffs in these cases—allowing cases to be brought thirty-five years after the age of majority—and reflected a strong departure from the majority of states' statute of limitations tolling provisions in this context. *See* UTAH CODE ANN. § 78B-2-308(7) (West 2018). In that sense, perhaps both the court's decision and the statute are an example of an overreach. This may be unsurprising given the sensitive and often tension-based nature of the issue at hand.

uncomfortable message that the interests of the courts and the accused trump the survivor's interest in justice.

Perhaps in response to this tension, the Supreme Court reversed the CAAF and allowed the case to proceed, making no mention of the presumption against retroactivity.[84] As Part III argues, this absence may have implications for the Court's process of value-setting and how courts ought to analyze these cases going forward.

III. The Supreme Court's Decision in *Briggs II*: Its Scope and Implications

The unanimous *Briggs II* decision started with the simple phrase "[t]he question before us is important . . . ."[85] There were two relevant issues before the Court. First, the meaning of "punishable by death" in the statute,[86] including whether the constitutional prohibition of the death penalty for rape of an adult woman meant that rape could not be viewed as a crime punishable by death under the UCMJ.[87] And, second, whether the amendment to the statute could be applied retroactively to reach the conduct at issue.[88]

The Court's analysis narrowly focused on the particulars of the statutory context at issue, reasoning that the most natural place to find what Congress meant by "punishable by death" was in the UCMJ, not some extra-statutory source.[89] In doing so, the Court concluded that "[v]iewing Article 43(a) in context, . . . 'punishable by death' is a term of art that is defined by the provisions of the UCMJ specifying the punishments for the offenses it outlaws."[90] The Court ultimately found that Briggs' prosecution was timely.[91] Because "punishable by death," was defined by a statutory framework (not by constitutional precepts as the *Briggs I* court concluded), and because rape was considered "punishable by death" under that statutory framework, it carried no statute of limitations.[92]

84. *Briggs II*, 141 S. Ct. 467, 470–74 (2020).

85. *Id.* at 469.

86. *Id.* at 470–471.

87. *Id.* at 471.

88. Brief for Petitioner at 9–10, *Briggs II*, 141 S. Ct. 467 (No. 19-108); Brief for Respondent at 7, *Briggs II*, 141 S. Ct. 467 (No. 19-108).

89. *See Briggs II*, 141 S. Ct. at 471 ("[T]herefore, Article 120's directive that rape could be 'punished by death' is the most natural place to look for Congress's answer to whether rape was 'punishable by death' within the meaning of Article 43(a).").

90. *Id.* at 473.

91. *Id.* at 473–74.

92. *Id.* at 469–70 ("During the period at issue, Article 120(a) of the UCMJ provided that rape could be 'punished by death,' and Article 43(a), which was amended in 1986,

The Court further noted the undesirable result that may occur under a different interpretation, stating "[i]f Article 43(a) meant what respondents claim and what the CAAF held, Congress would have adopted a statute of limitations provision without knowing with certainty what it would mean."[93] In other words, if a statute of limitations turned on the Court's interpretation of the Constitution, the meaning might be ever-changing and provide little clarity to individuals.[94]

Notably, the Court referenced all the individuals who benefit from clarity, stating:

> For prosecutors handling such cases, it is obviously helpful to know the deadline by which charges must be filed. For persons who know they may be under investigation, a known statute of limitations provides a date after which they may no longer fear arrest and trial. And for rape victims, who often wrestle with the painful decision whether to identify their attackers and press charges, a clear deadline allows them to know by when they must make that choice.[95]

While the presumption against retroactivity, as invoked by *Mitchell* and *Briggs II*, locates the bulk of interest-affected analysis with the presumed defendant, *Briggs II* takes a broader view.[96] The inclusion of the victim perspective is meaningful because it suggests that the interests of a victim in these matters have become relevant in determining the outcome.[97] Victims are now "in the game." Although whether they are pawns or rooks, in the context of this decision, remains undetermined.[98]

Finally, the Court analyzed the legislative intent, remarking that "calibrating the statutes of limitations for rape and other sexual of-

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provided that an offense 'punishable by death' could be tried and punished 'at any time without limitation,' . . . ." (citations omitted)).

93. *Id.* at 472.

94. *See id.* at 472. The Court pointed out that importing reasoning from an Eighth Amendment context may prove unsatisfying because of the different interests involved in constitutional analysis and statute amendments. *Id.*

95. *Id.* at 471.

96. *See id.* at 473 (noting that it is incomplete to assume that "Congress tied the meaning of the statutes of limitations in Article 43 to the Eighth Amendment," and discussing other factors relevant to its interpretation).

97. *Id.*

98. Which is to say undetermined "in the eyes of the law" (to say nothing of other means from which these individuals may draw their power). *Cf.* Matsuda, *supra* note 42, at 396 (discussing critics of monetary reparations for past injustice noting that "[s]ome thoughtful victim group members are inclined to reject reparations because of the political reality that any reparations award will come only when those in power decide it is appropriate").

fenses in more recent years"[99] may be because "the trauma inflicted by such crimes may impede the gathering of the evidence needed to bring charges [and] [v]ictims may be hesitant for some time after the offense about agreeing to testify."[100] Again, referencing the victim's perspective contrasts the lower court's decision and has implications for the Court's process of value-setting.

One doctrinal principle that might be drawn from *Briggs II* is that the four corners of the factual and legal situation presented ought to first guide the Court's analysis. This, in a sense, is just an example of the Court adhering to the foundational concept of statutory interpretation. While the lower court in *Briggs I*, and to an extent the court in *Mitchell*, seemed to turn statutory interpretation on its head by first looking to sources outside the statute to determine its meaning, the Court's analysis in *Briggs II* returned to the traditional approach (and what some may argue the legally sound approach) of focusing first on the statutory framework at issue.[101] Further, when the Court did look to outside sources, it analyzed legislative intent and considered the societal factors potentially underpinning the statutory expansion of statute of limitations in the context of sexual violence.[102]

From the perspective that the courts are arbiters of which individuals and groups the law ought to favor, *Briggs II* may demonstrate an interest in equalizing the status of the victim. What is notable, is that the Court did not import the presumption against retroactivity into its analysis.[103] Perhaps it did not need to. After all, the main reason the lower court reached the issue is because its previous decisions indicated that under constitutional precepts, rape could not be punished by death.[104] In that sense, perhaps the Court did not mention it because doing so was unnecessary since the Court had answered the question regarding the meaning of punishable by death. The Court's interpretation of the statute may indicate its desire to avoid the question of retroactivity.[105]

While the presumption against retroactivity was not determinative, it does not mean that it was irrelevant. For one, the centrality of the presumption in the lower court's decision creates reason to think

99. *Briggs II*, 141 S. Ct. at 473.
100. *Id.*
101. *Id.* at 470 ("[A] natural referent for a statute of limitations provision within the UCMJ is other law in the UCMJ itself.").
102. *See id.* at 473.
103. *See id.* at 470–74.
104. *See Briggs I*, 78 M.J. 289, 291–92 (C.A.A.F. 2019).
105. *See* Landgraf v. USI Film Products, 511 U.S. 244, 274–75 (1994).

that there would have been some discussion of it.[106] Moreover, it was discussed by both parties in their briefs.[107] And finally, the Court's conclusion arguably still triggers the problems the presumption seeks to resolve because it has construed a statute in a way that disturbs finality.[108] The absence of analysis may suggest that (1) the Court does not view its rendering of the statute as one that triggers a retroactivity analysis or (2) the Court agrees with the argument put forth by DK that such analysis is invoked as a last resort, and such a resort was not necessary.

By not importing this analysis and, instead, considering the victim in its analysis of what was at stake, the Court reestablished a consideration of the interested parties. It sets a value that bears significance in how the law ought to consider these cases.

With these concepts in mind, the Court's statement that *Briggs II* raises "important" questions[109] may be noteworthy from a values-setting perspective. Perhaps one implication from this is that, as a matter of value, an appropriate analysis should (1) be grounded in the statute before the court (including the intent behind that statute) and (2) consider the interests of all involved.

This does not suggest that the Court underwent a process that seeks to dictate the outcome in subsequent cases. Rather, it simply suggests that the Court recalibrated an unbalanced analysis to regain a sort of equilibrium. A reminder, perhaps, that jurisprudence ought to be balanced and grounded in the law, rather than fall too far adrift into areas where one group or set of values is given too much weight.[110]

106. *See generally Briggs I*, 78 M.J. at 292–95 ("We generally presume that subsequent amendments do not apply because there is both a presumption against retroactive legislation and a presumption in favor of repose." (citations omitted)).

107. *See supra* note 88.

108. *See Briggs II*, 141 S. Ct. at 473–74. This is because the Court's conclusion arguably undoes years of CAAF precedent, concluding that rape could not be punishable by death due to Eighth Amendment precedent. *Briggs I*, 78 M.J. at 291–92.

109. *Briggs II*, 141 S. Ct. at 469. This might seem like hair splitting, but imagine the importance this might have had. Imagine the rape victim who has waited for many years to finally act and perhaps struggled with the decision to come forward for years. Her case is denied at the lower court in such a way that makes it seem that any future attempts will be futile. The Supreme Court of the United States reverses that decision and begins by remarking on the importance of your case. It is not hard to imagine the level of relief and validation that might occur from that simple statement, to say nothing of the corresponding decision. *Cf.* Matsuda, *supra* note 42, at 384 ("The decision to award reparations is an act of contrition and humility that can ease victims' bitterness and alienation.").

110. A note on the criminal justice system. Ours is one that is racially biased and dysfunctional. What is at stake for defendants in our system is much different than the civil

IV. Distilling Principles from *Briggs II* to Inform Advocacy and Decision-making

Ultimately, it may be hard to read these tea leaves with satisfying accuracy. Still, it may be possible to distill some principles from the Court's decision to guide a court looking at these cases going forward. This section, briefly, does just that.

The first is to focus clearly and particularly on the statute. It might seem a little odd as something needing to be stated, but previous court decisions addressing the presumption suggest a move away from this, relying on extra-statutory means at the outset.[111] *Briggs II* makes clear that a focus on the statute and its statutory context is essential, noting that the most obvious place to look for what it means, is "in the UCMJ itself."[112]

This principle can serve important interests. For one, it can expose overreaching legislation. As it has been noted, often laws are passed in the heat of the moment, responding to a recent event that has stirred strong emotions in the body politic.[113] There is reason to think that in the context of sexual violence, this dynamic could take hold in some instances. Judicial review that is grounded in careful consideration of the statute could serve as corrective action for laws with these sorts of dubious origins.

Additionally, focusing on the statute provides benefits for both the accused and the victim. For the victim, it can provide a precise explanation as to why a claim was dismissed. It can also reduce the bitterness and further opacity that could stem from a blanket application of a principle unrelated to the statute on which the victim bases their claim. And for the defendant, grounding the analysis in the statute may prevent disparity in the administration of the law. Though racial disparities are entrenched in the criminal justice system and will not be eradicated by simply requiring a more focused statutory interpretation (after all, many statutes inherently contain racial bias), having a clear starting point makes less likely the possibility of invoking certain doctrines in a discriminatory manner.

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context. This paper does not suggest that every case should proceed due to changes in the statute of limitations. There may be cases where on balance, it makes more sense to deny the claims or charges, especially in light of the unfair system of justice.

111. *See supra* notes 70–85 and accompanying text.

112. *Briggs II*, 141 S. Ct. at 470.

113. Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994) (noting that legislatures' "responsivity to political pressures" may cause them to pass legislation targeting "unpopular groups and individuals").

The second principle distilled from *Briggs II* is to consider the values of all parties involved—not just focusing on the accused. While there may be incredibly important reasons in the criminal context to do so, in the civil context, these need not carry as much weight, as one's liberty is not necessarily at stake. Further, the interests of the victim in either context ought to be considered. Especially as these interests may undergird some of the reasons laws extending the statute of limitations were passed in the first place.

This principle serves the extremely valuable interest of achieving equal status for women in the eyes of the law. Though men certainly experience sexual violence, women are largely overrepresented as victims.[114] Focusing the lens on the experience and effect of these laws (and their interpretation) on the victim necessarily implicates women. And in doing so, it restores the view of women as meaningful players in the outcome of these cases. In other words, it conveys a sort of power to a group that traditionally did not have it.

The third principle is to consider the legislative intent and the social context in which a law came about. Advances in science have led to recent changes in our understanding of trauma, and its impact on memory[115] and the survivor.[116] As such, the public perception and understanding of these concepts have advanced as well.[117] These new advances and understandings matter. They ought to guide the analysis of these issues. Placing too much importance on the presumption against retroactivity, though possibly serving fine goals in some instances, threatens to deaden laws for those who might benefit from the changes that have resulted from these scientific advances in understanding trauma. This principle modernizes jurisprudence and brings the courts into the "real world." Rather than acting as if the law is devoid of social and scientific context, consideration of legislative intent and social context does the opposite.

114. *Statistics about Sexual Violence*, NAT'L. SEXUAL VIOLENCE RES. CTR. (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [https://perma.cc/HQ48-ATJD] (stating that "one in five women" versus "one in 71 men" will be raped at some point in their lives).

115. *See* Alison McCook, *PTSD Sufferers Store Memories in Different Part of Brain*, PTSD ASS'N CAN. (July 15, 2015), http://www.ptsdassociation.com/ptsd-sufferers/2015/7/15/ptsd-sufferers-store-memories-in-different-part-of-brain [https://perma.cc/X8MG-9YWX].

116. *See generally* Hopper & Lisak, *supra* note 24; Zepnic, *supra* note 25.

117. *See* Katherine Gillespie, *Everybody on the Internet is Talking About Their Trauma*, VICE (Apr. 16, 2018, 3:31 PM), https://www.vice.com/en/article/vbxx88/everybody-on-the-internet-is-talking-about-their-trauma [https://perma.cc/CN3K-2PBB] (remarking on trauma as a buzz word suggesting increased—even if incomplete—knowledge about the term).

Underneath cases that cling to the retroactivity principle and related concepts lies the pernicious assumptions that these are old cases involving events that happened years ago; that the court must draw the line somewhere and it is not worth disturbing long-standing precedent or constitutional precepts; that Congress could not have meant to cause such a disturbance; that the value of judicial composure must prevail over the value of redress for some. But these assumptions are not justice. They suggest restraint. They suggest looking the other way.

The unanimous decision in *Briggs II* suggests a different approach. That the goal is not to dispose of the case as cleanly as possible; that legislatures did not make a mistake in passing a law amending the statute of limitations; and that these are not issues that need to simmer somewhere else and be addressed judicially later. The time to consider these cases is now.[118] These cases, and all the individuals that might be affected by their resolution, deserve a closer look.

Conclusion

Courts are not just engaged in the process of deciding individual cases. They also make value judgments about who the court ought to favor and, as a result, who it disfavors. In cases involving sexual violence and statute of limitations, quick invocation of the presumption against retroactivity puts a thumb on one side of the scale favoring the interests of the court and the accused. Given what is at stake, balance is essential. The Supreme Court in *Briggs II* suggests an approach for looking at these cases that might get closer to striking a balance regarding these very important cases going forward.

118. Now, COVID-19 has led to an uptick in domestic violence which includes an uptick in sexual assault and abuse. *See* Taylor Walker, *A Second, Silent Pandemic: Sexual Violence in the Time of COVID-19*, HARV. SCH. MED. PRIMARY CARE REV. (May 1, 2020) http://info.primarycare.hms.harvard.edu/blog/sexual-violence-and-covid [https://perma.cc/HX9H-2Z9B] (describing the increase in domestic and sexual violence reports since March 2020, and stating that "[i]n March, minors made up half of the calls to the National Sexual Assault Hotline for the first time ever . . . . 67% identified their perpetrator as a family member, and 79% said they were living with that perpetrator"). These individuals likely cannot leave their abusers because of state-mandated lockdowns and financial instability spurred by the crisis (or because, as the Harvard School of Medicine article suggests, they are minors). Thus, the relevance of the statute of limitations in these cases (and the purpose behind them) will likely increase in years to come.