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CRIMINAL LAW—STATUTES OF LIMITATION ON SEXUAL ASSAULT CRIMES: HAS THE AVAILABILITY OF DNA EVIDENCE RENDERED THEM OBSOLETE?

I. INTRODUCTION

Jeri Elster’s assailant broke into her home while she slept.1 He bound her, brutally raped her for two hours, and threatened to kill her before slipping away into the night.2 Terrified, Elster contacted police, who for years were unable to solve the crime.3 Seven years later, a deoxyribonucleic acid (“DNA”)4 sample taken from a man who had been jailed on an unrelated charge revealed that he was Elster’s attacker.5 The rapist was never charged, convicted, or sentenced because California’s six year statute of limitations had expired the previous year.6

The advent of DNA technology has stimulated public debate as to the viability of statutes of limitation on sexual assault crimes, which in many states range from six to fifteen years.7 Such debate has arisen in response to the media attention that stories like Jeri Elster’s have

1. See Steve Chapman, Rapists Shouldn’t Be Able to Run out the Clock, CHI. TRIB., Mar. 12, 2000, at 19, available in 2000 WL 3644726 (reporting on the California legislature’s consideration of a bill to abolish the state’s statute of limitations when DNA evidence is available). Elster, whose story is recounted in Chapman’s article, testified in front of the California legislature in support of the bill. See id. On August 24, 2000, California’s governor signed an assembly bill allowing the prosecution of sex offenses within “10 years from the commission of the offense, or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later.” A.B. 1742, 1999-2000 Reg. Sess. (Cal. 2000), available in WESTLAW, 1999 CA A.B. 1742 (SN). This legislation went into effect in January 2001. See CAL. PENAL CODE § 803 (West Supp. 2001).


3. See Chapman, supra note 1, at 19.

4. DNA is “the chemical that stores coded information on how, when, and where an organism should make the many thousands of different proteins required for life.” Denise K. Casey, Genes, Dreams, and Reality: The Promises and Risks of the New Genetics, 83 JUDICATURE 105, 107 (1999).

5. See Chapman, supra note 1, at 19.

6. See id.

received. One journalist suggests that the "near-perfect certainty" with which DNA evidence can identify the perpetrator of a sexual assault—even years after the commission of the crime—has essentially transformed statutes of limitation on sexual offenses into "obsolete law." Others express similar sentiments, arguing that if DNA evidence can exonerate innocent prisoners after years in jail, it should "work the other way."

Meanwhile, defense attorneys warn of the dangers of eliminating statutes of limitations where DNA evidence is available, arguing that the presence of DNA proves only that the suspect was present at the scene, not that he committed the crime. Such statutes, it is noted, protect criminal defendants from having to battle charges based on "stale" evidence. Surprisingly, advocates for rape victims have even been among those expressing opposition to such measures, suggesting that prosecuting sexual assault cases years later might force women who have put the past behind them to relive their trauma once again.

Several states have recently responded to public pressures by extending or modifying their statutes of limitation for sexual assault crimes. Prosecuting attorneys in some states have even resorted to filing "John Doe" indictments, identifying the unknown assailants by their DNA profiles to halt the running of the applicable limitations periods. Whether or not these measures will survive judicial scrutiny

8. Chapman, supra note 1, at 19.
10. See id.
13. See, e.g., NEV. REV. STAT. ANN. § 171.083(1) (Michie Supp. 1999) (eliminating Nevada's statute of limitations on sexual assault in cases where the victim reports the attack to a law enforcement officer within a prescribed time).
14. See David Doege, Novel Warrant IDs Suspect Only by DNA: Databank Evidence Used to Charge 'John Doe' in Rape, MILWAUKEE J. SENTINEL, Sept. 2, 1999, at 1. Authorities in Wisconsin issued one of the first such warrants on September 1, 1999, identifying the assailant as "John Doe, unknown male' with matching DNA 'at genetic locations D1S7, D2S44, D5S110, D10S28 and D17S79.'" Id. The first "John Doe" warrant issued on an unknown rapist reportedly hailed from McPherson County, Kansas, in 1991. See Michael Luo, Unnamed Man Indicted by DNA, NEWSDAY, Aug. 9, 2000, at A3, available in 2000 WL 10027824; Kelly Kagamas Tomkies, When the Case
remains to be seen, as none have yet been challenged at the appellate level in the American court system.\footnote{15}{See Eric Slater, Positive ID, SEATTLE TIMES, Feb. 20, 2000, at A3. However, Sacramento police recently arrested the first suspect to have been identified in his arrest warrant only by his DNA profile. See generally Erin Hallissy \& Charlie Goodyear, Databank Match Brings Arrest on DNA Warrant: First Such Case Raises Civil Liberty Issues, S.F. CHRON., Oct. 25, 2000, at A3, available in 2000 WL 6494988. California Superior Court Judge Tani Cantil-Sakauye recently upheld the legality of the warrant in a February 23, 2001, hearing. See Judge Upholds Arrest Warrant Based on Unknown Suspect's DNA, CHI. TRIB., Feb. 25, 2001, at 7, available in 2001 WL 4045445.} Has the advent of DNA technology indeed rendered the policy justifications favoring statutes of limitation in sexual assault cases obsolete? This note addresses this question by first reviewing the traditional policies that favor criminal statutes of limitation. Next, this note discusses DNA evidence and its use in the context of sexual assault crimes. In addition, it examines how various state legislatures and law enforcement officials have responded to concerns that criminal statutes of limitation are unfair in light of the accuracy and longevity of DNA evidence. Finally, this note submits that the availability of DNA evidence has significant implications for the policies behind statutes of limitations on sexual assault crimes and proposes suggestions\footnote{16}{These suggestions do not apply to sexual assault crimes involving minor victims, as such offenses raise special policy concerns that are beyond the scope of this note.} for a statutory solution that would maintain some protections for criminal defendants and yet minimize the injustice created by the statutes that have allowed perpetrators—like the one who raped Jeri Elster—to walk free.
II. BACKGROUND

Sexual assault is a painfully traumatic experience that imposes upon its victims feelings of fear, self-blame, anxiety, and devastation. Women are not the only targets of sexual assault crimes—men and, tragically, children become victims as well. The Bureau of Justice Statistics recently reported a 13.3% increase in the overall number of sexual assaults (including attempts) perpetrated in the United States in 1999, indicating that this particular crime remains a prevalent area of national concern.

Sexual assault, like most other crimes, is subject to statutes of limitations in many states. Statutes of limitation are deeply embedded in the legal system, and they serve as a way to limit the possibility of a prosecution after a certain period of time has passed. However, most states have eliminated their limitation periods on sexual assault crimes.

17. Throughout this note, "sexual assault" refers primarily to "rape" simply because most DNA profiling cases involve rape. See George W. Clarke & Catherine Stephenson, Commentary to Edward Connors et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial xxiii, xxiii (1996). Arkansas defines rape as:

[S]exual intercourse or deviate sexual activity with another person: (1) By forcible compulsion; or (2) Not his spouse, who is a patient or resident of a hospital, nursing home, human development center, or other similar facility, and who is incapable of consent because he is mentally defective or mentally incapacitated; or (3) Who is incapable of consent because he is physically helpless; or (4) Who is less than fourteen (14) years of age . . . or (5) Not his spouse who is less than sixteen (16) years of age and who is incapable of consent because he is mentally defective or mentally incapacitated.


21. See Rennison, supra note 19, at 3.


24. See supra note 7. Nevertheless, a number of states have eliminated their limitation periods on sexual assault crimes. See Jonathan W. Diehl, Note, Drafting a Fair DNA Exception to the Statute of Limitations in Sexual Assault Cases, 39 JURIMETRICS J.
in the American judicial system, tracing their ancestral roots to the real property laws of ancient Greece. In the criminal context, these periods of limitation serve to define the time frame within which the State must commence an action for a specified offense. Criminal statutes of limitation are not mandatory; state legislatures may therefore change or eliminate these statutes at their discretion.

Enforcing limitation periods inevitably creates a tension between society’s need to punish criminal behavior and the necessity of protecting defendants from the prejudice created by the passage of time. Because courts are mindful of the potential prejudice created for the defendant who has to battle charges based on acts in the distant past, criminal statutes of limitation are generally construed liberally, “in favor of repose.” However, the relatively recent appearance of DNA technology on the judicial landscape has upset this balance, leading many to question the justifications for continuing to limit the time within which the State can prosecute criminal defendants for sexual assault crimes.

A viable solution to the issues that have begun to arise as a result of growing tensions between new technology and old laws necessitates an understanding of the traditional policies favoring criminal statutes of limitation as well as the nature of DNA evidence itself. This section begins by identifying the traditional rationales behind criminal statutes of limitation. Next, it provides an overview of DNA evidence and its importance in the prosecution of sexual assault crimes. This section then concludes by discussing recent strategies that prosecutors and legislatures have begun to employ in response to concerns about the

25. See Ochoa & Wistrich, supra note 11, at 454 & nn.7-8.
27. See Adlestein, supra note 23, at 250-51.
31. See generally Chapman, supra note 1, at 19.
perceived unfairness of statutes of limitation on sexual assault prosecutions.

A. Traditional Policies Favoring Criminal Statutes of Limitation

One of the primary policy justifications for imposing time limits on the prosecution of crimes is the desirability of prosecuting a criminal defendant using relatively fresh evidence. Limitation periods inherently recognize that the reliability of certain kinds of evidence diminish over time: "[M]emories fade, witnesses die or leave the area, and physical evidence becomes more difficult to obtain, identify, or preserve." According to the drafters of the Model Penal Code, the imposition of statutes of limitation on certain crimes reduces the probability of errors in conviction. These statutes thereby protect all potential defendants, especially those who are innocent.

Protecting criminal defendants from the threat of an unfair trial by encouraging law enforcement officials to investigate and prosecute crimes in a timely manner has often been cited as an important policy justifying criminal statutes of limitation. When the State is able to delay prosecution for prolonged periods of time, criminal defendants are penalized for the State's negligence. As the United States Supreme

32. See Model Penal Code and Commentaries § 1.06 cmt. 1 (1985). See also United States v. Ewell, 383 U.S. 116, 122 (1966) (recognizing that "statute[s] of limitation [are] usually considered the primary guarantee against bringing overly stale criminal charges"). This particular policy justification has held less importance in cases of childhood sexual abuse. See Gary M. Ernsdorff & Elizabeth F. Loftus, Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression, 84 J. CRIM. L. & CRIMINOLOGY 129, 154 (1993) (cautioning against the use of previously repressed memories to prosecute defendants suspected of sexually abusing children years after the alleged abuse). In 1993, seven states had statutes that permitted prosecution of childhood sexual abuse based on previously repressed memories. See id. at 153 n.120. Ernsdorff and Loftus note that the reliability of repressed memories is questionable at best. See id. at 154.


34. See id.

35. See Ochoa & Wistrich, supra note 11, at 462 (observing that "[e]very person, whether innocent or not, is a potential defendant").

36. See, e.g., Adlestein, supra note 23, at 262. See also Toussie v. United States, 397 U.S. 112, 115 (1970) (remarking that "[s]uch a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity").

37. See Doggett v. United States, 505 U.S. 647, 657 (1992). It should be observed, however, that criminal defendants have access to other protections besides statutes of limitation; the Sixth Amendment speedy trial guarantee, for example, offers some
Court noted in *Doggett v. United States*, law enforcement officials may be tempted to put off prosecuting those cases that are low on the priority list, thereby creating more prejudice for some criminal defendants than others. Overburdened by limitations on personnel and financial resources, government officials may not be persuaded into prompt action by public pressure alone. Statutes of limitation thus, according to some, serve to assure vigilance on the State’s part.

Another policy justification typically cited in favor of time limits on prosecuting crimes is the idea that the need for punishment wanes as time passes. Various legal scholars note that society’s instinct for retribution may, in some instances, fade, giving way to mercy for the defendant facing charges for forgotten acts. Theoretically, those who have committed criminal acts in the past and have not since engaged in criminal behavior have “self-rehabilitated,” making punishment long after their wrongs moot. Those who do not adapt to society’s rules and who continue to engage in crime will face prosecution for their more recent acts.

Some suggest that statutes of limitation serve to provide “security and stability to human affairs” by promoting repose. Although protection against unwarranted delays for the defendant who has been arrested, formally charged, or indicted. See U.S. CONST. amend. VI; United States v. Marion, 404 U.S. 307, 320 (1971).

39. See Doggett, 505 U.S. at 657.

41. See id.
42. See MODEL PENAL CODE AND COMMENTARIES § 1.06 cmt. 1 (1985); Adlestein, supra note 23, at 265.
43. This view has been criticized—one scholar notes that the “retributive impulse” simply does not fade in cases “involving homicide or lasting physical or psychological damage.” Adlestein, supra note 23, at 265-66.
44. See MODEL PENAL CODE AND COMMENTARIES § 1.06 cmt. 1 (1985); Adlestein, supra note 23, at 265.
45. See Note, supra note 40, at 634.
46. See MODEL PENAL CODE AND COMMENTARIES § 1.06 cmt. 1 (1985); Adlestein, supra note 23, at 265.
47. MODEL PENAL CODE AND COMMENTARIES § 1.06 cmt. 1 (1985) (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)). Authors Ochoa and Wistrich explain that “repose” embodies four intertwined concepts: (1) permitting “peace of mind;” (2) maintaining “settled expectations;” (3) “reduc[ing] uncertainty about the future;” and (4) “reduc[ing] the cost of measures designed to guard against the risk of untimely claims.” Ochoa & Wistrich, supra note 11, at 460. Here, “repose” includes the first three of these four ideas; this note separately discusses the costs associated with...
wrongdoers will be among those who rest easy knowing they are beyond the reach of justice, those who are innocent or unsure will also be free from the threat of erroneous prosecution. Witnesses, and arguably victims, can maintain the peace of mind that they have regained in the years since the crime. Law enforcement officials can also close old cases and focus attention and resources on newer cases.

Other policy rationales typically focus on the costs associated with having no time limits for prosecuting criminal offenders. For instance, threats of blackmail may loom indefinitely for the actor whose crimes are known to others. Such activity has the potential to lead to additional prosecutions, thus tying up more law enforcement and judicial resources.

Because various types of evidence deteriorate over time, litigation becomes more expensive than it would be if the prosecution were based on more recent events. Costs also increase as it becomes more difficult to find witnesses and to reconstruct the events surrounding the crime. Additionally, society bears the costs of continuing unproductive investigations, punishing wrongdoers who are caught years later, and losing productive members of society when wrongdoers have successfully rehabilitated.

The policies that have typically served to justify limitations on criminal prosecutions are complex and intertwined. They reflect a balance between the interests in protecting the criminal defendant from potential prejudice and in attaining efficiency and resolution. Regardless of the tools that prosecutors use to bring criminal defendants to justice, these concerns always remain in the backdrop. Nevertheless, the availability of DNA evidence has introduced some new twists to the balance of interests.

"untimely claims." See infra notes 52-57 and accompanying text.

48. See Ochoa & Wistrich, supra note 11, at 461.
49. See id. at 462.
51. See Diehl, supra note 24, at 435.
52. See Model Penal Code and Commentaries § 1.06 cmt. 1 (1985); Adlestein, supra note 23, at 265.
53. See Diehl, supra note 24, at 436.
54. See infra Part II.B.2.b.
55. See Ochoa & Wistrich, supra note 11, at 480.
56. See id.
57. See Adlestein, supra note 23, at 266.
B. DNA Evidence: An Overview of Its Importance in Prosecuting Sexual Assault Crimes

1. Uses of DNA Evidence

Touted by one commentator as "the greatest single breakthrough in the fight against crime since fingerprints," forensic DNA analysis has, in recent years, gained recognition as a powerful prosecutorial tool. Widespread acceptance of DNA technology by both scientific and legal communities has led to the use of DNA fingerprinting to identify and prosecute violent offenders and to exonerate those who are innocent. Before the advent of DNA technology, law enforcement officials often relied on forensic analysis of gene products—such as ABO blood groups—rather than the genes themselves to identify criminal offenders. Its uses have not been limited to identifying criminals; DNA fingerprinting has proved invaluable in paternity, adoption, and immigration cases. It has also aided in the identification of missing persons, as well as wartime and catastrophe victims. Even DNA evidence collected from non-human sources, such as dogs, cats, viruses, and plants, has made its way into courtrooms as trial evidence.

58. Renskers, supra note 30, at 309 (quoting DNA Testing on the Increase, 131 SOLIC. J. 1596 (1987)). Dr. Alec Jeffreys, University of Leicester genetics professor, coined the term "DNA fingerprinting," analogizing the unique nature of DNA profiles to that of fingerprints. See id. at 309 n.3.


60. See Renskers, supra note 30, at 310.


62. See Walter F. Rowe, Commentary to EDWARD CONNORS ET AL., CONVICTED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xv, xv (1996).


64. See Casey, supra note 4, at 109.


66. See Casey, supra note 4, at 109.

67. See id. at 109-10. In 1995, for example, an Arizona jury convicted a murderer based on DNA evidence obtained from the pods of a palo verde tree that investigators found in the bed of his pickup truck and at the murder scene. See State v. Bogan, 905 P.2d 515 (Ariz. Ct. App. 1995).
Although the human genetic make-up differs from person to person by a mere one to two tenths of one percent, the probability of two people sharing the same DNA profile is as minute as one in thirty billion. Practically all body fluids and tissues contain DNA, meaning that semen, blood, hair, skin cells, and saliva can all yield viable DNA profiles. Sexual assault crimes, in particular, yield rich DNA evidence, often from semen that the perpetrator has deposited.

a. DNA Profiling

After investigators collect DNA evidence from a crime scene, laboratory specialists isolate the DNA molecule from the sample and split it into fragments using enzymes. These fragments, known as hypervariable minisatellite regions, are placed on a semisolid gel, to which an electrical current is applied. The fragments “migrate” across the gel, the smaller fragments traveling greater distances than the larger ones. The DNA fragments are then transferred onto a nylon mem-

68. See Casey, supra note 4, at 107.
69. See Renskers, supra note 30, at 313. There is one notable exception to this statistic—identical twins share the same DNA profile. See Yale H. Yee, Note, Criminal DNA Data Banks: Revolution for Law Enforcement or Threat to Individual Privacy?, 22 AM. J. CRIM. L. 461, 463 (1995).
70. See Renskers, supra note 30, at 311. Although blood itself contains DNA, the mature red blood cells do not. See Casey, supra note 4, at 107.
71. See Renskers, supra note 30, at 311-12.
72. See Clarke & Stephenson, supra note 17, at xxiii. Clarke and Stephenson note that the DNA evidence used to exonerate 26 of the 28 inmates discussed in the Department of Justice case study derived from analysis of the sperm contained in the semen samples collected from the victims. See id.
73. See Renskers, supra note 30, at 312. For a more detailed, scientific explanation of this process, see NRC, supra note 63, at 15-18. Described in the book as “VNTR typing,” this method closely describes the second phase of a newer technique called Polymerase Chain Reaction using Short Tandem Repeat markers (“PCR-STR”), in which the DNA molecules in a given sample are replicated before they are split into fragments. See Christopher H. Asplen, From Crime Scene to Courtroom: Integrating DNA Technology into the Criminal Justice System, 83 JUDICATURE 144, 148 (1999); NRC, supra note 63, at 70. PCR-STR enables forensic laboratory specialists to analyze trace quantities of DNA evidence that would have been too small for scientists to analyze using older methods. See NRC, supra note 63, at 23. For a more in-depth discussion of PCR-based methods, see id. at 69-73.
74. See Renskers, supra note 30, at 312.
75. See NRC, supra note 63, at 15-16.
76. See id. at 16.
brane, and radioactive probes are applied.\textsuperscript{77} These probes, which consist of radioactive markers that attach to the fragments, produce the telltale bands of a DNA profile when the membrane is applied to photographic film.\textsuperscript{78}

In cases where there is a known suspect, investigators compare the DNA profile derived from crime scene evidence to the suspect's profile to determine if there is a match.\textsuperscript{79} If the two sample DNA profiles do not match, officials can rule out the suspect as the perpetrator.\textsuperscript{80} When the samples do match, investigators face three possible explanations for the results: (1) the two samples came from the same individual;\textsuperscript{81} (2) an error occurred either during the collection of the DNA sample or during its analysis in the laboratory;\textsuperscript{82} or (3) the samples came from two different persons with the same DNA profile.\textsuperscript{83} It is this last probability that scientists statistically compute to determine the probability that the suspect was the person who left the DNA at the scene.\textsuperscript{84} Because such a probability is "staggeringly small," asserts one commentator, "individuals may be positively identified or excluded from suspicion on the basis of their DNA."\textsuperscript{85}

b. DNA Databases

Law enforcement officials periodically face crime investigations where there is no known suspect.\textsuperscript{86} For instance, approximately thirty

\begin{itemize}
\item \textsuperscript{77} See id.
\item \textsuperscript{78} See id.
\item \textsuperscript{79} See Yee, supra note 69, at 464.
\item \textsuperscript{80} See NRC, supra note 63, at 51. If such an exclusion takes place prior to litigation, the suspect almost never goes to trial. See id.
\item \textsuperscript{81} See NRC, supra note 63, at 10.
\item \textsuperscript{82} See id. Such errors, notes one commentator, lead to inconclusive results, rather than to false matches. See Renskers, supra note 30, at 313. However, if samples are accidentally (or purposely) exchanged, a false match could occur if the sample tested did not actually come from the crime in question. See NRC, supra note 63, at 81-82. Overall, errors are more likely to lead to false exclusions rather than false matches. See id. at 51. See also discussion infra Part II.B.2.a.
\item \textsuperscript{83} See NRC, supra note 63, at 10.
\item \textsuperscript{84} See id.
\item \textsuperscript{85} Renskers, supra note 30, at 313-14. See also supra note 69 and accompanying text.
\item \textsuperscript{86} See, e.g., Jeff Jones, Indictment IDs Suspect by His DNA, ALBUQUERQUE J., Apr. 20, 2000, at A1, available in 2000 WL 18944892 (reporting on the investigation and indictment of an unknown serial rapist in New Mexico). One journalist reported that
\end{itemize}
percent of sexual assault victims do not know their attackers. In such cases, investigators are left without individual suspect profiles against which to compare DNA evidence collected from the victim or the crime scene.

In recent years, the Federal Bureau of Investigation, with the cooperation of a number of states, has established the Combined DNA Index System ("CODIS") to assist law enforcement officials in identifying suspects in cases where those offenders are unknown. Investigators using this system can compare DNA profiles generated from crime scene evidence with profiles stored on local or national DNA databases to obtain a match, which they then use to identify and arrest possible suspects. The "cold hits" that result from this matching process identify approximately one offender for every 1,000 samples contained in the CODIS system.

87. See RENNISON, supra note 19, at 8. Because unidentified assailants are harder to find, the applicable statute of limitations for rape is more likely to expire in these cases. See Diehl, supra note 24, at 439.

88. See NRC, supra note 63, at 133-34.

89. This identification system, which utilizes computer software and uniform analysis methods, has yet to realize its full potential. See Asplen, supra note 73, at 146; Hibbert, supra note 65, at 772 n.14. Not all states have access to CODIS, and those that do are not entirely consistent with regard to the classifications of criminals they include in their databanks or the types of criminal investigations warranting database searches. See Hibbert, supra note 65, at 773, 795. Nevertheless, all 50 states have enacted laws establishing DNA databanks, and all require certain classes of offenders to submit DNA samples for analysis and inclusion in those databases. See Asplen, supra note 73, at 147; Hibbert, supra note 65, at 767.

90. See Asplen, supra note 73, at 147.


92. Rodney Bowers, DNA Links Suspect to Benton Burglary, ARK. DEMOCRAT GAZETTE, Apr. 8, 2000, at B1 (describing a "cold hit" as the result of "matching a DNA sample to a previously unknown suspect").

93. See Asplen, supra note 73, at 147. CODIS has also proved useful in linking unsolved crimes to each other, including those committed in more than one state. See Hibbert, supra note 65, at 779-80.
c. Defendants and DNA

In addition to its widespread use by law enforcement officials and prosecutors, DNA technology has become increasingly useful for defendants and their attorneys.\(^94\) As many as one-third of primary suspects in rape cases are excluded before those cases ever reach the courtroom, thus quickly eliminating erroneous leads.\(^95\) Those who are indeed guilty may choose to plead and thereby avoid jury sentences.\(^96\)

One of the more striking defense uses of DNA profile comparison has been its recent employment in establishing the innocence of convicted offenders.\(^97\) A number of individuals convicted of violent crimes before the widespread acceptance of DNA technology in United States courtrooms have sought reevaluation of the evidence collected in their cases, resulting in their exoneration and release from prison.\(^98\) To date, at least seventy-two inmates—eight of whom were on death row—have been exonerated because post-conviction DNA profile comparisons revealed that their DNA profiles did not match the crime scene DNA evidence.\(^99\)

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\(^94\). See Renskers, supra note 30, at 310.
\(^95\). See NRC, supra note 63, at 11. Elimination of suspects before trial also benefits investigators, who are able to minimize wasted efforts. See id.
\(^96\). See Renskers, supra note 30, at 310.
\(^97\). See Rowe, supra note 62, at xv.
\(^98\). See id.
\(^99\). See Morning Edition (National Public Radio broadcast, Aug. 29, 2000) (transcript available at NPR Online) (visited Mar. 1, 2001) <http://www.npr.org/inside/transcripts/>. Those released had served, on average, seven years for crimes they did not commit. See Janet Reno, Message from the Attorney General, Edward Connors et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial iii, iii (1996). For more information about the use of DNA to exonerate persons who have been wrongly convicted, see Cardozo Law Innocence Project (last modified Oct. 13, 2000) <http://www.cardozo.yu.edu/innocence_project/>. The Innocence Project—a pro bono legal assistance program at the Benjamin N. Cardozo School of Law—has been the driving force behind overturning erroneous convictions through DNA analysis. See id.
2. The Accuracy and Longevity of DNA Evidence

a. Accuracy

The widespread use of DNA technology in the criminal justice system to both inculpate and exculpate suspected offenders has occurred primarily because of the accuracy with which it can identify specific individuals. According to the National Research Council, “[t]he technology for DNA profiling and the methods for estimating frequencies and related statistics have progressed to the point where the reliability and validity of properly collected and analyzed DNA data should not be in doubt.” The statistical odds of two random people sharing the same genetic profile is so small, according to one commentator, that positive identification is now possible. DNA analysis is not infallible, however, as it is subject to human error at each stage, from the field to the laboratory.

Errors in sample collection and handling can occur when investigators mislabel items of evidence or do not follow strict chain of custody protocols. Such mistakes may mean that the laboratory receiving the evidence will test the wrong sample, yielding incorrect results and perhaps even false matches. Collection and handling errors can, according to the National Research Council, be prevented through proper training, strict observation of handling procedures, “second reading” reviews, and sample retesting.

Contamination of samples can also lead to erroneous results. Evidence from the crime scene may be mixed with nonhuman materials.

100. See Yee, supra note 69, at 480.
101. NRC, supra note 63, at 2.
102. See Renskers, supra note 30, at 313-14; note 69 and accompanying text.
103. See NRC, supra note 63, at 80.
104. See id. at 80-81.
105. See id. at 80.
106. In a "second reading," a second person reviews the results and analyzes them for potential errors. See id. at 81. Forensic laboratories commonly follow this practice, which the Technical Working Group on DNA Analysis Methods guidelines require. See id.
107. See id. The NRC observes that sample mishandling is more readily detected because of the “discriminating power” of DNA analysis. See id. Such errors were not as likely to be caught when the evidence was subjected to blood-group or protein-marker testing. See id.
108. See id. at 82-83. Contamination occurs when the sample is mixed with a foreign material or substance. See id. at 82.
such as gasoline, grit, or microorganisms, which could cause a DNA test to fail.\textsuperscript{109} Other human biological evidence may act as a source of contamination, either when an investigator or laboratory specialist inadvertently introduces her own genetic material into the sample or when the sample itself is mixed during the commission of the crime.\textsuperscript{110} Contamination by genetic material from other humans creates more concern than non-human contamination, simply because it can lead to DNA typing errors.\textsuperscript{111} Laboratory technicians can detect false results stemming from sample contamination by using background control samples.\textsuperscript{112} As with handling errors, false results due to contamination can be minimized through rigorous adherence to handling guidelines and procedures.\textsuperscript{113}

Other types of mistakes include laboratory sample analysis errors,\textsuperscript{114} "carryover contamination,"\textsuperscript{115} and faulty equipment or techniques.\textsuperscript{116} Although any mistake is cause for concern, many are, according to the National Research Council, of no consequence.\textsuperscript{117} Painstaking care in the collection, handling, laboratory analysis, and case review of DNA evidence can reduce most errors.\textsuperscript{118} Commentators note that the primary

\textsuperscript{109} See NRC, supra note 63, at 83. This type of contamination does not result in DNA typing errors, meaning that false matches will not occur. See id.

\textsuperscript{110} See id. at 83-84. The classic example of a "mixed" sample is the vaginal swab taken from a rape victim, which contains both semen and vaginal secretions. See id. at 84. Similarly, a sample may be mixed if there are multiple assailants or if the victim engaged in consensual sexual activity prior to the attack. See, e.g., Cynthia Bryant, \textit{When One Man's DNA Is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners}, 33 COLUM. J.L. & SOC. PROBS. 113, 115 (2000); Hibbert, supra note 65, at 803.

\textsuperscript{111} See NRC, supra note 63, at 83.

\textsuperscript{112} See id. Background control sampling is the procedure by which investigators collect biological material adjacent to the primary sample and compare the two samples to determine if contamination has occurred. See id.

\textsuperscript{113} See id.

\textsuperscript{114} See Hibbert, supra note 65, at 803. One genetics expert estimates that "'clinical laboratory errors occur in all areas at rates estimated at between [one] percent and [five] percent.'" Id. (quoting Eric Lander, \textit{DNA Fingerprinting: Science, Law, and the Ultimate Identifier, in The Code of Codes} 191, 195 (Leroy Hood & Daniel J. Kevles eds., 1992)) (alterations in original).

\textsuperscript{115} NRC, supra note 63, at 84. Carryover contamination occurs when the substance used to amplify the DNA is introduced before the DNA sample is completely isolated. See id. This results in the amplification of not only the target sample but also the contaminant. See id.

\textsuperscript{116} See id. at 82.

\textsuperscript{117} See id. at 80.

\textsuperscript{118} See id. at 87.
way to detect any remaining errors and avoid their negative consequences is to provide for sample retesting. This requires that laboratory specialists divide evidence into multiple samples and separately retain them for later analysis. Retesting allows an accused individual to directly challenge initial matching results, virtually eliminating the need to take into consideration the possibility that errors have led to a false match.

b. Longevity

Scholars agree that preserved DNA evidence is not necessarily subject to the deterioration that other types of evidence tend to undergo. Even DNA that has not been preserved can yield viable genetic information years, even decades later. Chris Asplen, Executive Director of the National Commission on the Future of DNA Evidence, discussed in a recent article the potential impact of DNA evidence on statutes of limitation, observing that DNA technology raises unique issues because DNA samples last beyond the applicable statutes limiting the time periods within which criminal charges or appeals must be brought. The DNA of living persons exhibits even more striking longevity—one commentator remarked that "it is simple to change
one's physical appearance" but that "it is not yet possible to alter one's genome." Indeed, DNA remains "invariant throughout . . . life."

c. Other Issues

Interestingly, the accuracy of DNA evidence and its potential longevity have, in addition to solving some problems, created some new ones. As one scholar has remarked, "genetic technology has in many instances outpaced any ethical or governmental regulations on the technology." This becomes evident in light of the potential of DNA technology to reveal tremendous amounts of information about human physical and mental characteristics. Already, scientists are researching the potential of gene therapy to diagnose, treat, and ultimately prevent various genetic conditions such as cancer, cystic fibrosis, hemophilia, and rheumatoid arthritis. Yet many worry that employers and insurance companies who gain access to DNA databases might be able to use that information for discriminatory purposes. Others are fearful that this same information may be used to stigmatize certain racial groups or classes of offenders by revealing genetic characteristics or predispositions to which those groups are subject. At present, the DNA analysis methods that forensic laboratories use scan only specific portions of the DNA molecule, portions that do not reveal such information. Furthermore, the United States Supreme Court has held on several occasions that criminal offenders who are incarcerated or on probation simply do not share the same degree of privacy that law-abiding citizens enjoy, suggesting that privacy issues are more of a concern for the public at large, rather than for violent offenders.

126. Hibbert, supra note 65, at 790-91.
127. Yee, supra note 69, at 464.
128. Hibbert, supra note 65, at 818.
129. See id. at 790.
130. See Casey, supra note 4, at 109.
131. See generally Jennifer M. Jendusa, Comment, Pandora's Box Exposed: Untangling the Web of the Double Helix in Light of Insurance and Managed Care, 49 DEPAUL L. REV. 161 (1999).
132. See Hibbert, supra note 65, at 819.
133. See Casey, supra note 4, at 110.
134. See Hibbert, supra note 65, at 786 (citing, for example, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 612 (1989)). For an in-depth discussion of DNA databases and related privacy concerns, see Yee, supra note 69, at 461.
Another concern related to the accuracy and longevity of DNA evidence is its inability to pinpoint when or how long a particular suspect was at the scene of a crime. A suspect’s DNA can appear at the scene even if he was not the perpetrator, unless, of course the DNA is collected from semen in or on the victim. Even then, DNA obtained from that semen does not rule out the possibility that the alleged victim and the accused engaged in consensual sex. In these instances, DNA evidence may positively identify a suspect who is, in fact, innocent.

A final problem associated with the availability of accurate DNA technology to solve sexual assaults and other violent crimes is the current nationwide backlog of untested DNA samples. Many samples remain untested for years due to the sheer inability of state laboratories to meet the demands that the large volume of DNA evidence places on them. The backlog of unanalyzed CODIS samples is estimated at six years, meaning that many offenders will remain free during that period of time to victimize others. Many of these samples will also remain untested even after the applicable statutes of limitation expire, making it impossible for prosecutors to ever bring many offenders to justice.

Because DNA can identify criminal offenders with unprecedented statistical accuracy, and because such evidence can remain in existence for indefinite periods of time, many find that it is fundamentally unfair to permit known offenders to escape justice simply because the applicable statute of limitations has expired, particularly in light of

135. See NCFDE, supra note 91, at 2. The NCFDE notes that traditional fingerprint evidence poses similar concerns. See id.
136. See Diehl, supra note 24, at 438. Diehl gives the hypothetical illustration of a situation where investigators, relying solely on blood evidence found at the scene of a rape, collect blood that coincidentally fell from a bleeding passerby prior to the commission of the crime. See id.
137. See id.
138. See id. at 438-39.
140. See Hibbert, supra note 65, at 799.
141. See Asplen, supra note 73, at 147.
142. See Chapman, supra note 1, at 19 (noting that 4,000 of New York’s untested rape kits are older than five years). New York currently limits prosecutions for rape to five years. See Luo, supra note 14, at A3.
processing backlogs. Others find that laws limiting post-conviction testing of DNA evidence deserve similar review, since DNA can also positively exclude suspected and convicted offenders from guilt. Efforts are underway to reconcile the inevitable tensions that have grown in response to the availability of a technology that, unlike those before it, is capable of positively identifying assailants years after the crime.

C. Responses to Tensions

1. State Legislation

Individual states have discretion to establish their own statutes limiting the prosecution of crimes and may therefore extend or eliminate them as they choose. Several states have already responded to public pressure by extending or eliminating their statutes of limitation on sexual assault crimes. Illinois, for example, recently increased its statute of limitation for sexual assault crimes from five years to ten. Nevada and New Jersey have eliminated their statutes limiting the prosecution of sex offenses, and Florida no longer limits the time for prosecuting sexual battery if the crime is reported within seventy-two hours. Just months ago, the California Legislature adopted a novel measure, passing a law that has essentially eliminated the statute of limitation for sexual assault where DNA evidence is available, but that

143. See generally Chapman, supra note 1, at 19.
144. See generally Jennifer Longley, Legal Genes, PEOPLE MAG., May 15, 2000, at 111.
145. See Miguel Bustillo, DNA Tests Fuel Drive for Longer Rape Case Statute, L.A. TIMES, Feb. 29, 2000, at A3 (observing that “[i]n statehouses across the country, pressure has been building to scrap statute-of-limitation laws in light of DNA testing that has pointed to suspects in cases where the limits on charges had longed passed”).
146. See supra text accompanying note 27.
147. See Kozlowski, supra note 9, at 6. Just this past year, California, Colorado, Connecticut, Maryland, and Minnesota each enacted legislation modifying or extending their statutory limitation periods for crimes yielding DNA evidence. See Mark Hansen, The Great Detective, A.B.A. J., Apr. 2001, at 37, 40.
148. See Kozlowski, supra note 9, at 6.
151. See FLA. STAT. ANN. § 775.15(b) (West Supp. 2001).
limits prosecution to one year after that evidence conclusively identifies
the perpetrator. 152

Other states are following this trend and are likewise considering
legislative measures that would extend or eliminate limitation periods
for sexual assault crimes. 153 Pennsylvania is presently seeking to extend
its statute of limitation on rape, 154 while Michigan 155 and New York 156
have proposed the abolition of their limitation periods. The Michigan
Senate is considering an innovative bill that, if passed, will permit
prosecutors to indict unknown suspects based on DNA profile
evidence. 157 One commentator predicts that even more state legislatures
"will be tempted to adapt their laws to facilitate the use of DNA
evidence" as DNA technology advances. 158 However, other tactics may
be available to those states retaining their statutes of limitation on sexual
assault crimes. 159

2. A Unique Prosecution Tactic: "John Doe" Indictments

With little time to spare before the expiration of Wisconsin’s six-
year statute of limitation on sexual assault, officials in Milwaukee filed
a “futuristic arrest warrant” in September 1999, charging an unknown

made the passage of this law subject to approval of a law permitting imprisoned felons
to petition for post-conviction DNA testing. See id. § 1405; A.B. 1742, 1999-2000 Reg.

153. See Hansen, supra note 147, at 40. Arkansas has just passed a measure
extending the statute of limitations on rape to 15 years in cases where prosecution is
“based upon forensic DNA testing or other tests which may become available through
advances in technology.” 2001 Ark. Acts 920. Other states where similar legislation
is pending include Indiana, Massachusetts, and Pennsylvania. See Hansen, supra note
147, at 40.

154. See S.B. 561, 183rd General Assembly, Regular Sess. (Pa. 1999), available in
WESTLAW, 1999 PA S.B. 561 (SN).

155. See S.B. 1174, 90th Leg., Regular Sess. (Mich. 2000), available in WESTLAW,
1999 MI S.B. 1174 (SN). Michigan’s proposal would eliminate the limitation period
only in cases where available DNA evidence matches the DNA evidence of a specific
individual. See id.

156. See S.B. 8212, 223rd Annual Leg. Sess. (N.Y. 2000), available in WESTLAW,
1999 NY S.B. 8212 (SN).

157. See S.B. 1309, 90th Leg., Regular Sess. (Mich. 2000), available in WESTLAW,
1999 MI S.B. 1309 (SN). If passed, this measure will codify the procedure described
infra, Part II.C.2.

158. Diehl, supra note 24, at 432.

assailant with three unsolved rapes. Those responsible for filing the warrant did so believing that they could toll the statute of limitation and prosecute the attacker if he was later identified. Because Wisconsin law permits warrants that identify unnamed defendants using "any description by which [they] can be identified with reasonable certainty," officials reasoned that DNA profiles—which are much more specific than physical descriptions or aliases—should be sufficient to identify those suspects.

One journalist estimates that prosecutors across the country have filed as many as twenty such "John Doe" indictments. New York, Missouri, New Mexico, Pennsylvania, Oklahoma, Utah, California, and Texas are among those that have charged unknown assailants based on their DNA profiles. Critics of the tactic argue that it circumvents the purpose of naming a suspect in an arrest warrant because it does not place an unnamed suspect on notice that police are seeking him. After all, a suspect—who knows how he looks or what

160. See Doege, supra note 14, at 1. At the time, law enforcement officials thought the September 1999 warrant was "the first of its kind." Id. However, a similar warrant—surrounded by much less fanfare—was filed in Kansas in 1991. See Tomkies, supra note 14, at 1.

161. See Doege, supra note 14, at 1.

162. Id. Most states have similar provisions. See Slater, supra note 15, at A3. Arkansas's rule states that "[e]very arrest warrant shall . . . specify the name of the accused or, if his name is unknown, any name or description by which he can be identified with reasonable certainty." Ark. R. Crim. P. 7.2(a)(iv) (emphasis added).

163. See Richard Willing, Police Expand DNA Use: Charge Man with Rape Using Only Genetic Profile, USA TODAY, Oct. 25, 2000, at 1A.

164. See Luo, supra note 14, at A3.

165. See id.


171. See Blessilo, supra note 145, at A3.

172. See Associated Press, Unknown Man Indicted in Austin Rape Case, HOUSTON CHRON., Nov. 5, 2000, at 45A.

173. See Willing, supra note 163, at 1A.
his aliases are—will not know his own DNA profile. While the judicial response to this tactic has tentatively been favorable, it remains unchallenged at the appellate level.

III. STRIKING A BALANCE: TOWARD A LEGISLATIVE SOLUTION

As one scholar has observed, "[c]riminal statutes of limitations are . . . flexible instruments of legislative policy and often reflect the social concerns of the particular time and locality." The availability of DNA evidence has affected, if not altogether changed, most of the policy justifications that have traditionally supported state statutes of limitation on sexual assault crimes. Those state legislatures considering adapting their laws should carefully weigh the competing policy considerations that have begun to evolve as a result of DNA technology before implementing any sweeping changes. This section examines how the availability of DNA evidence has impacted traditional policies behind statutes of limitation on sexual assault crimes and concludes by offering suggestions for those legislatures that are considering changing their statutes of limitation on sexual assault where such evidence is available.

A. Reconciling New Technology with "Old Law": Some Emerging Policy Considerations

Whereas fresh evidence was once critical when a sexual assault case rested on the memories of eyewitnesses or other circumstantial evidence, the same is no longer true when DNA evidence is available. Even when memories are gone and the witnesses have become inaccessible, DNA acts as the ultimate witness by conclusively identifying the perpetrator or by excluding the accused from suspicion. Both the accuracy and longevity of DNA evidence are far superior to that of any other type of evidence, rendering concerns about "stale evidence" almost baseless. However, concerns remain where (1)

174. See id.
175. See supra note 15.
177. See supra note 122 and accompanying text.
179. See Renskers, supra note 30, at 313-14.
DNA evidence places a defendant at the scene of the crime, when in fact he was not the assailant;\textsuperscript{180} (2) the suspect contends that he and the alleged victim engaged in consensual sex;\textsuperscript{181} or (3) laboratory results erroneously inculpate the suspect because the evidence was mishandled, mislabeled, or contaminated.\textsuperscript{182} Absent any statute of limitation on sexual assault, a defendant in one of these situations may be forced to use stale evidence years after the alleged crime to defeat charges that are supported by incriminating DNA evidence. This would subject him to the very prejudices that statutes of limitation were designed to avoid.

Nevertheless, the availability of DNA evidence has clearly weakened this policy justification. Situations where investigators have no access whatsoever to any type of DNA evidence from the victim are surely rare due to the amount of physical contact that occurs during a rape.\textsuperscript{183} The chance that an innocent defendant might be erroneously convicted based on DNA evidence collected from the crime scene, therefore, seems just as unlikely. Even when a suspect wishes to mount a defense based on evidence mishandling or sample contamination, laboratories following procedures that allow for sample retesting and other checks practically eliminate the possibility that the DNA profile has erroneously inculpated the suspect.\textsuperscript{184} The only instance in which an innocent suspect truly remains at risk for defending against charges based on stale evidence occurs when prosecution commences years after the alleged crime and when the suspect contends that he and the alleged victim engaged in consensual sex.

One policy that continues to weigh somewhat in favor of maintaining time limitations for prosecuting sexual assault crimes is the need to encourage prompt investigation. Prompt investigation protects not only the rights of those criminal defendants whom officials prosecute years after the crime\textsuperscript{185} but also provides closure for rape victims who wish to

\textsuperscript{180} See supra note 136 and accompanying text. This scenario is only possible when no semen is obtained from the victim and investigators rely entirely on other biological material found at the scene. See Diehl, supra note 24, at 438. Such a situation seems highly unlikely, since officials are likely to collect other types of DNA evidence from the victim, i.e., hair, saliva, sweat, or blood. See Doege, supra note 122, at 15L.

\textsuperscript{181} See supra text accompanying note 137.

\textsuperscript{182} See supra text accompanying notes 104 & 110.

\textsuperscript{183} See NCFDE, supra note 91, at 3 (noting that “DNA evidence can be collected from virtually anywhere”); Latour, supra note 12, at B1 (observing that “[i]n a rape, the crime is the contact”).

\textsuperscript{184} See supra notes 106-07, 112-13, 119 and accompanying text.

\textsuperscript{185} See supra Part II.B.2.a.
put the horror of their attacks behind them. Quick apprehension and prosecution of rapists gives them less time to repeat their crimes and thus protects would-be victims.\textsuperscript{186}

Unfortunately, law enforcement officials investigating sexual assault crimes where crime scene evidence awaits DNA testing face long waiting periods due to the nationwide testing backlog.\textsuperscript{187} Allowing known offenders to walk free who, but for testing delays and statutes of limitation, would be behind bars, seems utterly unfair—particularly since rapists are highly likely to attack again.\textsuperscript{189}

Equally appalling is the injustice that arises when the best efforts of law enforcement officials yield DNA evidence, but the statute of limitations expires before those officials can link a known person to the DNA profile. In these situations, time limitations on sexual assault prosecutions seem arbitrary and unfair because offenders rest beyond the reach of the law despite prompt efforts of law enforcement officials. As one scholar has commented, “[s]ociety’s criminal justice goals surely go unfulfilled when manslaughters, rapes, robberies, arsons, thefts, and other crimes go unpunished because the evidence needed to prosecute is not yet discovered at the moment of the expiration of the statute of limitations, despite the diligence of the police and prosecutors.”\textsuperscript{190}

Despite these problems, encouraging prompt investigation remains an important policy worthy of protection when delays that would otherwise occur create prejudice for the defendant, prolong the victim’s healing process, and place society at risk for preventable attacks.

The idea that statutes of limitation are beneficial because the need for punishment wanes is, at best, a flimsy basis for placing limitation periods on sexual assault crimes. This policy justification lacks credibility even absent consideration of the impact of DNA technology simply because of the lasting harm that rape causes.\textsuperscript{191} As one journalist has succinctly stated, “[t]here’s no statute of limitations on the terror triggered by sexual molestation and assault.”\textsuperscript{192}

\begin{footnotes}
\item[186] See Asplen, supra note 73, at 148.
\item[187] See Hibbert, supra note 65, at 799.
\item[188] See Asplen, supra note 73, at 149 (observing that “the arbitrary allocation of five or ten years to the investigative process may be unfair to victims of crime who may now be able to have their crimes solved, but for the statute of limitations”).
\item[189] See Hallissy, supra note 2, at A1.
\item[190] Adlestein, supra note 23, at 260.
\item[191] See supra note 43.
\item[192] Betty DeRamus, \textit{Memories of Sexual Assault Have No Limits, So Why Should the
Furthermore, society’s interest in prosecuting a rapist does not diminish simply because that individual might have self-rehabilitated. To the contrary, experts believe that sexual offenders are more likely than any other class of criminals to repeat their crimes.\textsuperscript{193} Whereas this policy might apply to such crimes as theft or forgery, it simply does not provide any meaningful justification for limiting the time within which officials must prosecute sexual assault crimes.

The concept of repose continues to lend modest support for maintaining limitation periods on sexual assault crimes, particularly with regard to rape victims who wish to maintain the peace that they have rebuilt during the intervening years.\textsuperscript{194} For those survivors, “healing is no longer tied to someone going to prison,”\textsuperscript{195} even if DNA evidence could identify their attackers and bring them to justice. Repose also means that an innocent defendant implicated by the presence of his DNA at the crime scene or on the victim\textsuperscript{196} will be free from the threat of prosecution after a specified number of years has passed. Nevertheless, imposing a time limit on prosecuting sexual assault crimes where DNA evidence is available may mean that known offenders—whom DNA evidence has conclusively identified—will be free to rape again. Limiting prosecutions may also mean that those victims who do wish to see their attackers brought to justice will never get that chance. Given that sexual assault prosecutions based on DNA evidence often do not proceed without the victim’s testimony,\textsuperscript{197} and given that innocent defendants are typically excluded, rather than implicated, by DNA evidence, the policy of promoting repose does not ultimately weigh in favor of imposing statutory limitations on the prosecution of sexual assault crimes.

Those policy justifications that focus on the costs of allowing prosecutions in the absence of limitation periods have begun to erode with the advent of DNA technology. Already, DNA evidence has served to exclude primary suspects in sexual assault investigations before these cases ever reached a courtroom.\textsuperscript{198} Furthermore, guilty

\textsuperscript{193} See Hallissy, \textit{supra} note 2, at A1.
\textsuperscript{194} See Latour, \textit{supra} note 12, at B1.
\textsuperscript{195} Id.
\textsuperscript{196} See \textit{supra} notes 136-37 and accompanying text.
\textsuperscript{197} See Latour, \textit{supra} note 12, at B1.
\textsuperscript{198} See NRC, \textit{supra} note 63, at 11.
defendants faced with positive DNA test results often choose to plead rather than face trial.\textsuperscript{199} PCR ("Polymerase Chain Reaction")-based DNA testing, which has recently begun to replace older, slower testing methods, produces results in as little as twenty-four hours.\textsuperscript{200} This speed, combined with the increasing utilization of CODIS, promises to eventually assist law enforcement officials in apprehending unknown assailants faster than ever.\textsuperscript{201} These advances have already promoted the preservation of law enforcement and judicial resources and will become even more efficient with the further development of DNA technology. If anything, DNA technology promises to promote judicial economy and preserve law enforcement resources much more so than statutes of limitation on sexual assault crimes ever could.

The availability of DNA evidence has significantly weakened those policies that have traditionally favored statutes of limitation on sexual assault crimes, but it has not rendered these statutes altogether obsolete. In the absence of statutes of limitation on sexual assault crimes, defendants claiming consent may be prejudiced by their forced reliance on stale evidence in the face of incriminating DNA tests. Law enforcement officials will have less incentive to diligently pursue charges in difficult cases, and victims of unsolved assaults wishing to assist prosecution efforts will face the prospect of reliving their trauma after years of trying to forget. For these reasons, legislators should consider creating limited exceptions to their statutory limitation periods on sexual assault crimes, rather than eliminating those statutes of limitation altogether.

B. A Moderate Proposal

An effective exception to a statutory limitation period on sexual assault crimes should accomplish a number of goals. First, it should give a victim an incentive to promptly report her attack to law enforcement officials.\textsuperscript{202} Florida's statute, for example, eliminates its limitation

\textsuperscript{199} See Renskers, \textit{supra} note 30, at 310.
\textsuperscript{200} See NRC, \textit{supra} note 63, at 23. See also \textit{supra} note 73 (describing PCR testing).
\textsuperscript{201} See Asplin, \textit{supra} note 73, at 148.
\textsuperscript{202} The Bureau of Justice Statistics estimates that only 28\% of the 383,170 persons who suffered sexual assaults last year reported their attacks to police. See \textit{RENNISON}, \textit{supra} note 19, at 8, 11. This author acknowledges, however, that such an incentive will likely have only a modest impact on reporting rates, particularly in acquaintance rape cases. See generally Lenore M.J. Simon, \textit{Sex Offender Legislation and the Antitherapeutic}
on prosecutions for sexual battery when the victim reports the crime within seventy-two hours. Because DNA evidence from an assailant’s semen must be collected within seventy-two hours if it is to provide viable information, such a provision theoretically increases the likelihood that crucial biological evidence will be collected and preserved. California takes a less stringent approach by simply eliminating its statute of limitations when DNA testing establishes the identity of the assailant—an approach that assumes law enforcement officials have collected viable DNA evidence. Both approaches accomplish the goal of encouraging prompt reporting by giving victims the benefit of a statutory exception when their reports to police yield viable evidence. When a prompt report is not made, or when DNA evidence simply is not available, these statutes limit the time within which officials must commence prosecutions.

For those legislatures wishing to make prompt reporting a top priority, a strict seventy-two hour window similar to Florida’s would serve this purpose. Such a provision would also help ensure that prosecutions for sexual assault are based on very fresh—and hence more reliable—evidence. However, such a rigid deadline may serve to punish the reluctant victim who reports her crime after the seventy-two hour window has expired, even though sources of DNA evidence other than the attacker’s semen are available. State legislatures desiring to encourage prompt reporting and to increase the availability of fresh evidence, while minimizing prejudice to rape victims, should consider adopting a statutory exception that, like California’s, applies when a reported rape yields viable DNA evidence.

Effects on Victims, 41 ARIZ. L. REV. 485 (1999) (concluding that rape law reforms have had almost no effect on victims of nonstranger sexual assaults). Many women will never report their rapes either because they do not conceptualize their attacks as rapes or because they fear the added trauma of facing negative attitudes from friends, family, and the legal system. See id. at 505.

203. See FLA. STAT. ANN. § 775.15(b) (West Supp. 2001).
204. See Doege, supra note 122, at 15L.
206. See, e.g., FLA. STAT. ANN. § 775.15(b) (West Supp. 2001) (directing that “[i]f such crime is not reported within 72 hours after the commission of the crime, the prosecution must be commenced within the time period prescribed in subsection (2)”). Similarly, California’s measure now requires that the State commence prosecution of an offense within 10 years of the crime if DNA evidence is not available to establish the attacker’s identity. See CAL. PENAL CODE § 803 (h)(1).
207. See supra note 1.
An effective statutory exception will also give investigators ample time to gather evidence, process DNA samples, and pursue any available leads. Such time is especially crucial where the identity of the attacker is unknown. Those states considering merely extending their statutes of limitation on sexual assault crimes should realize that even generous statutes may not give investigators enough time to locate and arrest unknown attackers.

Michigan has proposed one solution to this problem; legislators there recently introduced a bill that would allow officials to indict an unknown offender based on his DNA profile. Authorities issuing indictments under this law would be able to stop the statute of limitations from expiring, giving them plenty of time to find the person with the matching DNA profile. States may also adopt California’s model and eliminate time limitations on sexual assault prosecutions when DNA evidence is available. Like Michigan’s proposed measure, California’s approach gives authorities unlimited time to investigate sexual assault crimes where DNA evidence is available. States that adopt either of these approaches can prevent known offenders from going unpunished just because time ran out for investigators.

Simply eliminating statutes of limitation where DNA evidence is available does not protect the suspect claiming a consent defense from the time delays that might force him to rely upon stale evidence for his defense. Nor does it encourage continued diligence on the State’s part to continue pursuing charges against the offender. For these reasons, states considering Michigan’s DNA indictment approach should think twice before following suit. Statutory exceptions for sexual assault crimes should minimize such delays by providing that DNA evidence undergo prompt analysis and that officials commence sexual assault prosecutions based on DNA evidence within a limited period of time.

208. See supra note 87.
209. See, e.g., Latour, supra note 12, at B1 (reporting that authorities in Massachusetts—a state that currently observes a 15-year statute of limitations on sexual assault crimes—must “race against time” to identify and locate many offenders).
210. See S.B. 1309, 90th Leg., Regular Sess. (Mich. 2000), available in WESTLAW, 1999 MI S.B. 1309 (SN). This bill provides the following: “In any indictment it is sufficient for the purpose of identifying the accused to . . . describe the accused as a person whose name is unknown or who is unknown but has a particular DNA profile . . . .” Id. (emphasis in original).
211. See CAL. PENAL CODE § 803(h)(1).
212. See id.
after that evidence has positively linked a suspect to the crime. Once again, California’s approach merits close consideration because it requires the analysis of collected DNA evidence within a specified period of time after the commission of the crime and because it requires officials to prosecute a sexual assault charge within a year of the date that DNA testing positively identifies the perpetrator.

State legislatures that eliminate limitation periods where DNA evidence is available need to include similar protective measures so that the policies of prompt investigation and protection of innocent defendants are adequately satisfied.

Finally, those states seeking to implement exceptions to their statutes of limitation on sexual assault crimes should, as a matter of fairness, seriously consider legislation that would permit post-conviction DNA testing for inmates prosecuted without the benefit of DNA testing. Indeed, DNA testing should work both ways. The power of DNA technology to positively identify some suspects—while excluding others—provides compelling support for those legislative changes that promote greater accuracy and fairness within the criminal justice system.

IV. CONCLUSION

DNA technology has undoubtedly instigated a revolution within the criminal justice system. Unlike any other type of evidence, DNA points its incriminating finger to the guilty offender with almost absolute certainty. In sexual assault cases where the identity of the attacker is unknown, DNA evidence is the unbiased witness that provides the definitive link between the crime and the criminal.

The availability of so precise a technology has led many to question the value of setting time limits on prosecutions for sexual assault crimes. These statutes of limitation seem cruelly unjust to those victims whose attackers—betrayed by their own DNA—will never pay for their deeds

213. See id. California’s law requires DNA analysis within two years of the date of the offense “[f]or an offense committed on or after January 1, 2001.” Id. A state considering such a limit should consider the constraints of its forensic laboratories in arriving at a time limit for DNA analysis. See supra text accompanying note 143.

214. See CAL. PENAL CODE § 803(h)(1).

215. See generally Longley, supra note 144, at 111. Not surprisingly, California has done so. See supra note 152.

216. See supra text accompanying note 9.
because time ran out for investigators. Indeed, the availability of DNA evidence has chipped away at the policy justifications supporting statutes of limitation on sexual assault crimes.

Nevertheless, the availability of DNA evidence has not rendered statutes of limitation on sexual assault crimes altogether obsolete. Time limitations remain valuable because they protect the accused suspect utilizing a consent defense from the prejudice of having to rely on stale evidence to defeat the prosecution's incriminating DNA evidence. Such statutes also encourage law enforcement officials to promptly investigate sexual assault crimes, thereby preventing future attacks, as well as conserving time and resources. Limitation periods promote repose for those victims who do not wish to reopen old wounds years later and place innocent would-be defendants beyond the reach of potential prosecution.

For these reasons, state legislatures looking to adapt their statutes of limitation to account for the impact of DNA technology should not eliminate limitation periods on sexual assault crimes altogether. Rather, they should consider measures that (1) encourage victims to promptly report their attacks to law enforcement officials by creating an exception to the applicable statute of limitations where DNA evidence is available, (2) allow investigators ample time to develop leads and arrest sexual offenders by eliminating the time limits on prosecutions when the DNA exception applies, and (3) minimize potentially prejudicial delays by requiring prompt analysis of DNA evidence and timely prosecution of suspects whose DNA evidence links them to sexual assault crimes. By implementing these exceptions to statutes of limitation where DNA evidence is available, state legislatures can blend new technology, changing public policies, and traditional laws to create a more fair and accurate system of criminal justice.

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