

MEETING THE STATUTE OR BEATING IT: USING "JOHN DOE"  
INDICTMENTS BASED ON DNA TO MEET THE  
STATUTE OF LIMITATIONS

MEREDITH A. BIEBER<sup>†</sup>

What can a prosecutor do when the only lead on a rape that occurred nearly six years ago is genetic material and the statute of limitations is about to run? A new option may be to file a "John Doe" indictment or arrest warrant that identifies the suspect by his genetic profile in order to commence the prosecution and thus avoid the running of the statute. Across the country, prosecutors are using this tactic to preserve rape cases that remain unsolved but threaten to be lost to the statute of limitations.<sup>1</sup> Once the government formally commences a prosecution,<sup>2</sup> the statute is tolled and the police can, theoretically, continue their efforts to identify the suspect. After the police discover a match for the DNA profile contained in the complaint or indictment, the state can arrest the suspect and put him on trial in order to determine his guilt or innocence.

Absent the commencement of prosecution, a case cannot be adjudicated once the statute of limitations has run. If a suspect is identified one day beyond the statutory limit, he cannot be tried for the offense. However, in committing certain crimes, such as rape, an offender often leaves behind some biological material (semen, blood,

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<sup>†</sup> B.A. 1994, George Washington University; J.D. Candidate 2002, University of Pennsylvania. I would like to thank my family, Arlene Fisk, Charles Gallagher, Johnny Griffin, III, Stephen Morse, and David Rudovsky.

<sup>1</sup> DNA indictments have been used in New York, Pennsylvania, California, Florida, and Wisconsin, among other states. See, e.g., *DNA Sample Used to Indict "John Doe" in N.Y. Rape Cases*, SEATTLE TIMES, Mar. 16, 2000, at A8 (reporting the DNA indictment of the so-called "East Side rapist"); *Serial Rapist Indicted on Long Island Based Solely on DNA Evidence*, AP, Aug. 9, 2000, LEXIS (describing a seventeen-count indictment of an unidentified rapist linked by DNA evidence to six rapes committed on Long Island between 1992 and 1995); Jeff Jones, *Indictment IDs Suspect by His DNA*, ALBUQUERQUE J., Apr. 20, 2000, at A1 (describing the first such indictment used in New Mexico).

<sup>2</sup> Do not confuse the use of a genetic code to commence a prosecution with trial *in absentia*, where the court actually hears and decides the case without the defendant being present. The commencement of a prosecution simply takes the case out of the statute of limitations and preserves it for trial. See *infra* Part I (outlining the procedural background of DNA indictments).

skin, hair).<sup>3</sup> Proponents of “John Doe” indictments say that using a DNA profile—rather than a name or physical description—to identify the suspect in an arrest warrant or indictment is a legitimate way to vindicate victims, prevent offenders from escaping justice, and prevent future crimes.<sup>4</sup> Critics, on the other hand, contend that issuing an arrest warrant based on a DNA profile is a disingenuous device of the prosecution that evades the statute of limitations and infringes on the constitutional rights of the accused.<sup>5</sup>

Using DNA profiles to identify the accused in an indictment or arrest warrant for the purpose of commencing a prosecution and effectively taking a case outside of the statute of limitations raises certain concerns about fairness to a defendant. However, this practice should be able to withstand judicial scrutiny. This Comment will argue that: (1) DNA-based indictments meet the legal sufficiency requirements for description; (2) DNA indictments are generally consistent with the rationales behind statutes of limitations; (3) DNA indictments are subject to certain limitations; and (4) checks must be employed when using genetic profiles to commence a prosecution.

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<sup>3</sup> See NAT'L INST. OF JUSTICE, DEP'T OF JUSTICE, WHAT EVERY LAW ENFORCEMENT OFFICER SHOULD KNOW ABOUT DNA EVIDENCE, at <http://www.ncjrs.org/nij/DNAbro/what.html> (Sept. 1999) (“Numerous cases have been solved by DNA analysis of saliva on cigarette butts, postage stamps, and the area around the mouth opening on ski masks. DNA analysis of a single hair . . . found deep in the victim’s throat provided a critical piece of evidence used in a capital murder conviction.”).

<sup>4</sup> See, e.g., *DNA Used to Indict Unidentified Rapist*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 16, 2000, at A7 (“A ‘John Doe’ indictment is legal if it contains a sufficient description of the suspect . . . ‘DNA certainly fits that bill.’” (quoting H. Richard Uviller, professor, Columbia University Law School)); Sean Gardiner, *DNA Indictment: East Side Rapist Is Identified Only by His Genetic Code*, NEWSDAY (Melville, N.Y.), Mar. 16, 2000, at A3 (“Arming law enforcement with the power to bring an immediate indictment would remove the current problem faced by prosecutors of concluding these difficult, complex, criminal investigations before the state’s five-year statute of limitations expires.” (quoting Sheldon Silver, New York Assembly Speaker, who proposed legislation that would allow “John Doe” indictments based solely on DNA samples)).

<sup>5</sup> See, e.g., Gardiner, *supra* note 4 (“[T]he John Doe indictment is a ‘very creative way to circumvent the statute of limitations’ but should not hold up under a court challenge. ‘The purpose of the statute of limitations is not for the district attorney, it’s for the accused . . . [to] have an opportunity to prepare a defense’ . . .” (quoting Gerald Lefcourt, a Manhattan-based defense attorney and former president of the National Association of Criminal Defense Lawyers)); David Hafetz, *DNA Is Used to Indict Unknown Man in Rape*, AUSTIN AM.-STATESMAN, Nov. 4, 2000, at A1 (quoting William Harrell, executive director of the American Civil Liberties Union of Texas, who called DNA-based indictments a “fiction” that “hold[s] on to the statute of limitations by inventing the identity of someone” and a “cheap remedy for poor investigative efforts” that contradict the intent behind statutory limitations).

## I. PROCEDURAL BACKGROUND

There are three ways the government formally can commence a prosecution, whether for the purpose of tolling the statute of limitations or otherwise. One way is to file a charge and then issue an arrest warrant based on the underlying complaint.<sup>6</sup> Another way to commence a prosecution is to present evidence to a grand jury.<sup>7</sup> If the grand jury returns an indictment, the prosecution has commenced formally.<sup>8</sup> Both procedures have been used to commence prosecutions against unidentified sexual assailants.<sup>9</sup> The third way to commence a prosecution for purposes of tolling the statute of limitations is to file an information against the accused.<sup>10</sup>

In the case of filing a charge and issuing an arrest warrant, consider, for example, Paul Eugene Robinson, the first man in the country to be arrested in conjunction with a warrant identifying him only by his DNA profile.<sup>11</sup> Robinson has been charged with a rape that occurred in 1994.<sup>12</sup> Although his identity was unknown at the time,

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<sup>6</sup> See, e.g., 42 PA. CONS. STAT. ANN. § 5552(e) (West 1981 & Supp. 2001) ("[A] prosecution is commenced either when an indictment is found or an information . . . is issued, or when a warrant, summons or citation is issued, if such warrant, summons or citation is executed without unreasonable delay.").

<sup>7</sup> See, e.g., N.Y. CRIM. PROC. LAW § 190.60 (McKinney 1993) ("After hearing and examining evidence . . . a grand jury may indict a person for an offense . . ."); see also BLACK'S LAW DICTIONARY 706 (7th ed. 1999) (defining a grand jury as "[a] body of . . . people who are chosen to sit . . . and who, in ex parte proceedings, decide whether to issue indictments").

<sup>8</sup> 42 PA. CONS. STAT. ANN. § 5552(e).

<sup>9</sup> New York has used a DNA indictment. *DNA Sample Used to Indict "John Doe" in N.Y. Rape Cases*, *supra* note 1. Philadelphia and Sacramento have issued arrest warrants based on genetic profiles. *Prosecutors Issue DNA "John Doe" Warrant*, ST. LOUIS POST-DISPATCH, Dec. 13, 2001, at A14 (Philadelphia); Audrey Cooper, *Man Charged in 1994 California Rape Case Based Solely on DNA*, MILWAUKEE J. SENTINEL, Oct. 25, 2000, at 6A (Sacramento). For a discussion of other cities that have issued DNA indictments, see *infra* notes 18-20 and accompanying text.

<sup>10</sup> See, e.g., PA. R. CRIM. P. 103 ("[An i]nformation is a formal written accusation of an offense made by the attorney for the Commonwealth, upon which a defendant may be tried, which replaces the indictment in all counties since the use of the indicting grand jury has been abolished."); see also BLACK'S LAW DICTIONARY, *supra* note 7, at 783 (defining an information as "[a] formal criminal charge made by a prosecutor without a grand-jury indictment"). As its definition makes clear, Pennsylvania no longer actually uses indicting grand juries; rather, it uses grand juries only for investigative purposes. See 42 PA. CONS. STAT. ANN. § 4548 (West 1981 & Supp. 2001) for a description of an "investigating grand jury." Because filing an information has not, to my knowledge, been used to commence a prosecution in conjunction with a DNA profile, I will not discuss it in this Comment.

<sup>11</sup> Cooper, *supra* note 9.

<sup>12</sup> Robinson has not been convicted. Erin Hallissy, *DNA-Based Warrant That Gave*

prosecutors in Sacramento filed charges for the assault in August of 2000, days before the six-year statute of limitations period expired.<sup>13</sup> Once the complaint was filed, a magistrate judge issued an arrest warrant.<sup>14</sup> Robinson was arrested in September 2000 when state computers matched his DNA with the genetic code given in the "John Doe" warrant.<sup>15</sup> Robinson's DNA had been entered in the state's computer databank<sup>16</sup> after police arrested him for an unrelated criminal matter.<sup>17</sup>

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*No Name Faces Appellate Test*, S.F. CHRON., Apr. 6, 2001, at A3. In February of 2001, a Sacramento Superior Court judge ruled that the warrant was constitutional. *Id.* Robinson's attorney appealed, arguing that the arrest warrant did not adequately describe his client. *Id.* On April 6, 2001, the state appeals court in Sacramento suspended his prosecution while deciding whether the state and federal constitutions bar "John Doe" DNA warrants. Richard Willing, *California Court Halts "John Doe" DNA Case*, USA TODAY, Apr. 9, 2001, at 3A. On August 8, 2001, the Supreme Court of California denied Robinson's application for stay and petition for review. *Robinson v. Sacramento County Superior Court*, No. S097774, 2001 Cal. LEXIS 5386, at \*1 (Cal. Aug. 8, 2001). In addition to Robinson's case, a circuit judge in Wisconsin has also upheld a warrant that identified a suspect only by his DNA profile. *Judge Upholds DNA-Based Warrant*, UPI, July 27, 2001, LEXIS. Judge Jeffrey A. Wagner opined: "There is no description more reasonably certain than DNA' [and the law needs to] 'catch up with the advances of this science.'" *Id.* Judge Wagner added that there was no evidence that police or prosecutors had deliberately delayed charging the suspect. *Id.*

<sup>13</sup> Cooper, *supra* note 9.

<sup>14</sup> The actual complaint and warrant identifying the suspect would read something like, "John Doe, unknown male with matching deoxyribonucleic acid (DNA) profile at genetic locations . . .," and proceed to list a series of letters and numbers listing the measurements of DNA segments that collectively represent the genetic profile of the accused rapist. See, e.g., Criminal Complaint filed with the Milwaukee County Circuit Court, Criminal Division, at 1, 3, *Wisconsin v. John Doe, Unknown Male with Matching Deoxyribonucleic Acid (DNA) Profile at Genetic Locations D1S7, D2S44, D4S139, D5S110, D10S28 and D17S79* (Dec. 8, 1999) (on file with author) (stating that the "unknown person involved in the sexual assault of [the victim] can be expected to have a profile that matches the foreign DNA profile from the semen recovered from the jeans of [the victim]").

<sup>15</sup> Cooper, *supra* note 9.

<sup>16</sup> All fifty states have legislation permitting criminal DNA databases. Aaron P. Stevens, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 922 (2001). For a list of the applicable statutes for each state, see *id.* at 922 n.12. On the constitutionality of these statutes, Aaron Stevens has commented that "[t]he U.S. Supreme Court has not yet ruled on any constitutional aspect of convict testing for DNA databases and has denied certiorari in two cases," and that "no state DNA database statutes have been held unconstitutional by any court." *Id.* at 941-42 (footnotes omitted).

<sup>17</sup> Cooper, *supra* note 9. Robinson's DNA was entered into the state database in 1998, when he was paroled after serving a five-year sentence for burglary. Erin Hallissy & Charlie Goodyear, *Databank Match Brings Arrest on DNA Warrant*, S.F. CHRON., Oct. 25, 2000, at A3. Ironically, his DNA was entered mistakenly; only murderers, rapists, violent assailants, and child molesters are subject to inclusion in the DNA database. *Id.*

Other jurisdictions have proceeded by DNA indictments. In Manhattan, a grand jury indicted the so-called "East Side rapist" based on his genetic profile.<sup>18</sup> A Wisconsin grand jury returned an indictment against an unknown suspect whose DNA was linked to three rapes that occurred in Milwaukee in 1993.<sup>19</sup> In New Mexico, a grand jury returned a forty-four-count felony indictment against "John Doe," an unidentified male "suspected of stalking, drugging and raping nine Albuquerque women over an eight-year period."<sup>20</sup> Despite the procedural difference between DNA indictments and DNA arrest warrants,<sup>21</sup> both practices implicate the same question: Does a genetic profile meet the legal requirements for sufficiency of description of the accused?<sup>22</sup> This question, along with the policy issues embedded therein, is central to determining whether DNA indictments are constitutional.

## II. CONSTITUTIONAL REQUIREMENTS FOR THE CONTENTS OF AN INDICTMENT OR CHARGE

In order to be enforceable, an indictment or charge must meet certain requirements. If a prosecutor wishes to commence a prosecution by filing a complaint, in order for the complaint to be valid, it must be in writing, under oath, and state the essential facts about the offense charged.<sup>23</sup> If the magistrate judge presented with the com-

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However, California's law concerning the DNA databank specifies that arrests and convictions will not be invalidated on grounds that DNA was mistakenly entered in the database. *Id.*

<sup>18</sup> *DNA Used to Indict Unidentified Rapist*, *supra* note 4.

<sup>19</sup> Gardiner, *supra* note 4.

<sup>20</sup> Jones, *supra* note 1.

<sup>21</sup> A prosecutor may choose one over the other for various legal or tactical reasons. For example, federal criminal procedure gives the defendant the right to be indicted by a grand jury for certain offenses. See FED. R. CRIM. P. 7(a) ("An offense which may be punished by death . . . [and a]n offense which may be punished by imprisonment for a term exceeding one year . . . shall be prosecuted by indictment."). One tactical reason for using a grand jury is the increased investigative opportunity for the prosecutor. See, e.g., *United States v. Mandujano*, 425 U.S. 564, 571 (1976) ("[T]he law vests the grand jury with substantial powers . . . Indispensable to the exercise of its power is the authority to compel the attendance and the testimony of witnesses, and to require the production of evidence." (citations omitted)). I suspect that in the case of "John Doe" DNA indictments, the state prosecutor may choose to proceed by grand jury because it lends the population's stamp of approval, through the jurors' return of the indictment, to a case that is on shaky grounds.

<sup>22</sup> Therefore, I will use the two procedures interchangeably in the discussion below unless otherwise noted.

<sup>23</sup> See, e.g., FED. R. CRIM. P. 3 ("The complaint is a written statement of the essen-

plaint believes there is probable cause that the accused committed the crime, a warrant is issued for the arrest of the accused.<sup>24</sup>

### A. Adequate Description of the Accused

A warrant must "contain the name of the defendant, or if [his] name is unknown, any name or description by which [he] can be identified with reasonable certainty."<sup>25</sup> The requirements for an indictment are similar. One state's formulation is that when a grand jury returns an indictment against an unnamed defendant, the indictment must "contain words of description which have particular reference to the person whom the Commonwealth seeks to convict."<sup>26</sup>

Although a warrant describing its subject only as "John Doe" is not constitutionally sufficient,<sup>27</sup> as long as it provides an adequate description of the accused, the warrant will not be invalidated.<sup>28</sup> A physical

tial facts constituting the offense charged. It shall be made upon oath before a magistrate judge.").

<sup>24</sup> See, e.g., FED. R. CRIM. P. 4(a) ("If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it.").

<sup>25</sup> FED. R. CRIM. P. 4(c)(1) (emphasis added). "This Rule has been read as a gloss on the Fourth Amendment." *United States v. Doe*, 703 F.2d 745, 747 (3d Cir. 1983) (construing *Wong Sun v. United States*, 371 U.S. 471, 481 n.9 (1963)).

<sup>26</sup> *Connor v. Commonwealth*, 296 N.E.2d 172, 175 (Mass. 1973). The name of the accused is not essential to an indictment.

[An indictment is a written accusation] against a person, and not against a name. A name is not of the substance of an indictment. And a person may be well indicted, without the mention of any name, and designating him as a person whose name is to the grand jurors unknown.

*Lasure v. State*, 19 Ohio St. 43, 50 (1869).

<sup>27</sup> See *Wong Sun v. United States*, 371 U.S. 471, 481 n.9 (1963) ("The Fourth Amendment . . . provides that 'no Warrants shall issue, but upon probable cause, . . . and particularly describing . . . the person . . . to be seized.'" (last three alterations in original) (quoting U.S. CONST. amend. IV)); see also MASS. R. CRIM. P. 6(b)(1) (Bender, LEXIS through Jan. 1, 2002) (forbidding the use of warrants where the defendant's name is unknown without a "description by which he can be identified with reasonable certainty"); *United States v. Doe*, 703 F.2d 745, 748 (3d Cir. 1983) (finding a warrant describing its subject only as "John Doe a/k/a Ed" insufficient on the grounds that there are thousands of people who go by the name "Ed" in the area where the warrant was executed).

<sup>28</sup> Johnny L. Griffin, III, counsel for criminal defendant Paul Robinson, argued that "the controlling cases regarding the use of John Doe warrants do not address the issue of these warrants being used to toll, extend or circumvent the statute of limitations." Motion to Dismiss for Lack of Subject Matter Jurisdiction at 9 n.4, *People v. Robinson*, No. 00F6871 (Cal. Super. Ct. 2000) (on file with author). This should not mean they are wholly irrelevant, however. The controlling John Doe cases should still

description may suffice. For example, in a Wisconsin case, a description in an indictment directed against "John Doe" that included the alias "Leo" and "enumerate[d] various other particulars concerning the race, sex, age, weight, hair color, eye color, and peculiar facial characteristics" of the defendant was found to be sufficient to identify the defendant.<sup>29</sup> In another case, the Third Circuit upheld a warrant describing its subject as "John Doe, a white male with black wavy hair and stocky build observed using the telephone in [a particular apartment]."<sup>30</sup>

A genetic code describes a person with far greater precision than a physical description or a name. While many people have the same name or may be described, for example, as having black hair or being five feet nine inches tall, "each person's DNA is different from every other individual's except for identical twins."<sup>31</sup> Therefore, a "John Doe" DNA warrant should provide a legally adequate description of the accused. Although "John Doe" warrants are disfavored by law enforcement, they are not novel. District attorneys have used "John Doe" warrants or indictments in conjunction with physical descriptions, fingerprints, and pictures of unknown suspects.<sup>32</sup> Using genetic codes in "John Doe" indictments seems to be a logical extension of these practices.

The use of DNA to indict suspects is similar to the use of fingerprints. The National Institute of Justice has written:

When using either DNA or a fingerprint to identify a suspect, the evidence collected from the crime scene is compared with the "known" print. If enough of the identifying features are the same, the DNA or fingerprint is determined to be a match. If however, even one feature of the DNA or fingerprint is different, it is determined not to have come

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apply in determining whether the warrant is specific enough. If it is valid, the state technically *has* commenced the prosecution and, hence, met the statute of limitations. If an unreasonable amount of time elapses before the accused is actually brought to trial, issues concerning the Speedy Trial provision of the Constitution may be raised. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."). For example, if a fugitive, whose name is known, is indicted but not brought to trial for years because he could not be located, the appropriate challenge might be violation of the right to a speedy trial, not failure to meet the statute of limitations.

<sup>29</sup> *United States v. Doe*, 401 F. Supp. 63, 65 (E.D. Wis. 1975).

<sup>30</sup> *United States v. Ferrone*, 438 F.2d 381, 389 (3d Cir. 1971).

<sup>31</sup> NAT'L INST. OF JUSTICE, *supra* note 3, at <http://www.ncjrs.org/nij/DNAbro/what.html>.

<sup>32</sup> *DNA Sample Used to Indict "John Doe" in N.Y. Rape Cases*, *supra* note 1.

from that suspect.”<sup>33</sup>

In both cases, once a match is found and the suspect is identified by name, he can be apprehended and put to trial.

### B. *The Policy Behind the Sufficiency Rule*

The purpose of requiring an adequate description of the accused is (1) to give notice to the accused of the charges against him and (2) to ensure that the language used is sufficient to protect the defendant against double jeopardy.<sup>34</sup> It is debatable whether the defendant is actually put on notice by an indictment identifying him solely by his genetic code. “Unlike an alias, physical description, place of residence, social security number, or other such means of identification, a person does not usually know his or her DNA profile.”<sup>35</sup> A complaint identifying the accused by his DNA may not inform him that he is being prosecuted unless he actually knows his genetic profile.

This criticism is difficult to refute. One response is that the possessor of the particular genetic code is on *constructive* notice. He, after all, was the one who committed the crime. The state should not be bothered by the fact that a rapist who has managed to conceal his identity may not have *actual* notice that he is being prosecuted. The troubling aspect of this response is that it assumes the guilt of someone based solely on the presence of his genetic material. Evidence of a person’s genetic material does not always indicate that a rape was committed. There may have been consensual sex, in which case the accused would have no reason to believe he was the subject of a felony prosecution. There may have been no sexual contact at all. Especially where the genetic material is something other than semen, it is less certain that any sexual act occurred.

This problem, though, would arise in very limited circumstances.

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<sup>33</sup> NAT’L INST. OF JUSTICE, *supra* note 3, at <http://www.ncjrs.org/nij/DNAbro/intro.html>.

<sup>34</sup> See *United States v. Gaytan*, 74 F.3d 545, 551 (5th Cir. 1996) (“The Sixth Amendment requires that an indictment . . . fairly inform the defendant of the charges filed against him . . . .” (citing *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991)); *United States v. De Stefano*, 476 F.2d 324, 328 (7th Cir. 1973) (“[T]he important function of [an] . . . indictment is to apprise the defendant of the nature of the offense . . . and to make an adequate record so that the defendant can plead any conviction or acquittal resulting from the indictment as a bar to future prosecutions.” (citation omitted)). The issue of double jeopardy is not relevant to this discussion and therefore will not be considered.

<sup>35</sup> Motion to Dismiss for Lack of Subject Matter Jurisdiction, *supra* note 28, at 9.



First, there would have to be a woman who claims "rape" when there was, in fact, no rape.<sup>36</sup> Second, a DNA profile would only be used where the woman did not know the name or physical description of the person she was accusing.<sup>37</sup> Further, the police would have to be unable to identify the suspect through reasonable investigation within the statutory limitation of five or six years, depending on the jurisdiction. While possible, the chance of these circumstances simultaneously existing is slim enough to be outweighed by the benefits of allowing DNA-based warrants or indictments in rape or sexual assault cases.

Using a physical description or sketch to further describe the subject of an indictment may partially address the problem of notice.<sup>38</sup> As noted above, a person generally does not know his genetic profile.<sup>39</sup> However, a person may recognize his own physical description or sketch and thereby be put on notice. A man who knows he is innocent, for example, may prefer to contact authorities and settle the issue rather than risk the prejudice of a delayed prosecution. A man who knows he is guilty, while he is under no legal obligation to turn himself in (and would probably be best off not to, lest he be viewed as making a confession), at a bare minimum, has the option of obtaining counsel to prepare a defense for any future prosecution.

Why does the issue of fair notice to the defendant take on greater importance when a DNA warrant or indictment is used to meet the statute of limitations? The answer lies in the rationales for having statutes of limitations in the first place.

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<sup>36</sup> In other words, she would claim rape when the sex was consensual or did not occur at all. Two possible scenarios are a cheating girlfriend or wife who claims rape to conceal her infidelity or a young girl who does not want to admit to her parents that she has had consensual intercourse. Although no exhaustive data exists on the percentage of false rape accusations, many claim that only about two percent of rape claims are unfounded. See Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947, 949 n.11 (citing many authors who state a two percent false rape claim rate). Greer, however, argues that the number is lacking empirical basis. See *id.* ("This empirical fact [of a two percent false rape claim rate] . . . is an ideological fabrication.").

<sup>37</sup> This would eliminate the scenario of the woman who claims rape falsely in order to "get back at" someone. Presumably, the woman in such a case would know the identity of the accused.

<sup>38</sup> See *supra* notes 27-30 and accompanying text (discussing the validity of "John Doe" warrants). "John Doe" warrants that give a physical description of the accused have been upheld. Arguably, a sketch is equivalent—it is a pictorial physical description—and could be upheld on the same grounds.

<sup>39</sup> *Supra* note 35 and accompanying text.

## III. RATIONALES FOR THE STATUTE OF LIMITATIONS

Statutes of limitations are legislatively or judicially created laws that limit the time during which a prosecution can be commenced.<sup>40</sup> After this period of time has expired, the crime cannot be prosecuted. Generally, more serious crimes have a lengthier limitation period.<sup>41</sup> Some crimes, such as murder, may have no statute of limitations at all.<sup>42</sup>

Statutes of limitations acknowledge that with the passage of time caused by delayed prosecution, evidence degrades, memories become less clear, and a defense becomes more difficult to mount.<sup>43</sup> The Due Process Clause may also help to prevent pre-prosecution delay, but it is difficult to raise a successful claim: the defense must show both that the delay "caused substantial prejudice to [the] appellee's rights to a fair trial and that the delay was an intentional device to gain tactical

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<sup>40</sup> See generally Jonathan W. Diehl, Note, *Drafting a Fair DNA Exception to the Statute of Limitations in Sexual Assault Cases*, 39 JURIMETRICS J. 431, 439-41 (1999) (arguing that an exception to statutes of limitations based on DNA evidence will not unduly burden defendants if the scope of the exception is limited and additional safeguards are implemented); Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460-500 (1997) (discussing the rationales for statutes of limitations including that they promote repose, minimize the deterioration of evidence, place defendants and plaintiffs on equal footing, promote cultural values of diligence, encourage the prompt enforcement of substantive law, avoid retrospective application of contemporary standards, and reduce volume of litigation).

<sup>41</sup> See, e.g., 42 PA. CONS. STAT. ANN. § 5552 (West Supp. 2001) (providing that the prosecution for an offense must commence within two years after it was committed, unless the offense falls under the category of major offenses, in which case the applicable statute of limitations is five years); see also CAL. PENAL CODE § 799 (West 1985 & Supp. 2002) (allowing prosecutions for offenses punishable by death, life imprisonment, or life without the possibility of parole to be commenced "at any time"); N.Y. CRIM. PROC. LAW § 30.10 2(a) (McKinney Supp. 2001) (allowing prosecutions for class A felonies to be commenced at any time).

<sup>42</sup> See 720 ILL. COMP. STAT. ANN. 5/3-5 (West Supp. 2001) (placing no limitation on beginning a prosecution for crimes of homicide, treason, arson, or forgery); MODEL PENAL CODE § 1.06 (1985) ("A prosecution for murder may be commenced at any time."). In certain cases, Florida, Mississippi, Nevada, and New Mexico impose no statute of limitations for rape. See FLA. STAT. ANN. § 775.15(1)(b) (West Supp. 2002) ("[P]rosecution for a first or second degree felony violation of s. 794.011 [sexual battery], if such crime is reported to a law enforcement agency within 72 hours after commission of the crime, may be commenced at any time."); MISS. CODE ANN. § 99-1-5 (1999) (imposing no statute of limitations for murder or rape prosecutions); NEV. REV. STAT. ANN. § 171.083 (Michie Supp. 2001) ("No limitation for sexual assault if written report filed with law enforcement officer during period of limitation . . ."); N.M. STAT. ANN. § 30-1-8G (Michie Supp. 2001) ("[F]or a capital felony or first degree violent felony, no limitation period shall exist and prosecution for these crimes may commence at any time after the occurrence of the crime.").

<sup>43</sup> *United States v. Marion*, 404 U.S. 307, 321 (1971).

advantage over the accused."<sup>44</sup> Because these requirements are too stringent for most defendants to meet, the statute of limitations serves a vital role in protecting against pre-indictment delay. In *United States v. Marion*, Justice White explained:

"[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence." These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.<sup>45</sup>

While statutes of limitations are necessary for ensuring the defendant's right to a fair trial, DNA indictments do not contravene the policy behind them.

#### A. *Preservation of Evidence*

One rationale behind the statute of limitations is to protect against the loss or degradation of physical evidence.<sup>46</sup> In rape cases, however, where DNA evidence is available, the risk that important evidence will be lost over time—and that the defense will suffer prejudice as a result—is diminished. DNA evidence is less susceptible to losing its probative value over time than other types of evidence. Once the sample is tested and profiled, it can be matched against a sample taken from a suspect at any time in the future, however distant. Because a person's genetic code (unlike a name or physical attribute) is fixed,<sup>47</sup> it retains its evidentiary value over time. Moreover, properly preserved genetic material can be kept indefinitely, so that a defendant can have the material tested independently for accuracy.<sup>48</sup>

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<sup>44</sup> *Id.* at 324.

<sup>45</sup> *Id.* at 322 (alterations in original) (citations omitted).

<sup>46</sup> Ochoa & Wistrich, *supra* note 40, at 471-83.

<sup>47</sup> See ACLU Massachusetts, *DNA Testing ACLU Q&A*, at <http://www.acu-mass.org/privacy/dnaqna.html> (last updated Aug. 13, 2001) ("DNA codes do not change over a lifetime, and the same codes are present in every cell of an individual's body.").

<sup>48</sup> See DAVID H. KAYE & GEORGE F. SENSABAUGH, JR., REFERENCE GUIDE ON DNA EVIDENCE 506, at [http://air.fjc.gov/public/pdf.nsf/lookup/sciman09.pdf/\\$file/sciman09.pdf](http://air.fjc.gov/public/pdf.nsf/lookup/sciman09.pdf/$file/sciman09.pdf) (last visited Feb. 15, 2002) ("In dry biological samples, protected from air, and not exposed to temperature extremes, DNA degrades very slowly. In fact, the relative stability of DNA has made it possible to extract usable DNA from samples hundreds to thousands of years old.").

### B. *Loss of Witness Recollection*

While DNA evidence stands the test of time, there still exists the concern that the defense may lose other ephemeral evidence, such as witness recollections that have faded with time.<sup>49</sup> For example, a defendant may be able to call witnesses to testify about the circumstances surrounding the alleged assault if timely notified. Years later, the accused may not be able to locate such witnesses, the witnesses may not remember, and the accused himself may not have a clear recollection of events at issue.

One approach to this problem is to ask whether the defense has suffered prejudice from this loss of evidence. Jonathan Diehl suggests that when a defendant who asserts a credible defense of consent can demonstrate a *reasonable probability* of prejudice (as opposed to the *actual prejudice* standard for a due process claim), he should be excluded from any DNA exception to the statute of limitations.<sup>50</sup> As Diehl notes though, “[i]n most cases, a defendant is unlikely to show reasonable probability of prejudice when identifying DNA is present. Unless there is reason to believe that . . . the sex was consensual, a positive DNA identification is likely to overwhelm any evidence the defendant could have presented within the statute of limitations.”<sup>51</sup> In other words, once the issue of identity is eliminated (through a DNA match), there must be serious doubt that the sex was forced in order for a jury to acquit.

### C. *Need for Repose*

Statutes of limitations “promote repose and decrease uncertainty.”<sup>52</sup> An accused individual generally should not have to live in perpetual uncertainty about whether the state will prosecute him.<sup>53</sup> This rationale is sensible only when the individual’s identity is known. In such cases, the state should not be permitted to delay indefinitely its choice to prosecute an identified suspect. The rationale for providing repose to a potential defendant is less compelling when the reason

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<sup>49</sup> See, e.g., *Mo., Kan., & Tex. Ry. v. Harriman*, 227 U.S. 657, 672 (1913) (“The policy of statutes of limitation is . . . that the parties shall not suffer . . . from death or disappearance of witnesses . . . or failure of memory.”).

<sup>50</sup> Diehl, *supra* note 40, at 441.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 435 (footnote omitted).

<sup>53</sup> See generally Ochoa & Wistrich, *supra* note 40, at 460-71 (discussing promotion of repose as a rationale for statutes of limitations).

for delay is that the suspect has concealed his identity from the victim and from the state. "Arguably, those guilty of crimes do not deserve the peace of mind that comes with the passage of the statutory limit."<sup>54</sup>

The need for repose is not limited to the accused. Society's rationales for punishment become less persuasive with the passage of time. For example, an offender who has committed a crime in the past, but who has not been arrested for other, more recent crimes, may be reformed and no longer in need of specific deterrence.<sup>55</sup> This, however, assumes that the offender, because he has not been arrested for more recent subsequent offenses, has not committed more crimes. Even if the need for specific deterrence is reduced, i.e. where the offender has reformed, general deterrence is still necessary. Other potential offenders, realizing that certain crimes will be punished regardless of how long the accused remains anonymous, may be deterred from committing similar crimes.

Another reason for the statute of limitations is that society's need for retribution diminishes with time.<sup>56</sup> This argument is less cogent when dealing with a crime as serious as rape. One can analogize to homicide, where there is generally no statute of limitations.<sup>57</sup> The long-term effect on rape victims belies claims that the need for retribution diminishes with time.<sup>58</sup>

#### D. *Ensuring Prompt Police and Prosecutorial Practices*

Statutes of limitations encourage prosecutor and police promptness.<sup>59</sup> Without a statute, the police may lack incentive to exercise due diligence in investigating the case. They may forgo extensive investi-

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<sup>54</sup> Diehl, *supra* note 40, at 435 (footnote omitted). Diehl wisely notes, though, that "not all of those who stand accused of a crime are guilty; statutes of limitations bring repose to the innocent as well." *Id.* (footnote omitted). Safeguards can be put in place to protect innocent people. *Infra* Part VI.

<sup>55</sup> See MODEL PENAL CODE § 1.06 cmt. 1 (Official Draft and Revised Comments 1985) ("[I]f the actor long refrains from further criminal activity, the likelihood increases that he has reformed, diminishing the necessity for imposition of the criminal sanction.").

<sup>56</sup> Diehl, *supra* note 40, at 435.

<sup>57</sup> See *supra* note 42 (discussing relevant statutes of limitations for homicide).

<sup>58</sup> See generally Carol C. Nadelson et al., *A Follow-Up Study of Rape Victims*, 139 AM. J. PSYCHIATRY 1266 (1982) (suggesting that rape victims were still suffering the effects of the rape up to two and a half years after the rape).

<sup>59</sup> See *Toussie v. United States*, 397 U.S. 112, 115 (1970) ("Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.").

gation and simply file charges based on the DNA evidence they already possess. Procedural safeguards can prevent such abuse. One possibility is to have magistrate judges require the police to show that they have exercised a reasonable degree of effort to identify the suspect before issuing a "John Doe" arrest warrant. In cases where the police and prosecution have exercised due diligence, it is not in the interest of justice to let the case evaporate when there exists highly probative evidence to use at trial if the suspect is later identified.

#### IV. RECENT LEGISLATIVE DEVELOPMENTS

Many believe that the probative value of DNA evidence is sufficiently high to overcome the risk of prejudice to the defense. Several recent proposals for, and adoption of, legislation that eliminates or extends the applicable statute of limitations in rape cases in which there is DNA evidence demonstrate this belief.<sup>60</sup> For example, California has recently amended its statute of limitations for sexual assault cases so that the relevant limitation is either ten years from the commission of the crime or one year after the suspect is conclusively identified by DNA testing.<sup>61</sup> In the case of the latter, the limitation period is effectively eliminated, provided that the biological material to be used as evidence is analyzed within two years of the commission of the offense. This extension of the statute to within one year after the suspect is conclusively identified by DNA demonstrates the confidence

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<sup>60</sup> See Amy Dunn, Note, *Criminal Law—Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?*, 23 U. ARK. LITTLE ROCK L. REV. 839, 858 & nn.154-57 (2001) (discussing proposals to amend limitations in Pennsylvania, Michigan, and New York).

<sup>61</sup> The California Penal Code states:

Notwithstanding the limitation of time described in Section 800, the limitations period for commencing prosecution for a felony offense described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290, where the limitations period set forth in Section 800 has not expired as of January 1, 2001, or the offense is committed on or after January 1, 2001, shall be 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, provided, however, that the one-year period from the establishment of the identity of the suspect shall only apply when either of the following conditions is met:

(A) For an offense committed prior to January 1, 2001, biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004.

(B) For an offense committed on or after January 1, 2001, biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense.

CAL. PENAL CODE § 803(i)(1) (West Supp. 2002) (emphasis added).

that the California legislature has in the probative value of DNA.<sup>62</sup>

Ironically, such legislation can be used to argue against the use of DNA warrants or indictments in order to meet the statute of limitations. Notably, the legislators did not opt to legitimize the use of "John Doe" warrants or indictments in the legislation. They only opted to extend the statute of limitations under certain circumstances. This is an *inclusio unius, exclusio alterius* type of argument. If legislators had desired to legitimize such practices, they could have done so. On the other hand, legislators may not have included such provisions because they were not aware of the possibility or because they thought that the extension of the statute of limitations in such cases would obviate the problem. If prosecutors are given (as the new statute provides for) an unspecified period to find a DNA match to make a conclusive identification, and then one year henceforth to commence their prosecution, there would seem to be no need for using "John Doe" DNA indictments or warrants in the first place.

While the legislators intended to ensure that prosecutions be timely commenced *once the identity of the suspect has been established by a DNA match*,<sup>63</sup> it is difficult to see how the effect would be different whether one proceeded by use of a DNA indictment or under an amended statute such as California's. That is, if one proceeds using a DNA warrant, the prosecution has technically commenced and thus *met* the statute of limitations. Once the identity of the suspect is discovered, the prosecutor is expected to continue the prosecution and bring the defendant to trial in a timely manner. If this does not happen, the defendant has a strong claim that his constitutional right to a speedy trial has been violated.<sup>64</sup>

The Sixth Amendment guarantee to a speedy trial, however, has not been strictly defined. In *Barker v. Wingo*, the Supreme Court held that the right to a speedy trial could be decided only on a case-by-case basis.<sup>65</sup> The Court articulated a balancing test that would take into ac-

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<sup>62</sup> Other states have drafted, and perhaps already have adopted, similar legislation. See, e.g., Diehl, *supra* note 40, at 436 ("[T]he Illinois Senate . . . voted to eliminate statutes of limitations whenever identifying DNA is present. Apparently, it believed DNA evidence overcomes the risk that the passage of time will result in the loss of important evidence.").

<sup>63</sup> See *supra* note 61 (quoting the legislation, which provides that a prosecution may commence within one year after the suspect is conclusively identified by DNA testing).

<sup>64</sup> See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . .").

<sup>65</sup> See 407 U.S. 514, 522 (1972) ("[A]ny inquiry into a speedy trial claim necessi-

count the length of the delay, the reason for the delay, whether the defendant asserted his Sixth Amendment right, and the prejudice to the defendant.<sup>66</sup> Elsewhere, the right to a speedy trial has been construed in terms of whether the delay was necessary or reasonable. For example, Federal Rule of Criminal Procedure 48(b) provides that “if there is *unnecessary* delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint.”<sup>67</sup>

A court would likely find that delay caused by the inability to identify and apprehend the suspect is reasonable so long as the police and prosecutor exercised due diligence in their investigations. Once the suspect has been identified, the court can exercise its discretion as to whether the state has unreasonably delayed bringing the suspect to trial. Therefore, the use of a DNA warrant or indictment to meet the statute of limitations does not place an accused in perpetual jeopardy of prosecution any more than does legislation such as California’s amendment to section 803 of its penal code.<sup>68</sup>

#### V. LIMITATIONS ON THE USE OF A GENETIC CODE TO COMMENCE THE PROSECUTION FOR PURPOSES OF MEETING THE STATUTE OF LIMITATIONS

Although prosecutors have used DNA indictments to meet the statute of limitations thus far only in sexual assault cases, there is no reason why these indictments could not be used for other crimes. DNA profiling lends itself most obviously to sex crimes, but why not use a hair left behind at the scene of a robbery, a fingernail scraping from the victim of a simple assault,<sup>69</sup> or even a fingerprint left behind during a burglary? The gravity of the crime should be weighed carefully before taking such a measure.

##### A. *Variation in Probative Value of Evidence*

As the probative value of the material diminishes, absent other corroborating evidence, it becomes less desirable to use genetic mate-

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tates a functional analysis of the right in the particular context of the case . . .”).

<sup>66</sup> *Id.* at 530.

<sup>67</sup> FED. R. CRIM. P. 48(b) (emphasis added).

<sup>68</sup> *See* CAL. PENAL CODE § 803(i)(1) (West Supp. 2002) (“[T]he limitations period for commencing prosecution . . . shall be 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 . . .”).

<sup>69</sup> During a struggle, a victim may scratch her attacker and trap bits of blood or skin under her fingernails.



rial alone to commence a prosecution against someone. For example, hair found at the scene of a crime alone may suggest little beyond the fact that the person to whom the hair belongs was at one time present at the site. In such a case, it may be inappropriate to commence a prosecution. On the other hand, seminal fluid collected during a rape examination is far more suggestive that a rape occurred. At a minimum, it provides evidence that there was sexual contact.

#### B. *Special Procedures to Protect Against Error*

Special care must be taken to minimize the risk of error when using DNA. There are two types of errors that occur in handling DNA. First, there is a risk of error in handling the evidence before it reaches the laboratory.<sup>70</sup> Mishandling, resulting in contamination and mislabeling, may lead to a false positive match.<sup>71</sup> This is the most difficult type of error to correct after the passage of time, as witnesses are less likely to remember the circumstances of the collection and transportation of the sample. The risk of mishandling, though, is always a possibility when there is forensic evidence involved. Police and technicians who handle samples must adhere to strict procedural guidelines and a system of documenting the chain of custody should be in place.

Error may also occur in the actual analysis of the material in the laboratory.<sup>72</sup> Ensuring that the defendant is given an opportunity to retest the evidence at an independent laboratory, should he wish to challenge the validity of the match, can eliminate the risk of this type of error. This requires both that a portion of the evidence is preserved for future testing<sup>73</sup> and that careful procedures are observed to prevent degradation of the evidence.<sup>74</sup> One commentator has sug-

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<sup>70</sup> See COMM. ON DNA FORENSIC SCI.: AN UPDATE, NAT'L RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 80-82 (1996) (discussing the mishandling of evidence and suggesting safeguards against such mishandling).

<sup>71</sup> On the other hand, mishandling may lead to a false exclusion. One way this can occur is when foreign biological material contaminates the sample. Testing may then reflect the code of the foreign DNA, which will likely not match the suspect's—and therefore exclude him as a suspect.

<sup>72</sup> *DNA Evidence, When Properly Collected and Analyzed, Should Not Be Called into Question*, The National Academies News, at <http://www4.nationalacademies.org/news.nsf/isbn/0309053951?OpenDocument> (May 2, 1996) ("Because no amount of effort can completely eliminate the risk of laboratory error, the best protection an innocent suspect has is the opportunity for an independent retest . . .").

<sup>73</sup> *Id.* ("[F]orensic samples should be divided into two or more parts as soon as possible after collection and the unused parts should be retained to permit additional tests.").

<sup>74</sup> Kathryn M. Turman, *Understanding DNA Evidence: A Guide for Victim Service Pro-*

gested, in the context of creating a DNA exception to the statute of limitations for rape cases, that the statute of limitations should be removed only if the specimen has been split and preserved for retesting.<sup>75</sup>

## VI. RECOMMENDATIONS

There are several possible ways to deal with the issue of the statute of limitations for sexual assault cases. One possibility is to eliminate the statute of limitations altogether in rape cases.<sup>76</sup> This seems the least desirable solution; people could make complaints of rape at any time in the future regardless of whether there is DNA evidence. Although prosecutorial discretion would filter out the most insubstantial claims, the absence of a statute of limitations gives the highest probability that the defense of those innocently accused will be prejudiced.

Another possibility is to amend statutes of limitations to provide exceptions for cases in which there is DNA evidence.<sup>77</sup> Such exceptions should mandate that the DNA be analyzed within a specified period of time after the crime is committed. A possible drawback to this approach is that police may lack motivation, once the DNA has been analyzed, to pursue their investigations actively. This would be especially true in difficult cases. Police may cease investigations and wait passively until a "cold hit"<sup>78</sup> is made with the computer database. Furthermore, such exceptions should mandate that the prosecution commence within a reasonable time after the identity of the suspect is discovered. Once the suspect has been identified, there is no reason to delay the prosecution any further.

The creation of DNA exceptions to the statute of limitations in

*viders*, OFF. FOR VICTIMS OF CRIME BULL. (U.S. Dep't of Justice), Apr. 2001, at 3 ("Biological evidence should always be thoroughly airdried, packaged in paper, and properly labeled, ensuring that the chain of custody . . . is maintained."), available at [http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna\\_4\\_2001/NCJ185690.pdf](http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna_4_2001/NCJ185690.pdf).

<sup>75</sup> Diehl, *supra* note 40, at 440 ("The risk of prejudice could be further reduced by limiting the statute to cases in which part of the evidence is preserved for future testing. . . . If [police or laboratories] do not [preserve a portion of the specimen], they risk the case being dismissed due to the statute of limitations.").

<sup>76</sup> See *supra* note 42 (discussing how this approach has been taken in other states).

<sup>77</sup> See *supra* note 61 and accompanying text (noting that California has taken a similar approach).

<sup>78</sup> A "cold hit" is "an association between an offender or a crime scene [that] is made absent an investigative lead." Press Release, Federal Bureau of Investigation, U.S. Department of Justice, First "Cold" Hit Recorded in National DNA Index System! (July 21, 1999), at <http://www.fbi.gov/pressrel/pressrel99/coldhit.htm>. This occurs when a sample is entered blindly against the entire database and a match is found. *Id.*

rape cases is probably the most desirable solution to the issue at hand. These exceptions represent legislative judgments that: (1) the crime of rape is grave enough to merit an extension of the statute; and (2) the probative value of DNA is high enough to counterbalance the competing concerns that the defense will be prejudiced. Additionally, such legislation makes clear that the exception is limited to sexual assault cases. Unfortunately, until state legislatures actually enact these exceptions, thousands of unsolved sexual assault cases continue to be lost to the statute of limitations.

Until states adopt such legislation, using DNA indictments or arrest warrants in order to commence a prosecution may be a valid way to preserve unsolved rape cases. In a technical sense, DNA indictments do meet the legal requirements for commencing a prosecution. In particular, the requirements for sufficiency of description theoretically can be met, for a person's genetic code is perhaps the most particular description of that person that exists. It is far more particular than a name or even a physical description. While several people can have the same name, only identical twins share the same genetic profile.<sup>79</sup> If there are physical descriptions of the suspect available, including police sketches, these should be included with the warrant or indictment in order to describe its subject more fully.

In order to prevent abuse, however, the use of DNA indictments or warrants should be conditioned on certain provisions. First, as Diehl suggests, the DNA sample should be split and preserved so that the defendant can have it retested independently.<sup>80</sup> Strict guidelines should be set to ensure the proper handling and documentation of DNA specimens.

Second, a DNA indictment or warrant should be resorted to only after some prescribed period of time. There should also be some showing that the police have exercised due diligence in their investigation and have exhausted their resources. DNA warrants should be used only as a last resort.

Third, DNA indictments should be used only where the DNA specimen is so probative that there is a reasonable certainty that the sexual contact occurred. One way to ascertain this would be to have a judicial hearing to determine that some level of suspicion beyond

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<sup>79</sup> See COMM. ON DNA TECH. IN FORENSIC SCI., NAT'L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 3 (1992) ("Except for identical twins, the DNA of a person is for practical purposes unique.").

<sup>80</sup> Diehl, *supra* note 40, at 440.

“probable cause” exists.<sup>81</sup> For example, semen or a pubic hair collected during a rape examination of the complainant may suffice. On the other hand, something less suggestive such as blood or hair from the scalp found at the crime site may not suffice.

Finally, DNA indictments should not be used to meet the statute of limitations in cases of misdemeanors or minor offenses. There should be some legislative guidance as to what crimes are not serious enough to outweigh the prejudice suffered by the defense. Because of the seriousness of sex crimes and the probative value of DNA, prosecutors should be able to use DNA specimens to commence rape prosecutions that threaten to be lost to the statute of limitations. Hopefully legislators will take notice.

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<sup>81</sup> David Rudovsky has called this “super-probable cause.” Interview with David Rudovsky, Senior Fellow, University of Pennsylvania Law School, in Philadelphia, Pa. (Nov. 15, 2000).