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Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights

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Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants'
Constitutional and Statutory Rights

COMMENTS

BEYOND FINGERPRINTING: INDICTING DNA THREATENS CRIMINAL DEFENDANTS' CONSTITUTIONAL AND STATUTORY RIGHTS

ANDREW C. BERNASCONI*

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INTRODUCTION

In September 2000, California police arrested Paul Eugene Robinson and charged him with committing a series of sexual assaults in Sacramento in 1994.¹ Despite the horrific nature of the crimes alleged,² the arrest unsettled civil libertarians because it marked the first time police officers arrested a person based solely on the suspect's genetic profile, rather than a name.³ At the time of the indictment, the police had not determined the accused individual's name⁴ and instead resigned themselves to seeking a "John Doe" warrant.⁵ In Robinson's case, the prosecutor filed charges only one

1. See Erin Hallissy & Charlie Goodyear, *Databank Match Brings Arrest on DNA Warrant*, S.F. CHRON., Oct. 25, 2000, at A3 (explaining the legal genesis of Robinson's case).

2. See Audrey Cooper, *Man Identified Only By DNA Arrested*, AP ONLINE, Oct. 25, 2000, available at 2000 WL 28615507 (reiterating that prior to Robinson's arrest, police officers called the suspect the Second Story Rapist "for his penchant of attacking women" on the second floor of their residences).

3. See *id.* (reporting that civil liberties advocates are concerned that the process of issuing "John Doe" arrest warrants might adversely affect suspects' abilities to defend themselves). For a further description of so-called "John Doe" indictments and warrants, see *infra* note 5.

4. See Richard Willing, *Police Expand DNA Use*, USA TODAY, Oct. 25, 2000, at 1A (noting that California is one of at least six states that has filed charges against unidentified suspects using DNA evidence); *County Charging Unknown Man with Rape on DNA Evidence*, AP NEWSWIRE, Feb. 14, 2000 [hereinafter *Unknown Man*] (quoting a California Deputy District Attorney, who filed similar DNA indictments prior to Robinson's arrest, as saying, "[w]hy should some victim not get what they [sic] deserve, just because we don't have a name?").

5. See BLACK'S LAW DICTIONARY 840 (7th ed. 1999) ("John Doe" is a "fictitious name used in a legal proceeding to designate a person whose identity is unknown . . ."). A "John Doe" indictment or warrant, therefore, charges the legal entity of a person with the commission of a crime, but describes the defendant through other means, e.g. a genetic profile, rather than listing the suspect's name. Cf. *id.* at 1450 (defining "John Doe Summons" as a "summons to a person whose name is unknown at the time of service."). See also Bill Dedman, *Only DNA Identifies Suspect in Rapes*, OREGONIAN, Oct. 10, 1999, at A8 (suggesting the process of indicting DNA is novel because prosecutors usually employ "John Doe" warrants "when the accused is known by an alias or by a physical description"). A DNA indictment

day⁶ before the statute of limitations would have barred any prosecution for the 1994 sexual assaults.⁷ In a case that likely will have a substantial impact on criminal procedure,⁸ the prosecutor in Robinson's case sparked a debate over the constitutionality of indicting suspects' genetic material to avoid the restrictions imposed on prosecutors by statutes of limitations.⁹

Although Robinson's case¹⁰ marks the first time the police have arrested an unnamed and unknown suspect based only on a deoxyribonucleic acid (DNA) description,¹¹ prosecutors in at least nine states have filed charges against or indicted "John Doe" suspects

simply replaces a physical description with a genetic description. *See Charges Identify Rapist Only By His DNA*, AP NEWSWIREs, Sept. 3, 1999 [hereinafter *Charges*] (describing a DNA-based warrant used in Milwaukee that identified the suspect as "John Doe, unknown male," with matching DNA at "genetic locations D1S7, D2S44, D5S110, D10S28 and D17S79").

Many state codes specifically provide for the use of "John Doe" warrants and indictments. *See, e.g.*, CAL. PENAL CODE § 815 (West 1985) ("A warrant of arrest shall specify the name of the defendant or, if it is unknown to the magistrate . . . the defendant may be designated therein by any name."); MASS. GEN. LAWS ch. 277, § 19 (1992) ("If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description An indictment of the defendant by a fictitious or erroneous name shall not be grounds for abatement").

6. *See* David Kravets, *DNA Sidesteps Limitations Statute*, AP ONLINE, Jan. 6, 2001, available at 2001 WL 3649888 (indicating the filing of charges precluded the statute of limitations from taking effect, thereby allowing Robinson's arrest after the statutory deadline).

7. *See* Willing, *supra* note 4, at 1A (revealing the prosecutor's reasoning that state law allows DNA-based warrants because the law allows warrants based on more general physical descriptions of suspects).

8. *See id.* (noting that experts believe Robinson's case will make "legal history"); *see also* Kravets, *supra* note 6 (suggesting Robinson's case might reach the U.S. States Supreme Court); Erin Hallissy, *DNA-Based Warrant Faces Appellate Review*, S.F. CHRON., Apr. 6, 2001, at A3 [hereinafter *Appellate Review*] ("Robinson's case could end up in the U.S. Supreme Court . . .").

9. *See* Cooper, *supra* note 2 (noting that Robinson's case marks the "flash point" in the debate between civil libertarians and law enforcement agencies).

10. On January 5, 2001, Robinson's attorney moved to dismiss the case against his client based on a lack of subject matter jurisdiction because the applicable statute of limitations expired before police arrested Robinson. *See* E-mail from Mr. Johnny C. Griffin III, Robinson's attorney, to author (Nov. 27, 2000) (hard copy on file with the *American University Law Review*). On February 23, 2001, a California Superior Court judge rejected Robinson's motion to dismiss the charges and upheld the arrest warrant as valid. *See* Erin Hallissy, *Judge Upholds Use of DNA Warrants*, S.F. CHRON., Feb. 24, 2001, at A1 (indicating that experts believe this ruling represents the first time a court has considered the validity of a warrant identifying an individual exclusively by genetic data). On April 25, 2001, the California state Court of Appeals issued a stay in Robinson's case until it reviews briefs and decides on the constitutionality of Robinson's arrest warrant. *See Appellate Review, supra* note 8, at A3 (recognizing the possibility that Robinson's case could ultimately compel the U.S. Supreme Court to "set a national precedent on whether it is legal to use DNA warrants to get around statutes of limitations").

11. *See* Willing, *supra* note 4, at 1A (stating the charges prosecutors filed against Robinson originally identified him "only by his DNA profile").

by relying exclusively on the suspects' genetic make-up.¹² The practice of charging or indicting DNA evidence in lieu of charging an identity—hereinafter referred to as “DNA indictment”—originated in Kansas.¹³ There, in 1991, McPherson County Assistant District Attorney Ty Kaufman indicted a DNA profile of a man who committed several rapes, but police never caught him.¹⁴ Theoretically, the indictment remains in effect until investigators identify the perpetrator of the rape,¹⁵ notwithstanding a five-year statute of limitations in Kansas for rape.¹⁶

Prosecutors did not repeat the practice of DNA indictment until 1999.¹⁷ On September 1, 1999, Milwaukee County Assistant District Attorney Norman Gahn used a DNA indictment to preserve sexual assault and kidnapping charges for a case in which the statute of limitations threatened to preclude further prosecution.¹⁸ At the time

12. See *id.* (indicating that California prosecutors “have charged a man with rape using a warrant that identified him only by his DNA profile”); Julian E. Barnes, *East Side Rapist, Known Solely by DNA, Is Indicted*, N.Y. TIMES, Mar. 16, 2000, at B1 (describing the indictment of an unidentified rapist in Manhattan relying on DNA evidence); *Charges*, *supra* note 5 (describing a 1991 Kansas case in which the prosecutor used DNA to “establish an unnamed defendant”); *DNA Profile is Used as Basis for Arrest Warrant in Sexual Assault Case*, ST. LOUIS POST-DISPATCH, Dec. 5, 1999, at C2 (stating that an arrest warrant was filed in Illinois against a suspect in a sexual assault case); Greg Kennedy, *Prosecutors File Charges Against DNA Profile in OU Student's Murder*, THE DAILY OKLAHOMAN, Mar. 21, 2000, at 1A (noting that charges were filed against DNA evidence in an Oklahoma murder case); *Pennsylvania State U.: DNA Leads to Warrant for Man's Arrest in Alleged Rape of Former Penn State Student*, U-WIRE, Mar. 30, 2000, available at 2000 WL 17590335 (discussing a Pennsylvania case in which a warrant was issued for the arrest of unknown man whose DNA matched the DNA evidence in a rape case); Lisa Sink & Linda Spice, *Use of DNA Evidence Expands*, MILWAUKEE J. & SENTINEL, Oct. 26, 2000, at 1B (reporting a Wisconsin prosecutor filed an arrest warrant against DNA); Brady Snyder & Amy Joi Bryson, *Charge Filed Against DNA*, DESERET NEWS, Mar. 3, 2000, at A1 (referring to two Utah criminal cases in which charges have been filed against DNA evidence); *Unknown Man Indicted in Austin Rape Case*, HOUS. CHRON., Nov. 5, 2000, at 45, available at WL 24523884 [hereinafter *Austin Rape*] (noting that a grand jury indicted an unknown man for a 1995 rape case when genetic material constituted the only evidence); *Williston Junior High School Vandalized*, AP NEWSWIRE, Apr. 23, 2000 (identifying a North Dakota rape case in which a prosecutor intended to use DNA evidence to obtain an indictment despite the fact he did not have a suspect).

13. See *Charges*, *supra* note 5 (stating that Milwaukee County Assistant District Attorney Norman Gahn was not the first prosecutor to file charges based solely on DNA).

14. See *id.* (indicating that Kaufman filed charges against the DNA material out of desperation because he did not possess any other leads in the case and the statutory deadline for prosecution was quickly approaching).

15. See *id.* (quoting Kaufman as indicating the cases remain open because “we haven't found him yet”).

16. See KAN. STAT. ANN. § 21-3106(4) (1995) (“[A] prosecution for rape . . . must be commenced within five years after its commission.”).

17. See *Serial Rapist Indicted on Long Island Based Solely on DNA Evidence*, AP NEWSWIRE, Aug. 9, 2000 (noting that prosecutors initiated DNA indictment in 1991, but “it was not until 1999 . . . that other jurisdictions began to follow suit”).

18. See David Doege, *Novel Warrant IDs Suspect Only by DNA Databank Evidence Used*

he filed the charges, Gahn promised additional DNA indictments would be forthcoming.¹⁹ Gahn lived up to his promise and by December 1999, he had used DNA indictments to obtain arrest warrants against two more suspects accused of sexual crimes.²⁰ The repeated invocation of the DNA indictment process by Gahn, a nationally recognized expert in DNA evidence,²¹ inspired other states to employ the same procedure.²²

Prosecutors like Gahn have stated explicitly that by seeking DNA indictments against “John Doe” defendants, rather than waiting and filing charges against suspects known by name, they intend to prevent the relevant statutes of limitations from barring prosecution when and if investigators later identify the suspects.²³ Although this approach is certainly a novel application of scientific and legal principles,²⁴ the process of charging genetic material without identifying the suspect raises significant legal questions about whether DNA indictments adversely affect a defendant’s chances of receiving a fair trial.²⁵

DNA indictments trigger further concerns about defendants’ rights upon considering the novelty of DNA evidence²⁶ and its potential for

to Charge ‘John Doe’ in Rape, MILWAUKEE J. & SENTINEL, Sept. 2, 1999, at 1A (stating that authorities filed the charges before they “bump[ed] up against the time limit” for bringing a criminal case, based on the relevant statute of limitations).

19. See *id.* at 12A (quoting Gahn as saying, “[w]e’ve got several more cases like this that have been identified, and we will be filing them.”).

20. See David Doege, *Prosecutor Uses DNA to Issue Warrant for Another Rapist*, MILWAUKEE J. & SENTINEL, Dec. 10, 1999, at 7 (noting that in addition to the three DNA indictments already filed, Gahn planned to pursue at least three more DNA indictments against suspected rapists within several weeks to preserve the state’s jurisdiction over the cases).

21. See Doege, *supra* note 18, at 12A (noting that Gahn’s actions and reputation as a recognized expert have enhanced Wisconsin’s reputation as a pioneer in the use of DNA evidence to resolve criminal cases).

22. See sources cited *supra* note 12 (listing states that have pursued charges against DNA material from crime scenes, all of which employed this procedure following Norman Gahn’s revival of DNA indictments in 1999).

23. See David Doege, *Arrest Sought for Assailant Known Only by Gene Profile*, MILWAUKEE J. & SENTINEL, Nov. 11, 1999, at 1 (“Gahn contends he has beaten the statute of limitations clock.”); *Rape Suspect Charged Only by DNA Code*, CINCINNATI POST, Oct. 8, 1999, at 9A (quoting Gahn as explaining, “[t]his way, it’s been put into the system so we will preserve jurisdiction”); Dedman, *supra* note 5, at A8 (“The prosecutor’s strategy [in using a DNA indictment] is an effort to keep the six year time limit for bringing charges from running out.”).

24. See Doege, *supra* note 18, at 12A (quoting Marquette University Law School Professor Daniel D. Blinka in describing Gahn’s DNA indictments as “extraordinary,” and Ray Dall’Ostro, the chairman of the Wisconsin Bar Association’s criminal law section, calling the cases “creative”).

25. See *id.* (according to Professor Blinka, “This [practice of DNA indictment] is going to raise some interesting, thick legal issues down the road”).

26. See *infra* notes 142-43 and accompanying text (indicating that fingerprinting dates back thousands of years); KEITH INMAN & NORAH RUDIN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS 21 (1997) (finding scientists did not perform DNA testing in

inaccuracy²⁷ relative to fingerprint evidence. Because prosecutors generally do not file “fingerprint indictments,”²⁸ the practice of indicting evidence of inferior accuracy, i.e., DNA, at least suggests the possibility of misguided prosecutions. Additionally, the nature of DNA indictments reflects the probability that prosecutors will arrest and charge defendants many years removed from the commission of the alleged crime,²⁹ potentially in violation of defendants’ constitutional right to a speedy trial.³⁰

Part I of this Comment provides an overview of the scientific and technological procedures that allow investigators to identify suspects on the basis of their genetic profiles. Part II discusses the evolution of statutes of limitations, including the purposes and policies giving rise to legislative limitations.³¹ Part II also examines the practice of DNA indictment against this historical background, concluding that DNA indictment does not comport with the reasons asserted for the existence of these legislative enactments. Part III provides an analysis of the use of fingerprints in criminal investigations. Part III then explores whether DNA evidence is sufficiently superior to fingerprinting to justify “John Doe” indictments, comparing and contrasting the use of fingerprints to that of DNA evidence in criminal trials. Part IV of this Comment provides a brief primer on the history of the Sixth Amendment right to a speedy trial,

the United States until 1986).

27. The scientific community uniformly regards fingerprint evidence as more accurate and capable of producing conclusive identifications than DNA evidence. *See infra* notes 173-74 (comparing the scientific accuracy of these two methods of identifying suspects in criminal investigations).

28. An official with the National District Attorneys’ Association has never heard discussion about the idea of indicting fingerprints nor seen any type of media coverage addressing the concept. Telephone Interview with James Polley, Director of Government Affairs, National District Attorneys’ Association (July 24, 2001). Similarly, a veteran state prosecutor for over 23 years is not aware of any jurisdiction that has taken steps to indict fingerprint evidence in the same way that prosecutors have done with DNA evidence. Telephone Interview with Ara Crowe, Executive Director of the Maryland State’s Attorneys’ Association, and state prosecutor for over 23 years (July 24, 2001).

29. For example, the prosecutors in the Paul Robinson case arrested the defendant after the statute of limitations expired, more than five years after the victim reported the crime. *See Kravets, supra* note 6 (providing the facts leading to Robinson’s arrest).

30. *See* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

31. Statutes of limitations are also known as “limiting actions,” and the terms will be used interchangeably throughout this paper. *Accord* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of the Statutes of Limitation*, 28 PAC. L.J. 453, 454-55 (1997) (“The law of limitation of actions is the set of legislatively and judicially created legal rules—including the classification of claims, the duration of limitation periods, the applicable principles of accrual and tolling, and the like—that determine whether a claim is time-barred.”).

questioning the constitutionality of DNA indictment against the backdrop of the Supreme Court's interpretation of the right.³² Part IV argues prosecutors' use of this practice raises serious, and perhaps constitutionally fatal, questions about DNA indictments' legitimacy. Part V concludes by providing recommendations to ensure the protection of criminal defendants' constitutional and statutory rights in the event the courts uphold the validity of DNA indictments.

I. THE FORENSIC USE OF DNA: HISTORICAL DEVELOPMENT OF DNA'S USE IN CRIMINAL INVESTIGATIONS

A brief guide to some of the technical and scientific prerequisites surrounding DNA analysis will prove helpful in providing a legal analysis to DNA indictment. Initially, a rapist or perpetrator of a sexual crime³³ must leave behind—generally at the crime scene—a sample of DNA that a trained technician will be able to recover and ultimately analyze.³⁴ This requirement does not present a high hurdle as, inevitably, virtually all perpetrators of sexual crimes leave behind DNA samples.³⁵ Because DNA resides in virtually every cell in the body,³⁶ the biological sample left by the sexual offender can be in the form of hair, skin, blood, urine, or saliva,³⁷ i.e., it need *not* be in

32. See U.S. CONST. amend. VI.

33. This Comment concentrates on the use of DNA indictments to assist in identifying and prosecuting perpetrators of sexual crimes, especially rape. The reasons for this narrow focus are three-fold: (1) Thus far, prosecutors have used the vast majority of DNA indictments to pursue cases against defendants accused of committing sexual crimes. See sources cited *supra* note 12 (listing cases, many of which involve rape and incest, in a number of states where prosecutors have sought DNA indictments); (2) Prosecutors most often use DNA evidence in sexual assault and murder cases. See Paul E. Tracy, Ph.D. & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for the 21st Century*, 90 J. CRIM. L. & CRIMINOLOGY 635, 657 (2000) (noting that DNA evidence usually is limited to sexual offenses and murder cases). Murder generally is not subject to a statute of limitations. See *infra* note 72 (listing crimes historically exempted from statutes of limitations); and (3) This line of demarcation drawn by prosecutors using DNA indictment allows an appropriate, albeit arbitrary, means of limiting the scope of this Comment. This author recognizes, however, the potential application of DNA indictments to additional criminal offenses.

34. See Tracy & Morgan, *supra* note 33, at 649 (stating that DNA's use for crime-fighting purposes depends on three premises: (1) the criminal must leave DNA evidence behind at the crime scene; (2) a trained technician must specifically perform a search for the DNA evidence; and (3) the evidence recovered must be "found, collected, and be of sufficient quantity and quality to permit DNA testing").

35. See Jonathan W. Diehl, Note, *Drafting a Fair DNA Exception to the Statute of Limitations in Sexual Assault Cases*, 39 JURIMETRICS J. 431, 432 (1999) (noting that rapists are distinguishable from other categories of criminals in that they "almost always leave behind identifiable biological evidence").

36. See Jennifer Sue Deck, Note, *Prelude to a Miss: A Cautionary Note Against Expanding DNA Databanks in the Face of Scientific Uncertainty*, 20 VT. L. REV. 1057, 1062 (1996) (stating that DNA appears in all human cells containing a nucleus).

37. See Tracy & Morgan, *supra* note 33, at 639 (indicating that cells containing

the form of sperm.³⁸ Whether a proper search for the DNA takes place, however, is an entirely different question.³⁹

Assuming DNA is collected, a DNA indictment presumes the biological sample recovered from the crime scene ultimately will match the sample of a person with a known identity, thereby revealing the identity of the assailant.⁴⁰ To give effect to DNA typing, the Federal Bureau of Investigation (FBI) initiated a pilot project in 1990 called the Combined DNA Index System (CODIS).⁴¹ Law enforcement officials gather and enter DNA samples into the CODIS database and its progeny,⁴² pursuant to a legislative mandate, after courts convict defendants for violating specified statutes.⁴³ These software-based database systems allow law enforcement officials to compare a DNA sample, regardless of whether the identity of the sample is known, with every sample entered in the database.⁴⁴ An

nuclei are found "in all bodily fluids, tissue, and hair").

38. Although it is certainly possible for a female to commit a sexual offense, the focus of this Comment is on sexual crimes committed by males against females. The concentration on male-against-female offenses is in recognition of the fact that "[t]he majority of sex offenders are male, while the majority of reported victims are female." Jessica E. Mindlin, Comment, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189, 193 (1990).

39. See Tracy & Morgan, *supra* note 33, at 654-55 (arguing that the scarcity of resources available to most law enforcement agencies severely limits DNA's use as a crime-fighting tool).

40. See Christopher H. Asplen, *Integrating DNA Technology into the Criminal Justice System*, 83 JUDICATURE J. 144, 146 (1999) (intimating that DNA typing is relatively useful to the extent that there is an identified sample that can be matched against an unidentified assailant's DNA).

41. See Tracy & Morgan, *supra* note 33, at 640 (noting that the Department of Justice, acting through the FBI, has taken advantage of the research and funding resources available through the National Institute of Justice to take the lead role in using DNA technology as a law enforcement tool). In 1994, Congress approved the project by providing legislative authorization for the FBI to create a criminal DNA databank in the DNA Identification Act. See 42 U.S.C. § 14132 (1995). See generally George Bundy Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Courts*, 65 FORDHAM L. REV. 2465, 2472 (1997) (delineating the three steps required to make statistical analysis of DNA typing useful: (1) comparison of a known sample against an unknown sample; (2) calculation of the probability of a random match between the two samples to establish the statistical significance of a match if found; and (3) determination of the probability of such a match with respect to the general population).

42. See, e.g., Tracy & Morgan, *supra* note 33, at 640-41 (discussing the Federal Convicted Offender DNA Database as another example of the FBI's leading role in developing DNA initiatives).

43. See *id.* (explaining that the Anti-Terrorism and Effective Death Penalty Act of 1996 requires incarcerated federal felons convicted of sexually violent offenses to provide DNA samples to the databanks as a condition of their release from prison). As of 1998, the CODIS system contained approximately 250,000 known samples from offenders convicted of the statutorily prescribed crimes. See Press Release, Federal Bureau of Investigation, The National DNA Index System (Oct. 13, 1998), available at <http://www.fbi.gov/pressrel/pressrel98.htm> (last visited June 18, 2001).

44. See Tracy & Morgan, *supra* note 33, at 642-85 (detailing the value of the database system). The hope is that the database comparison will lead to a "cold hit"

unstated premise behind the database regime, of course, recognizes that people who commit certain statutorily prescribed crimes will re-offend.⁴⁵

DNA is the chemical substance, located in virtually every human cell,⁴⁶ that carries an individual's genetic code.⁴⁷ In 1984, a scientist developed a method of using DNA as an effective means of personal identification, naming the process "DNA fingerprinting."⁴⁸ The methodology of DNA fingerprinting originally employed a process known as Restriction Fragment Length Polymorphism (RFLP)⁴⁹ but has since also used another process named Polymerase Chain Reaction (PCR).⁵⁰ Although PCR analysis offers the benefit of producing potentially conclusive results from a DNA sample of

between a sample of unknown origin and a sample from a person whose identity is known to law enforcement authorities. *See id.* at 644 n.40 (defining a "cold hit" as a situation when the source of a sample recovered from a crime scene matches with a sample of known origin in the database, thereby revealing the identity of a potential suspect).

45. *See* David Doege, *Felons' DNA Collection to Begin*, MILWAUKEE J. & SENTINEL, Nov. 15, 2000, at 1B [hereinafter Doege, *Felons'*] (recognizing that felons are often responsible for recidivistic crimes); Francie Latour, *Revisited Rapes, Reawakened Trauma*, BOSTON GLOBE, May 28, 2000, at B1 (declaring the "time-tested knowledge that rapists, like other violent criminals, tend to be repeat offenders."); NATIONAL RESEARCH COUNCIL, *DNA TECHNOLOGY IN FORENSIC SCIENCE* 119-20 (1992) [hereinafter NRC I] (listing recidivism statistics for prisoners released in 1983, which revealed that 36.4% of rapists and 32.6% of other sexual offenders were re-convicted within three years of their release). The NRC I report also found that a DNA profile databank focusing on sexual offenders, exclusive of other types of criminals, would be the most cost-efficient means of cataloguing DNA because of the high rate of recidivism for rapists. *See id.*

46. *See* Smith & Gordon, *supra* note 41, at 2465 (declaring that DNA "is found in every cell of the human body, except red blood cells").

47. *See* NRC I, *supra* note 45, at 2 ("DNA, the active substance of genes, carries the coded messages of heredity in every living thing").

48. *See* INMAN & RUDIN, *supra* note 26, at 19 (explaining that the scientist, Alec Jeffreys, discovered the application of DNA technology to the science of personal identification while otherwise searching for genetic disease markers in DNA). Although scientists have drawn legitimate distinctions between the terms "DNA fingerprinting," "DNA typing" and "DNA profiling," this Comment uses the terms interchangeably to refer to the process of using DNA evidence and technology to identify a person's identity. *See id.* (recognizing that scientists prefer the terms "DNA typing" or "DNA profiling" because they are more descriptive); *see also* NRC I, *supra* note 45, at 27-31 (distinguishing DNA fingerprinting, which refers to the process of testing multiple sites of a gene, from DNA typing, which tests only one site of a particular gene). DNA typing generally is preferred in the United States because the test results are easier to analyze, while English scientists prefer DNA fingerprinting. *See id.* at 28.

49. *See* Smith & Gordon, *supra* note 41, at 2468 (noting that RFLP analysis is the primary technique for developing DNA evidence). For a simplified explanation of the six scientific steps composing RFLP analysis, *see id.* at 2469-70.

50. *See* INMAN & RUDIN, *supra* note 26, at 19 (noting that Kary Mullis received a portion of the Nobel Prize in chemistry in 1986 for developing PCR analysis). *See generally id.* at 37-55 (providing a scientific explanation of how these two processes operate to analyze a DNA sample, which can lead to an inference about the source's identity).

limited quality and quantity,⁵¹ the RFLP analysis is more powerful in discriminating between samples and thus more reliable in accurately identifying a sample's source.⁵² Together, RFLP and PCR analysis provide the underlying framework for the identification of criminal suspects based on their DNA.⁵³

The use of DNA evidence in criminal investigations has emerged as one of the most revolutionary and useful tools available to police officers.⁵⁴ Law enforcement officials first applied DNA technology to the criminal realm in England by profiling DNA samples to identify a suspect in two unsolved murders.⁵⁵ Since that time, the FBI, most states, and even many counties and cities have developed their own forensic DNA laboratories in the United States.⁵⁶ The technology is particularly attractive to investigators and prosecutors because DNA test results are accurate and provide juries with virtually incontrovertible evidence linking a criminal defendant to a crime scene.⁵⁷ In fact, the American public perceives DNA test results as so conclusive that the National Research Council's expert commission on DNA evidence⁵⁸ found it necessary to caution courts against allowing jurors to draw unfairly prejudicial inferences from the

51. See NRC I, *supra* note 45, at 40 ("With PCR amplification, very small samples of tissue or body fluids—theoretically even a single nucleated cell—can be used to study DNA.").

52. See INMAN & RUDIN, *supra* note 26, at 47 (drawing a general comparison between PCR and RFLP analyses through a discussion of PCR analysis performed at a gene site named D1S80).

53. See *id.* at 19 ("RFLP and PCR technology together form the cornerstone of forensic DNA typing.").

54. See Manning A. Connors, Comment, *DNA Databases: The Case for the Combined DNA Index System*, 29 WAKE FOREST L. REV. 889, 889 (1994) ("The use of DNA for investigatory purposes is perhaps the most discriminating and efficient prosecutorial device to be developed since the advent of fingerprinting."); Tracy & Morgan, *supra* note 33, at 636 (noting that the use of DNA evidence "has been hailed as a godsend" for fighting crime); see also NRC I, *supra* note 45, at 25 (suggesting that as the use of DNA evidence in trials becomes more and more common, jurors will come to expect prosecutors to use it).

55. See INMAN & RUDIN, *supra* note 26, at 20 (discussing the historical development of DNA's now widely accepted use in criminal investigations).

56. See *id.* at 20-21 (asserting that federal and local governments reacted quickly in following the lead of private companies that initially introduced DNA testing in the United States).

57. See Sue Rosenthal, Note, *My Brother's Keeper: A Challenge to the Probative Value of DNA Fingerprinting*, 23 AM. J. CRIM. L. 195, 197 (1995) ("No two individuals, outside of identical twins, share the same genetic pattern."); Diehl, *supra* note 35, at 436 ("If a laboratory matches DNA samples from a crime scene and the suspect, the probability that the crime scene DNA came from the suspect can be remarkably high.").

58. See NRC I, *supra* note 45, at vii-viii (outlining the creation of The National Research Council's Committee on DNA Technology in Forensic Science in response to requests from scientists and the legal community for clarification on legal issues implicating DNA evidence).

evidence.⁵⁹

DNA's significance to this Comment is its durability.⁶⁰ DNA is useful to prosecutors who practice DNA indictment because they can store the sample in the hopes of subsequently determining the identity of the sample's source.⁶¹ With respect to the purpose for the statute of limitations, then, this practice begs the question: Has the "genius of our laws"⁶² become subservient to the genius of our scientific and technological advances?

Following the lead of the federal government, all fifty states now have similar DNA databases.⁶³ As a condition of federal funding for these databases, the states must collect samples from offenders convicted of sex-related felonies.⁶⁴ In 1998, the FBI introduced the National DNA Index System (NDIS), which allows law enforcement agencies at all levels of government to contribute samples to the national database⁶⁵ and thereby increase the odds of initiating a "cold hit."⁶⁶

59. See *id.* at 160 (warning that the perception of the infallibility of DNA evidence, along with its technical complexity, might lead juries to ignore other evidence).

60. See Tracy & Morgan, *supra* note 33, at 673 n.105 (noting that samples of DNA can remain viable for thousands of years if maintained under appropriate conditions).

61. See Barbara Ross et al., *John Doe' Indicted on DNA Evidence*, PITT. POST GAZETTE, Mar. 16, 2000, at A20 (quoting law enforcement officials as saying, "[n]ow, the indictment can stand 'for 100 years,'" and "DNA technology allows us to make arrests . . . 10 years from now"); David Doege, *supra* note 22, at 1 (quoting an Assistant District Attorney as saying, "[w]e're going to get [the DNA indictee] *someday*") (emphasis added).

62. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (holding that in a case involving prosecution for failure to pay a fine after violation of a statute prohibiting the use of maritime vessels to carry on the slave trade, it "would be utterly repugnant to the genius of our laws" to allow an untimely criminal prosecution for a non-capital offense "[i]n a country where not even treason can be prosecuted after a lapse" of the statutory period).

63. See Tracy & Morgan, *supra* note 33, at 669 (noting that every state has a DNA database system either in operation or in the development stages).

64. See *id.* at 674 (examining the uniformity of database statutes among different jurisdictions).

65. See *id.* at 640-41 (discussing the FBI's technological advances following introduction of the CODIS).

66. See *supra* note 43 (defining "cold hit").

II. HISTORICAL AND MODERN APPLICATION OF STATUTES OF LIMITATIONS

In the criminal context,⁶⁷ statutes of limitations set time limits beyond which prosecutors may not pursue a case.⁶⁸ Such statutes balance the competing policy interests of allowing valid claims and precluding stale claims.⁶⁹ Even though the advances in DNA technology mark tremendous scientific achievements, they also prompt significant legal questions.⁷⁰ Specifically, while the constitutionality of DNA indictments awaits adjudication in the courts, the historical purpose, rationale, and judicial application of statutes of limitations reveal such indictments possess limited validity and legitimacy.⁷¹

A. *Historical Development of Statutes of Limitations*

Protocols time-barring the prosecution of crimes have a long history in the United States.⁷² Although statutes of limitations

67. The primary focus of this Comment is on the policy and purpose of statutes of limitations in the realm of criminal prosecution, and references to statutes throughout this text are made with this criminal focus in mind. However, statutes of limitations also exist to bar civil claims. See generally ADOLPH J. LEVY, SOLVING STATUTE OF LIMITATIONS PROBLEMS 5-448 (1987 & Supp. 1992) (discussing civil litigation strategies for addressing statute of limitations issues in the context of liability, medical malpractice, wrongful death, governmental liability, the Federal Tort Claims Act, and the Soldiers' and Sailors' Civil Relief Act). There is great similarity between the purposes advanced to support these enactments in both the civil and criminal context. See *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (explaining the similarity of policies behind civil and criminal statutes of limitations); see also Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 253 n.234 (1995) ("To trace the origins of American criminal statutes of limitations, it is important to acknowledge that the civil law, as well as the English common law, influenced how criminal procedure developed in the American colonies.").

68. See BLACK'S LAW DICTIONARY, *supra* note 5, at 1422-23 (defining criminal statutes of limitations as legislative enactments "establishing a time limit for prosecuting a crime, based on the date when the offense occurred").

69. See Ochoa & Wistrich, *supra* note 31, at 454-55 (declaring that limiting statutes attempt to strike a balance between "the extinguishment of untimely claims and . . . encouraging the resolution of all claims, whether timely or untimely, on their substantive merits").

70. See Rosenthal, *supra* note 57, at 196 ("The advent of DNA analysis has revolutionized both research science and the judicial system over the course of the past decade."); David H. Kaye, *DNA Evidence: Probability, Population Genetics, and the Courts*, 7 HARV. J.L. & TECH. 101, 101 (1993) (recognizing that courts, attorneys, and government agencies, *inter alia*, have been "struggling with DNA identification evidence at least since 1985").

71. See *infra* Part II.A-C (discussing the historical purpose, rationale, and judicial application of statutes of limitation).

72. See J. Anthony Chavez, *Statutes of Limitations and the Right to a Fair Trial*, 10

addressing real property issues may be traced to ancient Greece,⁷³ most legislative limitations as we know them today derive from early English laws governing civil property claims.⁷⁴ The invocation of statutes of limitations gradually became more popular in England,⁷⁵ and by the beginning of the seventeenth century, King James I found it necessary to codify a new statute⁷⁶ to allow expansion of the use of limitations.⁷⁷

The first statutory limiting actions in the American colonies descended directly from these early English enactments.⁷⁸ These

CRIM. JUST. 2, 2 (Summer 1995) (noting that “[f]ederal jurisprudence always has contained statutes of limitations for all crimes, except murder and forgery, to ensure timely and fair administration of justice”); *see also* 51 AM. JUR. 2D *Limitation of Actions* § 1 (1970) (recognizing “pleas of limitation were allowed long before there was any statute on the subject”).

73. *See* WILLIAM D. FERGUSON, *THE STATUTES OF LIMITATIONS SAVING STATUTES* 7 (1978) (“Statutes of limitations relating to real property may be traced to ancient Greece or beyond through numerous societies that developed in the ancient world.”) (citation omitted).

74. *See* Ochoa & Wistrich, *supra* note 31, at 454 n.7 (indicating that “the first English statute of limitations for real property actions” was enacted in 4 Hen. 7, ch. 24 (1487) (Eng.)). *But see* Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COL. L. REV. 157, 157 (1927) (asserting that limitations of time in criminal and real actions had existed for centuries prior to the seventeenth century). *See generally* FERGUSON, *supra* note 73, at 40 & n.131 (describing the reasons leading to enactment of the Statute of Fines, 4 Hen. 7, ch. 14 (1487)); *id.* at 7-9 (discussing the progression of statutes of limitations and noting that “the first modern style statute” is 32 Hen. 8, ch. 2 (1540)); *id.* at 26 (revealing that England’s first statutes of limitations were intended to quiet men’s estates). Specifically, a woman who claimed she was raped “was required to proceed immediately to the nearest vill and there state the injury and show the marks and torn garments, then to report the matter to the chief officer of the hundred and finally complain in the next county court.” *Id.* at n.1 (citing 14 GLANVILLE, *TRACTUS DE LEGIBUS ET CONSUECUNDINIBUS* ch. 6 (1554)).

75. *See* FERGUSON, *supra* note 73, at 7-12 (explaining the origin and purpose of statutes of limitations through 1623).

76. *See id.* at 11-12 (discussing that the enactment of a general statute of limitations, 21 James I, ch. 16 (1623), was necessary to accommodate the desire to limit the period available to bring ejectment actions due to the pleading of fictitious claims to recover leasehold interests under 32 Hen. 8, ch. 2 (1540)).

77. *See* William M. Schrier, Note, *The Guardian or the Ward: For Whom Does the Statute Toll?*, 71 B.U. L. REV. 575, 576 (1991) (“The statute differed from those that had existed since antiquity in that it covered both personal and real property actions. Furthermore, it included specific time periods and liberal disability provisions.”) (citation omitted).

78. *See* Harvard Law Review Association, *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950) [hereinafter *Developments*] (“The Limitation Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law.”); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (noting that the 21st of James I “was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country”); *see also* *Adams v. Woods*, 6 U.S. (1 Cranch) 336, 342 (1805) (interpreting the American statute at issue by using 21st of James I as a basis for comparison); Schrier, *supra* note 77, at 576-77 (noting that King James I’s Limitation Act of 1623 provided the basis for the colonies’ limiting statutes in pre-Revolutionary America).

early limiting statutes applied only to civil claims⁷⁹ and proved very popular.⁸⁰ Shortly after the American Revolution, the States began enacting statutes limiting the time available for pursuit of criminal prosecutions.⁸¹ Today, all but two states⁸² have criminal time limitation periods.⁸³ Though the respective state legislatures create and control these statutes,⁸⁴ the language of the statutes tends to be similar and unambiguous.⁸⁵

The federal government followed the colonies' lead and during the second session of the First Congress, the representatives included a time limitation within a statute defining penalties for treason and

79. See FERGUSON, *supra* note 73, at 6 (recalling that the earliest English statutes of limitations addressed property issues, e.g., quieting men's estates); cf. Adlestein, *supra* note 67, at 253 n.234 ("To trace the origins of American criminal statutes of limitations, it is important to acknowledge that the civil law, as well as the English common law, influenced how criminal procedure developed in the American colonies.").

80. See Adlestein, *supra* note 67, at 252 (noting that most states had statutes of limitations at the beginning of the Republic, many of which were derived from eighteenth-century colonial statutes).

81. See *Developments*, *supra* note 78, at 1179 (acknowledging that the states codified general criminal statutes of limitations at a "fairly early date"); see also N.J. REV. STAT. § 263 (1820) (enacted in 1796) (limiting prosecution of capital offenses, except murder, to three years, and non-capital offenses to two years). New York and Vermont also enacted statutes of limitations before the 19th century. See Adlestein, *supra* note 67, at 252 n.233 (providing examples of offenses and their respective statutory time limitations for prosecution in New York and Vermont).

82. Wyoming and South Carolina are the two states that do not employ a statutory limitations regime. See Adlestein, *supra* note 67, at 249-50, 250 & n.223 (noting that while the length of the limitations and the types of offenses they cover vary from state to state, Wyoming and South Carolina are the only states without any statutory limitation period); 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, 151 n.114 (1993) (listing South Carolina and Wyoming as states without criminal statutes of limitations for any crimes and noting that seven other states do not have limitations for felonies).

83. See Adlestein, *supra* note 67, at 251 n.227 (finding that most states have limitation periods for prosecuting an offense, but that "[a] single general limitations period is not typical in state statutes, which commonly differentiate between degrees of offenses"). But see Ernsdorff & Loftus, *supra* note 82, at 151 n.114 (revealing that in seven states, there is no limiting time period for the prosecution of felonies). The seven states that do not have statutes of limitations for felonies are Alabama, Kentucky, Maryland, North Carolina, Rhode Island, Virginia, and West Virginia. See ALA. CODE § 15-3-5(a)(4) (Supp. 1993); KY. REV. STAT. ANN. § 500.050 (Michie 1990); MD. CODE ANN., CTS. & JUD. PROC. § 5-106 (Supp. 1992); N.C. GEN. STAT. § 15-1 (1983); R.I. GEN. LAWS § 12-21-2 (1981); VA. CODE ANN. § 19.2-8 (Michie Supp. 1993); W. VA. CODE § 61-11-9 (1992).

84. See 4 AM. JUR. *Trials* § 441 (1966) (observing the impossibility of making generalizations about the length of statutes of limitations among the states because they are subject to the control of individual legislatures and represent "public policy" considerations).

85. See *Developments*, *supra* note 78, at 1179 (asserting most codifications of statutory limiting periods provide "either that 'all actions . . . shall be brought within' or 'no action . . . shall be brought more than' so many years after 'the cause thereof accrued.'").

other capital crimes.⁸⁶ Although Congress extended the statute's breadth in 1876⁸⁷ and thereafter modified this limiting statute periodically,⁸⁸ the statute remains in effect today.⁸⁹ Moreover, Congress has indicated its legislative preference for limiting actions by codifying statutory limitations for a wide variety of actions.⁹⁰

All time-limiting actions remain subject to modification by the will of the relevant legislating body.⁹¹ State legislatures and the U.S. Congress explicitly make modifications when they decide to change the limitation periods.⁹² Although courts have some discretion in applying statutes of limitations under the tolling doctrine,⁹³ their

86. See Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119 (providing a limitation of three years for treason and all capital crimes (except "wilful murder" and forgery), and a limitation of two years for all non-capital offenses).

87. See Act of Apr. 13, 1876, ch. 56, 19 Stat. 32. As amended, the statute included within its scope "most federal crimes." See Adlestein, *supra* note 67, at 249 n.222 (providing an historical overview of the development of the criminal statutes of limitations in the United States).

88. Congress subsequently exempted capital crimes from the statutes of limitations period in 1939. See Act of Aug. 4, 1939, ch. 419, 53 Stat. 1198 (removing limitations periods from all capital offenses). In 1948, Congress codified the statutory limitations in their current sections. See Adlestein, *supra* note 67, at 249 n.222 (indicating that the Act of June 25, 1948, ch. 645, 62 Stat. 683, 827-28 (codified at 18 U.S.C. §§ 3181-3182 (1988)) codified an exemption of limitations for capital offenses and limited the statutory period for non-capital offenses to three years). In 1954, Congress extended the period of limitations from three years to five years for non-capital crimes, unless otherwise excepted. See Act of Sept. 1, 1954, ch. 1214, § 10(a), 68 Stat. 1142, 1145, amended by Act of Sept. 26, 1961, Pub. L. No. 87-299, 75 Stat. 640, 648 (changing the statute of limitations period to five years for non-capital offenses).

89. See 18 U.S.C. §§ 3181-3182 (1988) (stating the time limits for prosecuting capital and non-capital offenses).

90. See generally James M. Fisher, *The Limits of Statutes of Limitation*, 16 Sw. U. L. REV. 1, 35-435 (1986) (providing annotated tables of the federal statutes of limitations). Accord 4 AM. JUR. TRIALS § 441 (1966) (contending "[m]ost federally created rights of action have specific statutes of limitations," but noting that "there is no federal statute of limitations of general application").

91. See 4 AM. JUR. TRIALS § 441 (1966) ("Limitation of actions is controlled by statute . . . Statutes of limitation come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate."); Adlestein, *supra* note 67, at 251 (clarifying that, because legislatures control the statutes, "the time periods in these statutes can be changed at the will of the legislature or can be eliminated entirely") (citations omitted).

92. See, e.g., Adlestein, *supra* note 67, at 249 & n.222, 250 & n.223 (revealing that as recently as 1988, Congress extended the statute of limitations for criminal violations of the RICO statute); see also *id.* at 250 n.223 (noting that "[s]tate statutes of limitations are frequently amended, usually to extend the limitations periods"); Michael E. Baughman, Comment, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose for Corporate Directors?*, 143 U. PA. L. REV. 1065, 1116-17 (1995) (suggesting legislatures have a duty to monitor the application of statutes of limitations by the courts and "must not shirk [their] responsibility."); Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 BYU L. REV. 917, 922 (1992) (implicitly arguing that it seems "dubious" for courts to diverge from the explicit text of statutes of limitations to adapt the statute to changing times).

93. Tolling "stop[s] the running of a statute" of limitations. See BLACK'S LAW

authority in this respect is limited.⁹⁴

B. *Rationale Supporting the Statutes of Limitation*

Little consensus exists on the purposes compelling the creation of civil statutes of limitations.⁹⁵ The historical purpose of criminal statutes of limitations, however, remains the same today⁹⁶ as when first employed: to promote repose.⁹⁷ Although the definition of this legal

DICTIONARY, *supra* note 5, at 1495 (defining “toll”); *see also* Michael John Byrne, *Let Truth Be Their Devise: Hargett v. Holland and the Professional Malpractice Statute of Repose*, 73 N.C. L. REV. 2209, 2218 (1995) (finding that because of the “harsh results” of the rigidity of statutes of limitations, “almost all jurisdictions” began to employ methods of tolling the statutory period).

94. *See* Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 23 (1991) (“The equitable tolling cases are quite specific in their genesis and limited in scope, and do not offer a broad exception to applying an otherwise appropriate statute of limitations.”); *see also* O’Brien v. Mass. Bay Transp. Auth., 541 N.E.2d 334, 335-36 (Mass. 1989) (declaring the court will not read a legislative intent to create a short statute of limitations into a statute when the legislature did not explicitly indicate this preference within the statute); Schrier, *supra* note 77, at 576-77 (suggesting most modern limiting statutes have restricted judicial discretion by specifically codifying the 1623 Limitation Act’s tolling provisions for minority and mental incompetency); *cf.* Heriot, *supra* note 92, at 952-53 (asserting that by the nineteenth century, American equity courts had converged so much with the law courts that equity judges realized they “should accept the length of time stated in the analogous statute of limitations as reasonable and not deviate from it except in unusual circumstances”).

95. *See* Ochoa & Wistrich, *supra* note 31, at 514 (noting that “[i]t is probably futile to attempt to isolate a single purpose from among those listed [in the article, discussing civil statutes of limitations] that sensibly could be assigned a greater general importance than all of the others”). The ambiguity and confusion over the reasons justifying civil limiting actions, ironically, results from a popular satisfaction with the statutes. *See* Adlestein, *supra* note 67, at 257 n.251 (suggesting there has been very little legislative debate over the purposes for statutes of limitation relating to civil actions because society generally has been content with their operation since the Limitations Act of 1623). Because the statutes traditionally have not been a point of contention, the polity has accepted them without any detailed legislative justification. *See* FERGUSON, *supra* note 73, at 40 (“the statutes themselves shed little or no light upon the underlying purpose of the statutes but only the general situation sought to be remedied”); *see also* Mary E. Miller, *Barbed Wire in the Borderland: Statute of Limitations Choices for Wrongful Discharge Claims*, 23 SAN DIEGO L. REV. 833, 835 (1986) (“Regarding both English law and the early American statutes, the intent of the enacting legislatures is not readily apparent.”).

96. *See* Byrne, *supra* note 93, at 2216 (“Recent Supreme Court decisions and a treatise on the limitation of actions have confirmed the persistence” of the purpose of repose behind the statutes of limitations).

97. *See* Heriot, *supra* note 92, at 925 (stating Parliament’s historical policies behind England’s 1540 limiting statute were “clear,” in that Parliament wanted to “guard against the dangers of trying a case for which the relevant evidence had been lost or destroyed . . .”). “Repose,” is defined as “[c]essation of activity; temporary rest.” BLACK’S LAW DICTIONARY, *supra* note 5, at 1303. In the context of limiting actions, however, the term takes on a variety of meanings. *See* Ochoa & Wistrich, *supra* note 31, at 460 (noting the “primary purpose” behind statutes of limitations was to preserve repose); *see also* Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944) (“Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded,

term varies in scope and language,⁹⁸ statutory limitations ultimately preserve a defendant's right to assemble evidence and prepare a vigorous defense.⁹⁹ Although the first English limiting statutes were designed to quiet estates,¹⁰⁰ American commentators define domestic statutes in terms more relevant to a modern context.¹⁰¹

Most importantly, the statutes protect defendants from an unfair trial by militating against prejudice caused by deterioration of evidence.¹⁰² This policy is premised, at least partially, on the theory that evidence inherently degenerates with the passage of time.¹⁰³

and witnesses have disappeared."); Sinclair & Szypszak, *supra* note 94, at 23 ("The articulated focus of statutes of limitations . . . seems to be on the difficulties inherent in litigating stale claims and on the unfairness to defendants that would result from having to search for evidence that has faded or has been lost due to the passage of time."); Adlestein, *supra* note 67, at 262 ("The Supreme Court's rationale for criminal statutes of limitations involves . . . the protection of the individual defendant from a potentially unfair trial . . ."); *Developments*, *supra* note 78, at 1185 (stating that the "primary consideration" of statutes with time limitations "is undoubtedly one of fairness to the defendant").

98. Compare Ochoa & Wistrich, *supra* note 31, at 460 ("[R]epose' includes at least four distinct but overlapping concepts: (a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims"), with MODEL PENAL CODE § 1.06 cmt. 1 (1985) (listing purposes for criminal statutes of limitations, including "promot[ing] repose by giving security and stability to human affairs").

99. See FERGUSON, *supra* note 73, at 40-43 (debunking the theories that the statutes are designed to protect the public interest or a plaintiff's rights); *id.* at 43 (concluding "it logically appears that the primary purpose of the statutes was to protect defendant against loss of witnesses and evidence and to protect his acts in reasonable reliance on plaintiff's inaction"). But see Adlestein, *supra* note 67, at 258 n.253 ("The general interest of the public also is served by statutes of limitations" in the form of judicial efficiency) (quoting 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1, at 16 (1991 & Supp. 1993)). Once again, this analysis is generally cloaked in the language of civil claims, but its historical basis is applicable to criminal actions as well. See Adlestein, *supra* note 67, at 252 (reasoning the policies underlying civil statutes of limitations facilitate an understanding of their criminal counterparts).

100. See FERGUSON, *supra* note 73, at 26 (asserting the purpose of quieting estates by creating statutes of limitations was only partially achieved in England).

101. For a thorough discussion of the policies favoring and disfavoring statutes of limitations in the civil context, see generally Ochoa & Wistrich, *supra* note 31, at 460-510.

102. See *id.* at 471-72 (arguing that deterioration or loss of evidence increases the possibility of unfair prejudice against defendants).

103.

This justification of the limitation system rests on three premises. The first is that the minimization of error in adjudication is a goal of the legal system. The second is that, on balance, evidence deteriorates with the passage of time. The third is that the effects of such deterioration on the accuracy of the legal system can be avoided by barring all cases commenced after the limitation period has expired.

Id. at 472; see also Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1219 n.147 (1992) (noting experimental memory psychologists have proven that eyewitness testimony potentially suffers from infirmities including "incorrect perception at the input stage, internal revisions

Similarly, because the interests of a criminal defendant supersede those of a civil counterpart,¹⁰⁴ criminal statutes of limitations are shorter in duration than civil statutes.¹⁰⁵ As a further protection for defendants, legislatures intended the statutes to reach only the explicit circumstances contemplated within the statute's language, i.e., they did not provide courts *carte blanche* to extend their application as individual judges saw fit.¹⁰⁶

C. *Judicial Interpretation of the Statute of Limitations*

Despite the popularity of statutes of limitations with society in general,¹⁰⁷ these legislative initiatives were not immediately popular

during the storage phase, and contamination during the retrieval stage," thereby rendering a reliance on memory inherently suspect) (citations omitted). In addition to the unreliability of the quality of memory, the natural process of "internal self-elaboration on memory," or "confabulation," leads to the danger that human memory will "account for missing information by supplying the missing details from the subject's general store of life experiences or from logical deductions about what the missing information *ought* to be." *Id.* at 1230 n.190 (emphasis added) (citation omitted).

The dangers of faulty memory only increase during crimes, such as forcible sexual assaults, that involve the use of intimidating weapons. *See id.* at 1232 n.204 ("In a highly stressful state people concentrate more on just a few features from their environment, and they consequently pay less attention to others. This selectivity of attention can be seen when people experience crimes involving weapons.") (quoting ELIZABETH F. LOFTUS & JAMES F. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 50-51 (1987)).

104. *See* Ernsdorff & Loftus, *supra* note 82, at 148 (noting courts recognize that "a criminal charge portends far greater consequences than a civil charge"); *Developments, supra* note 78, at 1186 (recognizing that criminal defendants seek to protect the "special interest" of preserving their freedom, as distinct from the interests that defendants in civil actions seek to protect); *see also* Heidi L. Neuendorf, Note, *The Judicial Impediment on Legislative Lawmaking in Stratmeyer v. Stratmeyer*, 44 S.D. L. REV. 115, 144 (1999) (delineating the higher burden of proof required to prevail over criminal, as opposed to civil, defendants).

105. *See* Neuendorf, *supra* note 104, at 144 (arguing that criminal statutes of limitations are shorter because the 'proof beyond a reasonable doubt' standard for criminal prosecutions necessitate a more vigilant preservation of evidence and protection against stale claims); *see also* Adlestein, *supra* note 67, at 255-56 n.240 (positing that shorter durations for criminal statutes of limitations might initially have been the result of American colonists' fears of state oppression, and concluding the statutory periods "tended to become fixed" once they initially became established in American law).

106. *See* Heriot, *supra* note 92, at 954-55 (decrying courts' extensions of limiting statutes through judicially-created mechanisms such as "discovery rules," which allow actions to commence beyond the statutorily-prescribed period if the injury is not discoverable until some point in time beyond the applicable statutory period). "Prior to the advent of discovery rules, statutes of limitation essentially operated like this: A specific length of time was selected by the legislature to cover all cases that fell into a *particular category* of substantive law." *Id.* (emphasis added).

107. *See* Adlestein, *supra* note 67, at 252-60 (suggesting that there has been very little legislative debate over the statutes' purposes because society generally has been content with their operation since the Limitations Act of 1623).

with American courts.¹⁰⁸ In this respect, the American experience once again mirrored the historical development of the statutes in England.¹⁰⁹

Over time, however, judicial attitudes shifted dramatically. In 1805, the Supreme Court of the United States declared it would be unfair and illogical to allow a criminal prosecution after the statutory period elapsed.¹¹⁰ By 1879, the Court had acknowledged the importance of limiting actions to civilized society.¹¹¹ The Court indicated that the true value of the limitation periods rests in their ability to protect defendants from “stale demands”¹¹² that could prejudice the defendant because of fading memories or an inability to summon witnesses.¹¹³ Up to contemporary times, the Court consistently has recognized the value of these limitations in promoting repose and protecting suspects from the potential jeopardy of defending against stale claims.¹¹⁴ In emphasizing the importance of protecting

108. See 51 AM. JUR. 2D *Limitation of Actions* § 5 (1970) (reviewing the “inhospitable reception” that statutes of limitations received by the courts); *Developments, supra* note 78, at 1188 (noting that there are “numerous references” documenting courts’ initial hostility towards statutes of limitations).

109. See FERGUSON, *supra* note 73, at 28-29 (noting that English courts, especially beginning in 1698, discouraged use of the statute and “increasingly permitted avoidance” of its limitations by interpreting it in a very strict and narrow sense, so as to allow its application in only very limited instances and capacities).

110. See *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (recognizing the inherent contradiction in allowing a prosecution for a non-capital offense after the statutory deadline expired, while simultaneously upholding the limiting period on capital crimes).

111. See *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence . . . [the statutes] promote repose by giving security and stability to human affairs.”).

112. See *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360, 373-75 (1828) (refusing to allow a claim to proceed against a partnership after the relevant statute of limitations had expired, even though the plaintiff claimed the defendants’ debt was “pre-existing”).

113. See *id.* at 373-75 (ruling that allowing a claim after the expiration of the limiting action defeats the spirit and intent of the statute of limitations, i.e., preventing “the introduction of stale and dormant demands, of long standing, and of uncertain proof”).

114. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (confirming that “the plea of limitations” is a “meritorious defense”) (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938)); *United States v. Marion*, 404 U.S. 307, 321 (1971) (choosing to apply the statute of limitations, rather than the Sixth Amendment, to protect a defendant from potential prejudice that may be caused when “[p]assage of time . . . may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself”); *Toussie v. United States*, 397 U.S. 112, 114-15 (1970) (declaring that limiting statutes are “designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past”); *Bridges v. United States*, 346 U.S. 209, 215-16, 226 (1953) (enforcing “a longstanding congressional ‘policy of repose’ that is fundamental to

defendants from stale claims, the Court explicitly has acknowledged that limiting statutes will extinguish otherwise valid claims.¹¹⁵

D. Statute of Limitations Issues Implicated by DNA Indictment

At first glance, the accuracy and durability of DNA evidence collected from the scene of a rape or other sexual crime appears to help solve America's growing criminal problems.¹¹⁶ Consideration of the issue beyond the superficial surface, however, suggests this sense of security and confidence is based on two potentially erroneous assumptions. First, the theory assumes that a person whose DNA is collected from a crime scene participated in the reported crime. Second, DNA evidence presumes that determining the identity of the perpetrator constitutes the only, or alternatively the most important, goal in a criminal investigation.

These assumptions are consistent with the "get tough on crime" mentality engulfing the nation.¹¹⁷ Ironically, courts initially were reluctant to apply statutes of limitations despite their popularity with society.¹¹⁸ Now, however, courts appear willing to apply these

our society and our criminal law" and deciding to apply the statute in the absence of "a clear [legislative] direction" to the contrary) (quotation marks in original); *Pendergast v. United States*, 317 U.S. 412, 418 (1943) (noting that the statutes should be enforced even though "[e]very statute of limitations, of course, may permit a rogue to escape"); *United States v. Scharton*, 285 U.S. 518, 522 (1932) (stating the statute of limitations should be "liberally interpreted in favor of repose"); see also *Developments, supra* note 78, at 1189 ("Modern American courts . . . have generally exhibited an attitude favorable to liberal imposition of the statutory bar, both in civil and in criminal actions . . .").

115. See *Kubrick*, 444 U.S. at 125 ("[S]tatutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable."). But see *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("This policy of repose, designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights.") (emphasis added).

Despite this author's recognition of an alleged rape victim's substantial interests in justice, the Court's words in *Burnett* are specifically applied to civil trials, as evidenced by the reference to "plaintiff's rights." *Id.* It is unlikely the Court would apply this reasoning to a criminal prosecution because a criminal defendant's interests outweigh the interests of a defendant in a civil claim. See *supra* notes 104-105 (emphasizing a defendant's interest in liberty); see also *Heriot, supra* note 92, at 919-20 ("Indeed, the statute of limitations does sometimes produce results that seem hypertechnical in view of its underlying policy concerns. Like all rules, it is both overinclusive and underinclusive.").

116. See *Sink & Spice, supra* note 12, at 1B (reflecting law enforcement's reliance on DNA evidence to resolve heretofore unsolvable cases); *Charges, supra* note 5 (indicating that DNA indictments "really show the power of DNA evidence and how valued DNA testing has become for both law enforcement and prosecutors").

117. See *Tracy & Morgan, supra* note 33, at 670 (discussing the "get tough" on crime mentality as a reason for some states' expansion in the number of crimes that require submission of samples to DNA databanks).

118. See *supra* notes 108-109 and accompanying text (reflecting judicial disfavor of

statutes¹¹⁹ in the face of society's objection.¹²⁰

By vindicating rape survivors' rights, DNA indictments bring at least a modicum of comfort to those whose claims would otherwise be time-barred.¹²¹ Proponents hail DNA indictments for providing law enforcement more time to investigate criminal offenses.¹²² However, DNA indictments disregard the very *purpose* for which statutes of limitations were enacted: to provide repose and to preclude defendants from being held to answer stale charges so outdated they presumptively impede defendants' abilities to marshal potentially exculpatory evidence.¹²³ Indicting DNA to avoid the statute of limitations directly contradicts the legislative policies that gave rise to limiting actions.¹²⁴

The argument that rape survivors' interests should take precedence over statutes of limitations posits that the accuracy of DNA typing outweighs any potentially exculpatory evidence the defendant might

statutes of limitations).

119. See *supra* notes 110-114 and accompanying text (detailing the courts' shift in attitude in favor of applying statutes of limitations).

120. See *Unknown Man*, *supra* note 4 (reflecting the feeling that criminals who commit horrible crimes should be brought to justice and should not be allowed to benefit from their anonymity); see also Adlestein, *supra* note 67, at 260 (asking, rhetorically, why criminals should be afforded amnesty for serious offenses, like manslaughter and rape, just by virtue of the passage of time).

121. See Betty DeRamus, *Memories of Sexual Assault Have No Limits, So Why Should the Crime?*, DET. NEWS, June 1, 2000, at 1 ("[B]eing able to identify and catch the perpetrator would ease the pain and trauma of the [rape] victim. We'd all feel better."); Hanh Kim Quach, *Senate Panel OKs Rape Bill*, ORANGE COUNTY REG., June 29, 2000, at A4 (quoting a rape survivor as saying, "[s]ix years (statute of limitations) is insulting to women who have been raped"); Willing, *supra* note 4, at 1A (quoting a rape victim, whose case was the subject of a DNA indictment, as saying, "I can now put some closure on my personal matter and put something negative into something positive"); Heather Lourie, *Clock May Cease to Aid Rapists*, ORANGE COUNTY REG., Jan. 16, 2000, at A1 (citing a rape survivor's frustration upon learning the case against her alleged attacker had been time-barred: "What's the point of our justice system? Why do they bother?").

122. See B.G. Gregg, *DNA Proposal Targets Rapists*, DET. NEWS, June 6, 2000, at 1 (noting that indicting a criminal under the name "John Doe" would provide police additional time to find the person who matched the DNA).

123. See *supra* text accompanying notes 96-105 (describing generally the purpose behind the statute of limitations).

124. See Baughman, *supra* note 92, at 1115 ("Legislatures create statutes of limitation for a purpose—namely, for granting repose to defendants and increasing judicial efficiency by preventing stale claims."). Baughman goes on to argue that allowing courts the discretion to determine when an action "accrued," and therefore when the respective statute of limitations begins to run, "undermines the legislative policies that were the basis of statutes of limitations. Why would a legislature create" a limiting period if it were possible to still bring the charge long after the statutory period expired? *Id.* at 1116. See also *Developments*, *supra* note 78, at 1191 (asserting that the constitutional protection against ex post facto laws "precludes the removal of a bar already raised by criminal limitations"). A DNA indictment essentially removes the statutory limiting period protecting criminal defendants.

otherwise procure for his defense.¹²⁵ This argument, while compelling if true, tenuously draws on the inferences of too many assumptions to establish a general principle. Independently, without corroborating testimony or evidence, the presence of a person's DNA in a particular place indicates, at best, the person was present in that place in the past.¹²⁶ The DNA, by itself, does not indicate why, when, or how it arrived at the scene.¹²⁷

With this fact in mind, a DNA sample derived from semen found during a victim's post-rape hospital examination¹²⁸ might be the most probative type of forensic evidence for DNA analysis involving sexual crimes. Even this evidence, however, is not dispositive with respect to the alleged rapist's guilt. In such an instance, the issue of the victim's alleged consent becomes paramount.¹²⁹ Even when the issue turns on consent, a defendant certainly will find it more difficult to corroborate a legitimate consent defense with witnesses and other evidence at a point fifteen years¹³⁰ or more after the alleged rape.¹³¹

125. See Diehl, *supra* note 35, at 436 (stating the proposition that if the probative value of the DNA evidence is sufficiently high, "the defendant is unlikely to be prejudiced by the disappearance of other evidence, at least in the sense that any evidence the witness might have lost would be unlikely to change the outcome of the trial"); Peter Slevin, *For DNA Detectives, the Workload is Exploding*, WASH. POST, Nov. 14, 2000, at A3 (quoting the District of Columbia's medical examiner, Jonathan L. Arden, as implying that DNA invariably implicates only the guilty).

126. Even this proposition is tenuous, however. Consider, for example, the situation in which a person (Person #1) is in a crowded room (or elevator or nightclub) and several of the person's hair fibers are transferred to an adjacent person's (Rapist's) clothing, to which they stick. If the Rapist proceeds to commit a sexual crime, the transferred hair fibers from Person #1 are left at the crime scene by the Rapist. Then law enforcement officials may hold Person #1 as culpable for the crime, if the hair fibers are indeed recovered from the crime scene. See Diehl, *supra* note 35, at 432 (indicating that hair is one source susceptible to DNA testing).

127. See *id.* at 438 (considering that the innocence of a hypothetical rape suspect could be questioned when he passed by the crime scene prior to the crime, inadvertently left blood there, and left before the crime commenced).

128. See Michael O. Allen, *Rape Kit Funding Pushed*, N.Y. DAILY NEWS, Nov. 5, 2000, at 5 (reflecting a legislator's frustration with funding decisions concerning the testing of "rape kits," which hospital personnel use to gather and save DNA evidence when a woman alleges she has been raped).

129. See Diehl, *supra* note 35, at 439-40 (noting and criticizing a legislative proposal designed to protect defendants truthfully claiming consent by limiting the DNA exception to the statute of limitations to defendants who are unknown to the victim, under the theory that defendants known to the victim are more likely to have consensual sex with the victim).

130. The statute of limitations for rape in Massachusetts, for example, is fifteen years. See MASS. GEN. LAWS ch. 277, § 63 (1992).

131. The author recognizes the slim likelihood of a consenting woman falsely to allege rape within such a brief time after the incident so as to allow for collection of the DNA evidence. However, the purpose of this Comment is not so much to measure such probabilities as it is to acknowledge potential infirmities that may prejudice an otherwise innocent defendant.

Consider, for example, the hypothetical situation in which a married man meets a woman at a bar, they both consume alcohol, and ultimately engage in intercourse

Additional circumstances exist whereby allowing DNA as probative evidence of a rape suspect's guilt prejudices an otherwise innocent defendant, through misidentification¹³² and improper handling of DNA evidence (leading to cross-contamination),¹³³ for example.

This summary of potential problems that inhere in the use of DNA evidence long after the criminal conduct occurs is not intended to be exhaustive.¹³⁴ Rather, it offers a brief overview of the conflict between the practice of DNA indictment and the purpose of limiting actions to protect defendants from answering charges prompted by stale evidence.

DNA remains an incredibly useful tool in solving crimes and resolving questions of identity. However, the practice of indicting DNA substantially conflicts with the historical development,¹³⁵ purpose,¹³⁶ and judicial attitudes¹³⁷ toward modern statutes of

the same night. The man, feeling guilty after contemplating his infidelity, leaves abruptly without intending any further contact with the woman, even though he never considered the possibility she never consented. If the woman has a different perspective and goes to the hospital immediately after the man leaves and asserts her belief she was raped, and the man's DNA is recovered, it may be entered into an offender database. If the man is convicted of a violent offense, for example, twenty years later and is matched to his DNA from the adulterous night, he might be held to answer for the rape charge. In such an instance, he would likely find it difficult to find witnesses with memories strong enough to bolster his version of the evening's events. See, e.g., *In a First, Rape Charge Based on No-Name Warrant Issued for DNA*, BIOTECH. NEWSWATCH, Nov. 6, 2000, at 4 (citing San Francisco's chief public defender remarking, "It's difficult for a defendant to mount a defense that is six years old"); Willing, *supra* note 4, at 3A (quoting a New York City defense attorney saying, "[s]uppose the sex was consensual. After 15 or 20 years, how's he supposed to find the witnesses who can back his story up?").

132. Recall that no two people have the same genetic make-up—except for twins. See Rosenthal, *supra* note 57, at 197 (indicating identical twins have identical genetic structure). Consider the hypothetical occurrence of a rape linked to one of two identical twins many years after a crime occurred. In this situation, the memories of witnesses who could provide an alibi for the innocent suspect/brother are extremely important, but may have deteriorated beyond recall by the time the prosecution commences. See Ochoa and Wistrich, *supra* note 31, at 474-75 (detailing the rapid rate at which memory deteriorates).

133. See generally William C. Thompson, *Accepting Lower Standards: The National Research Council's Second Report on Forensic DNA Evidence*, 37 JURIMETRICS J. 405, 417-20 (1997) (suggesting various sources of error in analyzing and interpreting DNA evidence and results).

134. See Richard Lempert, *After the DNA Wars: Skirmishing with NRC II*, 37 JURIMETRICS J. 439, 444 (1997) (listing as possible reasons leading to an erroneous positive match: (1) the real criminal had DNA matching the suspect's at the tested loci; (2) the expert forensic scientist lied in their testimony; (3) the police failed to properly consider the relevant suspect pool; (4) lab error; and, (5) intentional or inadvertent contamination by police).

135. See *supra* notes 91-92 and accompanying text (revealing the legislative preference for statutes of limitations and establishing legislatures' ability to modify the statute to adapt to modern circumstances).

136. See *supra* notes 103-104 and accompanying text (outlining the long-standing purpose of repose served by statutes of limitations and reiterating potential causes of prejudice a criminal defendant would face without such limiting actions); see also

limitations. The better solution remains for legislatures to modify their respective statutes of limitations,¹³⁸ either by extending them within explicitly-drawn parameters¹³⁹ or abolishing them altogether for rape and other sexual crimes when investigators collect DNA evidence.¹⁴⁰ Such a solution would settle lingering legal questions

Developments, supra note 78, at 1187 (concluding that questions about the propriety of a statutory limiting period should rely upon an analysis of the underlying purposes served by a limiting action).

137. *See Developments, supra* note 78, at 1189 (explaining that courts strictly construe criminal statutes of limitations, even if it leads to an “[un]reasonable result,” because “courts are reluctant to create exceptions where the legislatures have not explicitly done so”).

138. *See id.* at 1188 (maintaining that the most effective means of resolving a legal controversy over interpretation of the rights and remedies afforded by statutes of limitations lies in the hands of the legislating entities). “On existing causes of action, the [duration of the limiting period] may always be lengthened, even as to criminal prosecutions” *Id.* at 1190. Generally, a decision about the existence or duration of a specific statute of limitations is a policy matter that lies within the province of the legislatures, not the courts. *See id.* at 1179 (articulating that legislatures have made similar policy decisions, generally speaking, in excluding particular felonies, e.g., murder, manslaughter, arson, and forgery, from the statute of limitations); Adlestein, *supra* note 67, at 252 (“Criminal statutes of limitations are thus flexible instruments of legislative policy and often reflect the social concerns of the particular time and locality.”).

139. *See Diehl, supra* note 35, at 439 (suggesting courts have discretion to ignore the statute of limitations if the prosecution meets a burden of showing that a rape victim did not know her alleged attacker, thereby avoiding the consent defense). Diehl further lists several methods by which laboratories might reduce possible scientific error and recommends that prosecutors split the DNA evidence with defendants to allow the defense to perform its own testing. *See id.* at 440.

Legislatures also might consider, for example, tolling the statute of limitations upon a showing of evidence corroborating the DNA test results to support an accusation against a defendant who might otherwise avoid the charge by raising a statute of limitations defense. *See, e.g.,* Ernsdorff & Loftus, *supra* note 82, at 132 (recommending that courts require independent corroborating evidence to support adult victims of child sexual abuse who bring civil actions against their alleged abusers based on repressed memory retrieved through hypnosis as an adult).

Several legislatures already have started to re-examine their statutes against the backdrop of DNA indictments. *See, e.g.,* Dennis Chaptman, *Lift Time Limit for Rape Cases, Legislators Urge*, MILWAUKEE J. & SENTINEL, Nov. 4, 1999, at 20 (reporting that a bill abolishing the statute of limitations, when fingerprint evidence is also retrieved, passed one chamber of the Wisconsin legislature); Terry Hillig, *Judge Declares Man a Habitual Offender, Gives Him Life Sentence*, ST. LOUIS POST-DISPATCH, July 27, 2000, at B4 (reporting the legislature entertained proposals from prosecutors on increasing the statutes of limitations for felony sex offenses); Deborah Kalb, *Toricelli Bill Would Abolish 5-Year Statute of Limitations for Rape*, GANNETT NEWS SERVICE, June 14, 2000, available at 2000 WL 4401064 (reporting legislative proposals to abolish the statute of limitations for rape, introduced into the United States Senate); *Limits of Prosecution*, DET. NEWS, Mar. 29, 2000, at 14 (discussing legislative proposals to extend Michigan’s statute of limitations); *Week in Review*, DES MOINES REG., Feb. 20, 2000, at 5 (“Rep. Charles Larson . . . and Sen. Andy McKean . . . say the three-year statute of limitations in rape cases needs to be reconsidered in light of technological advances.”); Willing, *supra* note 4, at 1A (“At least seven other states [in addition to New Jersey, Florida, and Nevada] are considering eliminating or extending their statutes of limitation for crimes that can be solved by DNA evidence.”).

140. *See Sex Offenders and Statutes of Limitations* (CNNfn television broadcast, Feb. 24, 2000) (transcript on file in Lexis-Nexis Library, Transcripts File) (listing New

over defendants' statutory rights and preserve institutional integrity, instead of forcing prosecutors to find a loophole through which to press what otherwise would constitute stale charges. Furthermore, after legislative modification of statutes of limitations, suspects defending charges so old that potential prejudice remains would still retain the ability to invoke their Sixth Amendment speedy trial right to dismiss the charges.¹⁴¹ A comparison between DNA and fingerprint evidence reveals that, aside from the potential prejudice inherent in defending stale claims, DNA indictees might suffer further prejudice both at the indictment and the trial stage, for which they might require Sixth Amendment relief.

III. HISTORY AND DEVELOPMENT OF FINGERPRINT SAMPLES

From the time that Alec Jeffreys described his then-new DNA typing technique as "DNA fingerprinting" in 1984,¹⁴² the nomenclature stuck¹⁴³ and with it follows the natural comparison with traditional fingerprint analysis. Criminal investigators and prosecutors have come to recognize DNA as the most accurate and effective investigative tool since the advent of traditional fingerprint techniques.¹⁴⁴ Proponents of DNA indictments claim DNA's ability to identify previously unknown suspects outweighs any prejudice defendants might face due to the lapse of time between the crime and the indictment, and thus justifies use of DNA indictments.¹⁴⁵

A comparison of the accuracy of DNA versus fingerprint evidence reveals that this argument remains subject to attack on several grounds. The following comparison outlines the benefits and inherent limitations of both types of evidence, concluding prosecutors should employ the same restraint with cases based on DNA evidence as they have shown with fingerprint evidence.

Jersey, Nevada, and Florida as states that have eliminated their statutes of limitations for rape); Heather Lourie, *DNA Alters Rape Law*, ORANGE COUNTY REG., Aug. 26, 2000, at A1 (reporting enactment of a law in California eliminating the statute of limitations if investigators analyze the sample within two years of the crime).

141. See *infra* notes 298-301 and accompanying text (finding that a delay of five years or greater between the indictment and an arrest will provide the DNA indictee with a potential speedy trial defense).

142. See INMAN & RUDIN, *supra* note 26, at 20 (describing the historical development of DNA profiling).

143. A simple LEXIS search in the "Law Reviews, Combined" database for the term "DNA fingerprinting" reveals at least 250 documents containing the term (performed Nov. 25, 2000).

144. See Connors, *supra* note 54, at 889 (describing forensic DNA analysis through a comparison with fingerprint evidence).

145. See *supra* note 125 and accompanying text (citing claims that DNA results are so accurate as to outweigh any prejudice to a defendant).

A. *Historical Use of Fingerprints as an Identification Technique*

The use of traditional, or dermatoglyphic,¹⁴⁶ fingerprints to identify people dates back over two thousand years to ancient times, when the Chinese used thumbprints in lieu of signatures for legal documents and criminal confessions.¹⁴⁷ The first recorded use of fingerprints as tools to determine identification occurred in 1684, when Dr. Nehemiah Grew issued a report to London's Royal Society describing the ridges and pores on the hands and feet.¹⁴⁸ In 1788, J.C.A. Mayer became the first researcher to announce that fingerprints are unique to each person, though his research was not precise enough to allow the inference that fingerprints could always distinguish one person from another.¹⁴⁹

Fingerprints' first foray into criminal justice occurred when a Scottish doctor practicing in Japan used them to exonerate a man accused of burglary by showing that the prints left at the crime scene did not belong to the accused.¹⁵⁰ In 1897, a German researcher established the applicability of dermatoglyphic prints to identification of criminal suspects by demonstrating fingerprints do not change over time.¹⁵¹ Shortly thereafter, in 1899, Edward Henry published a book delineating a classification system for taking and filing fingerprints in criminal investigations.¹⁵² England and Wales implemented the Henry classification system in 1901.¹⁵³ With modifications by the FBI, law enforcement agencies in the United States continue to use the Henry system today.¹⁵⁴

146. See INMAN & RUDIN, *supra* note 26, at 6 (comparing and contrasting dermatoglyphic fingerprints with current DNA typing methods).

147. See JOE NICKELL & JOHN F. FISCHER, CRIME SCIENCE 112 (1999) (asserting that the Chinese use of fingerprinting was the "earliest recognition of the uniqueness of fingerprints and their suitability for personal identification").

148. See ANNITA T. FIELD, FINGERPRINT HANDBOOK 3 (1959) (listing a chronology of the use of fingerprints).

149. See *id.* at 4 (noting that Mayer determined that skin ridges were unique to each individual and that the similarities in fingerprints were very close in some people).

150. See NICKELL & FISCHER, *supra* note 147, at 113 (noting an article published by a physician, Dr. Henry Faulds, sparked a debate with Herschel over who deserved credit for pioneering the fingerprinting technique).

151. See Field, *supra* note 148, at 4 (describing how researcher Herman Weckler compared and published a print of his own palm taken in 1856 with another print taken in 1897).

152. See NICKELL & FISCHER, *supra* note 147, at 114 (noting that Henry, Herschel's successor in India, further developed Herschel's scholarship to create a workable classification system). Henry completed his research in 1899 and published a book the next year. See *id.* at 115-16.

153. See *id.*

154. See *id.* (noting the FBI has modified the system to adapt it to the agency's changing needs).

In 1903, officials in the United States first used fingerprinting in the criminal context to distinguish between two men at Leavenworth Prison who looked alike and bore the same name.¹⁵⁵ Prison officials booking an incoming inmate named Will West became confused when they recognized West's name, physical features, and measurements, because the man West resembled already was incarcerated at Leavenworth.¹⁵⁶ This scenario provided the impetus for Leavenworth and prisons nationwide to adopt a system of fingerprinting.¹⁵⁷ The following year the St. Louis, Missouri police department officially adopted a fingerprint classification system to assist in its crime-fighting endeavors.¹⁵⁸ Between 1905 and 1908, the U.S. Army, Navy, and Marine Corps followed suit and adapted a fingerprint system to fit their needs, while the federal government's acceptance of fingerprint analysis culminated in 1908 when the precursor to the FBI implemented a fingerprint identification system.¹⁵⁹

The increasing use by law enforcement agencies of dermatoglyphic analysis invariably compelled criminal defendants to attack the validity of fingerprints as evidence in criminal trials. The first reported case involving a legal challenge to fingerprint evidence occurred in *People v. Jennings*¹⁶⁰ in 1911. In upholding a murder conviction, the *Jennings* court relied on "standard authorities on scientific subjects"¹⁶¹ and found the trial court properly admitted

155. See *id.* at 115 (retelling the story of "The Two Will Wests," a situation which fingerprinting advocates exploited to demonstrate that fingerprints could "infallibly distinguish one man from others").

156. See *id.* (explaining that the two men were actually identical twins, although they denied any relationship to each other).

157. See *id.* (noting that Leavenworth reportedly transferred to a fingerprint identification system "the next day"); see also *id.* at 115-16 (listing New York's Sing Sing Prison, the United States Army, Navy and Marine Corps as some of the organizations following Leavenworth's lead). In fact, there were so many fingerprint technicians employed that they created the International Association of Identification in 1915. See *id.*

Prior to adopting a fingerprint-based system, prisons and law enforcement agencies used the *bertillonage* method of identification. See NICKELL & FISCHER, *supra* note 147, at 114 (describing the process as a system of anthropometry, which is the science of measuring the human body, by taking measurements of the length of the left arm, length and breadth and diameter of the skull, length of left middle and little fingers, length of the left foot, length of the right ear, and recording of other physical characteristics for each individual).

158. See FIELD, *supra* note 148, at 5 (recognizing the foresight of St. Louis as having the first police department in the country to embrace fingerprinting).

159. See NICKELL & FISCHER, *supra* note 147, at 115-16 (detailing further the government's acceptance of fingerprint analysis by noting that Congress established the FBI's Identification Division in 1924 to serve as the central repository of all fingerprint records obtained by the FBI).

160. 296 N.E. 1077 (Ill. 1911).

161. *Id.* at 1081.

fingerprint evidence.¹⁶² Although commentators have since criticized this decision for its shortsighted logic,¹⁶³ *Jennings* paved the way for admission of fingerprint evidence nationwide.¹⁶⁴

Bolstered by the *Jennings* decision, prosecutors successfully introduced fingerprint evidence throughout the following decade in criminal trials in New Jersey,¹⁶⁵ New York,¹⁶⁶ Nevada¹⁶⁷ and Texas.¹⁶⁸ By 1932, the federal courts accepted the reliability of fingerprint evidence in establishing a suspect's identity.¹⁶⁹ Today, forensic fingerprint analysis has evolved to become one of the cornerstones of criminal investigations.¹⁷⁰ Judges take judicial notice of the accuracy of fingerprinting rather than requiring prosecutors to establish reliability of the process itself.¹⁷¹ Fingerprint evidence impacts criminal prosecution and trials to such an extent that the courts subsequently invoked its success as the basis for admitting other identification evidence—including DNA.¹⁷² The question remains,

162. *See id.* (relying upon encyclopedias and treatises on criminal law as the basis for confirming the trial court's decision).

163. *See, e.g.,* Michael J. Saks, *Mertin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 HASTINGS L.J. 1069, 1085-86 (1998) (criticizing the oft-cited hypothesis, upon which the *Jennings* court accepted fingerprint evidence as reliable, that fingerprints from two individuals can never be the same). Saks argues it is impossible to declare conclusively that no two fingerprints are the same without comparing all possible samples. *See id.* at 1086 ("It mattered not that the hypothesis never could be proved.")

164. *See id.* at 1085 (noting that once the courts accepted fingerprint evidence as being uniquely identifying, fingerprint impressions became the standard form of identification evidence).

165. *See* State v. Cerciello, 90 A. 1112, 1115 (N.J. 1914) (holding that fingerprint evidence could be admitted, although the court was unaware if it was actually offered into evidence).

166. *See* People v. Roach, 109 N.E. 618, 623 (N.Y. 1915) (concluding that fingerprint evidence was reliable because of the progress made by scientists and police investigators throughout the world).

167. *See* State v. Kuhl, 175 P. 190, 195-96 (Nev. 1918) (relying on science and expert witness testimony as the basis for admitting fingerprint evidence).

168. *See* McGarry v. State, 200 S.W. 527, 528 (Tex. Crim. App. 1918) (holding that fingerprint evidence did not violate the defendant's rights and the evidence could be admitted).

169. *See, e.g.,* United States v. Kelly, 55 F.2d 67, 70 (2d Cir. 1932) ("But, as a means of identification, [fingerprinting] is just as useful and important where the offense is a misdemeanor [as it is in felony cases] . . . It can really be objected to only because it may furnish strong evidence of a man's guilt.")

170. *See* RICHARD SAFERSTEIN, CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE 412 (5th ed. 1995) ("Today the fingerprint is the pillar of modern criminal identification.")

171. *See* M.C. Dransfield, Annotation, *Fingerprints, Palm Prints, or Bare Footprints as Evidence*, 28 A.L.R. 2d 1115 (1953) ("So general is the use of fingerprint identification and so accurate are the results therefrom that in many cases it has been expressly declared that the courts will take judicial notice thereof.")

172. *See* Saks, *supra* note 163, at 1085 ("Once the courts accepted fingerprint evidence as being uniquely identifying, fingerprints became an icon for every other kind of identification evidence—tool marks, bullets, bite marks, handwriting,

however, whether the accuracy of DNA profiling, relative to fingerprinting, justifies the use of DNA indictments.

B. Comparison between Dermatoglyphic and DNA Evidence

Researchers liken DNA to dermatoglyphic fingerprints because both provide a highly individualistic sample.¹⁷³ The value of each to law enforcement efforts thus far has been substantial.¹⁷⁴ The use of DNA analysis to identify suspects is a procedure that, like fingerprinting,¹⁷⁵ will endure for many years to come.¹⁷⁶ Thus, a comparison of DNA and fingerprint analysis will facilitate an understanding of the issues implicated in the subsequent discussion about the impact of DNA indictments on defendants' abilities to receive a fair trial.¹⁷⁷

First, jurors often hold the misperception that DNA evidence possesses "an aura of infallibility."¹⁷⁸ Jurors continue to improperly weigh DNA evidence¹⁷⁹ even though fingerprint evidence remains, as

voiceprints, shoe prints, broken glass, and so on.").

173. See NRC I, *supra* note 45, at 29 (describing the "useful[ness]" of comparing DNA samples with fingerprints, as each provides an "individualizing characteristic" that derives from the "personal uniqueness of the patterns").

174. See Tracy & Morgan, *supra* note 33, at 636-37 (reflecting the value of both procedures through the claim that DNA is "the next great breakthrough since fingerprints").

175. See generally FIELD, *supra* note 148, at 3-6 (revealing the longevity of the use of dermatoglyphic fingerprinting through a chronological listing of its use in identifying criminal suspects).

176. See Tracy & Morgan, *supra* note 33, at 636 (indicating the need to address significant policy questions regarding DNA testing because, "as with fingerprints, it looks like DNA testing and associated databases are here to stay").

177. For a more specific treatment of the possibility that DNA indictments impede defendants' abilities to receive a fair trial, see *infra* Part IV.D.

178. See *Commonwealth v. Curnin*, 565 N.E.2d 440, 441 (Mass. 1991) (refusing to admit DNA evidence at a rape defendant's trial because the probability of the defendant's DNA randomly matching the crime scene evidence at 1 in 59 million "must have a strong impact on a jury"); NRC I, *supra* note 45, at 161 (insisting that DNA evidence, like all other laboratory work, is subject to error). The National Research Council found the potential for juror misuse of DNA evidence to be so potentially damaging to a defendant that it officially recommended a study to develop methods of decreasing the misinterpretation of DNA evidence. See NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 204 (1996) [hereinafter NRC II] ("Recommendation 6.1: Behavioral research should be carried out to identify any conditions that might cause a trier of fact to misinterpret evidence on DNA profiling and to assess how well various ways of presenting expert testimony on DNA can reduce such misunderstandings.").

179. See Jonathan J. Koehler et. al, *The Random Match Probability in DNA Evidence: Irrelevant and Prejudicial?*, 35 JURIMETRICS J. 201, 212 (1995) [hereinafter Koehler] (maintaining jurors may "overweight" very small probabilities that an innocent defendant's DNA would randomly match genetic material from the crime scene because: (1) people tend unfairly to give more evidentiary weight to statistics, like extremely small DNA random match probabilities, because they remain vivid and memorable when juries go to deliberate; and (2) people also tend to "combine probabilistic items of evidence by averaging them").

shown below, the superior identification technique.¹⁸⁰ Because DNA profiling has not reached a level of reliability comparable to that of fingerprinting,¹⁸¹ triers of fact unfairly draw inferences against a defendant based on DNA evidence that might otherwise be warranted only by fingerprint analysis.¹⁸²

Second, a direct correlation between the respective abilities of

The authors' article supports this hypothesis with compelling data. The authors conducted two studies in which they provided mock jurors and laypersons with a fact pattern typical in a criminal murder prosecution. *See id.* at 212-13 (describing the protocol of the study). When the fact pattern presented random match probability evidence revealing that an innocent defendant's DNA would match DNA from the crime scene in a probability of 1 in 1 billion, the jurors voted to convict two or three times more often than a control group of mock jurors not presented with this statistical evidence. *See id.* at 213-14 (breaking down study results by control group). More importantly, the study found "little impact" on the jurors' proclivity to convict *even when* they possessed evidence of a laboratory error rate, suggesting a relatively high potential for error in analysis and interpretation of the DNA samples, several orders of magnitude higher than the random match probability. *See id.* at 214 (describing the low impact of providing the laboratory error rate to jurors).

Furthermore, juror misperceptions about the reliability of DNA evidence in establishing a defendant's guilt might be due, at least in part, to prosecutors' arguments that the science behind DNA analysis renders it superior to fingerprint evidence. *See NRC I, supra* note 45, at 161 (chiding attorneys who "oversell" DNA evidence).

Prosecution experts, on the other hand, occasionally misstate or let prosecutors misstate the import of their testimony—suggesting, for example, that if a defendant's DNA matches DNA collected at a crime scene and there is a one in a million chance that a randomly selected person would have matching DNA there is only a one in a million chance that someone other than the defendant committed the crime. There are even cases where prosecution experts have suggested that false positive error is impossible in DNA analysis.

Lempert, *supra* note 134, at 441-42; *see, e.g.*, *People v. Fishback*, 829 P.2d 489, 492 (Colo. Ct. App. 1991) (restating the prosecution expert's testimony insisting the DNA testing process used was "failsafe"); *see also* Jonathan J. Koehler, *Error and Exaggeration in the Presentation of DNA Evidence*, 34 *JURIMETRICS J.* 21, 23 & n.8 (1993) (listing further examples of misleading and inaccurate testimony by prosecution expert witnesses regarding the reliability of DNA analysis).

180. *See NRC I, supra* note 45, at 157 (concluding that "as a personal identification method, fingerprinting is the definitive forensic technique"). Several facts substantially support the assertion that fingerprinting is more reliable than DNA evidence.

[Fingerprinting] has almost 100 years of development, which has established empirically that a person has unique fingerprints; fingerprints can even distinguish between twins. Fingerprints are easily detected and developed, and large electronic fingerprint databases exist all over the world. A fingerprint is a directly observable impression that does not generally involve extensive chemical or biochemical manipulation. Rarely do fingerprint experts differ in conclusions reached after examination of fingerprint evidence.

Id.

181. *See id.* at 161 (clarifying that DNA identifications will not be as reliable as fingerprinting "until technology and [DNA] databanks improve").

182. *See United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (reasoning fingerprint evidence is so conclusive that "[i]t can really be objected to only because it may furnish strong evidence of a man's guilt").

fingerprint and DNA evidence to distinguish between possible sources proves misleading. As a general rule, fingerprints are more conclusive and reliable in establishing a link between a sample and a criminal suspect.¹⁸³ Researchers theoretically have the ability to obtain and analyze all of the information fingerprints provide.¹⁸⁴ In direct contrast, however, scientists examining DNA samples possess the capability to analyze only one millionth of the three billion units of human DNA.¹⁸⁵ Though current DNA analysis capabilities lead to conclusions about the source of a DNA sample,¹⁸⁶ a great deal of disagreement and inconsistency remains over the scope of DNA analysis required to produce a result as conclusive as an examination of fingerprint samples.¹⁸⁷

Third, although police routinely take fingerprints from a crime

183. *See id.* at 113 (finding that fingerprints can lead to a certain match, while RFLP DNA analysis might require the examination of further loci not contained in the database, following an initial match).

184. *See* INMAN & RUDIN, *supra* note 26, at 6 (observing that with dermatoglyphic fingerprints, unlike with DNA, “there are no missing pieces of information”).

185. *See id.* (clarifying that the comparison between DNA and fingerprints might be more accurately represented through a description of DNA as a “partial [finger]print” because it may not be necessary to have all DNA information to make a positive identification).

186. *See id.* (noting that, as with partial latent fingerprint samples, scientists may not require the full breadth of DNA’s information “to be convinced of the individuality of a DNA profile”).

187. *Compare id.* (suggesting that an analysis of nine loci within a gene might be sufficient to draw a conclusive inference that two DNA samples originated from the same source), *with* Dr. Jennifer Smith, Remarks at the Meeting IX Proceedings of the National Commission on the Future of DNA Evidence, Comments Regarding R & D Report (Apr. 9, 2000), at <http://www.ojp.usdoj.gov/nij/dnamtgtrans9/trans-e.html> (last visited Oct. 17, 2000) (commenting on a suggestion to increase the standard number of loci presently analyzed from 13 to 20, remarking, “I guess I would just leave [the standard number of 13] alone, is what I’m saying, because we cannot get anyone to say [the number required to conclusively establish a match is] 12 loci, it’s 13 loci, it’s ten loci, so to avoid numbers in general—we are doing—the community is doing the best it can with the 13. It’s sometimes difficult to get everyone to do the 13.”). Dr. Smith, the manager of the DNA Analysis Unit for the FBI laboratory, further revealed the disagreement over the number of loci that scientists should test in remarking:

I would say right now it is as good as fingerprinting, personally. When I walk into court and I testify this individual is the source of this DNA, to me that’s the same as—if not better than a fingerprint in some instances . . . [But scientists advocating an increase in the standard number of loci tested are] saying [the accuracy of DNA typing] will get better and eventually it will be as good as fingerprinting.

Id. The discussion between Dr. Smith and the members of the National Commission reveals the difficulty and inconsistency in reaching a consensus regarding a standard number of loci that the scientific community should employ before drawing conclusions as to the identity of a DNA sample’s source. *See generally id.* (citing comments with varying recommendations for a standard number of loci ranging all the way from ten to fifty).

A “locus,” with respect to DNA testing, is “the specific physical location of a gene on a chromosome.” *See* INMAN & RUDIN, *supra* note 26, at 168.

scene, they collect DNA samples on a far less consistent basis.¹⁸⁸ This inconsistency in collection does not result from a lack of available DNA evidence, as criminals—and especially rapists¹⁸⁹—almost always leave behind DNA samples.¹⁹⁰ Rather, police do not commonly collect DNA samples because such an effort is cost-prohibitive.¹⁹¹ This inconsistency might result in a prejudicial inference, against a criminal defendant, that the evidence or case is especially important because investigators resorted to DNA profiling.¹⁹² Additionally, the failure to collect DNA evidence also leads to conclusory statements that rhetorically, rather than scientifically, bolster the value of DNA evidence.¹⁹³

DNA evidence warrants a further comparison with fingerprints by virtue of the similarity in matching unknown samples with suspects of known identity.¹⁹⁴ In both instances, analysts compare portions (i.e., a partial fingerprint from a specific finger or a locus of a specific gene) of a sample from an unknown source with its known counterpart (i.e., a print from the same finger or a profile of the same genetic locus).¹⁹⁵ Similarly, government officials store fingerprint samples as well as genetic profiles from known sources in central repositories,¹⁹⁶

188. See NRC I, *supra* note 45, at 112 (declaring that police find latent fingerprints more often than they find DNA-containing fluid samples).

189. See *supra* note 33 and accompanying text (delineating the scope of this Comment, emphasizing the focus on rape and other sexual crimes).

190. See Diehl, *supra* note 35, at 432 (recognizing the frequency with which rapists leave genetic samples at the crime scene).

191. See Tracy & Morgan, *supra* note 33, at 655 (concluding “it is doubtful” that local law enforcement agencies have the resources to perform a full DNA investigation at every crime scene); *cf.* NRC I, *supra* note 45, at 112 (indicating that the cost of collecting DNA from every crime scene is prohibitive).

192. See NRC II, *supra* note 178, at 203 (implying laypersons, serving as triers of fact, might be unduly influenced by the presentation of DNA evidence).

193. See NRC I, *supra* note 45, at 112 (contending that, “where it exists, DNA evidence will often be more probative than fingerprints, in that the presence of body fluids is harder to attribute to innocuous causes”) (emphasis added). The NRC I report further indicated that “[t]hat is especially true in rape cases, in which positive identification of semen in the vagina is virtual proof of intercourse (although it leaves open the issue of whether it was consensual).” *Id.* Notably, the NRC I report provided only a *parenthetical* reference to the issue of consent. This conclusory assertion, albeit qualified, provides a prime example of a statement that might unfairly influence the debate over DNA’s probative value.

194. See Asplen, *supra* note 40, at 148 (“DNA is similar to fingerprint analysis in how the matches are determined.”); NRC I, *supra* note 45, at 24 (concluding that techniques of DNA analysis are analogous to well-established forensic techniques, including fingerprint examinations).

195. See Asplen, *supra* note 40, at 148 (comparing the objectively descriptive factors of each type of evidence).

196. Compare NRC I, *supra* note 45, at 17-18 (discussing the impact of the expansion of the Automated Fingerprint Identification System (AFIS) central fingerprint database in solving tens of thousands of additional crimes), with Tracy & Morgan, *supra* note 33, at 642 (delineating the ideal process for searching a central DNA database to match an unknown sample with an identifiable DNA source).

thus allowing law enforcement agencies easy accessibility for comparison.¹⁹⁷

Even though the methodologies for performing a screening are similar, the disparity between the associated costs of each process remains significant.¹⁹⁸ Aside from the cost of the relevant software, fingerprint collection is inexpensive and efficient.¹⁹⁹ In contrast, the labor-intensive effort to analyze each DNA sample requires a relatively substantial financial commitment.²⁰⁰ The higher financial burden of DNA analysis has produced an enormous backlog of DNA samples awaiting analysis following their collection from crime scenes.²⁰¹

DNA and fingerprint results share a common bond with respect to the primary controversy over their use as evidence against defendants at trial. The debate swirls not around the admissibility of the evidence,²⁰² but rather around the form of the expert testimony introducing the evidence.²⁰³ Specifically with respect to DNA

197. See NRC I, *supra* note 44, at 111 (explaining that with the development of the AFIS fingerprint database, law enforcement officials now can compare an unidentified latent fingerprint with millions of known patterns within minutes); Tracy & Morgan, *supra* note 33, at 640-41 (elaborating on federal initiatives designed to increase the efficiency and efficacy of DNA analysis in criminal investigations, including the National DNA Index System (NDIS), which provides investigators with an enhanced tool in violent crimes investigations by permitting law enforcement agencies at all levels of government to submit DNA samples to a national database).

198. See NRC I, *supra* note 45, at 118 ("Ordinary fingerprint databanks have low variable costs and high fixed costs, and DNA typing databanks have high variable costs and comparatively low fixed costs.").

199. See *id.* at 117 (revealing that the costs associated with collecting dermatoglyphic prints are essentially limited to the cost of personnel time in taking and filing the fingerprints).

200. See Tracy & Morgan, *supra* note 33, at 667 (using the industry rate of \$50 per test for a single DNA sample to estimate the cost of testing every federal inmate in custody); NRC I, *supra* note 45, at 117 (calculating the cost of each component of the analysis and concluding that RFLP DNA analysis costs approximately \$100-150 per sample).

201. See, e.g., Kim Kozlowski, *Michigan Lags in Catching Rapists: Lack of Resources Creates State Backlog in DNA Testing*, DET. NEWS, May 30, 2000, at 1E (citing a National Bureau of Justice statistic indicating that two-thirds of DNA laboratories across the country possess backlogs of unanalyzed samples); LaTour, *supra* note 45, at B1 (reporting that New York police have insisted on reopening 12,000 unsolved rape cases, each with DNA samples that require analysis); *Senator Proposes DNA Indictments*, AP NEWSWIRE, June 5, 2000 (quoting a state legislator who indicated that the backlog of unanalyzed DNA samples in the Michigan State Police crime laboratory stands at 12,000 and 15,000 samples); Quach, *supra* note 121, at A4 (reporting California's backlog of at least 18,000 samples from rape cases alone).

202. See M.C. Dransfield, Annotation, *Fingerprints, Palm Prints, or Bare Footprints as Evidence*, 28 A.L.R. 2D 1115, 1130-31 (1953) (finding that fingerprint identification results are so accurate that many courts have taken judicial notice of their reliability and accuracy); Jonathan Greenberg, *DNA Fingerprinting: A Guide for Defense Counsel*, 1989 ARMY LAW. 16, 17 (observing that attacking the overall admissibility of DNA evidence is not a worthwhile endeavor for defense counsel).

203. See M.C. Dransfield, Annotation, *Fingerprints, Palm Prints, or Bare Footprints as*

evidence, the scientific community has disagreed on the proper standards for estimating the probability of a random match between a criminal defendant and a DNA sample collected from a crime scene.²⁰⁴ In fact, in a span of fewer than five years, an expert commission²⁰⁵ on the application of DNA technology to the legal forum contradicted the conclusions drawn by its predecessor commission²⁰⁶ regarding the proper means of calculating such probabilities.²⁰⁷

Finally, DNA and fingerprint samples differ significantly in their genesis and physical composition, an important factor carrying the potential to significantly affect a defendant's right to a fair trial pursuant to a DNA indictment. Fingerprints derive their unique characteristics from random events occurring during the embryonic stage of human development—separate from genetic influence—while the DNA's individualizing characteristics derive from genetic variation.²⁰⁸ The difference has important implications for distinguishing between twin siblings; because twins by definition have the same genetic structure,²⁰⁹ their DNA is indistinguishable, yet scientists have the ability to distinguish between identical twins on the basis of their respective fingerprint patterns.²¹⁰

Aside from the possible unfairness of using genetic evidence against a DNA indictee at trial, which this Comment addresses

Evidence, 28 A.L.R. 2d 1115, 1121 (1953) (announcing that the most contentious issue regarding expert opinion on fingerprint evidence relates to the form in which the expert must express the opinion, i.e., whether the expert may testify conclusively that a suspect left the latent fingerprint sample); Kaye, *supra* note 70, at 168 (contending that “the search for a procedure to convey—intelligibly, accurately and fairly—the probative value of . . . [DNA] evidence has proved challenging”).

204. See Thompson, *supra* note 133, at 417 (criticizing the National Research Council's recommendations on the standards by which to measure probabilities of a random match and suggesting alternative methods as more accurate and fair to a criminal defendant).

205. See NRC II, *supra* note 178, at 49 (providing the commission's task statement, which generally charges NRC II with updating the NRC I report).

206. See NRC I, *supra* note 45, at vii-viii (describing the formation of NRC I).

207. See NRC II, *supra* note 178, at 49 (describing NRC II's task statement as a relatively vague charge). Although the NRC II task statement spoke mainly in generalities, the statement notably emphasized the specific need to revamp the National Research Council's stance on the interpretation and explanation of probability statistics. See *id.* “The committee . . . will also specifically rectify those statements regarding statistical and population genetics issues in the previous report that have been seriously misinterpreted or led to unintended procedures.” *Id.*

208. See NRC I, *supra* note 45, at 29, 31 (describing the differences between DNA typing and dermatoglyphics).

209. See Rosenthal, *supra* note 57, at 197 (noting that identical twins have identical genetic patterns).

210. See NRC I, *supra* note 45, at 29-30 (demonstrating that fingerprint forensics depends on nongenetic physical manifestations and explaining that DNA relies exclusively on genetic variation, which is absent in twin siblings).

further in the speedy trial analysis,²¹¹ prosecutors' reliance on DNA evidence at the post-indictment arrest phase also threatens a suspect's rights. DNA indictments rely on a presumption of guilt after obtaining a cold hit between a crime scene sample and a DNA offender database sample.²¹² This presumption threatens a person identified by the cold hit because the search for additional suspects usually ends at that time.²¹³ By focusing their energies on the cold hit suspect rather than continuing to exclude other possible sources of the DNA, law enforcement officials risk overlooking the culpability of equally probable suspects and ultimately prosecuting an innocent individual.²¹⁴

Rather than accepting the DNA match as conclusive evidence of the cold hit suspect's guilt, one commentator suggests investigators should expend additional resources to confirm that other persons with similar genetic structures could not have been the source of the crime scene sample,²¹⁵ even when circumstantial corroborating evidence suggests the cold hit defendant's guilt.²¹⁶ Thus, DNA indictments based on genetic matches between a database and the indictee only justify pursuit of the prosecution after an investigation affirmatively excludes other potential sources of the crime scene sample through testing of additional loci and consideration of non-genetic (e.g., fingerprint) circumstantial evidence.²¹⁷

211. See *infra* Part IV.D (discussing the potential for DNA and its concomitant evidentiary infirmities to impair an accused's defense).

212. See, e.g., Barbara Ross et al., *Indictment by DNA Genetics Get an Unknown Man Charged as E. Side Rapist*, N.Y. DAILY NEWS, Mar. 16, 2000, at 7 ("All cops need [after the DNA indictment] is a name to match with the [genetic] evidence, and they can nail the rapist.")

213. See Chaptman, *supra* note 139 (quoting a government official who remarked, "if you've got the DNA, you know it's the guy."); Lempert, *supra* note 134, at 460 ("investigations typically stop when police think they have the culprit").

214. See Lempert, *supra* note 134, at 461-62 (criticizing law enforcement's failure to consider all subjects within the relevant suspect pool in lieu of undue reliance on, and confidence in, DNA samples matching at a particular number of loci). Lempert considers a scenario in which "fairly suspected" persons with similar genetic structures, such as close relatives, escape justice at the cost of an innocent person's liberty, because investigators discontinued the investigation into other suspects after matching the crime scene sample with the DNA indictee's sample. See *id.*

215. See *id.* at 456-57 (indicating a defendant's random match probability of one in 50 million does not rule out the possibility that the father, brothers, cousins, and uncles with DNA matching the defendant's at the relevant loci may have committed the crime).

216. See *id.* at 460-61 (recommending police should extend their investigations beyond relatives who are "plausible suspects," even when eyewitness testimony corroborates matching DNA results between the crime scene and the suspect).

217.

[Urging the state to] replace its random match statistic [between the crime scene sample and the suspect] with a statistic showing the likelihood that at least one named relative [named by the suspect as another possible source of

Thus, despite the frequent comparisons between fingerprint and DNA identification techniques, the differences between the two suggest fingerprint evidence provides a more reliable method of identifying suspects. This conclusion therefore begs a response as to why prosecutors indict based on DNA but not on fingerprint matches.²¹⁸

C. *Why Haven't Fingerprints Been Indicted?*

To sustain an indictment or criminal information and the resulting arrest warrant,²¹⁹ the issuing body²²⁰ must find that probable cause²²¹ exists to believe the indictee committed the relevant crime.²²² In the case of DNA indictments, grand juries issue "John Doe" indictments.²²³ Although courts have not yet ultimately ruled on the validity of DNA indictments,²²⁴ logic dictates that "fingerprint indictments" would be at least as reliable—if not more so²²⁵—than

the DNA] has DNA like the defendant's unless the state excludes each named relative through DNA testing [of additional loci] or exculpatory non-DNA evidence of a sort unlikely to implicate the relatives implicates the defendant.

Id. at 461.

218. Although prosecutors indeed may have indicted fingerprints in the past, this author's research did not reveal any such instances.

219.

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.

FED. R. CRIM. P. 4(a)

220. A grand jury issues indictments, while prosecutors independently charge suspects through a criminal information. See BLACK'S LAW DICTIONARY, *supra* note 5, at 776, 783 (defining an indictment as a "formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person," and a criminal information as "[a] formal criminal charge made by a prosecutor without a grand-jury indictment").

221. See FED. R. CRIM. P. 9(a) ("Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment."). A finding of probable cause requires "[a] reasonable ground to suspect that a person has committed . . . a crime . . ." BLACK'S LAW DICTIONARY, *supra* note 5, at 1219. This standard "amounts to more than a bare suspicion but less than evidence that would justify a conviction." *Id.*

222. See, e.g., Commonwealth v. Angiulo, 615 N.E.2d 155, 162 (Mass. 1993) (holding that the requirement of probable cause to issue an indictment "is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions") (quoting Jones v. Robbins, 8 Gray 329, 344 (1857)).

223. See Dedman, *supra* note 5, at A8 (defining "John Doe" indictments as the vehicles through which DNA indictments take effect).

224. See *Appellate Review*, *supra* note 8 (reporting that a California appellate court will issue a ruling on the validity of DNA indictments that may be appealed to the California Supreme Court or even the U.S. Supreme Court).

225. See NRC I, *supra* note 45, at 157 (establishing fingerprint analysis as the most

DNA indictments.

The presence of a person's fingerprint at a crime scene does not compel the conclusion that the person in all reasonable likelihood committed the crime.²²⁶ Although DNA indictments remain subject to challenge on the grounds that they alone do not establish probable cause, courts have consistently found that fingerprints alone are sufficient to establish probable cause and, in some cases, even proof beyond a reasonable doubt of a suspect's guilt.²²⁷ Even though prosecutors ostensibly could indict on fingerprint evidence alone with confidence they will satisfy the indictment's probable cause requirement,²²⁸ they have acted with restraint and declined to do so.²²⁹

Prosecutors' attempts to vindicate the rights of rape victims²³⁰ indeed represent noble endeavors. Yet, if they continue to pursue DNA indictments, they might find it difficult to refrain from pursuing fingerprint indictments to vindicate the rights of victims of other types of criminal activity.²³¹ Such a scenario essentially would

reliable form of forensic evidence).

226. See *United States v. Kelly*, 55 F.2d 67, 70 (2d Cir. 1932) (noting that a fingerprint "is not in itself a badge of crime").

227. See *State v. Maya*, 493 A.2d 1139, 1145 (N.H. 1985) (finding fingerprint evidence sufficient to establish probable cause for a search warrant); *Hughes v. Superior Court*, 209 Cal. Rptr. 861, 865 (Cal. Ct. App. 1985) (making a fact-specific distinction between a previous case holding that fingerprint evidence alone failed to establish probable cause to bind the defendant over for trial); *People v. Thrower*, 670 P.2d 1251, 1253 (Colo. Ct. App. 1983) (recognizing police officers only satisfied the probable cause requirement to sustain a search warrant after they obtained fingerprints linking defendant to the crime); *People v. Summers*, 426 N.E.2d 937, 940 (Ill. App. Ct. 1981) ("[T]o sustain a conviction solely on fingerprint evidence, fingerprints corresponding to the fingerprints of the defendant must have been found in the immediate vicinity of the crime under such circumstances as to establish beyond a reasonable doubt that the fingerprints were impressed at the time the crime was committed." (quoting *People v. Rhodes*, 422 N.E.2d 605, 608 (Ill. 1981), *rev'g* *People v. Van Zant*, 405 N.E.2d 881 (Ill. 1980))); *State v. Helms*, 12 S.E.2d 243, 245 (N.C. 1940) (holding that fingerprint evidence matching the defendant's taken from a windowsill in a breaking and entering case was "properly admitted" and "sufficient to take the case to the jury"); *People v. Les*, 255 N.W. 407, 408-10 (Mich. 1934) (ruling the discovery of the defendant's palm print on a window sill through which an intruder unlawfully gained access to the home sufficiently established probable cause to link the defendant to the crime).

228. See *id.*

229. It is possible that prosecutors, prior to DNA indictments, did not conceive of the idea of indicting fingerprints. However, prosecutors have not chosen to pursue this means of law enforcement despite widespread media attention of DNA indictments. See *supra* note 218 (suggesting prosecutors have never attempted a fingerprint indictment); see also *supra* note 12 (listing media reports describing DNA indictments).

230. See *Unknown Man*, *supra* note 4 (indicating prosecutors owe a duty to rape victims to pursue every means possible of bringing the attacker to justice).

231. See *Kravets*, *supra* note 6 (quoting Johnny Griffin III, Paul Robinson's attorney, claiming prosecutors will "start doing it for everything" if courts uphold DNA indictments).

obliterate the statute of limitations for any crime resulting in DNA or fingerprint evidence.²³² In essence, the legal justice system could transform overnight from an institution designed to protect the innocent²³³ to a system that places more value on winning convictions—with potentially disastrous implications for innocent bystanders who had the misfortune to leave their DNA or fingerprints at a place that subsequently turned into a crime scene.

IV. HISTORICAL AND MODERN APPLICATION OF THE SPEEDY TRIAL CLAUSE

If the courts uphold DNA and fingerprint indictments in spite of their inconsistency with the policy underlying statutes of limitations,²³⁴ defendants ultimately might rely on the Sixth Amendment's Speedy Trial clause²³⁵ as a last resort to protect their rights. The following analysis examines the historical development and purpose of the clause, leading to provocative questions about the constitutionality of DNA indictments. The section concludes by extrapolating existing precedent and suggesting an analysis courts should employ in assessing the constitutionality of DNA indictments with respect to the speedy trial provision.

A. *History of the Speedy Trial Clause*

The Sixth Amendment provides, in relevant part, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”²³⁶ As with the statute of limitations, the Speedy Trial Clause derives from English law.²³⁷ The earliest evidence of a similar right comes from the Assize of Clarendon in 1166.²³⁸ The most formal

232. See *id.* (quoting Griffin saying, “there will be no statute of limitations” and implying “the criminal justice system would be turned on its head” if courts validate DNA indictments).

233. See Neuendorf, *supra* note 104, at 144 (recognizing the special protections afforded criminal defendants through a very high prosecutorial burden of proof).

234. See *supra* Part II.D (arguing DNA indictments undermine the policies justifying statutes of limitations).

235. See Adlestein, *supra* note 67, at 263-67 (arguing courts should have greater discretion in applying statutes of limitations because the Sixth Amendment's Speedy Trial clause ultimately provides relief for defendants aggrieved by stale evidence and an inability to fairly present a vigorous defense).

236. U.S. CONST. amend. VI.

237. See *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (tracing the development of the speedy trial guarantee in American courts, finding their genesis in the “English law heritage”).

238. See Ronna A. Laidley, Note, *The Filing of an Indictment Against a Criminal Defendant Activates His Sixth Amendment Right to a Speedy Trial, Notwithstanding the Fact that the Defendant Had No Knowledge of the Indictment Until the Time of His Arrest*, 24 ST. MARY'S L.J. 595, 597 (1993) (tracing the history of the Speedy Trial clause).

historical articulation of the clause, however, appeared in the Magna Carta in 1215.²³⁹

At an early date, Sir Edward Coke recognized the importance of providing a speedy trial to defendants detained in custody.²⁴⁰ He commended the traveling justices for meting out speedy justice.²⁴¹ Coke viewed the Magna Carta as “one of the fundamental bases of English liberty.”²⁴² As a result of Coke’s substantial influence, his opinions had a significant impact on American colonists.²⁴³

Virginia’s Bill of Rights, the first among the colonies, revealed deference to Coke’s writings by borrowing heavily from the Magna Carta.²⁴⁴ Several of the other colonies followed Virginia’s lead by enacting similar provisions within their respective state constitutions.²⁴⁵ Although few documents record the adoption of the Sixth Amendment’s Speedy Trial Clause,²⁴⁶ the Supreme Court has recognized that the speedy trial guarantee in Virginia’s Declaration of Rights of 1776 provided the foundation for the Sixth Amendment.²⁴⁷ In addition to the federal guarantee to a speedy trial, each of the fifty states provides a similar guarantee to those within its

239. *Klopper*, 386 U.S. at 223 (“We will sell to no man, we will not deny or defer to any man either justice or right”) (quoting MAGNA CARTA, c. 29 (c. 40 of King John’s Charter of 1215 (1225)), *translated and quoted in* COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (Brooke, 5th ed., 1797)).

240. *See Klopper*, 386 U.S. at 223-24 (citing the writings of Coke, which emphasized the detainee’s liberty interests).

241. *See id.* at 224 (quoting Coke as saying that the justices “have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice . . . without detaining him long in prison”).

242. *Id.* at 225.

243. *See* Daniel A. Conforti, Note, *Doggett v. United States: Breathing New Life Into the Right to a Speedy Trial*, 21 W. ST. U. L. REV. 619, 619-20 (1994) (discussing the influence of Coke’s writings on Thomas Jefferson and John Rutledge); *see also Klopper*, 386 U.S. at 225 (recognizing that Coke’s writings were the standard course of study for students of the law at that time).

244. *See Klopper*, 386 U.S. at 225 (explaining that the Virginia Declaration of Rights of 1776, as drafted by George Mason, stated that “a man hath a right . . . to a speedy trial . . .”).

245. *See id.* at 225 n.21 (listing Delaware, Maryland, Pennsylvania, and Massachusetts, and noting that Kentucky, Tennessee, and Vermont also adopted speedy trial guarantees upon their admission to the Union during the eighteenth century).

246. *See* *Dickey v. Florida*, 398 U.S. 30, 41 n.2 (1970) (Brennan, J., concurring) (stating “[r]ecords of the intent of [the Speedy Trial Clause’s] Framers are sparse,” but noting the Framers appeared to have assigned the Clause the same value it received in the English common law); Laidley, *supra* note 238, at 611 n.85 (indicating that the records reveal only one passage where the First Congress considered the Speedy Trial clause, despite copious debate on the other Bill of Rights proposals).

247. *See* *United States v. Marion*, 404 U.S. 307, 314 n.6 (1971) (reasoning that James Madison probably relied on the Virginia Declaration of Rights as a “model” for drafting the Sixth Amendment).

jurisdiction.²⁴⁸

B. Rationale Justifying the Speedy Trial Clause

Commentators generally agree the Speedy Trial Clause protects three distinct interests: (1) to avoid protracted pre-trial detention of the defendant;²⁴⁹ (2) to avoid the anxiety and embarrassment of public accusation of a crime;²⁵⁰ and (3) to minimize the prejudice to a defendant's ability to defend himself by pressing the charges before evidence deteriorates and memories fade.²⁵¹ These three interests do not exhaust all the reasons behind the Speedy Trial Clause, but rather account for the most important and oft-cited purposes advanced to justify this constitutional guarantee.²⁵² All three of these interests are designed to protect the rights of the accused in a criminal prosecution.²⁵³

First, the Speedy Trial Clause protects a criminal defendant's personal liberty interests by compelling the Government to dispose of his case as soon as possible.²⁵⁴ Of the three reasons justifying the Speedy Trial Clause, this rationale holds the strongest basis in historical context.²⁵⁵

248. See *Klopfers*, 386 U.S. at 226 (emphasizing that the right is considered fundamental); see also Laidley, *supra* note 238, at 598 n.19 (indicating that every state except New York, Nevada and North Carolina has incorporated the right to a speedy trial into its state constitution).

249. See STEVEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 998 (West 6th ed. 2000) (providing a brief overview of the history leading to modern-day application of the Speedy Trial clause).

250. See *id.*

251. See *id.*

252. See, e.g., Laidley, *supra* note 238, at 599-600 (claiming that the Clause also protects societal interests such as the "desire to reduce the possibility that the accused will commit further crimes" while awaiting prosecution).

253. See *Beavers v. Haubert*, 198 U.S. 77, 87 (1905) (declaring that the Speedy Trial clause "secures rights to a defendant").

254. See *United States v. Levine*, 658 F.2d 113, 119 (3d Cir. 1981) (maintaining that the rationale of the Sixth Amendment's speedy trial guarantee overlaps with that of limiting statutes because they both primarily protect the interests of defendants, but also simultaneously protect society from unincarcerated offenders and provide relief to prosecutors who might otherwise be required to press claims so old they would inhibit the government's capacity to bring the case).

255. See Brian P. Brooks, Note, *A New Speedy Trial Standard for Barker v. Wingo: Reviving a Constitutional Remedy In An Age of Statutes*, 61 U. CHI. L. REV. 587, 597 (1994) ("The Sixth Amendment was adopted against a backdrop of English and early colonial practice in which criminal prosecutions had been conducted with 'unfairness,' 'brutality,' and the 'savage satisfaction' of the courts in their oft-exercised power of life and death over criminal defendants.") (quoting FRANCIS H. HELLER, THE SIXTH AMENDMENT 13 (1951)); Conforti, *supra* note 243, at 634 (arguing that "historical precedent" requires that the defendant's liberty interests are implicated before the speedy trial guarantee attaches); Laidley, *supra* note 238, at 611-12 (suggesting there is an "historical mandate" in the Speedy Trial Clause's protection of personal liberty); see also *United States v. Provo*, 17 F.R.D. 183, 197 (D.

The second interest advanced in support of the speedy trial guarantee is less tangible than the first.²⁵⁶ The courts have consistently referred to this interest as the defendant's right to minimize "public obloquy."²⁵⁷ The goal of this interest is to reduce, to the extent possible, the anxiety, embarrassment, and suspicion that are inherent when a person is publicly accused of criminal activity.²⁵⁸

The third interest, protecting a defendant from stale claims, overlaps to a great extent with the rationale supporting statutes of limitations.²⁵⁹ This purpose does not find support in the historical evolution of the right to a speedy trial, as courts independently have developed and adopted the reason as fundamental to an understanding of the speedy trial right.²⁶⁰ Their interpretation lies at the heart of the analysis in this Comment.

C. *Judicial Interpretation and Application*

The constitutionality of DNA indictments, in light of the Sixth Amendment's Speedy Trial clause, likely will be challenged in the near future.²⁶¹ The following discussion suggests that the difficulty in anticipating the Supreme Court's ruling on the subject derives, at least partially, from the Court's inconsistent application of the Speedy Trial Clause.

Prior to 1967, the Supreme Court had given "scant attention"²⁶² to the Speedy Trial Clause. Until that time, the Court had considered only three cases directly addressing the constitutional right to a

Md.), *aff'd*, 380 U.S. 857 (1955) (determining the speedy trial guarantees in the earliest American provisions were designed to protect defendants against undue incarceration based on the fact that these American provisions borrowed heavily, if not verbatim, from the British Habeas Corpus Act of 1679).

256. See Brooks, *supra* note 255, at 587 (recognizing that the basis for the speedy trial guarantee is "slippery" and "amorphous") (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972)).

257. See, e.g., *United States v. Marion*, 404 U.S. 307, 320 (1971). "Obloquy" is "[t]he state or condition of being ill spoken of; disgrace or bad repute." BLACK'S LAW DICTIONARY, *supra* note 5, at 1104.

258. See Neuendorf, *supra* note 104, at 144 (stressing that "the stigmatism that goes along with the assertion of something as serious as sexual abuse has a very damaging effect"); Brooks, *supra* note 255, at 596-98 (analyzing the three interests protected by the Speedy Trial Clause).

259. See *supra* Part II.B (analyzing the reasons giving rise to the statute of limitations).

260. See Brooks, *supra* note 255, at 597 (arguing that this reasoning "was not as central to the original understanding of the Sixth Amendment," but recognizing that modern judicial analysis has afforded it the most attention of the three interests).

261. See Kravets, *supra* note 6 (suggesting Paul Robinson's case and similar cases in the future might find final adjudication in the United States Supreme Court).

262. *Dickey v. Florida*, 398 U.S. 30, 40 (1970) (Brennan, J., concurring) (cataloguing the historical development of the Sixth Amendment).

speedy trial.²⁶³ The legal protections afforded to defendants remained so slight that in 1975, Congress deemed it necessary to codify a statutory version of the speedy trial guarantee²⁶⁴ to give force to the constitutional right.²⁶⁵ In fact, the relative dearth of Supreme Court precedent on this topic may be due, in part, to the preclusionary effect of the more stringent statutory provisions.²⁶⁶

Beginning with the Supreme Court's decision in *United States v. Ewell*,²⁶⁷ however, the Speedy Trial Clause began to take on far more significance than previously accorded. For the first time, the Court delineated the three protections²⁶⁸ the constitutional provision protects.²⁶⁹ The following year, the Court decided another speedy trial case, *Klopper v. North Carolina*,²⁷⁰ explicitly stating that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."²⁷¹ The Court underscored its newfound fascination with the Speedy Trial Clause by announcing the Sixth Amendment right to a speedy trial applies to the states through the Fourteenth Amendment.²⁷² In *Klopper*, the Court justified its decision²⁷³ by examining the personal liberty and public obloquy rationales, without considering the potential evidentiary prejudice to

263. *See id.* (attempting to define more specifically the concrete rights guaranteed by the Speedy Trial Clause by analyzing its historical context).

264. *See* 18 U.S.C. § 3161 (2000) (delineating time limits and exclusions to ensure a speedy trial for a defendant).

265. *See* *United States v. Bullock*, 551 F.2d 1377, 1380-81 (5th Cir. 1977) (comparing the Act's legislative intent "to implement the Sixth Amendment's goal of insuring that those who are accused of crime are brought speedily to trial" with the purpose for a similar local court rule).

266. *See* *United States v. Loud Hawk*, 474 U.S. 302, 304 n.1 (1986) ("The more stringent provisions of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., have mooted much litigation about the requirements of the Speedy Trial Clause as applied to federal prosecutions."). Note, however, that the statutory Speedy Trial Act was not enacted until January 3, 1975, and thus cannot account for the Clause's lack of judicial priority prior to that date. *See* *Bullock*, 551 F.2d at 1380 (providing the historical context of the Speedy Trial Act).

267. 383 U.S. 116 (1966).

268. *See supra* Part III.B (articulating that the Speedy Trial Clause protects a defendant's interests in avoiding excessive pre-trial incarceration, avoiding public obloquy, and avoiding the prejudice of defending against stale claims).

269. *See Ewell*, 383 U.S. at 120 (reiterating that the Sixth Amendment's Speedy Trial Clause attempts to prevent unnecessary incarceration prior to trial, minimize anxiety related to public accusation, and limit the possibility that a long delay will hinder an accused's ability to defend himself).

270. 386 U.S. 213 (1967).

271. *Id.* at 223.

272. *See id.* at 222-23 (indicating that previous cases "declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law").

273. The Court held that the state had violated a criminal defendant's speedy trial guarantee when it entered a "nolle prosequi with leave" against the defendant, indefinitely postponing the prosecution but simultaneously vesting the prosecutor with the right to reinstate charges against the defendant at any time in the future. *Id.* at 214.

a defendant's case.²⁷⁴

Since 1967, the Court's decisions have reflected an internal disagreement over the importance of potential prejudice to a defendant in speedy trial analysis.²⁷⁵ With the precedent in apparent conflict, the Court took the opportunity to clarify its speedy trial doctrine in *Barker v. Wingo*²⁷⁶ in 1972. *Barker* involved a defendant's appeal from a murder conviction on speedy trial grounds after sixteen postponements of his trial date throughout the five years following his arrest.²⁷⁷ Notably, however, Barker did not object to the first eleven continuances, and only asserted his speedy trial right on the day his trial began in 1963.²⁷⁸ The Court's opinion²⁷⁹ marked a

274. See *Klopper*, 386 U.S. at 221-22 (emphasizing the "limitations placed upon [the defendant's] liberty" and the "public scorn" that the defendant might suffer while the defendant remained under indictment).

275. In *Dickey v. Florida*, the next major Speedy Trial Clause case decided three years after *Klopper*, the Court considered *only* the potential prejudice to the defendant's case. See *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970). Although, in fairness, the facts of this case did not directly implicate the personal liberty and public obloquy interests, they were not irrelevant. See *id.* at 32, 34 (relating the facts of the case). The defendant was incarcerated in a federal institution when the state of Florida sought a writ of detainer against him in 1960, and thus was not subject to pre-trial detention in connection with the state charge of armed robbery. Furthermore, the defendant was not formally charged by the state until December of 1967, shortly before his January 1968 release from federal prison. *Id.* at 34. *But see id.* at 41-42 (Brennan, J., concurring) (applying all three interests discussed in *Ewell* and *Klopper*, including the potential prejudice factor, to the present case).

Just a year later, however, the Court's interpretation of the interests protected by the Speedy Trial Clause emphatically changed again with its decision in *United States v. Marion*, 404 U.S. 307 (1971). In *Marion*, the Court rejected—without discussion—the reasoning of *Dickey* and its predecessors, writing "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." See *Marion*, 404 U.S. at 320 (citing *Ewell* and *Klopper* for the proposition that the Speedy Trial Clause only protects the defendant's interest in minimizing undue pre-trial incarceration and public obloquy). To support this new interpretation, the Court emphasized "[t]he law has provided other mechanisms to guard against . . . prejudice resulting from the passage of time between crime and arrest or charge," namely the statutes of limitations. *Id.* at 322-23. See also *United States v. MacDonald*, 456 U.S. 1, 8 (1982) ("The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations."). *But see* *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (intimating the importance of determining the possible impairment of an accused's defense by recognizing an unquantifiable prejudice due to lost witnesses or fading memories); *Doggett v. United States*, 505 U.S. 647, 661-62 (1992) (Thomas, J., dissenting) (acknowledging the prevention of prejudice to a defendant as "an independent and fundamental objective of the Speedy Trial Clause"). In *Doggett*, Justice Scalia also found the Court's one-sentence attempt to harmonize the apparent conflict in the cases to be "eminently unpersuasive." *Id.* at 662.

276. 407 U.S. 514 (1972).

277. See *id.* at 517-18 (tracing the procedural posture of the case from 1958 through 1963).

278. See *id.* (delineating the reasons for the postponements).

279. Justice Powell wrote for the 7-member majority opinion, while Justice Brennan joined Justice White's concurring opinion. See *Barker*, 407 U.S. at 536.

departure from the Sixth Amendment's historical protection of the rights of criminal defendants²⁸⁰ by declaring the speedy trial right also protects a societal interest distinct from the rights of the defendant.²⁸¹

After noting the deficiencies of alternative proposals,²⁸² the Court enunciated a new four-part balancing test to determine whether a prosecution has violated a defendant's speedy trial rights. Instead of exclusively focusing on the defendant's interests, the test additionally considers (1) "society[']s interest in bringing swift prosecutions,"²⁸³ by examining the length of delay between indictment, arrest and trial, (2) the validity of the government's reason for the delay,²⁸⁴ (3) the defendant's delay in asserting his right,²⁸⁵ and (4) prejudice to the defendant.²⁸⁶ Despite the discussion about the importance of societal rights, the Court explicitly declared that the interest in minimizing prejudice to the defendant²⁸⁷ is the "most serious" of the four factors because the integrity of the legal system of justice depends on an accused's ability to defend against criminal claims.²⁸⁸

Although the new *Barker* test finally provided a relatively concrete guideline by which to measure the defendant's rights, subsequent decisions revealed a continuing conflict over whether the Sixth Amendment should be applied to vindicate a defendant's interest in minimizing prejudice to his case.²⁸⁹ Most recently, in *Doggett v. United*

280. See *Beavers v. Haubert*, 198 U.S. 77, 87 (1905) (indicating the speedy trial right accrues to criminal defendants).

281. See *Barker*, 407 U.S. at 519 (insisting the Speedy Trial Clause protects societal interests "separate from, and at times in opposition to, the interests of the accused"). The Court also may have attempted to retrospectively justify its decision in *Marion* by indicating that an extensive pre-trial delay does not "per se" prejudice a defendant, as fading memories may also prejudice the prosecution's case. *Id.* at 521.

282. See *id.* at 523-26 (declining to set a strict time limit by which cases must go to trial and rejecting the "demand-waiver" doctrine). The Court felt it would invade the province of the legislative branch by setting a "rigid" deadline. *Id.* at 523. The Court also considered the "demand-waiver" doctrine, which "provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial." *Id.* at 525. This doctrine seemed unreasonable and failed to harmonize with existing precedent protecting rights similar to those preserved by the Speedy Trial Clause. *Id.* at 525-26 (finding the demand-waiver doctrine "is not consistent with the interests of defendants, society, or the Constitution.").

283. *Barker*, 407 U.S. at 527.

284. See *id.* at 531 (acknowledging the subtle distinction between this interest and the length of the delay factor).

285. See *id.* at 528-29 (finding the defendant's "assertion of or failure to assert" distinction to be more consistent with constitutional development).

286. See *id.* at 532 (defining this factor in terms of the historical development that gave rise to the Speedy Trial Clause).

287. In articulating the evils that an emphasis on prejudice seeks to counter, the Court defined this right in terms of the defendant's interest in the three traditional reasons advanced to justify the Speedy Trial Clause. See *supra* Part IV.B.

288. See *Barker*, 407 U.S. at 532 ("[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system.").

289. See, e.g., *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (concluding

*States*²⁹⁰ the Court again sullied the clarity of the Speedy Trial Clause waters by reviving the significance it attached to prejudice against the defendant in the earlier *Dickey v. Florida* opinion.²⁹¹

In *Doggett*, Drug Enforcement Agency (DEA) agents attempted to arrest the defendant, Marc Doggett, at his residence in 1980 after a federal grand jury indicted him for conspiring to import and distribute cocaine.²⁹² Doggett, however, had left for Colombia, without any knowledge of the indictment, by the time agents reached his residence.²⁹³ The agents subsequently entered Doggett's name into several national databases and notified Customs officials of the outstanding arrest warrant.²⁹⁴ In 1981, agents learned Doggett was facing drug charges in Panama, but their failure to secure his extradition allowed Doggett to return to Colombia.²⁹⁵ Doggett returned to the United States in 1982, passing through Customs without any problems,²⁹⁶ and settled into an otherwise productive and law-abiding life.²⁹⁷ The DEA agents assigned to the case failed to actively pursue Doggett or inquire into his location,²⁹⁸ allowing him to live freely until a routine credit check performed by the U.S. Marshal's Service in 1988 finally helped police locate Doggett and execute his outstanding arrest warrant.²⁹⁹

that potential impairment of a fair trial caused by lost witnesses or fading memories "is not sufficient to support respondents' position that their speedy trial rights were violated"); *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (noting that "statutes of limitations . . . provide 'the primary guarantee against bringing overly stale criminal charges'" (quoting *Ewell*, 383 U.S. at 122); *United States v. MacDonald*, 456 U.S. 1, 7-8 (1982) (citing *Marion* to emphasize the significance of the pre-trial incarceration factor, and noting that statutes of limitations and the Due Process Clause are the primary forms of protection against prejudice to the defendant).

290. 505 U.S. 647 (1992).

291. *See supra* note 275 (arguing that the *Dickey* Court's only concern rested with the defendant's interest in minimizing prejudice).

292. *See Doggett*, 505 U.S. at 648-50 (reiterating the facts of the case).

293. *See id.* at 649 (relating that Doggett's mother informed DEA agents he had left four days prior to the agents' arrival).

294. *See id.* (indicating DEA agents placed Doggett's name into the Treasury Enforcement Communication System and the National Crime Information Center databases, both of which assist Customs agents to effect outstanding arrest warrants when the subjects of the warrants attempt to re-enter the United States).

295. *See id.* (revealing the DEA agents informally requested that Panamanian officials "expel" Doggett to the United States because they believed a formal extradition request would be a waste of time).

296. *See id.* (explaining that Customs officials did not apprehend Doggett because his name had expired from the Customs database in 1980).

297. *See Doggett*, 505 U.S. at 649 (insinuating Doggett's actions did not imply he actively evaded capture because he "married, earned a college degree, found a steady job as a computer operations manager, lived openly under his own name, and stayed within the law").

298. *See id.* at 649-50 (implying that officials could have located Doggett at a much earlier point in time if they had taken basic steps to follow up on the case).

299. *See id.* at 650 (emphasizing the ease with which the Marshal's Service

In applying the *Barker* four-factor balancing test to *Doggett*, the Court placed a strong emphasis on the fact that the government could not justify the reason for the eight and a half year delay in pursuing the defendant's case.³⁰⁰ However, the Court also indirectly created an irrefutable presumption of prejudice to the defendant's case, to be weighed against the government, when the defendant makes a showing of an "extraordinary" delay in prosecution.³⁰¹ In so doing, the Court essentially made it easier for defendants to tip the *Barker* balance in favor of defendants.

*D. Applying Barker/Doggett to DNA Indictments*³⁰²

The practice of DNA indictment raises several questions of constitutional significance in light of the Court's interpretation of the Speedy Trial Clause throughout the past thirty years. Because DNA indictments are designed to defeat the relevant statute of limitations,³⁰³ the prosecution presumes the delay between indictment and trial will be substantial.³⁰⁴ A speedy trial defense for a DNA

determined *Doggett's* residence and place of employment).

300. See *id.* at 657 (noting that the Government's "egregious persistence in failing to prosecute" the defendant was "clearly sufficient" to justify granting relief to the defendant).

301. See Steven M. Wernikoff, *Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of Their Indictments: Doggett v. United States*, 83 J. CRIM. L. & CRIMINOLOGY 804, 826-29 (1993) (asserting that the Court's failure to define even broad parameters for the term "extraordinary delay," combined with the absence of any guidelines or suggestions as to how the prosecution could possibly rebut a defendant's claim of prejudice, places a "heightened burden" on the prosecution to limit post-indictment delay).

302. The following discussion presumes a case of DNA indictment with circumstances similar to those of Mr. Robinson's case. See Kravets, *supra* note 6 (relating the facts of the case). In other words, the analysis assumes a DNA indictment resulting in the arrest of a defendant, following a cold hit against a DNA databank, all occurring after the statute of limitations otherwise would have expired.

303. See Doege, *Another Rapist*, *supra* note 20, at 7 (revealing the impetus behind the decision to indict the DNA rested with the prosecutor's desire to retain jurisdiction over the case).

304. See Adelstein, *supra* note 67, at 251 n.228 (indicating most state statutes set the time during which a prosecution may commence at three years for felony offenses). If the prosecutors practicing DNA indictment felt confident they could file charges against a named defendant prior to the expiration of the statutory period, they would have no reason to seek DNA indictments. It appears prosecutors, therefore, have committed themselves to bringing untimely prosecutions many, many years after the relevant statute of limitations expired. See, e.g., *Senator Proposes DNA Indictments*, AP NEWSWIRE, June 5, 2000 (quoting a prosecutor indicating he will pursue cases against DNA indictees "no matter how long it takes to track the suspect down").

The circumstances will not always involve a lengthy period between indictment and arrest, however. In California, Paul Robinson's arrest warrant for rape was issued just prior to the statutory deadline. See Kravets, *supra* note 6 (observing that prosecutors pursued the warrant the day before the statutory deadline would have expired). The defendant was arrested shortly after the warrant was issued. See *id.*

indictment should offer a great deal of protection, especially in light of the Court's creation of an irrefutable presumption of prejudice to the defendant who establishes that an "extraordinary delay"³⁰⁵ took place between indictment and arrest.³⁰⁶ The following discussion examines some important constitutional questions implicated by DNA indictments and attempts to harmonize the practice with the articulated objective of protecting defendants from the prejudice caused by a delayed prosecution.

As a preliminary matter, a doubt remains as to whether a defendant implicated by a DNA indictment retains the right to raise a speedy trial defense. The Sixth Amendment provides that "the accused shall enjoy the right to a speedy . . . trial"³⁰⁷ The Supreme Court has construed this clause to require either the arrest or the filing of a formal indictment or criminal information before the Sixth Amendment right to a speedy trial attaches.³⁰⁸ Yet the Court has construed the Sixth Amendment as applicable only to "persons," which do not necessarily include samples of genetic material.³⁰⁹

The underlying rationale for this policy acknowledges that a defendant's arrest is a public act that restricts his personal liberty and subjects him to suspicion and embarrassment in the community.³¹⁰ The practice of DNA indictment occurs, by definition, when the identity of the defendant is known neither to law enforcement agencies nor the public at large.³¹¹ Therefore, the defendant is at no

(hailing DNA evidence for revealing an identity that investigators had fruitlessly pursued for six years).

305. See Wernikoff, *supra* note 301, at 826-29 (explaining how the Court's failure to illustrate the possibility of rebutting a defendant's claim of prejudice leads, de facto, to a finding of presumptive harm to the defendant's case).

306. See Adelstein, *supra* note 67, at 263-67 (implying the Sixth Amendment remains the ultimate protection for defendants who might otherwise be prejudiced by an inequitable application of the statute of limitations, but suggesting a flexible, non-constitutional approach could be developed to "weigh the actual prejudice caused by unjustifiable delay against the reasons for such delay" to protect societal interests).

307. U.S. CONST. amend. VI.

308. See *Dillingham v. United States*, 423 U.S. 64, 65 (1975) (per curiam) (holding that a delay of twenty-two months between arrest and indictment on automobile theft charges violated the Speedy Trial Clause because the defendant is considered "accused" at the time of his arrest, even though the formal indictment occurred at a much later time) (citing to *Marion*, 404 U.S. 307, 320-21 (1971)).

309. See *Marion*, 404 U.S. at 313 ("[T]he protection of the Amendment is activated only when a criminal prosecution has commenced and extends only to those persons who have been 'accused' in the course of that prosecution.") (emphasis added).

310. See *Dillingham*, 423 U.S. at 65 ("Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.") (quoting *Marion*, 404 U.S. at 320-21).

311. See *Dedman*, *supra* note 5, at A8 (explaining that prosecutors must file each

risk of suffering from restrictions on his liberty or public humiliation because the charge is filed in the form of a “John Doe” indictment.³¹² If, however, the courts find a DNA indictment sufficiently describes a person,³¹³ as DNA indictment proponents suggest,³¹⁴ only an unreasonably hypertechnical reading of precedent would preclude application of the speedy trial provision on these grounds.³¹⁵

Assuming *arguendo* that the Court will not dismiss such a defense as facially insufficient, many additional questions remain after *Doggett* regarding the constitutionality of DNA indictments. The pivotal question depends on whether the Sixth Amendment protects defendants against prejudice due to lost or faded evidence, or whether that duty lies within the primary province of the statute of limitations.

1. *Beyond Doggett: Application of the Barker test to DNA indictment*

The Court’s conflicting precedent³¹⁶ in addressing this question offers no easy answers in the case of DNA indictments. For this reason, the following analysis raises some of the difficult questions that DNA indictment provokes and attempts to extrapolate the Court’s reasoning to the current scenario. The section concludes with recommendations that courts should entertain upon examining DNA indictments in light of the Speedy Trial Clause.

charge as a “John Doe” indictment or warrant because authorities remain unaware of the suspect’s identity).

312. See *Charges*, *supra* note 5 (using genetic markings to provide the description of the suspect instead of phenotypical physical features).

313. See generally *People v. Montoya*, 255 Cal. App. 2d 137, 142-43 (1967) (holding that a warrant containing a fictitious name must describe the suspect with such reasonable particularity to allow the arrest of the suspect based on the warrant’s description).

314. See *Austin Rape*, *supra* note 12 (quoting a prosecutor in the District Attorney’s office as saying, “You might not know the name, but there’s only one person on this Earth that has this marker”); see also Eric Slater, *Rape Case Tests the Limits: Milwaukee Uses Genetic Evidence to File Warrants in Unsolved Crimes*, L.A. TIMES, Feb. 11, 2000, at A1 (relating Norman Gahn’s words: “We know exactly who these rapists are. We just don’t know their names”).

315. See *Doggett v. United States*, 505 U.S. 647, 651 (1992) (implying the Sixth Amendment must be interpreted liberally because a purely literal reading of the words of the Amendment otherwise would preclude prosecutors from delaying a defendant’s trial, regardless of the circumstances); *United States v. MacDonald*, 456 U.S. 1, 15 (1982) (employing a “natural reading” of the text of the Speedy Trial Clause).

316. See *supra* note 275 (reflecting the Court’s internal dispute over how much emphasis to place on the defendant’s interest in avoiding prejudice).

a. Length of delay

In assessing the length-of-delay factor, the Supreme Court has recognized a one-year delay between accusation and trial presents a presumption of prejudice to the defendant sufficient to trigger a *Barker* analysis.³¹⁷ The Court thereby shifted the burden to the prosecution to rebut the presumptive prejudice.³¹⁸ In *Doggett*, however, the Court found an irrebuttable presumption of prejudice³¹⁹ due to “extraordinary”³²⁰ delays, without defining which factors cause an extraordinary delay and without distinguishing an extraordinary from a regular delay.³²¹

A simple examination of the length of delay involved in *Barker*³²² and *Doggett*³²³ leads to the conclusion that a delay lasting longer than five years, i.e., longer generally than most limiting statutes,³²⁴ qualifies as extraordinary and thereby presents an irrebuttable presumption of prejudice against a criminal defendant. Although the foregoing conclusion appears to establish unequivocally that DNA indictments presumptively prejudice defendants’ cases, two factors deserve consideration on this issue. First, the relevant time frame involved in speedy trial analysis is the period between accusation (or arrest) and trial.³²⁵ Because prosecutors have artificially manipulated the

317. See *Doggett*, 505 U.S. at 651-52 & n.1 (declaring that a “presumptively prejudicial” delay “does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry”) (citation omitted).

318. See Wernikoff, *supra* note 301, at 828 (criticizing the Court for failing to offer guidelines suggesting a means through which the government might rebut the presumption of prejudice).

319. See *Doggett*, 505 U.S. at 657-58 (focusing entirely on the rights of the defendant, without offering any hint to the government how they could have responded to the defendant’s Speedy Trial claim).

320. See *id.* at 658 (implying that an eight and a half year delay was “extraordinary” in saying “we have called shorter delays ‘extraordinary’”); see also *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (“It is clear that the length of delay between arrest and trial—well over five years—was extraordinary.”).

321. See Wernikoff, *supra* note 301, at 826 (suggesting that the existence of an extraordinary, as opposed to a regular, delay “greatly affects which party has the burden of showing the existence of prejudice”).

322. The delay was greater than five years. See *Barker*, 407 U.S. at 517-19 (tracing the delay from 1958 through to 1963, when *Barker* finally went to trial).

323. The delay was eight and a half years between *Doggett*’s indictment and his arrest. See *Doggett*, 505 U.S. at 652 (finding the eight and a half year delay sufficient to trigger a *Barker* analysis).

324. See Adelstein, *supra* note 67, at 251 n.228 (indicating most state statutes set three years as the time beyond which a felony prosecution may not commence for felony offenses).

325. See *United States v. Marion*, 404 U.S. 307, 313 (1971) (announcing the Supreme Court’s opinion that “the Sixth Amendment speedy trial provision has no

indictment process,³²⁶ they in effect prohibit defendants from invoking their Sixth Amendment rights until the statute of limitations has expired.³²⁷ When prosecutors indict DNA immediately prior to the expiration of the limitations period, they deprive defendants of statutory rights and may also preclude an invocation of constitutional rights.³²⁸

Second, the Court allows subjective interpretations to control whether the length of the delay is sufficient to trigger a *Barker* analysis.³²⁹ By way of example, the Court recommended trial courts consider the nature of the criminal activity, suggesting they should tolerate longer delays for more “serious” crimes.³³⁰ Leaving this decision to subjective determination creates the danger judges will focus on the emotionally compelling account of a rape victim to determine the severity of the crime’s effect.³³¹ Lower courts should

application until the putative defendant in some way becomes an ‘accused,’” which can occur through indictment, arrest, or the filing of a criminal information against a suspect).

326. See Slater, *supra* note 314, at A1 (reporting an instance in which the Assistant District Attorney filed a DNA indictment only eight hours before the statute of limitations would have expired); see also Kravets, *supra* note 6 (revealing that the prosecutor filed the charges only one day before the statutory deadline).

327. In other words, a suspect may invoke the speedy trial guarantee only after he has been accused. In many instances, prosecutors have filed DNA indictments immediately prior to the expiration of the relevant statute of limitations. See *supra* note 326. It is patently unreasonable to expect defendants—and even defense counsel who have not had the opportunity to research the issue—to be so aware of the length of the relevant limitations period and the current status of the Supreme Court’s conflicting Sixth Amendment doctrine. See *supra* note 275 (outlining the Court’s inconsistencies in Speedy Trial analysis), as to allow them to invoke their Sixth Amendment rights during the few hours after arrest when the statute of limitations remains applicable.

328. Whether a defendant may invoke his constitutional Speedy Trial guarantee depends on how quickly police arrest him after filing the DNA indictment. Suspects who have unwittingly been indicted by virtue of their DNA theoretically may remain at large for many years; they would have the stronger Sixth Amendment argument. Contrast that scenario, however, with the case of Paul Robinson in California, who probably could not seek protection under the Sixth Amendment because the period between indictment and arrest was so brief. See Kravets, *supra* note 6 (indicating that police arrested Robinson only a few weeks after the DNA indictment). In this case, prosecutors left Robinson without recourse to either the statute of limitations or the Speedy Trial guarantee, despite the fact that more than five years had passed since the crime that police allege he committed. See *id.* (noting that the suspect’s identity had baffled the prosecutors for five years).

329. See *Barker*, 407 U.S. at 530-31 (suggesting courts need to draw fact-specific conclusions based on the “peculiar circumstances” of each case to decide whether the length of the delay triggers further Sixth Amendment analysis).

330. See *id.* at 531 (“To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.”).

331. See *id.* at 533 (recognizing the *Barker* test is a “difficult and sensitive balancing process”); Wernikoff, *supra* note 301, at 832-33 (arguing that the subjective aspects of *Barker*’s balancing test inherently require courts to substitute their own values for objective ones in assessing the validity of a prosecution).

remain mindful of *Barker's* emphasis on the *complexity* of the crime itself as opposed to the severity of its *results* in order to avoid trampling DNA indictees' constitutional rights.³³²

b. Cause of the delay

In the speedy trial cases the Court has adjudicated under a *Barker* analysis, it has concentrated on issues such as the government's intentional or negligent "lethargy"³³³ and the defendant's stall tactics.³³⁴ Prosecutors' injection of genetic evidence into this analysis, through DNA indictments, presents entirely new issues the Court has not yet addressed. For example, has the government satisfied its burden of diligence³³⁵ simply by entering a DNA sample from an unknown source, collected from the scene of an alleged crime, into a databank? An extrapolation of *Doggett* implies the government's burden reaches further than simply entering data into a databank,³³⁶ although *Doggett* remains distinguishable on the grounds the police in that case knew the defendant's identity.³³⁷

On the other hand, the government has very limited options in searching for a suspect they do not know by name or physical

332. See, e.g., *United States v. Vassell*, 970 F.2d 1162, 1164 (2d Cir. 1992) (focusing on the difficulty in gathering and interpreting evidence rather than the harm inflicted on the victims).

333. See *Doggett v. United States*, 505 U.S. 647, 656, 657 (1992) (affirming *Barker's* emphasis on weighing "official bad faith" against the government, and concluding that the governmental delay in the instant case reflected "egregious persistence in failing to prosecute" the defendant) (emphasis added); *Barker*, 407 U.S. at 531 ("A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government."). But see *United States v. Lovasco*, 431 U.S. 783, 796 (1977) (finding that the delay caused by prosecutors' further investigation into the case constituted a good-faith attempt to marshal the facts of the case and thus did not prejudice the defendant).

334. See *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986) (explaining that the delay should be weighed against the defendant because he filed "indisputably frivolous petitions"); *United States v. MacDonald*, 456 U.S. 1, 11 (1982) (finding that the defendant caused the delay in the case through his "legal maneuvers").

335. See *Doggett*, 505 U.S. at 656 (concluding that the defendant would have been unable to present a viable speedy trial claim if the government "had pursued *Doggett* with reasonable diligence from his indictment to his arrest"); Wernikoff, *supra* note 301, at 829 (interpreting the Court's *Doggett* decision to place on the government "a constitutional duty to make a diligent good-faith effort to bring indicted defendants to trial without unnecessary delay").

336. See *Doggett*, 505 U.S. at 652, 649 (concluding that the Government made "no serious effort" to find the defendant, despite the fact that an investigator had entered *Doggett's* name into the Treasury Enforcement Communication System database and had notified other agencies of the outstanding warrant); Wernikoff, *supra* note 301, at 831 ("[C]ourts should require the prosecution to diligently seek defendants under protections granted by the Sixth Amendment.").

337. See *Doggett*, 505 U.S. at 650 (relating the fact that the Marshal's Service verified the defendant's residence and work address "within minutes" after running a credit check).

description.³³⁸ In fact, by analogy the Court might sympathize with a governmental delay caused by difficulty identifying the suspect.³³⁹ The government might further strengthen its position by likening an investigation premised on a DNA indictment to other types of complex prosecutions that require additional time to investigate.³⁴⁰

DNA indictments raise the additional question of whether courts should tip the balance against the government for the delay in entering a defendant's DNA sample into a database.³⁴¹ In such a scenario, the delay could have resulted from a lack of available resources³⁴² or prosecutors' failure to recognize the usefulness of DNA evidence.³⁴³ Courts may properly deem this delay official negligence,³⁴⁴ especially with respect to prosecutors' failure to realize

338. See *id.* at 656 (finding it inappropriate to weigh the length-of-delay factor against the government when the government must track down a defendant who goes into hiding); Wernikoff, *supra* note 301, at 830 (recognizing that the courts do not require "heroic efforts" by law enforcement officials pursuing a suspect who avoids identification and capture).

339. See *United States v. Lovasco*, 431 U.S. 783, 796 (1977) (declaring the government did not violate fundamental rules of fairness by delaying a suspect's trial while continuing its investigation to identify potential co-defendants); see also *Barker v. Wingo*, 407 U.S. 514, 531 (1972) (noting that tracking down a missing witness is a "valid reason" to "justify appropriate delay"). See generally *Doggett*, 505 U.S. at 656 ("Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable.").

340. See *Barker*, 407 U.S. at 530-31 (offering a complex conspiracy charge as the type of case justifying longer periods of investigation, and concluding that "the length of delay that will provoke [a *Barker*] inquiry is necessarily dependent upon the peculiar circumstances of the case").

341. See *DNA Labs Hired to Clear 12,000 NYC Rape Cases*, FLA. TIMES-UNION, Sept. 28, 2000, at A8 (reporting that New York City alone has a backlog of 16,000 rape kits that have not been analyzed); Kozlowski, *supra* note 201, at 1E (identifying Michigan's backlog of samples from sex offenders dating back to 1991, awaiting entry into the state and federal DNA databanks, at 15,000); *State Could Solve More Rapes With Funds for DNA*, GRAND RAPIDS PRESS, June 13, 2000, at A8 [hereinafter *Funds for DNA*] (noting that two-thirds of the states struggle with tremendous backlogs of DNA samples from sexual assault and violent crimes); Robert Tanner, *DNA Puts Statutes of Limitations on Trial*, PATRIOT LEDGER (Quincy, MA), Mar. 18, 2000, at 4 (counting 180,000 untested rape kits nationwide); cf. *supra* Part III.B (discussing the differences between fingerprints and DNA samples in the cost and effort required to compile the relevant databases).

342. See *City Moves to Clear Unsolved Rapes*, N.Y. L.J., Sept. 28, 2000, at 7 (discussing New York City's appropriation of \$12 million to reduce the backlog of 16,000 untested rape kits); *Man Could Be First Arrested with DNA Warrant*, AP NEWSWIRE, Oct. 24, 2000 (discussing how a \$50 million grant from the California Office of Criminal Justice Planning will help reduce the backlog of cases and allow for more DNA indictments).

343. See Slevin, *supra* note 125, at A3 (repeating the words of a Brooklyn Assistant District Attorney, saying, "[v]ery few people either take advantage of [the benefits of DNA evidence] or know about it. We're so swamped with crime, assistant DAs come through and they don't have DNA training").

344. See *Doggett*, 505 U.S. at 656 (delineating the different levels of delay that courts may assign to the government, and noting that between diligent prosecution and bad faith delay lies "official negligence").

the importance of DNA evidence. Dicta from the *Barker* opinion suggests courts should attribute such delay to the government³⁴⁵ but should not weigh it as heavily as deliberate governmental bad-faith.³⁴⁶

In making their assessments, however, courts should not overlook prosecutors' professional responsibilities³⁴⁷ in seeking indictments.³⁴⁸ If prosecutors begin indicting DNA to circumvent the statute of limitations for every rape case,³⁴⁹ for example, they significantly increase the risk of running afoul of professional standards of conduct.³⁵⁰ If the courts uphold DNA-based warrants and indictments, prosecutors can and should seek to preserve defendants' constitutional rights by employing these tools based on reasoned judgment³⁵¹ rather than mere opportunity.³⁵²

345. See *Barker*, 407 U.S. at 531 (“A . . . neutral reason such as negligence . . . should be weighted less heavily but nonetheless be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.”).

346. See *Doggett*, 505 U.S. at 657 (asserting that courts must consider a delay due to official negligence, even if lacking in bad faith, but contending that courts accordingly should not weigh negligent delay as heavily as official bad-faith delay).

347. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (2001) (“The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”).

348. See Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 733 (1999) (emphasizing that prosecutors face an ethical dilemma between acting as zealous advocates for the sovereign and responsibility to “a broader duty to ensure justice”).

349. See Latour, *supra* note 45, at B1 (“In New York, police have begun a massive effort to reopen 12,000 unsolved rapes” based on DNA testing and indictments).

350. See *United States v. Lovasco*, 431 U.S. 783, 791 (1977) (“[I]ndeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists *but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.*”) (emphasis added) (footnotes omitted).

351. See Henning, *supra* note 348, at 715-16 (“[T]he Fifth and Sixth Amendments, which largely govern the manner in which the prosecutor conducts a criminal proceeding, do not require an assessment of the reasonableness of the government's actions, as does the Fourth Amendment's proscription on ‘unreasonable searches and seizures.’”) (quoting U.S. CONST. amend. IV). In deciding whether to indict genetic material from a rape crime scene, prosecutors should consider the existence and reliability of corroborating evidence such as eyewitness identification of the alleged perpetrator, physical evidence left at the scene that could link the perpetrator to the crime at a much later date in the future, the possibility the genetic material derived from a source other than the suspect (i.e., especially when the DNA tested is from hair or blood samples, as opposed to semen samples), the possibility of contamination of the sample's genetic material, the precedent-setting implications for the current and future defendants, and the ability and resources available to exclude other possible sources of the DNA sample who have similar genetic structures. See Slater, *supra* note 314, at A1 (reiterating questions prosecutors should ask when deciding whether to seek a DNA indictment, including, “Could the victim be located to testify if a DNA match was found? Was there any chance the suspect could claim the encounter was consensual? How vicious was the attack?”).

352. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995)

c. Defendant's vigilance in asserting speedy trial rights

In *Doggett*, the Supreme Court found that the defendant's vigilance in asserting speedy trial rights should not weigh against a defendant who is unaware of an indictment pending against him.³⁵³ In the case of a DNA indictment, the defendant presumably would not know he had been indicted even if the indictment described the genetic markers within the DNA.³⁵⁴ Absent a showing by the government that the defendant knew about the indictment,³⁵⁵ this consideration will be a non-factor in a *Barker* analysis of a DNA indictment case.

The discussion above focuses on three factors that individually retain importance in assessing a defendant's right to a speedy trial.³⁵⁶ As alluded to in each instance, however, the main thrust of this analysis depends on the lynchpin of the Speedy Trial Clause: the potential prejudice accruing to an accused defending via an old claim.³⁵⁷

d. Prejudice to the defendant

The *Barker* Court identified three interests that lower courts should consider when weighing the prejudice suffered by defendants as a result of the delay: (1) oppressive pre-trial detention;³⁵⁸ (2) public obloquy;³⁵⁹ and (3) impairment of the defendant's ability to defend

(implying prosecutors possess the ability to charge defendants in almost any conceivable manner because "[t]he prosecutor's charging discretion is, for the most part, unreviewable").

353. See *Doggett*, 505 U.S. at 653-54 (insisting that this factor would have weighed heavily against the defendant if the Government had proved he knew of the indictment and still failed to assert his right). The Court ultimately deferred to the issuing magistrate's conclusion that the defendant left the country before police indicted him and therefore did not know about the indictment. See *id.* By devoting almost a full page to settling a controversy over the factual status of the case and only two sentences to an analysis of whether this factor could weigh against an unaware defendant, the Court suggested the absurdity of weighing this factor against a defendant unaware of the pending indictment. See *id.*

354. See Willing, *supra* note 4, at 1A (casting doubt on the theory that people could recognize their DNA profile by citing the comments of a law professor with extensive DNA experience, remarking, "[p]eople know their own name, even their own nickname or alias, but do they know their own (DNA) profile?") (parenthesis in original).

355. See *Doggett*, 505 U.S. at 653 (lambasting the government for arguing that the defendant knew of the indictment after the government failed to challenge testimony to the contrary at a hearing on the speedy trial motion).

356. See *Barker v. Wingo*, 407 U.S. 514, 533 (1972) ("[N]one of the four factors . . . [is] either a necessary or sufficient condition . . . [T]hey are related factors and must be considered together with such other circumstances as may be relevant.").

357. See *United States v. Ewell*, 383 U.S. 116, 120 (1966) (announcing prejudice to a defendant's case takes precedence over any other factors or considerations) (quoting *Smith v. United States*, 360 U.S. 1, 10 (1959)).

358. See *Barker*, 407 U.S. at 532 (listing the factors).

359. See *id.*

himself.³⁶⁰ Recognizing the Supreme Court has not been consistent in analyzing the prejudice factor,³⁶¹ the following section attempts to predict the impact of DNA indictments on these considerations. It concludes that this *Barker* factor should favor the defendant because DNA indictments inherently prejudice indictees' abilities to raise defenses.

i. Pretrial detention

In applying the pretrial detention factor, the Court's main concerns address restrictions on defendants' liberty.³⁶² By definition,³⁶³ DNA indictees do not face the consequences contemplated by pretrial detention and therefore render it a non-issue in speedy trial analysis of DNA indictments.

ii. Public obloquy

The Court has also expressed a concern over the social consequences a suspect faces upon public accusation of a crime.³⁶⁴ As with the pre-trial detention issue, a DNA indictree's nominal anonymity³⁶⁵ shields him from public obloquy and similarly renders it moot.

iii. Impairment of defense

Because the Court has not applied the impairment of defenses factor consistently, the following analysis relies on the Court's most recent articulation of the issue in *Doggett*.³⁶⁶ The majority suggested that courts have a duty to consider all factors resulting from a post-accusation delay affecting an accused's defense.³⁶⁷

360. See *id.*

361. See *supra* Part IV.C (revealing the Court's "ping-pong" approach in deciding how much emphasis to afford this factor).

362. See *Loud Hawk*, 474 U.S. at 312 ("[T]he Speedy Trial Clause's core concern is impairment of liberty.").

363. See *Dedman*, *supra* note 5, at A8 (indicating "John Doe" indictments, the device through which grand juries file DNA indictments, describe a person whose identity is otherwise unknown to law enforcement officers or the public at large).

364. See *Marion*, 404 U.S. at 320 ("Arrest is a public act that may . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.").

365. See *Charges*, *supra* note 5 (indicating grand juries issue "John Doe" indictments for DNA indictees because the indictree's name remains unknown).

366. See *supra* note 275 (tracing the court's internal conflict in analyzing the issue of prejudice to an accused's defense). Given the Court's inconsistent and relatively infrequent application of this factor, the most recent articulation provides the most relevant guide for extrapolating its logic to the current, novel situation.

367. See *Doggett*, 505 U.S. at 655 ("Once triggered by arrest, indictment, or other official accusation . . . the speedy trial enquiry must weigh the effect of the delay on the accused's defense just as it has to weigh any other form of prejudice that *Barker*

In *Doggett*, the Court unwittingly bolstered the argument of future defendants challenging DNA indictments by declaring that defendants need not prove actual prejudice to assert impairment of defense.³⁶⁸ If the government fails to justify its delay in bringing the prosecution,³⁶⁹ courts should automatically weigh this failure in the defendant's favor.³⁷⁰ The impairment of defenses factor will prove especially helpful to defendants whose alleged crimes occurred long ago³⁷¹ and who no longer may assert a statute of limitations defense.³⁷² Furthermore, if the courts find the government's failure to enter a defendant's DNA sample into the relevant database to constitute official negligence,³⁷³ the delay constitutes presumptive prejudice and this factor should favor the defendant.³⁷⁴

In examining the possible prejudice to a DNA indictee's defense, courts should also consider the unique implications of the use of DNA evidence.³⁷⁵ In addition to facing the presumptive prejudice caused by a lapse of time long enough to trigger a *Barker* analysis,³⁷⁶

recognized.”).

368. *See id.* (acknowledging the virtual impossibility of proving the actual degree of harm a defendant's case suffers through lost evidence and fading memories caused by the passage of time). This declaration by the Court clarified the issue for lower courts, which prior to *Doggett* had required a showing of prejudice before entertaining a Speedy Trial Clause claim. *See* Wernikoff, *supra* note 301, at 823-24 & n.156 (collecting cases).

369. For a more detailed discussion of questions raised by DNA indictments in assigning blame for the cause of delay, see *supra* Part IV.C.

370. *See Doggett*, 505 U.S. at 655 (“Thus, we generally have to recognize that excessive delay *presumptively* compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”) (emphasis added).

371. *See id.* at 656 (instructing courts to tip the balance of the prejudice factor in favor of defendants in such a manner that “its importance increases with the length of delay”).

372. *See supra* note 328 (discussing the means through which prosecutors have used DNA indictments to preclude defendants the opportunity of presenting a statutory defense).

373. *See supra* Part IV.D.1.b (discussing the possibility that courts will attribute the cause of delay factor to the government for its failure to enter a genetic sample into the relevant DNA database).

374. *See Barker*, 407 U.S. at 531 (holding that courts should assess “neutral reason[s]” constituting official government negligence against the government, albeit less heavily than intentional delays); *United States v. Aguirre*, 994 F.3d 1454, 1456 (9th Cir. 1993) (“Where the government is negligent in pursuing a defendant, prejudice will be presumed and its weight in defendant's favor will depend on the length of the delay.”); *United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992) (holding that the government's negligence created a “strong” presumption of prejudice against the accused's defense after the prosecutors lost his file and only arrested the defendant after finding the file five years later).

375. For a general discussion of the inherent problems faced by suspects attempting to rebut DNA evidence, as opposed to the more scientifically accurate fingerprint evidence, see *supra* Part III.B.

376. *See Doggett*, 505 U.S. at 652 & n.1 (establishing a duration of one year between indictment and arrest as presumptively prejudicial).

DNA indictees must also address prejudice caused by use of DNA evidence that manifests in factors such as: jurors' overemphasis on statistical probabilities explaining the relevance of DNA evidence;³⁷⁷ misperceptions surrounding the accuracy of DNA evidence;³⁷⁸ misleading explanations of DNA evidence to jurors by prosecutors and their witnesses;³⁷⁹ the potential for jurors to assign undue weight to DNA evidence because of the inconsistency with which investigators collect it;³⁸⁰ and the scientific community's lack of consensus in interpreting DNA evidence.³⁸¹ The foregoing list does not suggest the government necessarily causes these unique problems, but instead illustrates the significant hurdles an accused faces in defending against the implications raised by DNA evidence. The prejudice a defendant faces as a result of the cumulative effect of these factors on a jury is substantial.³⁸² When assessed in combination with the presumptive prejudice caused by the passage of time, these DNA-related issues warrant special consideration in favor of defendants by courts determining the possibility that an accused's case has been impaired.

CONCLUSIONS AND RECOMMENDATIONS

The advent of DNA evidence presents exciting new possibilities, and prosecutors recently have exploited its potential through the novel practice of indicting genetic material. Though the virtues of this practice have been extolled in the media, a deeper analysis reveals the adverse implications for criminal defendants' statutory and constitutional rights.

First, by directly undermining the rationale giving rise to statutes of limitations, DNA indictments flagrantly disregard the historical development as well as the legislative³⁸³ and judicial preference³⁸⁴ for

377. See Koehler *supra* note 179, at 212 (revealing that jurors significantly "overweight" random match probabilities).

378. See NRC I, *supra* note 45, at 161 (clarifying the superiority in accuracy of fingerprint evidence, relative to DNA evidence); see also *id.* at 157 (indicating the inability of DNA evidence to distinguish between the identity of twins).

379. See Lempert, *supra* note 134, at 441-42 (describing prosecutors' misrepresentations regarding the accuracy of DNA evidence).

380. See NRC I, *supra* note 45, at 112 (noting investigators cannot afford to collect DNA evidence with the frequency they collect fingerprints, leading to the implication the prosecution warrants higher priority than an ordinary street crime).

381. See Lempert, *supra* note 134, at 444 (suggesting that some experts overstate the reliability of the evidence).

382. See *Commonwealth v. Curnin*, 565 N.E.2d 440, 441 (Mass. 1991) (indicating the statistical random match probabilities *alone* have a prejudicial impact on a jury).

383. See Adelstein, *supra* note 67, at 249-50 (inferring a legislative preference for statutes of limitations).

384. See *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (enunciating the judicial

limiting actions. Additionally, while forensic scientists have proven DNA to be extremely useful in identifying criminal suspects, genetic evidence does not yet deserve the accolades that dermatoglyphic fingerprint evidence has garnered.³⁸⁵

These conclusions compel several recommendations. First, legislatures should re-assess their respective statutory regimes to determine whether their current limiting actions warrant modification in light of the scientific advances that give effect to DNA indictments. The development of public policy lies within the primary domain of legislatures and they are uniquely positioned to accomplish this task.³⁸⁶ This solution offers the additional benefit of preserving defendants' statutory rights rather than forcing them to seek adjudication in courts of law.

Second, where possible, prosecutors should rely on fingerprint evidence to a greater extent than DNA evidence. By doing so, they would increase the probability of drawing a definitive conclusion as to identity and simultaneously avoid the unique problems and the possible prejudice to defendants that is associated with DNA evidence.

Third, in the event courts uphold the validity of DNA indictments, prosecutors should exercise restraint in using them, similar to the restraint they have shown in using fingerprint evidence. This recommendation does not imply prosecutors should never use DNA indictments; indeed, there may be instances when they are especially appropriate.³⁸⁷ However, their use should be limited to circumstances when, as with fingerprints, the available evidence indicates significant corroborating evidence and a substantial likelihood that: a crime occurred, the genetic sample derived from the DNA indictee, and the DNA sample did not arrive at the crime scene inadvertently or innocently.³⁸⁸

preference for statutes of limitations).

385. See NRC I, *supra* note 45, at 161 (establishing fingerprints as more reliable than DNA evidence).

386. See Baughman, *supra* note 92, at 1117 (suggesting legislatures possess the responsibility to make public policy decisions).

387. See, e.g., Lempert, *supra* note 134, at 461-62 (describing a hypothetical scenario in which a crime is committed at an Arctic air base). In Lempert's hypothetical situation, the base consists of approximately 100,000 people, virtually all of whom have provided samples for a DNA database. In that instance, a 1:100,000 probability of a random match would be far superior even to a staggering number like 1:1 million in the civilian world. See *id.*

DNA indictments may also be appropriate when the DNA sample is collected from a rape kit, following allegations of a sexual assault for which consent cannot be contested. See *supra* Part II.D (discussing the probative value of genetic samples collected during a post-rape hospital examination).

388. See, e.g., *People v. Summers*, 426 N.E.2d 937, 940 (Ill. App. Ct. 1981) (finding

Finally, in analyzing a DNA indictee's inevitable invocation of their speedy trial guarantee, courts should carefully scrutinize the potential prejudice to the indictee's defense caused by the passage of time by considering the possibility that prosecutors precluded invocation of his statutory rights.³⁸⁹ Moreover, courts should grant special consideration to the unique sources of potential prejudice to defendants occasioned by DNA evidence.³⁹⁰ In performing their Sixth Amendment analysis, courts should bear in mind not only the retrospective difficulties caused by the passage of time, but also the futuristic hurdles a DNA indictee faces in attempting to exonerate himself.

These recommendations attempt to provide safeguards against the most egregious sources of prejudice facing DNA indictees. They provide a preliminary step toward the preservation of criminal defendants' rights as well as the integrity and that public trust in the criminal justice system.³⁹¹

probable cause existed to link a defendant to a crime scene when the evidence revealed the fingerprints could only have been impressed at the time the crime was committed).

389. See *supra* note 328 (explaining how prosecutors' manipulation of the DNA indictment process potentially prevents indictees from asserting a statute of limitations claim, depending on when prosecutors sought the DNA indictment).

390. See *supra* Part IV.D.1.d.iii (listing the problems raised specifically by DNA evidence).

391. See Conforti, *supra* note 243, at 635 (implying both defendants and society as a whole will benefit from the diligent prosecution and resolution of crimes).