
***An Appropriate Balance? – A Survey and Critique of State and
Federal DNA Indictment and Tolling Statutes***

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Cite as: 6 J. High Tech L. 213

Introduction

In 1983 Sir Alec Jeffrey ushered a new age into the legal system by revealing the extraordinary applications of DNA fingerprinting.¹ Since then, DNA has crept into various facets of the criminal system, for example post-conviction exonerations. However, within the last few years, legislatures have begun incorporating DNA profiling into

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1. *See Two Decades of DNA Fingerprints*, BBC News at <http://news.bbc.co.uk/1/hi/sci/tech/3636050.stm> (last viewed Oct. 22, 2005). In 1983, the English police asked Sir Alec Jeffrey to extract and compare DNA profiles between a rape suspect and material from the victim. No match was made. As a result, the police profiled other locals but no match was made to the victim's DNA evidence. It was later revealed that the original suspect profiled had persuaded another person to give their sample in lieu of his own. A new comparison resulted in a match, and the man was later found guilty and sentenced. *See* <http://www.bbc.co.uk/crime/caseclosed/colinpitchfork.shtml> (last viewed Mar. 24, 2006). For good discussion on the role of DNA in the legal world, *see* Symposium, *The Human Genome Project, DNA Science and the Law: The American Legal System's Response to Breakthroughs in Genetic Science*, 51 AM. U.L. REV. 401 (2002). For a more technical reading on DNA's use in the courts *see* SCIENCE IN THE LAW, FORENSIC SCIENCE ISSUES, 664-761 (David L. Faigman *et al.* eds., 2002). Apart from identical twins, every human has a unique hereditary chemical composition that is employed by scientists to identify individuals. *Id.*

the beginning of the prosecutorial process.² The first DNA indictment, which was non-statutory, was filed in 1999.³ In response, legislatures have enacted statutes that either allow DNA profiles as the basis for an indictment, create new limitation periods based on some form of connection of DNA evidence to a suspect, normally called “identification,” or a do mixture of both.⁴ In essence, these statutes aim to toll the applicable statute of limitations and thus allow more time to file or catch a criminal who left behind discernible DNA evidence.

However, this burgeoning development has not been without some controversy.⁵ As stated by the federal congress the statutes are to, encourage swift and efficient investigations, while recognizing the durability and credibility of DNA evidence and preventing an injustice if a “cold hit” occurs outside the limitations period.⁶

The goals are to help prevent heinous crimes from reoccurring and suspects escaping justice when their legal identity is unknown.⁷ This is especially true in regard to sexual crimes.⁸ A further goal is to

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2. See notes 54-97 (exploring and classifying recent statutes and cases) and Table 1. For the purposes of this Note an indictment, warrant for arrest, complaint, arraignment, information, *et al*, are interchangeable, depending on the statute or case. All represent the first step required by the appropriate jurisdiction to commence a prosecution and thus halt the statute of limitations period.
 3. Eric Slater, *Rape Case DNA Tests the Limits; Milwaukee Uses Genetic Evidence to File Warrants in Unsolved Crimes. National Databank is Overwhelmed by Samples, Under Funded and Uncoordinated*, LOS ANGELES TIMES, Feb. 11, 2000, Lexis All News Database. See note 16 and accompanying text.
 4. *Id.*
 5. Sir Alec Jeffrey warned that the sole means of conviction should not rest upon DNA evidence. *National Roundup: Police DNA Log Now has 2m Profiles*, GUARDIAN NEWSPAPER, June 26, 2003, Lexis All News Database. For legal commentaries and background on the greater constitutional issues surrounding DNA indictment and tolling statutes, see Corey E. Delaney, Note, *Seeking John Doe: The Provision and Propriety of DNA-Based Warrants in the Wake of Wisconsin v. Dabney*, 33 HOFSTRA L. REV. 1091 (2005); Frank B. Ulmer, *Using DNA Profiles to Obtain “John Doe” Arrest Warrants and Indictments*, 58 WASH. & LEE. L. REV. 1585, 1590-99 (2001); Andrew C. Bernasconi, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants’ Constitutional and Statutory Rights*, 50 AM. U.L. REV. 979 (2001); Meredith A. Bieber, *Meeting the Statute or Beating It: Using “John Doe” Indictments Based on DNA to Meet the Statute of Limitations*, 150 U. PA. L. REV. 1079 (2002).
 6. Quoting S. REP. NO. 107-334, at 12 (2002)(recording Congressional debate on the DNA Sexual Assault Justice Act of 2002).
 7. See notes 13-29 and accompanying text (discussing sexual crimes as impetus for these statutes). It is not unconceivable that a person’s legal identity will become a DNA profile and not a name.
 8. *Id.*

make sure that these statutes do not circumvent the respective rationales for indictments and the statutes of limitations.⁹ The swath of new statutes presents numerous solutions and problems. This Note will seek to explore and criticize them.

First, this Note will explore the reasons behind this new trend of using DNA indictments and tolling statutes in an effort to explain the solutions and problems these statutes have in turn created. Next, it categorizes of the various statutes and how they work, then discusses how they have coped with common criticisms and fears. Finally, the Note will explore what other problems have arisen from both the wording of these statutes and their actual usage. Included at the end is a diagram (Diagram 1) outlining how these statutes operate, and a table (Table 1) cataloguing various elements and mechanisms of current statutes. In essence, this Note is concerned with describing, analyzing and criticizing these statutes directly and not with larger constitutional problems *per se*. Unless the statutes are deemed unconstitutional, lawyers have to work with its provisions.

9. *See Critics Raise Privacy Concerns over DNA Database* (NPR radio broadcast, Nov. 16, 2004) available at <http://www.npr.org/templates/story/story.php?storyId=4173172> (last viewed Mar. 21, 2006); Earl Ainsworth, *DNA: The Flip Side*, NEW JERSEY LAWYER, THE WEEKLY NEWSPAPER, Vol. 12, No. 30 (2003) (exploring defense attorneys continuing questions on limitations period's elimination in New Jersey); Glenn Chapman, *High Court DNA Ruling Could Revolutionize Prosecution, Experts Say*, AGENCE FRANCE PRESSE ENGLISH WIRE, Aug. 10, 2001, Lexis All News Database (highlighting California's Robinson case which lead to California's statute); Jerry Crimmins, *DNA Indictments are Probably Fair: Professors*, CHICAGO DAILY LAW BULLETIN, Oct. 29, 2004 (noting some professors think DNA indictments are fair with some reservations); Art Barnum, *DNA Indictments Extend Law's Reach; Move Helps Keep Cases Open*, CHI. TRIB., Sept. 23, 2004 (commentating on DePage's County policy of reviewing of cold rape and burglary cases); Suzanne Smalley, *Newest Suspect in Rapes: The DNA 'John Doe' Indicted to Keep Cases Open*, THE BOSTON GLOBE, June 20, 2004, at 1-4 (noting criticisms of recent DNA indictments in Massachusetts which include over-reliance on DNA, how juries will assess DNA evidence and the abolishment of the statute of limitations); Jeane MacIntosh, *DNA Spells I.D. – State Indicts 'Doe' Pervs*, THE NEW YORK POST, Apr. 26, 2004, at 1-2. (New York is embarking upon a "John Doe Indictment Project," targeting unsolved rape cases nearing the Statute of Limitations period, and the governor is pushing for a legislative change to incorporate DNA indictments); *see also* Rebecca Porter, *DNA Evidence Changes for Whom the Statutes Toll*, NEWS & TREND, at 2 (2004); Jeane MacIntosh, *DNA Spells I.D. – State Indicts 'Doe' Pervs*, THE NEW YORK POST, Apr. 26, 2004, at 2.

Statutory Rationales and Background

The General Assembly finds that the mission of the criminal justice system is to punish the guilty and to exonerate the innocent. The General Assembly further finds that Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence.¹⁰

This quotation is from the legislative Notes accompanying Arkansas' DNA indictment and tolling statute.¹¹ This excerpt reflects a convergence of two objectives. The first is a drive to incorporate and sell the idea of the infallibility of DNA evidence and its use in the judicial system.¹² The second is the more public policy reason of preventing dangerous criminals from escaping justice and re-offending due to legal technicalities, namely the statute of limitations. A plethora of new statutes have arisen as a result of these two goals.

One criminal area in the forefront of the controversy over DNA indictments and tolling statutes is that of sexual crimes. Sexual crimes are particularly sensitive, due to the extreme emotional, as well as physical, effects of sexual violence. In 1999, just before the statute of limitations ran out, the first DNA indictment was filed against a genetic location sequence.¹³ Milwaukee prosecutor Norman Gahn had taken an unprecedented step and merely marked the indictment as "John Doe, unknown male...matching...DNA at genetic locations..."¹⁴ The unknown suspect had raped a seven-year old girl in 1994.¹⁵ Gahn stated, "I think it's good for our victims of sexual assault to know that we haven't forgotten them. We will use every available bit of technology to go after these attackers..."¹⁶ In a similar New York case, the defendant David Martinez attempted to

10. 2001 Ark. Acts 1780, § 1.

11. *Id.*; ARK. CODE ANN. § 5-1-109(b)(1)(B) (Michie 2006); ARK. CODE ANN. § 5-1-109(i)-(j) (Michie 2006).

12. See notes 5, 120-26 and accompanying text (exploring general criticisms behind the use of DNA).

13. Eric Slater, *Rape Case DNA Tests the Limits; Milwaukee Uses Genetic Evidence to File Warrants in Unsolved Crimes. National Databank is Overwhelmed by Samples, Under Funded and Uncoordinated*, LOS ANGELES TIMES, Feb. 11, 2000, Lexis All News Database.

14. *Id.*

15. *Id.*

16. *Prosecutors Using DNA Evidence to Stop the Clock on Statute of Limitations* (CBS News Broadcast, Oct. 8, 1999) (interviewing Gahn after the first DNA indictment). See also Slater, note 3.

rape a woman in the Canal Street subway station but was not identified or apprehended. Prosecutors indicted a DNA profile found on the victim before the limitations period ran out, and Martinez was eventually arrested after the sample was matched to the suspect's DNA profile. The district attorney said "John Doe [DNA] indictments represent closure for so many victims."¹⁷ These concerns surrounding sexual victims prompted the initial impetus for DNA indictment and tolling statutes. The background to two specific statutes shows how concern for sexual victims was the impetus for these new statutes.

In 2002 Georgia's criminal limitations statute was amended by the governor.¹⁸ The process began when the Georgia Network to End Sexual Assault (GNESA) discovered an alarming amount of "cold hits," which are when DNA from convicted felons is later matched with now time-barred sex crimes.¹⁹ When GNESA proposed legislation to permit prosecutions against these cold hits, the lieutenant governor fully agreed, stating these crimes were the most egregious in society.²⁰ Georgia Senator Hecht noted "now [is the] opportunity for us to bring to justice those criminals who have previously inflicted pain [through] molestation, kidnapping, and even murder..."²¹ The lieutenant governor further stated that "there's no limit on the suffering these crimes cause, and there should be no time limit on our ability to find out who did the crimes...there is no statute of limitations on a person's pain."²² Encouraged by the advent of DNA technology, Georgia enacted an amendment that extended the limitations period for certain crimes based on certain DNA criteria.²³

The senatorial report on the Federal DNA Sexual Assault Justice

17. *New York man nabbed on DNA indictment for old sex crime*, AGENCE FRANCE PRESSE, Oct. 28, 2004. David Martinez was eventually identified and arrested in 2004. Barbara Ross, *DNA Hit Cracks '94 Rape Case, Say Probers*, NEW YORK DAILY NEWS, Oct. 28, 2004; Laura Italiano, *'Fiend' Without Name is ID'd*, NEW YORK POST, Oct. 28, 2004; *New York man nabbed on DNA indictment for old sex crime*, AGENCE FRANCE PRESSE, Oct. 28, 2004.

18. GA. CODE ANN. § 17-3-1(c1)(2002); John Hamrick, *Recent Statute, § 17-3-1 (amended)*, 19 GA. ST. U.L. REV. 118, 120 (2002)(discussing statute's progress and content).

19. Hamrick, *supra* note 18, at 120.

20. *Id.*

21. *Id.* Hecht also stated that "the DNA technology available to us has allowed us to take care of crimes that were perpetuated beyond the four and seven year statute of limitations previously...established by law." *Id.*

22. *Id.*

23. GA. CODE ANN. § 17-3-1(c1) (*Iowa* type statute). See *infra* notes 54-70 and accompanying text (discussing *Iowa* type statutes).

Act of 2002 expresses emotions similar to those of Georgia.²⁴ § 3282 was only one section of the wider Sexual Assault Justice Act which hoped to “increase Federal resources available to States and local governments to combat crimes, particularly sexual assault crimes, with DNA technology...[and]...enhance the infrastructure so that the criminal system can harness the power of DNA.”²⁵ When discussing the proposed DNA indictment statute, 18 U.S.C. § 3282, the report states “‘John Doe’ DNA indictments respond effectively to the profound injustice done to rape victims when delayed DNA testing leads to a ‘cold hit’ after the statute of limitations has expired.”²⁶ Like Georgia, Congress has expressed and highlighted the undesirability of cold hits. Congress also took note that other states had thought it prudent to enact similar statutes.²⁷ In this respect, new state laws encouraged Congress to enact new federal legislation. The fact that many of the new statutes apply only to sexual crimes reflects the high level of concern about these crimes.²⁸ A new trend has seen DNA indictment and tolling statutes’ application extended into other crimes as well.²⁹

In addition to outrage over unsolved sexual crimes, the increase in statutes was driven by an increased acceptability and use of DNA in the judicial system. The court in *State v. Woodall*, concerning kidnapping and sexual assault, was the first court of last resort to consider DNA evidence; it held that expert testimony on DNA evidence was admissible.³⁰ The defendant was initially found guilty,

24. S. REP. NO. 107-334.

25. *Id.* at *9 (referencing examples). In accord with later general criticisms of DNA testing, *see* notes 120-26, the report discussed how the Act will provide sufficient funding solve cold hits using DNA technology. *Id.*

26. *Id.* at *12.

27. *Id.* The report highlighted the famous Robinson Californian case. A woman was brutally raped but the police were unable to solve the crime. Seven years later a DNA match was made but occurred after the statute of limitations had expired. *Id.*; Glenn Chapman, *High Court DNA Ruling Could Revolutionize Prosecution, Experts Say*, AGENCE FRANCE PRESSE ENGLISH WIRE, Aug. 10, 2001, Lexis All News Database. California in response enacted CAL. PENAL CODE § 803(i)(starting a one year limitations period from a match so long as the evidence is analyzed two years from the crime’s commission).

28. *See e.g.* ARK. CODE ANN. § 5-1-109(b)(1)(B)(rape § 5-14-103); FLA. STAT. § 775.15 (15)(sexual battery, lewd behavior, etc); CONN. GEN. STAT. § 54-193b (2004)(sexual assault offenses).

29. *See e.g.* DEL. CODE ANN. tit. 11, § 3107(a) (2004)(allowing DNA indictments for criminal procedure in general); N.J. STAT. ANN. § 2C:1-6(c)(tolling for any crimes upon identification); ARK. CODE ANN. § 5-1-109(i)-(j)(applying statute implicitly to all crimes).

30. 385 S.E.2d 253 (W. Va. 1989)(stating the added proviso so long as there was not contrary testimony on procedure). Interestingly, the state chemist who testified at the trial was later investigated for perjury, echoing commentator

but was eventually released after a DNA test proved his innocence. Today, DNA evidence is regularly used in federal and state courts.³¹ DNA technology facially appears to have passed evaluation by the justice system, becoming such an integral part of many criminal trials that attorneys need to fully educate themselves about it.³² It is no surprise, then, that DNA technology has been picked up as a method to extend the limitations period for certain heinous crimes. As the Senate noted,

“John Doe” DNA indictments strike the appropriate balance: they encourage swift and efficient investigations, while recognizing the durability and credibility of DNA evidence and preventing an injustice if a “cold hit” occurs outside the limitations period.³³

Statutory Building Blocks

State and federal legislatures have approached in various ways the problem of using DNA to enable law enforcement to prosecute criminals beyond the normal statute of limitations period.³⁴ These statutes employ two main building blocks, though as discussed *infra*, these have formed four discernible categories.³⁵

The first building block is permitting a DNA indictment. The simplest example is found in Delaware’s statute, which states:

(a) In any indictment for a crime in which the identity of the accused is unknown, it is sufficient to describe the accused as a person whose name is unknown but who has a particular DNA profile.³⁶

William Moffitt’s concerns on the dangers and imbalances inherent in the system. Ulmer, *supra* note 5, at note 65. See Symposium, *supra* note 1 (noting the inherent bias and unfairness in governmental DNA testing and limited access to defendants).

31. All jurisdictions permit DNA evidence under a *Frye*, *Daubert*, relevance-helpful or statutory standard. See Ulmer, *supra* note 5, at 1596-1600 (discussing DNA jurisprudence up to present day).

32. See Ulmer, *supra* note 5, at 1596-1600 (reflecting on how DNA aware attorneys are rarely surprised by the science’s inclusion).

33. S. REP. NO. 107-334, at *12 (2002)(commentating on the DNA Sexual Assault Justice Act of 2002).

34. See Table 1 and Diagram 1.

35. See notes 54-97 and accompanying text.

36. DEL. CODE ANN. tit. 11, § 3107(a).

Unlike a John Doe indictment that requires other particularizing details, this type of statute requires only the suspect's DNA to begin an indictment.³⁷ As the only case on point, *State v. Dabney* permitted a common law indictment, and it is unclear whether this type of statute is permitted.³⁸ A DNA indictment gives law enforcement and prosecutors the ability to stop the limitations period running with information not otherwise usable in an indictment. In effect the limitations period is tolled until they find more information to successfully find and prosecute a suspect.³⁹

Other states have added conditions that must be met before a DNA indictment can be filed. Arkansas' rape statute allows DNA indictments if they are brought within 15 years of the crime.⁴⁰ Arkansas also requires some form of due diligence before the indictment is available, as does Michigan.⁴¹ See *infra* for a discussion of how statutes attempt to incorporate some form of due diligence in response to worries concerning lackadaisical law enforcement. As these conditions are not oppressive, DNA indictments are an obvious tool for legislatures to employ, though most have not taken that approach.⁴²

The second building block employed is one in which a new, extended or permanent tolling of the statute of limitations is triggered by "identification." Generally to "identify" or "identification" means that "a person's legal name is known and the person has been determined to be the source of the DNA."⁴³ For example, in Iowa:

37. See notes 98-104 and accompanying text (describing the particularizing requirement).

38. *State v. Dabney*, 663 N.W.2d 366, 372 (Wis. Ct. App. 2003), *appeal denied* 671 N.W.2d 850 (2003).

39. Others include N.H. REV. STAT. ANN. § 592-A:7(II)(creating DNA indictments through close reading of sentence one and two - the first includes the discretionary 'may,' while the second allows tolling when the complaint contains 'only' a DNA profile); ARK. CODE ANN. § 5-1-109(b)(1)(B) & (i)-(j); MICH. COMP. LAWS § 767.24(2)(b) (2004).

40. ARK. CODE ANN. § 5-1-109(b)(1)(B)(extending beyond the normal six year limitation period for the crime).

41. MICH. COMP. LAWS § 767.24(2)(b)(requiring DNA evidence that is determined "to be found from an unidentified individual"); ARK. CODE ANN. § 5-1-109(i)-(j)(requiring genetic information "to be likely be applicable only to the unknown person").

42. See Table 1.

43. IOWA CODE § 802.2(3) (2005). See also MICH. COMP. LAWS § 767.24(2)(c)(ii). Other states use a definition of "deoxyribonucleic acid profile," which in essence has the same effect - "an individuals patterned chemical structure of genetic information identified by analyzing biological material that contains the individuals deoxyribonucleic acid." WIS. STAT. § 939.74(2d)(a). See also DEL. CODE ANN. tit. 11, § 3107(b)(2)(elaborating a similar definition).

if the identity of the person against whom the...indictment is sought is established through the use of a DNA profile, an...indictment shall be found within three years from the date the identity of the person is identified by the person's DNA profile....⁴⁴

Thus, once an identification is made the State has, in this example, three years to commence an action for the crime to which the statute applies.⁴⁵ After the match is made, an appropriate limitations period is created within which a prosecution must commence.⁴⁶ Though the 'identification' trigger is required to engage the new limitations period, in effect there is tolling before this event occurs.

These two building blocks have been used together or separately, with variations, to create four discernable patterns or categories. We will call them the *Iowa*, *Illinois*, *Delaware*, and *Arkansas* categories. The *Iowa* category allows for some form of identification trigger, which may or may not require other preconditions before identification is complete.⁴⁷ The second *Illinois* category is a variation of the first, which creates a new, different, or permanent limitations period when certain preconditions are met not including an identification trigger.⁴⁸ Third is the *Delaware* category which consists purely of a DNA indictment and no tolling mechanisms.⁴⁹ Last, the *Arkansas* category combines both some form of DNA indictment and identification-triggered limitations period.⁵⁰

44. IOWA CODE § 802.2(1)-(2).

45. In Iowa, the statute applies to crimes for "sexual abuse in the first, second, or third degree committed on or with a person who is under the age of eighteen years...or any other sexual abuse in the first, second, or third degree...." IOWA CODE § 802.2(1)-(2).

46. IOWA CODE § 802.2(1)-(2). Iowa compensates, in some respects, for the *de facto* tolling by shortening the limitations period from ten years to three years for the applicable crimes once identification occurs. *Id.*

47. See CAL. PENAL CODE § 803(i) (2006); CONN. GEN. STAT. § 54-193b; FLA. STAT. § 775.15 (15); GA. CODE ANN. § 17-3-1; IND. CODE ANN. § 35-41-4-2(b) (2004); IOWA CODE § 802.2; KAN. STAT. ANN. § 21-3106(7) (2003); ME. REV. STAT. ANN. tit. 15, § 3105-A(1) (West 2005); N.J. STAT. ANN. § 2C:1-6(c) (West 2004); N.M. STAT. ANN. § 30-1-9.2 (Michie 2006); OKLA. STAT. tit. 22, § 152(c)(2); OR. REV. STAT. § 131.125(8); 42 PA. CONS. STAT. § 552(C.1); UTAH CODE ANN. § 76-1-302(3)-(4); WIS. STAT. § 939.74 (2003); 18 U.S.C.S. § 3297 (2004).

48. See 720 ILL. COMP. STAT. 5/3-5(a)(2) (2004); TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(B) (Vernon 2004).

49. See DEL. CODE ANN. tit. 11, § 3107(a); 18 U.S.C. 3282 (2004).

50. See ARK. CODE ANN. § 5-1-109(b)(1)(B) & (i)-(j); MICH. COMP. LAWS §

It is interesting to note that legislatures did not adopt some form of altered Rule 15(c)(3).⁵¹ When a complaint is amended to add a new party mistakenly misnamed, the original Rule 15(c)(3) allows the amended complaint to relate back to the original for statute of limitations purposes.⁵² Thus when an identification occurred, the normal limitation period would “relate back” to the original DNA indictment. However, case law has stated that with normal John Doe indictments, an amended complaint naming the real suspect does not relate back.⁵³

Statutory Categories

Iowa Category

The first category is the most common.⁵⁴ We will call it the *Iowa* category, as Iowa’s statute represents the simplest form of this category.⁵⁵ For example, in Iowa’s statute, upon identification of a DNA sample with a suspect, the state has three years to commence an action against that identified person.⁵⁶ The normal limitations period for the crimes outlined in the statute is ten years. No DNA indictment is created. Most states today have taken an approach similar to Iowa’s probably because they feel more comfortable commencing an action against an ‘identified’ individual than against a mere DNA sequence.⁵⁷

Other *Iowa* types incorporate additional ancillary requirements.⁵⁸ These take the form of preconditions or concurrent conditions connected to the identification trigger.⁵⁹ Preconditions work by

767.24(2)(b); N.H. REV. STAT. ANN. § 592-A:7(II) (2005).

51. FED. R. CIV. P. 15(C)(3).

52. *Id.*

53. *See Ferreira v. City of Pawtucket*, 365 F. Supp. 2d 215, 217 (D.R.I. 2004). The case stated that an amendment naming a party in place of a John Doe defendant did not relate back. Thus, the statutory period begins on the amended complaint. The court reasoned that lack of knowledge as to the identity of a defendant that formed the basis of the John Doe indictment was not a “mistake” under 15(c)(3). *Id.*

54. *See* Table 1.

55. IOWA CODE § 802.2(1)-(2).

56. *Id.*

57. *See* Table 1.

58. These other preconditions are often added in response to common criticisms about DNA indictment and tolling statutes. *See* notes 98-172 and accompanying text (describing problems and attempted statutory solutions).

59. *Id.*

requiring satisfaction even before an identification trigger can occur.⁶⁰ Presumably, if identification occurs before these preconditions are satisfied then the new, altered or permanent limitations period will not occur. Others statutes have concurrent conditions that need to occur along with identification.⁶¹ Common examples of these preconditions include: preservation of the DNA evidence from which the profile was drawn, the availability of the DNA to the accused,⁶² notification by the victim to law enforcement within a certain time,⁶³ analysis of DNA evidence before a certain time⁶⁴ and a diligent investigation to discover an unknown suspect.⁶⁵ Sometimes these preconditions have to occur within the normal limitations period for the relevant crimes.⁶⁶ Examples of concurrent conditions include identification during the normal limitations period,⁶⁷ some firm moment in time when identification should have occurred,⁶⁸ and passage through a closed hearing on the identification of the perpetrator.⁶⁹ Some statutes incorporate extra elements at both stages.⁷⁰

Whether these additional elements are required, or are pre- or

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60. See Table 1. *But see* notes 64-69 (describing Illinois type statutes – in particular 720 ILL. COMP. STAT. 5/3-5(a)(2) and TEX. CODE CRIM. PROC. ANN. ART. 12.01(1)(B)).
61. See CONN. GEN. STAT. § 54-193b; FLA. STAT. § 775.15 (15); IND. CODE ANN. § 35-41-4-2(b); ME. REV. STAT. ANN. tit. 15, § 3105-A(1); OR. REV. STAT. § 131.125(8).
62. See FLA. STAT. § 775.15 (15) (2005); GA. CODE ANN. § 17-3-1; MINN. STAT. § 628.26(f) (2005); OKLA. STAT. tit. 22, § 152(c).
63. See CONN. GEN. STAT. § 54-193b; OKLA. STAT. tit. 22, § 152(c).
64. See CAL. PENAL CODE § 803(i); WIS. STAT. § 939.74 (requiring the “identifi[cation] of a deoxyribonucleic profile”).
65. See N.M. STAT. ANN. § 30-1-9.2; WIS. STAT. § 939.74. Another isolated precondition example is ME. REV. STAT. ANN. tit. 15, § 3105-A(1)(requiring the victim “had not attained 16 years of age at the time of the crime” and that the juvenile perpetrator had “attained 16 years of age.”).
66. WIS. STAT. § 939.74 (stating in paragraph (b)’s chapeau “[i]f before the time limitation....”).
67. OR. REV. STAT. § 131.125(8); CONN. GEN. STAT. § 54-193b.
68. FLA. STAT. § 775.15 (15)(stating “should have been established by the exercise of due diligence”); IND. CODE ANN. § 35-41-4-2(b)(stating “could have discovered the identity of the offender with DNA...evidence by the exercise of due diligence”).
69. ME. REV. STAT. ANN. tit. 15, § 3105-A(1). In comparison to other state and federal statutes, Maine requires prosecution to prove to a closed hearing that the profile extracted from the biological evidence left at the scene of the crime probably matches the suspect sought to be indicted. All other states take it on faith that when identification occurs no other preliminary judicial proceeding should take place – irregardless of when this identification occurs.
70. CONN. GEN. STAT. § 54-193b; FLA. STAT. § 775.15 (15); ME. REV. STAT. ANN. tit. 15, § 3105-A(1).

concurrent conditions is often unclear and is subject to statutory interpretation by the judiciary. What is clear, however, is that these requirements certainly exist and have some effect. As noted *supra* these conditions were instituted in response to common criticisms and perceived problems.

Illinois Category

Illinois and Texas constitute the second category.⁷¹ These two states take a different approach and ignore both the DNA indictment and identification trigger avenues. In effect these statutes create a permanent tolling if certain conditions are met. No identification is required to create this scenario but there is a list of pre-conditions. For example:

any offense involving sexual conduct or sexual penetration....in which the DNA profile of the offender is obtained and entered into a DNA database within 10 years after the commission of the offense and the identity of the offender is unknown after a diligent investigation by law enforcement authorities may be commenced at any time.⁷²

Therefore, in effect, when, a) the DNA profile of the offender is entered into a database within ten years and, b) the offender is unknown after a diligent investigation, then prosecution may begin at any time. Problems with this statute immediately present themselves. First, as discussed later, how is the offender chosen whose biological evidence is the basis for the profile? The statute talks in singular terms. Does this rule out multiple offenders? How is one picked above the other? Second, presumably these preconditions can occur outside of the normal limitation period for the crime, in essence giving suspects the impression that they are no longer subject to prosecution when in fact they are.⁷³ In effect, there exists open-

71. 720 ILL. COMP. STAT. 5/3-5(a)(2); TEX. CRIM. PROC. CODE ANN. § 12.01(1)(B).

72. 720 ILL. COMP. STAT. 5/3-5(a)(2). Subsequent to this, the statute adds other pre-conditions (some added at a later date), which require the victim to report the offense to 'law enforcement' within two years after the commission of the offense *or* the victim is murdered during the commission of the crime or dies two years after the crime. *Id.*

73. Contrary to one of the main tenets of the statute of limitations, *see supra*

ended tolling without any identification trigger to shorten the period to prosecute so long as the biological material is profiled and entered into the appropriate database – an easy enough task. Also, though not explicitly, the statute effectively allows and creates a DNA indictment but as with most of such statutes its meaning is unclear.⁷⁴

However, the statute has its advantages. The preconditions force law enforcement to carry out a thorough investigation if they want to later utilize the DNA evidence. They must find and register the profile *and* conduct a diligent investigation.⁷⁵ Though these terms are fraught with ambiguity, at least *something* is required.

The Texas statute is similar in nature to the Illinois statute. For sexual assaults it states that:

[I]f during the investigation of the offense biological matter is collected and subjected to forensic DNA testing and the testing results show that the matter does not match the victim or any other person whose identity is readily ascertained...[then there is]...no limitation.⁷⁶

How long the *investigation* is to last, what biological matter is required and when the testing is to occur are all left open to interpretation. The statute's requirement that "testing results show that the matter does not match the victim or any other person whose identity is readily ascertained" is tantamount to due diligence in matching the profile to all accessible suspects.⁷⁷

Delaware Category

Delaware and 18 U.S.C. 3282 constitute the *Delaware* category.⁷⁸ Enacted in 2001 and 2003 respectively, these statutes represent early attempts to rework requirements for an indictment.⁷⁹ They are almost identical and allow for the filing of an indictment based purely on a DNA profile. Thus, the normal limitations period applies, in contrast

notes 151-63 and accompanying text.

74. Since no identification is required, the preconditions could act like a DNA indictment because upon satisfaction the criminal process has effectively began.

75. *See supra* notes 137-50 and accompanying text (discussing due diligence).

76. TEX. CRIM. PROC. CODE ANN. § 12.01(1)(B).

77. *Id.* *See supra* notes 137-50.

78. DEL. CODE ANN. tit. 11, § 3107(a); 18 U.S.C. 3282.

79. S. REP. NO. 334, at *12 (2002); 73 DEL. LAWS 160 (2001); S. REP. NO. 107-334.

to the *Illinois* and *Iowa* type statutes. Congress embedded this indictment into the Federal Rules of Criminal Procedure.⁸⁰ 18 U.S.C. § 3282 is very similar to Delaware's statute, which was possibly used as a basis for the federal statute.⁸¹ *Delaware* statutes contain the same problems regarding when the DNA sample is tested, what DNA sample is used, what if any due diligence is required when looking for the suspect, etc., as the other statutes. Yet both statutes are simple and insert DNA into an already known and accepted process, the indictment, without any precondition or identification that triggers different limitation periods.

Arkansas Category

Three state statutes are found in this category: Arkansas, New Hampshire and Michigan.⁸² These statutes incorporate some form of DNA indictment and new, different, or permanent identification-triggered limitations period. Arkansas possesses two statutes that fall into this category.⁸³ The Arkansas rape statute extends the limitations period to fifteen years during which time "a prosecution for rape may commenced if based on forensic...DNA testing...."⁸⁴ What "DNA testing" means exactly is unclear, but probably is a DNA indictment based upon the profile of an unknown individual. Unanswered is what, for example, would happen if a DNA sample is found and linked to the crime after the normal limitations period – will the extended fifteen years still count?

Arkansas' second broader DNA statute is clearly divided between DNA indictments in section (i) and extending the limitations period in section (j).⁸⁵ Section (i) states

If there is biological evidence connecting a person
with the commission of an offense and that person's

80. FED. R. CRIM. P. 7.

81. Delaware was enacted in 2001, 73 DEL. LAWS 160 (2001), whereas § 3283 was enacted in 2003, *see* S. REP. NO. 334, at 12 (2002) (discussing § 3282's background and mechanisms). The language is almost verbatim.

82. ARK. CODE ANN. § 5-1-109(b)(1)(B) & (i)-(j); MICH. COMP. LAWS § 767.24(2)(b); N.H. REV. STAT. ANN. § 592-A:7(II).

83. ARK. CODE ANN. § 5-1-109(b)(1)(B); ARK. CODE ANN. § 5-1-109(i)-(j).

84. ARK. CODE ANN. § 5-1-109(b)(1)(B).

85. ARK. CODE ANN. § 5-1-109(i)-(j). Presumably section (b)(1)(B) on rape crimes is excluded from sections (i) and (j), and that the extended fifteen year limitations period applies and will not allow DNA indictments. Otherwise, (b)(1)(B) is pointless in light of these sections. § 5-1-109(b)(1)(highlighting "(B) However" after section (A)).

identity is unknown, the prosecution is commenced if an indictment or information is filed against the unknown person and the indictment contains the genetic information of the unknown person and the genetic information is accepted to be likely to be applicable only to the unknown person.⁸⁶

In a more verbose manner this parallels the *Delaware* type but adds a due diligence element before a DNA indictment is allowed. Section (j) is more convoluted but appears to say the following: When the biological material is matched to an individual who is registered in the state or national DNA Index System, then from that point a prosecution is available up to the normal statutory period for that crime.⁸⁷ Why Arkansas sought to employ the Index System route is unclear, but it was probably in order to be able to test multiple people. Also troubling is the “implic[ation] [of] a person *previously* identified” through the Data Base search.⁸⁸ The “*previously*” suggests that once a match is made there is no automatic trigger like in the *Iowa* class statutes, but that the prosecution can wait until after identification before commencing the process.

Similarly, New Hampshire’s statute is bifurcated between indictments and tolling.⁸⁹ The first sentence states that the “description of the accused *may* include an identifiable ridge skin impression or a DNA profile” to begin complaints.⁹⁰ Although not explicitly permitting a complaint based purely on DNA, the second sentence implies it when stating “a complaint that contains only a[...]DNA profile...shall...toll the applicable statute of limitations.”⁹¹ Thus, a DNA indictment is available for all crimes, but for certain crimes enumerated in the second sentence the statute is tolled when a DNA indictment is used to start the process. Therefore, there is no identification trigger to toll the statute, which is similar to the *Illinois* type in many regards.

86. ARK. CODE ANN. § 5-1-109(i)

87. In full – “When...DNA testing implicates a person previously identified through a search of the State DNA Data Base or National DNA Index System, no statute of limitation that would otherwise preclude prosecution of the offense precludes the prosecution until a period of time following the implication of the person by...DNA testing has elapsed that is equal to the otherwise applicable period.” *Id.*

88. *Id.* (emphasis added).

89. N.H. REV. STAT. ANN. § 592-A:7(II) (emphasis added).

90. *Id.* (emphasis added).

91. *Id.* For a discussion of other technologies implied in this statute, see notes 164-71 and accompanying text.

Michigan's statute presents another strange amalgamation of elements.⁹² If DNA evidence is gathered and determined to be from an "unidentified individual" then an action may "be filed at any time."⁹³ However, the statute throws in an identification trigger which trumps the aforementioned DNA indictment, stating "[h]owever, after the individual is identified, the indictment shall be found and filed within 10 years after the individual is identified..." or by the alleged victim's twenty-first birthday, whichever comes first.⁹⁴ Prosecutors get the advantage of both techniques concurrently as they can file a DNA indictment at any time, but if identification occurs (once again it does not state when or if one is required at all), they still have ten years to file.

All four categories show that legislatures are struggling to incorporate a science given an aura of infallibility into the prosecutorial process ridden with the feeling that criminals are escaping too easily.⁹⁵ No clear pattern has yet emerged, though a version of the *Iowa* type is starting to predominate.⁹⁶ This inconsistency in statute type is reflected in the existence of the four categories described and the fact that the earliest statutes consist of all four types.⁹⁷ In reality, however, all four categories have the same effect. When a DNA sample exists from a crime scene that is linked to an unknown individual, the state can sit on it until a match is found or file a DNA action and similarly sit on it.

The variations in the statutes are a response to varying criticisms about DNA indictments and DNA tolling statutes. However, these variations, although attempting to solve problems, have in turn

92. MICH. COMP. LAWS § 767.24(2)(b).

93. *Id.* (highlighting the due diligence aspect again).

94. *Id.*

95. *See* notes 10-29 and accompanying text (exploring background to this feeling).

96. *See* notes 54-70 and accompanying text (exploring *Iowa* statutes).

97. For example California (2000/06)(*Iowa* type), Delaware (2001)(Delaware type), Indiana (2001)(*Iowa* type), Kansas (2001)(*Iowa* type), Texas (2001)(Illinois type), Wisconsin (2002)(*Iowa* type), New Jersey (2002)(*Iowa* type), Illinois (2002)(Illinois type), Georgia (2002)(*Iowa* type), Michigan (2002)(Arkansas type), 18 U.S.C. § 1382 (2003)(Delaware type) and 18 U.S.C. § 3297 (2004)(*Iowa* type). *See* following for enactment dates CAL. PENAL CODE § 803 (West 2004); 73 DEL. LAWS 160 (2001); IND. CODE ANN. § 35-41-4-2(b) (Michie 2004); 2001 KAN. SESS. LAWS 208; 2001 TEX. SESS. LAW. SERV. 12 (2001); WIS. STAT. § 939.74(2d)(2003); 2002 N.J. SESS. LAW SERV. 308; 2002 ILL. LEGIS. SERV. 92-752 (West); John Hamrick, Recent Statute, § 17-3-1 (*amended*), 19 GA. ST. U.L. REV. 118, 120 (2002); 2002 MICH. PUB. ACTS 1394 (replacing earlier attempt to enact a similar statute - 2000 MICH. PUB. ACTS 1174); S. REP. NO. 334, at 12 (2002); 18 U.S.C.S. § 3297 (2004).

created their own problems. This next section will explore how common criticisms of these statutes have, or have not, been solved, beginning with problems surrounding constitutional reasonable certainty and DNA indictments. Explored next is the criticism surrounding the rationale for the statute of limitations. Included in this criticism is the deleterious effect on evidence; prejudice, access and evidential over-reliance; law enforcement and due diligence; and repose. Finally, there is an exploration of other problems created by these statutes.

Criticisms and Solutions

Constitutional Reasonable Certainty and DNA Indictments

“A DNA profile alone is enough to issue a ‘John Doe’ warrant.”⁹⁸ This entry in Wayne R. LaFave’s *Search & Seizure* embodies the increasing acceptance of DNA indictments within legal jurisprudence. A DNA indictment, however, is not an end in itself, but a means to reach another goal – the tolling of the statute of limitations to allow law enforcement to identify the suspect. Some states have employed non-statutory DNA indictments, but in addition to the federal legislation there are four state statutory DNA indictments.⁹⁹ With regard to the statutes at hand, DNA indictments have been deemed constitutional by legislative fiat. Under the common law a few cases have already sustained the viability of DNA indictments under the reasonable certainty requirements of indictments.¹⁰⁰ Modern commentators have explored this issue in

98. 3 Wayne R. LaFave, SEARCH AND SEIZURE § 5.1(g) (3d. ed. 1996 & Supp. 2003). Black’s Law Dictionary defines a John Doe summons as one “to a person whose name is unknown at the time of service.” BLACK’S LAW DICTIONARY 1450 (7th ed. 1999).

99. Non-statutory:- *see for example* Wisconsin, *see Dabney*, 663 N.W.2d at 372 (quoting 3 Wayne R. LaFave, Search and Seizure § 5.1(g)); Massachusetts, *see* Suzanne Smalley, *Newest Suspect in Rapes: The DNA ‘John Doe’ Indicted to Keep Cases Open*, THE BOSTON GLOBE, June 20, 2004, at 1-4 (noting DNA indictment use after legislature failed to abolish for statute of limitations for rape). Statutory DNA indictments:- ARK. CODE ANN. § 5-1-109(b)(1)(B); ARK. CODE ANN. § 5-1-109(i)-(j); DEL. CODE ANN. tit. 11, § 3107(a); MICH. COMP. LAWS § 767.24(2)(b); N.H. REV. STAT. ANN. § 592-A:7(II); 18 U.S.C. § 3282.

100. *Dabney*, 663 N.W.2d 366 (affirming DNA indictments under common law, stating DNA profile is the most discrete and effective means to identify a person). For a description and analysis of this case *see* Corey, note 5. State

detail and it is outside the scope of this Note.¹⁰¹ In short, an indictment requires sufficient information to identify a suspect and enough evidence of the crime to establish probable cause.¹⁰² A DNA profile is sufficient to fulfill these requirements.¹⁰³ Suffice it to say, until the judiciary in each state or at the federal level decides the court of statutory DNA indictments constitutionality, then the state and federal legislatures will continue to employ them.¹⁰⁴

Statute of Limitation Problems

The general constitutionality of tolling statutes in light of the

v. Davis, 698 N.W.2d 823, 831-32 (Wis. Ct. App. 2005)(affirming *Dabney* though different DNA profiling techniques were employed); Robinson Case, see Glenn Chapman, *High Court DNA Ruling Could Revolutionize Prosecution, Experts Say*, AGENCE FRANCE PRESSE ENGLISH WIRE, Aug. 10, 2001, Lexis All News Database; Ulmer, *supra* note 5, at 1608-09. California's Supreme Court rejected the defendant's argument that his arrest was too vague. Paul Robinson was the first suspect DNA indicted and subsequently caught following a 'cold hit.'

101. See *supra* note 5 (listing modern constitutional commentators).

102. The Fourth Amendment of the United States Constitution states that warrants issued shall "particularly describ[e]...the persons...to be siezed." U.S. CONST. AMEND. IV. As elaborated in the Federal Rules of Criminal Procedure, Congress states that a warrant must contain the defendant's name or if it is unknown, a name or description by which the defendant can be identified with reasonable certainty. FED. R. CRIM. P. 4(b)(1) (2004). Also, the warrant must adequately describe the crime's essential facts so as to establish probable cause; even if the crime's exact methodology is unknown. FED. R. CRIM. P. 4(a); FED. R. CRIM. P. 7(c)(1); Bieber, *supra* note 5, at 1083-84. The main purpose for the reasonable certainty requirement is to put the accused on sufficient notice of the charges, to allow a defense, to plead and to prevent double jeopardy. *United States v. Gaytan*, 74 F.3d 545, 551 (5th Cir. 1996)(requiring indictment to fairly inform defendant charges filed against him); *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991)(stating important indictment function to apprise defendant nature of offense so accused). Courts have not created an all-inclusive list but the absence of a name is not fatal so long as the indictment presents sufficient information to identify the person. Ulmer, *supra* note 5, at 1603-06 n.117 (citing factors like residence, physical description, etc.); See e.g. *United States v. Doe*, 401 F. Supp. 63, 65 (E.D. Wis. 1975)(holding valid indictment using an alias and peculiar facial characteristics and other general bodily attributes); *United States v. Ferrone*, 438 F.2d 381, 389 (3d Cir. 1971)(holding valid an indictment employing physical description and known local); *State v. Pecha*, 407 N.W.2d 760, 765 (Neb. 1987)(holding indictments employing only "John Doe" name and probable location invalid).

103. *Id.*

104. Note that the *Dabney* case was decided on common law grounds, as the relevant statute was not in effect at the crime's commission. Though referring to the new Wisconsin statute, it was ultimately based on common law. *Dabney*, 663 N.W.2d 366.

rationale behind the statute of limitations has been widely discussed.¹⁰⁵ The overriding rationale is to prevent excessive delay before a suspect is prosecuted and is, in the words of the Supreme Court, “vital to the welfare of society.”¹⁰⁶ Though the statute of limitations is a statutorily created protection, and as such amendable, its long pre-Constitutional history points to its importance.¹⁰⁷ Until the arrival of the statutes in question, tolling was available only in certain circumstances, such as for infants and “toxic torts.”¹⁰⁸ There are four relevant broad rationales behind the statute of limitations, which commentators criticize statutes for circumventing.¹⁰⁹ These are the deleterious effect on evidence, then prejudice, access and evidential over-reliance, followed by, law enforcement and due diligence, and repose. Either in reaction or anticipation, some legislatures have incorporated solutions into their statutes and this section of the Note will examine, how and, if they have succeeded.¹¹⁰

105. See *supra* note 5 (listing modern constitutional commentators).

106. Kearns, *supra* note 24, at 328; William M. Schrier, Note, *The Guardian or the Ward: For Whom Does the Statute Toll?*, 71 B.U.L. REV. 575, 586 (1991) (exploring limitations history within context of insanity tolling exception); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (stating further that “[a]n important public policy lies at their [statute of limitations] foundation”).

107. The Statute of Limitations is not a constitutional right *per se*. See Kearns, *supra* note 26, at 328 (stating limitation safeguards are not guaranteed by the Constitution). See also *Dabney*, 663 N.W.2d at 373 (quoting in dicta *State v. Sher*, 437 N.W.2d 878 (1989) on statutory basis for limitations period); Ulmer, *supra* note 5, at 1611-12; Bieber, *supra* note 5. The first statute of limitations was the 1623 Limitations Act from the reign of James I of England (VI of Scotland). JAMES I, ch. 16 (1623). The Act differed from previous examples because it covered both personal and real actions, and provided definite time periods. The Colonies followed English Common Law by enacting similar examples and these formed the basis for the state and federal statutes of limitations. Indeed, Congress has extended the gambit of the statute into other areas, and extended the limitation period in other areas. Schrier, *supra* note 106, at 576 (exploring limitations history within context of insanity tolling exception); Harvard Law Review Association, *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950); Bernasconi, *supra* note 5, at 990-94.

108. Lisa Napoli, Article, *Tolling the Statute of Limitations for Survivors of Domestic Violence who Wish to Recover Civil Damages Against their Abusers*, 5 CIRCLES BU. W.J.L. & SOC. POL. 53, 56 (1997) (exploring tolling for infants based on idea non-capacity to protect legal rights and for toxic torts because injuries indiscernible until much later); Jessica E. Mindlin, Comment, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189, 197-201 (1990) (discussing judicial approaches to tolling including continuing crime doctrine and secret manner statutes).

109. See note 5 for modern commentators.

110. See *infra* notes 111-72 and accompanying text (exploring examples) and see *infra* Table 1.

Deleterious Effect on Evidence

First is the possible deleterious effect on the memories of defendants, witnesses, and the physical evidence as the trial date recedes further and further from the event.¹¹¹ Human memory is fallible by its nature and will often degrade and trick the mind of both the defendant and the witnesses during and after the crime.¹¹² This fear of stale evidence encompasses the idea that physical evidence will also degrade over time.¹¹³ Proponents of the use of DNA evidence counter this criticism by claiming DNA will retain its evidentiary value over a long period of time.¹¹⁴ Yet in recognition that this so-called infallible evidence is still subject to the failures of people and law enforcement, many statutes have attempted to incorporate solutions.¹¹⁵

Two tactics have been adopted so far. The first forces law enforcement to collect, analyze, and preserve relevant DNA evidence before a statute is open to tolling. For example, Florida requires “a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA...[to be]...preserved and available for testing by the accused.”¹¹⁶ A variation adds that the DNA preserved is capable of testing, adding, it appears, a requirement that is more than mere preservation.¹¹⁷ California requires that biological evidence is analyzed within two years from the crime’s commission, which in effect requires the preservation of a testable sample, a requirement similar to the above examples.¹¹⁸ Under the Illinois statute the sample must be entered into the appropriate database within ten years of the crime.¹¹⁹

Some statutes have also sought, in some way, to protect victim memory degradation endangered by the often limitless tolling

111. Ulmer, *supra* note 5, at 1611-15; Bieber, *supra* note 5, at 1089-90.

112. Bieber, *supra* note 5, at 1090.

113. *Id.*

114. Bieber, *supra* note 5, at 1089. “Because a person’s genetic code is fixed, it retains its evidentiary value over time.” *Id.*

115. CAL. PENAL CODE § 803(i); CONN. GEN. STAT. § 54-193b; FLA. STAT. § 775.15 (15); GA. CODE ANN. § 17-3-1; 720 ILL. COMP. STAT. 5/3-5(a)(2); MINN. STAT. § 628.26(f); OKLA. STAT. tit. 22, § 152(c)(2).

116. FLA. STAT. § 775.15 (15); GA. CODE ANN. § 17-3-1 (requiring essential the same).

117. *See* OKLA. STAT. tit. 22, § 152(c)(2); MINN. STAT. § 628.26(f). As with all these statutes, no cases have determined the limits of these operative words.

118. CAL. PENAL CODE § 803(i).

119. 720 ILL. COMP. STAT. 5/3-5(a)(2)(requiring other tolling pre-conditions satisfaction).

available. For example, in Connecticut the victim must report the crime to law enforcement within five years for identification tolling to occur.¹²⁰ Illinois and Oklahoma require two and twelve years respectively.¹²¹ Victims, as well as witnesses, are forced to bring forward their claim while, it is hoped, their memories are still fresh. Unfortunately not all statutes have this requirement, and indeed many are indefinite in nature, circumventing the rationale for the statute of limitations.¹²² For the statutes that do include this requirement, it is paramount under the language that the victims come forward before the allotted time expires.

As for the direct DNA preservation requirement, various unanswered questions are raised. Though beyond the scope of this paper, there are technical questions about the science and mechanisms used to profile and store these samples.¹²³ Who is to preserve and store them – the same people who are prosecuting?¹²⁴ Who will pay for it?¹²⁵ How much material is to be preserved, and how many times can it get tested? Who must or can do the testing? These are questions that law enforcement will seek to resolve until a court decides the exact meaning of the wording in the statutes.

Prejudice, Access, and Evidential Over Reliance

The question of who must do the testing, mentioned above, raises an important problem not linked directly to the rationale behind the statute of limitations. The problem is whether the prosecution and the DNA testing system are prejudicing defendants. Recent scandals have highlighted the inadequacy of the forensic laboratory system.¹²⁶

120. CONN. GEN. STAT. § 54-193b.

121. 720 ILL. COMP. STAT. 5/3-5(a)(2); OKLA. STAT. tit. 22, § 152(c)(2).

122. See note 5 and commentators (discussing rationale problems).

123. *But compare* State v. Davis, 281 Wis. 2d 118, 135, 698 N.W.2d 823 (Ct. App. Wis. 2005) (accepting different profiling techniques for Wisconsin DNA indictments). Note that the *Davis* court did not directly consider the Wisconsin statute but merely stated “[w]e have previously ruled that the State is permitted to file a complaint, which identifies the defendant only by his DNA profile.” *Id.* Presumably this refers to common law DNA indictment, as *Dabney* referred to the statute only in dicta when it discussed the extended discovery period created by Wisconsin’s statute.

124. See notes 126-36 and accompanying text (discussing bias in the system).

125. See DNA Sexual Assault Justice Act of 2002 (dealing with monetary funding for DNA systems within the judicial system); S. REP. NO. 107-334 (recording Congressional debate and reasoning behind the Sexual Assault Justice Act of 2002).

126. *Critics Raise Privacy Concerns over DNA Database* (NPR radio broadcast, Nov. 16 2004) (citing recent scandals within all forensic laboratories), at 3; Symposium, *The Human Genome Project*, 51 AM. U.L. REV. at 408.

One commentator has stated that “the very people who are trying to put the accused in jail are the people who control the science.”¹²⁷ Many indigent parties simply do not possess the resources to pay for independent DNA testing and must rely on the state - the same party that possesses the DNA and prosecutes them with it.¹²⁸ Providing access to a DNA sample is not the same as paying for an independent test. Only two states have acknowledged any prejudicial threat by requiring DNA evidence preserved and *available* for testing to the accused.¹²⁹ This is a different standard than merely being *testable* or *preserved*. Inasmuch as the statutes do provide some safeguards, prosecutors need to check that DNA samples are preserved and capable of testing. Unfortunately, the legal system provides representation to the needy, but not yet the access or ability to test the science that is prosecuting them.

Another related criticism revolves around a perceived over-reliance on DNA. These statutes, for the most part, act simply on DNA evidence found at the scene of the crime that is reasonably connected to the unknown suspect.¹³⁰ One commentator said that we are “essentially being sold...the notion that we can have a degree of certainty” with DNA evidence.¹³¹ Science is advancing to shorten the time taken to connect a profile to a suspect.¹³² However, few cases will ever succeed based purely on one piece of DNA evidence.¹³³ A commentator on one particular case stated that “DNA evidence was exonerating to the best of anybody’s information and yet it was still possible for the prosecution to argue that DNA was not definitive because crimes can be committed by multiple people.”¹³⁴

127.Symposium, *The Human Genome Project*, 51 AM. U.L. REV. at 417-18 (quoting symposium speaker William Moffitt of Asbill, Junkin & Boss).

128.*Id.* at 426-27.

129.FLA. STAT. § 775.15 (15); GA. CODE ANN. § 17-3-1.

130.*See* notes 127-53 and accompanying text (discussing due diligence requirements). *But compare* DEL. CODE ANN. tit. 11, § 3107(a)(allowing indictments based just on DNA and no other requirements); ARK. CODE ANN. § 5-1-109(i)-(j)(allowing DNA indictments and DNA tolling if identification occurs through national or state Index System).

131.Symposium, *The Human Genome Project*, 51 AM. U.L. REV. at 417.

132.*See for example* <http://news.bbc.co.uk/2/hi/science/nature/4736984.stm> (discussing how forensic scientists could start using DNA retrieved from a crime scene to predict the surname of the suspect)(last viewed April 3, 2006).

133.*See* Jeffrey’s statement in note 5 and *see the* Ford Heights case in Symposium, *The Human Genome Project*, 51 AM. U.L. REV. at 415-16. “Only a significant minority of cases at this point can be resolved one way or the other with any certainty based on the examination of DNA evidence.” Professor Miller in Symposium, *The Human Genome Project*, 51 Am. U.L. Rev. at 416.

134.*Id.* at 416. For more information on this case *see*

With regard to the statutes in question, the corollary problem is whether a simple DNA sample is enough even to start the prosecutorial process, let alone convict a defendant. Maine is the only state that tackles this head on by adding this proviso “if the attorney for the State first presents evidence based on DNA...to the court in a closed hearing that implicates the defendant in the crime by a preponderance of the evidence.”¹³⁵ In essence, when reading § 3105-A(1) in its entirety, this requires a closed grand jury-like test before tolling is permitted.¹³⁶ Before any form of DNA tolling can occur, *all* factors are considered when determining the relevance of the DNA sample to the crime and suspect. This helps alleviate the fear that mere DNA is indicting suspects without some form of barrier to test its relevance.

Law Enforcement and Due Diligence

The second major rationale behind the statute of limitations is to promote and ensure prompt investigation by law enforcement and prosecution by the state.¹³⁷ Entwined with this rationale are elements of deleterious evidence and prejudice.¹³⁸ Though this rationale seems obvious, we should not underestimate the statute of limitations’ role in forcing law enforcement to diligently investigate a crime.¹³⁹ The statute is a looming wall that forces authorities to investigate and prosecute crimes.¹⁴⁰ The fear is that new DNA indictment and tolling statutes will provide no incentive for law enforcement and provide an easy way out.¹⁴¹ For example, without the option to employ DNA indictments, enforcement officers in a rape crime have to investigate all the surrounding facts, suspects, forensics, family members, etc., before even reaching the indictment stage. A DNA sample from the victim, however, would suffice to indict a profile.

As a result many statutes have incorporated some form of due

http://talkleft.com/new_archives/003511.html (last viewed Thursday 6th, 2006).

135. ME. REV. STAT. ANN. tit. 15, § 3105-A(1).

136. *Id.*

137. Ulmer, *supra* note 5, at 1615-16; Beiber, *supra* note 5, at 1091-2.

138. *See supra* notes 111-25 and accompanying text (discussing these issues).

139. The requirement for a Speedy Trial and Due Process will only protect the defendant so far, and not to the same extent as the Statute of Limitations. *See* Ulmer, *supra* note 5, at 1619-20, for Speedy Trial, *see generally* Bernasconi, *supra* note 5.

140. Ulmer, *supra* note 5, at 1615-16.

141. Beiber, *supra* note 5, at 1091-92.

diligence requirement on law enforcement before a DNA indictment or tolling is available.¹⁴² Some states have no due diligence requirement, either explicit or implicit.¹⁴³ The states with due diligence employ various methods. One version is implicit, as seen in Delaware, which begins with “[i]n any indictment for a crime in which the identity of the accused is unknown....”¹⁴⁴ Though not explicit, presumably law enforcement has to carry out some sort of investigation to reach the point where it has an obvious suspect who is unidentified. Other statutes impose a more positive requirement for a proper investigation. For example, Texas adds that the profile collected must “not match the victim or any other person whose identity is readily ascertained....”¹⁴⁵ Thus law enforcement must actively eliminate all other readily ascertainable suspects around the crime scene before the statute applies. Another alternative is found in Illinois, which requires that “the identity of the offender is unknown after a diligent investigation by law enforcement.”¹⁴⁶ In reality this is probably equal to the method Texas uses.

Due diligence, however, may reach a higher level than Delaware, Texas, or Illinois implicitly require. The level of investigation

142. *See for example* ARK. CODE ANN. § 5-1-109(i)-(j) (requiring profile “to be applicable only to the unknown person”); FLA. STAT. § 775.15 (15) (allowing tolling when perpetrator “should have been established”); 720 ILL. COMP. STAT. 5/3-5(a)(2) (requiring a diligent investigation); IND. CODE ANN. § 35-41-4-2(b) (requiring “could have discovered the identity with due diligence”); WIS. STAT. § 939.74 (requiring comparisons of DNA to profiles that “did not result in a probable identification of the person whose is the source of the biological material”).

143. N.H. REV. STAT. ANN. § 592-A:7(II); CAL. PENAL CODE § 803(i); IOWA CODE § 802.2; 18 U.S.C.S. § 3297; KAN. STAT. ANN. § 21-3106(7); MINN. STAT. § 628.26(f); OR. REV. STAT. § 131.125(8); OKLA. STAT. TIT. 22, § 152(c)(2); N.J. STAT. ANN. § 2C:1-6(c); ARK. CODE ANN. § 5-1-109(b)(1)(B).

144. DEL. CODE ANN. tit. 11, § 3107(a). Other examples include 18 U.S.C. § 3282 (“for which the identity of the accused is unknown”); GA. CODE ANN. § 17-3-1 (“if the DNA evidence does not establish the identity of the accused”); UTAH CODE ANN. § 76-1-302(3)-(4) (“the identity of the person who committed the crime is unknown but DNA evidence is collected that would identify the person at a later date”); 42 PA. CONS. STAT. § 552(C.1) (“used to identify an otherwise unidentified individual as the perpetrator of the offense”); N.M. STAT. ANN. § 30-1-9.2 (“and a suspect has not been identified”); MICH. COMP. LAWS § 767.24(2)(b) (“that is determined to be from an unidentified individual”).

145. TEX. CODE CRIM. PROC. ANN. ART. 12.01(1)(B); ARK. CODE ANN. § 5-1-109(i)-(j) (“person’s identity is unknown...and the genetic information is accepted to be likely to be applicable only to the unknown person”); WIS. STAT. § 939.74 (“did not result in a probable identification of the person whose is the source of the biological material”). *Dabney* called it an extended “discovery period.” 663 N.W.2d at 373.

146. 720 ILL. COMP. STAT. 5/3-5(a)(2).

required will depend on any judicial interpretation. Florida's statute, for example, is triggered when an identification is made or "should have been established by the exercise of due diligence."¹⁴⁷ Indiana's is triggered when law enforcement "could have discovered the identity of the offender with DNA...evidence by the exercise of due diligence."¹⁴⁸ Both require due diligence, which favors the defendant because law enforcement has to carry out some measurable standard before the statute is usable. Yet, the statute also creates a mythical point that the suspect's identity "could" or "should" have been discovered, which could favor either side depending on how these phrases are interpreted.¹⁴⁹ As "should" or "could" might occur long before actual identification, then the defendant's limitation period could begin earlier than the other statutes that require actual identification. Prosecutors do not have to wait to dredge up a suspect, which could take a long time, before the statute applies. As already seen, Maine provides the harshest standards for law enforcement as must persuade a court that the evidence "implicates the defendant in the crime by a preponderance of the evidence."¹⁵⁰

Repose

One main rationale for the statute of limitations is to promote repose.¹⁵¹ The idea is to allow defendants and/or suspects definite knowledge that after a certain period of time they are not subject to prosecution. Courts have rationalized this precept by pointing to the greater societal benefits that will accrue from repose.¹⁵² In effect repose is meant to encourage offenders to reengage with society, while at the same time preventing society from obsessing about past crimes and freeing law enforcement resources for more recent crimes.¹⁵³ Punishment becomes less persuasive with the passage of time.¹⁵⁴ Society's need for retribution diminishes over time.¹⁵⁵

147.FLA. STAT. § 775.15 (15).

148.IND. CODE ANN. § 35-41-4-2(b).

149.Other non-indictment examples exist, *see* 28 U.S.C. § 1658 (starting statute of limitations when a securities fraud occurs or when defendant's should have discovered the fraud).

150.ME. REV. STAT. ANN. tit. 15, § 3105-A(1).

151.*See* Kearns, *supra* note 26, at 327; Ulmer, *supra* 5, at 1615; Bieber, *supra* note 5, at 1090-01. Repose is defined as the "cessation of activity; temporary rest." BLACK'S LAW DICTIONARY 1303 (7th ed. 1999).

152.This idea is iterated in *Wood* where the court talked about the grandiose idea that limitation statutes promote "security and stability to human affairs." 101 U.S. at 139.

153.Ulmer, *supra* note 5, at 1615; Beiber, *supra* note 5, at 1090-91.

154.Beiber, *supra* note 5. Beiber criticizes the idea that an offender, who after the

This criticism is hard to mollify without actually repealing DNA indictment and tolling statutes. Their essence is to extend the statute of limitations or indeed toll it permanently. Until an identification is made the statute is tolled and then a new limitations period begins, which may be the normal period,¹⁵⁶ different¹⁵⁷ or limitless.¹⁵⁸ Where a statute employs just a DNA indictment, then the original statutory period applies and in essence provides for repose. But since DNA indictments are few, the problem of repose still exists.¹⁵⁹ A few statutes attempt to lessen this effect. Arkansas' rape DNA tolling statute requires the DNA indictment to be brought within fifteen years.¹⁶⁰ Connecticut requires the identification trigger to occur within twenty years of the crime.¹⁶¹ New Jersey took a different tack, whereby once identification occurs, then the normal statute of limitations period begins from when the state possessed the DNA evidence.¹⁶² Overall these statutes circumvent repose whether they intend to or not.¹⁶³

initial crime, does not need the continuing deterrence of prosecution after the statute of limitations period. *Id.* For Beiber, repose ignores the fact that even though a previous offender was not subsequently prosecuted for another crime does not mean that, a) a crime was not committed or, b) was simply not detected or caught. *Id.* at 1091. Beiber adds further, that if the criminal is not pursued for the initial crime because of the statute of limitations, the criminal is *more* likely to engage in later criminal activity and not learn from the first. Another commentator, Listokin, points out that "extensions of a statute of limitations may be counterproductive" because the threat of additional punishments, in his example sexual molestation, are so "far off in the future...[the limitations period]...does little to deter would-be molesters, who heavily discount additional punishments." Yair Listokin, Article, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 114 (2002)(positing new explanation for statute of limitations and stating no consistent rationale exists). Thus, there is no cost-benefit to having no or an extended statute of limitations, and authorities should use their limited resources for recent crimes. *Id.*

155. Ulmer, *supra* note 5, at 1615-16; Beiber, *supra* note 5, at 1091.

156. *See e.g.* N.M. STAT. ANN. § 30-1-9.2; 18 U.S.C.S. § 3297; ARK. CODE ANN. § 5-1-109(i)-(j).

157. *See e.g.* CAL. PENAL CODE § 803(i)(one year from trigger); IOWA CODE § 802.2 (three years from trigger); MICH. COMP. LAWS § 767.24(2)(b) (ten years from trigger or victim's twentieth fifth birthday).

158. *See e.g.* MINN. STAT. § 628.26(f) (tolling permanently); N.H. REV. STAT. ANN. § 592-A:7(II) (tolling permanently); OKLA. STAT. tit. 22, § 152(c)(2) (tolling permanently).

159. DEL. CODE ANN. tit. 11, § 3107(a); 18 U.S.C. 3282.

160. ARK. CODE ANN. § 5-1-109(b)(1)(B) (possessing both DNA indictment and tolling).

161. CONN. GEN. STAT. § 54-193b (belonging to *Iowa* category statute).

162. N.J. STAT. ANN. § 2C:1-6(c) (belonging to *Iowa* category statute).

163. For constitutional discussions *see supra* note 5.

Other Problems

In addition to DNA profiling, some states have allowed for use of older and new technologies.¹⁶⁴ Arkansas' rape statute creates the widest latitude for new technology, stating that the statute may apply to "another test that may become available through an advance in technology."¹⁶⁵ One question is whether there is a limit to what new technologies may be introduced. One such new area is biometric authentication techniques.¹⁶⁶ What about old technologies? Dermatoglyphic fingerprinting has been around since the 1700s and accepted as evidence in the courts since the 1930s.¹⁶⁷ Is "new" technology that which is new to the indictment process or only that which is newly invented? Though this technology provision in Arkansas' rape statute is forward looking, it may let in too many untested technologies with no jurisprudential history behind them.¹⁶⁸

New Hampshire creates narrower latitude by providing for the use of "identifiable ridge skin impression[s]."¹⁶⁹ This is unclear but it will provide for dermatoglyphic fingerprinting. New Jersey is explicit and allows for identification by DNA profiling or "fingerprint analysis."¹⁷⁰ By allowing for DNA, legislatures are in

164. ARK. CODE ANN. § 5-1-109(b)(1)(B); N.H. REV. STAT. ANN. § 592-A:7(II); N.J. STAT. ANN. § 2C:1-6(c).

165. ARK. CODE ANN. § 5-1-109(b)(1)(B).

166. Ronald Rosenberg, *For a Chicago Agency Suspicious of its Staff, The Eyes Have It*, THE BOSTON GLOBE, Nov. 14, 1988 (mentioning how eye patterns can differentiate between identical twins and discussing early commercial eye scanning usage); Gwen Kennedy, Article, *Thumbs Up for Biometric Authentication!*, 8 COMP. L. REV. & TECH. J. 379 (2004) (discussing and explaining biometric techniques like eye-retina-iris scans, palm print and facial recognition).

167. See e.g. Ulmer, *supra* note 5, at 1608-10; Bieber, *supra* note 5, at 1004-07, 1086-88; Bernasconi, *supra* note 5 at 1004-16 (describing fingerprinting history and exploring reasons there absence as indictments). In many ways dermatoglyphic fingerprinting is "more conclusive" than DNA in establishing evidential links. Bieber, *supra* note 5, at 1009. Dermatoglyphic fingerprint databases are more expansive, cheaper to employ and fingerprints are more frequently left behind in comparison to DNA samples. Also, dermatoglyphic fingerprints originates from a physical source; DNA is genetic and can lead to difficulties in distinguishing between twin siblings. *Id.* at 1008-1013 (stating no problems exist in distinguishing between twins using fingerprints as arise during random events during embryonic development). Compare Rosenberg, *supra* note 166 (mentioning how eye patterns can differentiate between identical twins).

168. Compare DNA see *supra* notes 30-33 and accompanying text (discussing history of DNA in the court system).

169. N.H. REV. STAT. ANN. § 592-A:7(II).

170. N.J. STAT. ANN. § 2C:1-6(c).

effect opening the door to both new and old technologies.¹⁷¹

Other questions are raised but not answered by the courts or legislatures. Most of the statutes possess identification triggers or some sort of preconditions (see Table 1) but none state *when* law enforcement has to test the DNA from the crime's scene. Or taking this further, does only one DNA sample have to apply? Can law enforcement possess a multitude of DNA samples and file indictments for all of them or indeed use them all to toll the statute indefinitely? Though possibly a question of forensic science and the role of evidence in trials, where does the DNA evidence have to be located? Due diligence and not "readily ascertainable" standards help to a certain degree, but Maine with its grand jury approach is arguably the best. These new statutes' language is, as with most statutes, ambiguous and difficult to interpret. Each state takes a different approach, and practitioners should look to their appropriate statute closely. Case law is sparse and unhelpful; hence many arguments on interpretation are open.¹⁷²

Conclusion

As befits a new legislative area, the statutes discussed in this Note are diverse in content, application, and interpretation. Though lofty in their goals, in practice they have created myriad problems. These statutes began as an "appropriate balance."¹⁷³ The balance has shifted, however, and the protective power of the statute of limitations diminished, as the statutes increasingly are applied to less

171. Bernasconi, *supra* note 5, at 1008-13 (stating no problems exist in distinguishing between twins using fingerprints as arise during random events during embryonic development), *compare* Ulmer, *supra* note 5, at 1590-94 (discussing how apart from identical twins every human has a unique hereditary chemical composition that is employed by scientists to identify individuals).

172. *See Dabney*, 663 N.W.2d 366; *Davis*, 698 N.W.2d 823.

173. Quoting S. REP. NO. 107-334, at *12.

heinous crimes. It appears as if the ideal statute would limit itself to extreme crimes, with a Maine like pre-trial test, short additional tolling periods, and clearer parameters on how and which DNA is tied to a suspect.

<i>Element / Jurisdiction</i>	<i>Exact Statute</i>	<i>Relevant Crimes</i>	<i>DNA Indictment Available?</i>	<i>Other Pre-conditions for Tolling (besides bio evidence)</i>	<i>Is There An Identification Trigger for Tolling?</i>	<i>New, Different or Permanent Tolling Period</i>	<i>Includes Other Techs?</i>	<i>Includes fingerprint evidence?</i>
<i>Arkansas</i>	Ark. Code Ann. § 5-1-109(b)(1)(B)	Rape	YES (if brought within 15 yrs, as compared to normal 6 yrs)	NONE	NO	15 yrs	YES	YES (implied)
	Ark. Code Ann. § 5-1-109(i)-(j)	Any	YES (if unlikely to be the perpetrator)	NONE	YES (if through national or state Index Systems)	Normal SOL period for the crime from the trigger	NO	NO
<i>California</i>	Cal. Penal Code § 803(g)	<i>See</i> 290(a)(2) (A)	NO	Evidence is analyzed for DNA profile 2 yrs from crime	YES	ONE YEAR FROM TRIGGER	NO	NO
<i>Connecticut</i>	Conn. Gen. Stat. § 54-193b	Sexual assault	NO	Victim notifies law five yrs after crime	YES (if within 20 yrs)	20 yrs	NO	NO

<i>Element / Jurisdiction</i>	<i>Exact Statute</i>	<i>Relevant Crimes</i>	<i>DNA Indictment Available?</i>	<i>Other Pre-conditions for Tolling (besides bio evidence)</i>	<i>Is There An Identification Trigger for Tolling?</i>	<i>New, Different or Permanent Tolling Period</i>	<i>Includes Other Techs?</i>	<i>Includes fingerprint evidence?</i>
Delaware	Del. Code Ann. tit. 11, § 3107(a)	Any	YES	NONE	NO	NONE	NO	NO
Florida	Fla. Stat. § 775.15 (15)	Sexual battery, lewd offenses	NO	DNA evidence is preserved and available to accused	YES (and 'should have been established')	ONE YEAR FROM TRIGGER	NO	NO
Georgia	Ga. Code Ann. § 17-3-1	See same code section	NO	DNA evidence is preserved and available to accused	YES	ANYTIME FROM TRIGGER	NO	NO
Illinois	720 Ill. Comp. Stat. 5/3-5(a)(2)	See § 12-12	NO	i) DNA profile entered database 10 yrs after crime, ii) a diligent investigation for identity, iii) victim repts crime w/n 2 yrs or victim murdered during crime or 2 yrs afterwards	NO	ANYTIME	NO	NO

<i>Element / Jurisdiction</i>	<i>Exact Statute</i>	<i>Relevant Crimes</i>	<i>DNA Indictment Available?</i>	<i>Other Pre-conditions for Tolling (besides bio evidence)</i>	<i>Is There An Identification Trigger for Tolling?</i>	<i>New, Different or Permanent Tolling Period</i>	<i>Includes Other Techs?</i>	<i>Includes fingerprint evidence?</i>
Indiana	Ind. Code Ann. § 35-41-4-2(b)	Class B or C felony	NO	NONE	YES (or “could have discovered the identity with due diligence”)	ONE YEAR FROM TRIGGER	NO	NO
Iowa	Iowa Code § 802.2	Sexual abuse (1 st -3 rd)	NO	NONE	YES	THREE YEARS FROM TRIGGER	NO	NO
Kansas	Kan. Stat. Ann. § 21-3106(7)	See 21-3106(2) & 22-3717	NO	NONE	YES	ONE YEAR FROM TRIGGER	NO	NO
Maine	Me. Rev. Stat. Ann. tit. 15, § 3105-A(1)	Sexual crimes	NO	i) victim below 16 at crime, ii) perp above 16 at identification	YES (if State convinces closed court by preponderance DNA implicates defendant)	ANYTIME FROM TRIGGER	NO	NO
Michigan	Mich. Comp. Laws § 767.24(2)(b)-(c)	See 767.24(2)	YES (but only until identification of the “unidentified individual”)	NONE	YES	10 years from identification or victim’s 25 birthday	NO	NO

<i>Element / Jurisdiction</i>	<i>Exact Statute</i>	<i>Relevant Crimes</i>	<i>DNA Indictment Available?</i>	<i>Other Pre-conditions for Tolling (besides bio evidence)</i>	<i>Is There An Identification Trigger for Tolling?</i>	<i>New, Different or Permanent Tolling Period</i>	<i>Includes Other Techs?</i>	<i>Includes fingerprint evidence?</i>
Minnesota	Minn. Stat. § 628.26(f)	<i>See</i> 609.342 to 609.344	NO	Collection and preservation material capable of DNA test	NO	ANYTIME	NO	NO
New Hampshire	N.H. Rev. Stat. Ann. § 592-A:7(II)	<i>See</i> same section	YES	NO	YES (if DNA indictment)	ANYTIME	YES (identifiable ridge skin impressions)	YES (implied)
New Jersey	N.J. Stat. Ann. § 2C:1-6(c)	Any	NO	NONE	YES	Normal SOL period (but reaches back to the point when state has both DNA profile/fingerprint of suspect & physical evidence)	NO	YES
New Mexico	N.M. Stat. Ann. § 30-1-9.2	<i>See</i> 30-9-11	NO	A suspect has not been identified	YES	Normal SOL period for crime from trigger	NO	NO
Oklahoma	Okla. Stat. tit. 22, § 152(c)(2)	<i>See</i> tit. 22, § 152(1)	NO	i) victim notifies law w/n 12 yrs, ii) sample preserved and testable	YES	ANYTIME FROM TRIGGER	NO	NO

<i>Element / Jurisdiction</i>	<i>Exact Statute</i>	<i>Relevant Crimes</i>	<i>DNA Indictment Available?</i>	<i>Other Pre-conditions for Tolling (besides bio evidence)</i>	<i>Is There An Identification Trigger for Tolling?</i>	<i>New, Different or Permanent Tolling Period</i>	<i>Includes Other Techs?</i>	<i>Includes fingerprint evidence?</i>
Oregon	Or. Rev. Stat. § 131.125(8)	Rape and Sodomy (1 st Degree)	NO	NO	YES (if occurs after normal SOL)	12 YEARS FROM TRIGGER	NO	NO
Pennsylvania	42 Pa. Cons. Stat. § 5552(C.1)	Sexual misdemeanor and felony	NO	NONE	YES	ONE YEAR FROM TRIGGER	NO	NO
Texas	Tex. Crim. Proc Code. Ann. § 12.01(1)(B).	Sexual assault	NO	i) biological material, ii) DNA profile, iii) does not match victim or other likely suspects	NO	ANYTIME	NO	NO
Utah	Utah Code Ann. § 76-1-302(3)-(4)	See 76-3-203.5(1)(c)) (i)(A)-(AA)	NO	NONE	YES	ONE YEAR FROM TRIGGER	NO	NO
Wisconsin	Wis. Stat. § 939.74(2d)(b)	See 940.225(1) – (2)	NO	i) no matches with likely suspects, ii) identification of DNA evidence, iii) i) & ii) have to occur within normal period for crime	YES	ONE YEAR FROM TRIGGER	NO	NO

<i>Element / Jurisdiction</i>	<i>Exact Statute</i>	<i>Relevant Crimes</i>	<i>DNA Indictment Available?</i>	<i>Other Pre- conditions for Tolling (besides bio evidence)</i>	<i>Is There An Identification Trigger for Tolling?</i>	<i>New, Different or Permanent Tolling Period</i>	<i>Includes Other Techs?</i>	<i>Includes fingerprint evidence?</i>
<i>Federal</i>	18 U.S.C.S. § 3297 (2004)	Certain felonies	NO	NONE	YES	Normal SOL period from trigger	NO	NO
	18 U.S.C.S. § 3282 (<i>see also</i> Fed. Rules Crim. Proc. R. 7)	<i>See</i> 18 USCS §§ 2241 et seq	YES	NONE	NO	NORMAL PERIOD	NO	NO

Diagram 1 – Schematic showing the four statutory types and their mechanics

Crime

